

A RULE AGAINST PERPETUITIES FOR THE TWENTY-FIRST CENTURY

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Editors' Synopsis: This Article describes the common law Rule Against Perpetuities and its modern developments, including promulgation of the widely adopted Uniform Statutory Rule Against Perpetuities. The Article also explores the important policies that underlie the Rule Against Perpetuities. The author argues that federal law, including federal transfer taxes, should not and, as a practical matter, cannot be used to implement the policies served by the Rule, but that there is a continuing need for the Rule Against Perpetuities under state law. This Article proposes a Rule Against Perpetuities that replaces the traditional use of lives in being plus twenty-one years with a new fixed term of ninety years. The author believes that this proposed Rule Against Perpetuities would eliminate many of the administrative burdens that complicate application of the Rule but would continue to implement its underlying policies.

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I. INTRODUCTION

Historically, English chancellors and common law judges had a strong desire to maintain the alienability of property, especially real property,¹ and the common law Rule Against Perpetuities (“Rule”) is one

¹ See 3 THOMPSON ON REAL PROPERTY § 28.02(a) (David A. Thomas ed., 2d.ed. 2002) for a history of the rules designed to keep property alienable. Alienability means that property owners can freely transfer property or interests in property to others during

of the rules they developed to keep property alienable.² The classic statement of the Rule is attributed to Professor John Chipman Gray:³ “No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”⁴ The four editions of Professor Gray’s book have been “considered authoritative wherever the Common Law exists.”⁵

Although easily stated, the Rule is complex and technical, and its application easily misunderstood.⁶ The California Supreme Court once excused an attorney’s violation of the Rule in a will he drafted because the court believed that the Rule was difficult to understand.⁷

their lifetimes or at death. See BLACK’S LAW DICTIONARY 79 (8th ed. 2004).

² See 10 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 71.01[1] (Michael Allen Wolf ed. 2003).

³ See, e.g., 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.02; Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1868 (1986) [hereinafter Dukeminier, *Modern Guide*].

⁴ JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (Roland Gray ed., 4th ed. 1942).

⁵ 6 AMERICAN LAW OF PROPERTY § 24.1 (A.J. Casner ed. 1952). Professor Gray’s formulation of the Rule was “adopted by practically every court which dealt with the subject.” W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 639 (1938) [hereinafter Leach, *Nutshell*].

⁶ “[N]o rule in Anglo-American property law has generated as much lawyerly debate and consternation as the rule against remoteness in vesting, commonly called the Rule.” 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.01.

⁷ See *Lucas v. Hamm*, 364 P.2d 685, 690 (Cal. 1962). The court stated, “In view of the state of the law relating to perpetuities and restraints on alienation and the nature of the error, if any, . . . it would not be proper to hold that the defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise.” The attorney who drafted the will fell into a trap caused by a remote possibility:

The provision of the will quoted in the complaint, namely, that the trust was to terminate five years after the order of the probate court distributing the property to the trustee, could cause the trust to be invalid only because of the remote possibility that the order of distribution would be delayed for a period longer than a life in being at the creation of the interest plus 16 years (the 21-year statutory period less the five years specified in the will). . . . [T]he possible occurrence of such a delay was so remote and unlikely that an attorney of ordinary skill acting under the same circumstances might well have “fallen into the net which the Rule spreads for the unwary” and failed to recognize the danger.

Id. At least one California court of appeal doubts the continued validity of the decision: “There is reason to doubt that the ultimate conclusion of *Lucas v. Hamm* is valid in today’s state of the art. Draftsmanship to avoid the rule against perpetuities seems no longer esoteric.” *Wright v. Williams*, 121 Cal. Rptr. 194, 199 n.2 (Cal. Ct. App. 1975). In

The Rule has been variously described as a reign of terror,⁸ a technicality-ridden legal nightmare,⁹ and a labyrinth.¹⁰ Professor Gray wrote:

A long list might be formed of the demonstrable blunders with regard to its [the Rule Against Perpetuities'] questions made by eminent men, blunders which they themselves have been sometimes the first to acknowledge; and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it.¹¹

For longer than the last half-century, legislatures have considered various reforms of the Rule, and various jurisdictions have adopted some of those reforms. In 1953, Professor W. Barton Leach, a leading proponent of reform of the Rule during the mid-twentieth century, proposed five legislative provisions that would simplify application of the Rule, two of which proved to be the most significant:

- (a) A provision that the Rule will be applied to any interest on the basis of events which have actually occurred at the termination of preceding interests, not on the basis of events which might have occurred but did not.
- (b) A provision that, where a violation of the Rule is found, the offending interest will be re-shaped by the court if this can be done within the limits of the Rule without alteration of the essential purpose of the testator or settlor.¹²

Bacquet v. Livingston, 129 Cal. Rptr. 514 (Ct. App. 1976), a different court of appeal limited the application of the *Lucas* case by refusing to extend it to errors made in drafting a marital deduction provision. *But see Smith v. Lewis*, 530 P.2d 589, 600 (Cal. 1975) (Clark, J. dissenting and relying on *Lucas*).

⁸ See W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952) [hereinafter Leach, *Perpetuities Perspective*].

⁹ See W. Barton Leach, *Perpetuities Legislation: Massachusetts Style*, 67 HARV. L. REV. 1349, 1349 (1954).

¹⁰ See Dukeminier, *Modern Guide*, *supra* note 3, at 1867.

¹¹ GRAY, *supra* note 4, at xi.

¹² Leach, *Perpetuities Perspective*, *supra* note 8, at 747-48.

The first recommendation led to the wait-and-see movement.¹³ The second recommendation may be called reformation, although it sometimes is referred to within the category of reforms known as *cy pres*.¹⁴ Several jurisdictions enacted statutes adopting one or both of these provisions.¹⁵

The New York Legislature followed a different route. It reformed its statutory Rule by removing various remote possibilities from consideration.¹⁶ The legislature also enacted a statute that allowed the courts to reform interests that violate the Rule because of a provision that conditioned vesting of the interest to an age more than twenty-one years.¹⁷ Courts can reform such an age designation to twenty-one years.¹⁸

In the 1980s, wait-and-see and reformation received two significant boosts: *The Restatement (Second) of Property: Donative Transfers* was promulgated in 1983,¹⁹ and the Uniform Statutory Rule Against Perpetuities (“USRAP”) was approved in 1986.²⁰ Both adopted wait-and-

¹³ The beginning of the wait-and-see movement is often traced to a 1952 article by Professor Leach. See *Perpetuities Perspective*, *supra* note 8. See, e.g., Dukeminier, *Modern Guide*, *supra* note 3, at 1880. However, Pennsylvania enacted the first wait-and-see statute in 1947, five years before Professor Leach’s article was published. See Estates Act, 1947 Pa. Laws § 4.

¹⁴ See, e.g., *In re Estate of Chun Quam Yee Hop*, 469 P.2d 183, 185 n.4 (Haw. 1970); James Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation*, 21 N.Y.U. L. REV. 384 (1946).

¹⁵ See, e.g., 1960 Ky. Acts, ch. 167, § 2 (codified as KY. REV. STAT. ANN. § 381.216 (LexisNexis 2002)); 132 Ohio Laws, S.B. 13, § 13 (codified as OHIO REV. CODE ANN. § 2131.08(c) (West 2006)). Professors William B. Stoebuck and Dale A. Whitman report that, apart from the states that now have adopted the Uniform Statutory Rule Against Perpetuities, see *infra* note 22 and accompanying text, seven states (Iowa, Kentucky, Rhode Island, South Dakota, Vermont, Virginia, and Washington) adopted both wait-and-see and reformation by statute, but only for interests subject to trust. They also report that Iowa, Maine, Maryland, and Pennsylvania adopted only wait-and-see by statute (Iowa is incorrectly listed in this category, see IOWA CODE ANN. § 558.68 (West 2006)). Four states (Idaho, Missouri, Oklahoma, and Texas (Texas’s statute is limited to gifts to charity)) adopted only reformation by statute. In addition, three states (Hawaii, Mississippi, and New Hampshire) adopted reformation by court decision. See WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 134 nn.3–4 (3d. ed. 2000).

¹⁶ See 1960 N.Y. Laws ch. 448 (codified in N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(b) (McKinney 2002)).

¹⁷ See 1966 N.Y. Laws ch. 952 (codified in N.Y. EST. POWERS & TRUSTS LAW § 9-1.2).

¹⁸ See *id.*

¹⁹ See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS (1983).

²⁰ See UNIF. STATUTORY RULE AGAINST PERPETUITIES, 8B U.L.A. 223 (2001). USRAP is now included in the Uniform Probate Code. See UNIF. PROBATE CODE §§ 2-

see and reformation.²¹ Twenty-seven jurisdictions enacted USRAP,²² although two of those jurisdictions later repealed the Rule altogether.²³ One adopted a 365-year alternate Rule in place of USRAP's ninety years,²⁴ and two replaced it with a 1,000-year statutory Rule Against Perpetuities.²⁵

A different development paralleled the widespread adoption of USRAP. At least six jurisdictions purported to repeal the Rule in its entirety.²⁶ Other jurisdictions have repealed the Rule as it applies to trusts²⁷ or have adopted a modified Rule to apply to trusts.²⁸ In recent years, some writers advocated for the repeal of the Rule in its entirety²⁹ or

901 to -906, 8 U.L.A. 61-62 (Supp. 2006).

²¹ See RESTATEMENT (SECOND) OF PROP: DONATIVE TRANSFERS §§ 1.5-1.6; UNIFORM STATUTORY RULE AGAINST PERPETUITIES §§ 1(a)(2), 8B U.L.A. 236.

²² See UNIFORM STATUTORY RULE AGAINST PERPETUITIES, 8B U.L.A. 227 (Supp. 2005) (Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, Utah, Virginia, and West Virginia).

²³ Alaska and New Jersey adopted USRAP. See 1994 Alaska Sess. Laws ch. 82; 1991 N.J. Laws ch. 192. However, each later repealed the Rule altogether. See ALASKA STAT. § 34.27.075 (LexisNexis 2005); N.J. STAT. ANN. § 46:2F-9 (West 1999). *But see* ALASKA STAT. § 34.27.051 (2005) (providing a 1000-year rule for the creation and exercise of powers of appointment).

²⁴ See NEV. REV. STAT. § 111.1031(1)(b) (LexisNexis 2005).

²⁵ See COL. REV. STAT. § 15-11-1102.5 (2006); UTAH CODE ANN. § 75.2-1203 (LexisNexis 2004), *amended by* 2003 Utah Laws, ch. 301, § 7 (removing "Uniform" from the name of its statutory Rule and adopting a 1000-year fixed term of years in place of USRAP provisions).

²⁶ See ALASKA STAT. § 34.27.075 (2005); IDAHO CODE ANN. § 55-111 (2006); N.J. STAT. ANN. § 46:2F-9 (1999); R.I. GEN. LAWS § 34-11-38 (LexisNexis 2006); S.D. CODIFIED LAWS § 43-5-8 (LexisNexis 2003); WIS. STAT. ANN. § 700.16(5) (West 2006).

²⁷ See ARIZ. REV. STAT. ANN. § 14-2901(A)(3) (West 2005); D.C. CODE ANN. § 19-904(10) (LexisNexis 2006); 765 ILL. COMP. STAT. ANN. § 304/4(a)(2) (West 2006); ME. REV. STAT. ANN. tit. 33, § 101-A (2005); MD. CODE ANN., EST. & TRUSTS § 11-102(e) (LexisNexis 2006); MO. ANN. STAT. § 456.025(1) (West 2006); NEB. REV. STAT. ANN. § 76-2005(9) (2005); N.H. REV. STAT. §§ 547:3-k, 564:24 (LexisNexis 2005); OHIO REV. CODE ANN. § 2131.09 (LexisNexis 2006); VA. CODE ANN. § 55-13.3(C) (2006).

²⁸ See, e.g., DEL. CODE ANN. tit. 25, § 503(a)-(b) (2004) (repealing the Rule for trusts of personal property and adopting a fixed-term rule of 110 years for trusts of real property); FLA. STAT. ANN. § 689.225(2)(f) (West 2006) (adopting USRAP with a special section that substituted 360 years for ninety years for its wait-and-see period, applicable to trusts only); WASH. REV. CODE ANN. § 11.98.130 (West 2005) (adopting a 150-year Rule for trusts); WYO. STA. § 34-1-139(b) (LexisNexis 2005) (allowing an election of a 1000-year Rule for trusts).

²⁹ See, e.g., Keith L. Butler, Note, *Long Live the Dead Hand: A Case for Repeal of*

proposed exempting donative private express trusts from the Rule.³⁰ Other writers disagreed.³¹ Congress is studying whether and how to deal with the resultant new dynasty trusts.³²

It is time to adopt a new Rule consisting of a ninety-year perpetuity period which would completely replace lives in being plus twenty-one years. Legislatures should preserve reformation. Such a Rule would be easy to understand and apply; it would implement fully the Rule's purposes. Legislatures should define "vested" to guide future generations of attorneys and judges. This is the next logical evolution of the Rule.

Part II of this Article will present a brief overview of the operation of the common law Rule. Part III will present examples of statutory reform of the Rule. Part IV will demonstrate that there is a continuing need for the Rule. Part V will recommend this new modern Rule.

II. AN OVERVIEW OF THE COMMON LAW RULE AGAINST PERPETUITIES IN THE UNITED STATES

A. Introduction

Prior to the middle of the fifteenth century, courts recognized contingent remainders as the principal, nonvested future interest.³³ At that time, contingent remainders generally were not alienable.³⁴ The doctrine of destructibility of contingent remainders was entrenched solidly in the

the Rule Against Perpetuities in Washington, 75 WASH. L. REV. 1237 (2000); Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601 (2002).

³⁰ See, e.g., Brian Layman, *Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal*, 32 AKRON L. REV. 747 (1999); Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588 (2003); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the RAP*, 24 CARDOZO L. REV. 2097 (2003).

³¹ See, e.g., Edward C. Halback Jr., *Significant Trends in the Trust Law of the United States*, 32 VAND. J. TRANSNAT'L L. 531 (1999); Ira Mark Bloom, *Perpetuities Refinement: There Is an Alternative*, 62 WASH. L. REV. 23 (1987) [hereinafter Bloom, *Perpetuities Alternative*]; Susan F. French, *Perpetuities: Three Essays in Honor of My Father*, 65 WASH. L. REV. 393 (1990); Verner F. Chaffin, *Georgia's Proposed Dynasty Trust: Giving the Dead Hand Too Much Control*, 35 GA. L. REV. 1 (2000).

³² See Rachel Emma Silverman, *Looser Trust Laws Lure \$100 Billion*, WALL ST. J., Feb. 16, 2005, at D1.

³³ See ROBERT J. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 8 (1966); 3 JOHN A. BORRON, LEWIS M. SIMES, & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* § 1112 (3rd ed. 2004).

³⁴ See RESTATEMENT OF PROP.: FUTURE INTERESTS § 162(1) cmt. (1936).

law³⁵ making property subject to contingent remainders alienable.³⁶ Vested remainders were always alienable.³⁷

A different form of property ownership began to be used during the thirteenth century. Landowners who took part in the Crusades sometimes entrusted land to other persons, imposing various conditions that were “sometimes cast in the form of a use.”³⁸ Uses gradually became more widespread. By the end of the fifteenth and early sixteenth centuries, the use caused serious problems,³⁹ including loss of revenue to the Crown.⁴⁰ In 1536, King Henry VIII prevailed upon Parliament to enact the Statute of Uses.⁴¹ This led to the unexpected development of new, nonvested future interests.⁴² Ultimately named executory interests,⁴³ courts did recognize these interests;⁴⁴ however, the courts did not apply the rules used to destroy contingent remainders to destroy executory interests.⁴⁵ This approach necessitated the development of a new rule to control restraints on alienability of property caused by the growing use of executory interests.⁴⁶ Over time, the Rule was developed to fulfill this need.⁴⁷

³⁵ See LYNN, *supra* note 33, at 8; 1 BORRON, SIMES, & SMITH, *supra* note 33, § 193.

³⁶ See LYNN, *supra* note 33, at 8.

³⁷ See *id.*

³⁸ THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 576–77 (5th ed. 1956). A use was created when an owner conveyed land “to one person for the use of a another person.” *Id.* at 580. The person for whom the use was created had an enforceable equitable interest. “By the end of the fifteenth century a fair body of law had been settled which gave a definite form to the use.” *Id.* These uses were forerunners of modern trusts. See *id.* at 598–99.

³⁹ See *id.* at 580–84.

⁴⁰ See *id.*; 1 BORRON, SIMES, & SMITH, *supra* note 33, § 29.

⁴¹ 1536, 7 Hen. 8, c. 10. See also PLUCKNETT, *supra* note 38, at 584–86; 3 POWELL, *supra* note 2, § 19.05[1].

⁴² See 3 POWELL, *supra* note 2, § 19.05[2] (“By [operation of the Statute of Wills], executory devises of both springing and shifting types became possible future interests.”).

⁴³ See 1 BORRON, SIMES, & SMITH, *supra* note 33, § 30; 10 POWELL, *supra* note 2, § 71.02[1].

⁴⁴ LYNN, *supra* note 33, at 8.

⁴⁵ See *Pells v. Brown*, 79 Eng. Rep. 504 (K.B. 1620); 1 BORRON, SIMES, & SMITH, *supra* note 33, § 201 (“Contingent remainders could be destroyed at common law but executory interests could not . . .”).

⁴⁶ See 3 BORRON, SIMES, & SMITH, *supra* note 33, § 1211.

⁴⁷ See LYNN, *supra* note 33, at 8; GRAY, *supra* note 4, §§ 123–200.1; 3 BORRON, SIMES, & SMITH, *supra* note 33, §§ 1211–1221; PLUCKNETT, *supra* note 38, at 595–98.

B. General Operation of the Common Law Rule Against Perpetuities

By the early 1800s, the Rule generally was settled in a form approximating Professor Gray's later wording, although the wording in the early 1800s was still in a state of flux.⁴⁸ Professor Gray first stated his classic formulation of the Rule in 1906, and United States courts widely adopted this statement of the Rule.⁴⁹

Thus stated, the Rule is about the vesting of interests.⁵⁰ Interests vested at the time of creation never violated the Rule,⁵¹ nor did interests not vested when created but that were certain to vest within the period allowed by the Rule.⁵² The Rule invalidated only interests that were not absolutely certain to vest within the period prescribed by the Rule.⁵³ Invalid interests were void *ab initio*.⁵⁴

Courts always applied the common law Rule as of the time interests were created,⁵⁵ in doing so, the courts used a what-might-happen approach.⁵⁶ The Washington Supreme Court captured this approach well: "If by any conceivable combination of circumstances, it is possible that the event upon which the estate or interest is limited may not occur within the period of the rule, the limitation is void."⁵⁷ This approach allowed

⁴⁸ Compare *Welsh v. Foster*, 12 Mass. 93, 97 (1815) ("The event must, in its original limitation, be such that it must either take place, or become impossible to take place, within the space of one or more lives in being, and a little more than twenty-one years afterward."), with *Morris' Trustees v. Howe's Heirs*, 20 Ky. Rpt. 199, 201 (1826) ("That period is for life, or lives in being and twenty-one years and a few months, and the rule is the same in this country, in relation both to real and personal estate.").

⁴⁹ See 3 BORRON, SIMES, & SMITH, *supra* note 33, § 1221; Leach, *Nutshell*, *supra* note 5, at 639.

⁵⁰ See 3 BORRON, SIMES, & SMITH, *supra* note 33, § 1222; Leach, *Nutshell*, *supra* note 5, at 639.

⁵¹ See LYNN, *supra* note 33, at 9, 33; 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.03(a).

⁵² See LYNN, *supra* note 33, at 32–33; Leach, *Nutshell*, *supra* note 5, at 647.

⁵³ See LYNN, *supra* note 33, at 7, 33; Leach, *Nutshell*, *supra* note 5, at 642–43.

⁵⁴ See Leach, *Nutshell*, *supra* note 5, at 656.

⁵⁵ See *id.* at 642; 10 POWELL, *supra* note 2, § 72.02[2].

⁵⁶ Professor Dukeminier labeled this "The What-Might-Happen Test." Dukeminier, *Modern Guide*, *supra* note 3, at 1876.

⁵⁷ *Estate of Lee v. Seattle First Nat'l Bank*, 299 P.2d 1066, 1069 (Wash. 1956) (citations omitted). Earlier, the Kentucky Court of Appeals stated,

If, by possibility, it [the interest being evaluated] may not vest within the prescribed limits of time, it is a void limitation, although, in the end, it does in fact happen that the person might have taken within the time fixed by the rule. And a limitation extending beyond the period of perpetuity, and therefore void as to that part, is void in the whole,

courts to imagine a wide variety of remote possibilities that resulted in invalidating contingent interests.⁵⁸

Application of the common law Rule required courts to use a two-step process.⁵⁹ First, the court would determine and classify each interest that was created using the rules of property, wills, and trust law; the Rule had no role in determining the interests created.⁶⁰ Once the court determined the interests, it would apply the Rule.⁶¹ Courts rigidly applied the common law Rule.⁶² The Rule was a rule of law, not a rule of interpretation.⁶³ Professor Gray captured the harshness of the Rule: “The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention.”⁶⁴ The Rule applied to legal and equitable interests in real and personal property.⁶⁵ The interests to which the Rule applied could be created by deed or other lifetime instrument,⁶⁶ by will,⁶⁷ by trust,⁶⁸ or by some contracts.⁶⁹ The Rule applied to contingent remainders and executory interests.⁷⁰ The Rule applied to class gifts.⁷¹ It also applied to powers of appointment and to interests created by

both as to the period within and that beyond the limits of perpetuity.

Beall v. Wilson, 143 S.W.2d 55, 57 (Ky. 1912).

⁵⁸ See Dukeminier, *Modern Guide*, *supra* note 3, at 1876; 10 POWELL, *supra* note 2, § 72.03[1].

⁵⁹ See, e.g., *Conn. Bank & Trust Co. v. Brody*, 392 A.2d 445, 449 (Conn. 1978); *Bowerman v. Taylor*, 94 A. 652, 653 (Md. 1915).

⁶⁰ See, e.g., *Conn. Bank & Trust Co.*, 392 A.2d at 449; *Bowerman*, 94 A. at 653.

⁶¹ See, e.g., *Conn. Bank & Trust Co.*, 392 A.2d at 449; *Bowerman*, 94 A. at 653.

⁶² If there is any possibility that the interest will vest after the time limit set by the Rule, the interest is void. See *Burruss v. Baldwin*, 103 S.E.2d 249, 250 (Va. 1958). See also *Conn. Bank & Trust Co.*, 392 A.2d at 449; *Estate of Foster*, 376 P.2d 784 (Kan. 1962); *Parker v. Parker*, 113 S.E.2d 899 (N.C. 1960). “It is immaterial that the contingencies actually do occur within the permissible period or actually have occurred when the validity of the instrument is first litigated.” Leach, *Nutshell*, *supra* note 5, at 642–43. See also LYNN, *supra* note 33, at 33.

⁶³ See *Conn. Bank & Trust Co.*, 392 A.2d 449; *Burruss*, 103 S.E.2d 249. See also 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.03(b).

⁶⁴ GRAY, *supra* note 4, § 629.

⁶⁵ See *id.* § 202; 3 BORRON, SIMES, & SMITH, *supra* note 33, § 1235.

⁶⁶ See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.03(a).

⁶⁷ See Leach, *Nutshell*, *supra* note 5, at 642.

⁶⁸ See *id.* at 642, 662.

⁶⁹ See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.03(j); Leach, *Nutshell*, *supra* note 5, at 660–62.

⁷⁰ See 3 BORRON, SIMES, & SMITH, *supra* note 33, §§ 1236–1237.

⁷¹ See Leach, *Nutshell*, *supra* note 5, at 648–51.

the exercise of powers of appointment.⁷² Courts did not consider how the facts actually developed.⁷³ Courts only invalidated interests that violated the Rule.⁷⁴

C. Basic Application of the Common Law Rule Against Perpetuities

This Section will present the basic operation of the Rule in two Illustrations. Thereafter, this Section will discuss additional details of the operation of the Rule.

Illustration 1

The facts of a Tennessee case, *Hassell v. Sims*,⁷⁵ provide an opportunity to illustrate the basic operation of the common law Rule. In 1906, a grantor conveyed land by a deed. At the time he executed and delivered the deed, he was married. The deed gave his wife a life estate, but only as long as she remained his widow after his death. He gave his children a life estate to follow his wife's life estate or remarriage. The final gift was the remainder to his grandchildren. At the time the grantor delivered the deed in 1906, the grantor and his wife had several living children but no grandchildren. By 1940, the time of the litigation, the couple had had several additional children,⁷⁶ and there were also a number of grandchildren then living.⁷⁷ The grantor and his wife, Dora, were still alive in 1940 when the Supreme Court of Tennessee decided the case.⁷⁸

In order to understand the operation of the Rule, this Illustration will consider each interest created by the deed. This Illustration follows the law's two-step process—first determine the interest to be examined, and then apply the Rule.

The Rule did not apply to the wife's life estate. The deed was effective upon delivery.⁷⁹ Dora's life estate was a present interest as soon

⁷² See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.03(b); LYNN, *supra* note 33, at 16.

⁷³ See *supra* notes 55–58 and accompanying text.

⁷⁴ See Dukeminier, *Modern Guide*, *supra* note 3, at 1895–97. On occasion, the doctrine of infectious invalidity applied and invalidated an entire disposition of property.

⁷⁵ 141 S.W.2d 472 (Tenn. 1940).

⁷⁶ Some might argue that the birth of these children proved the validity of the common law presumption that one or more children could be born to a person who was alive when an interest was created. See *infra* text accompanying notes 86–87.

⁷⁷ See *Hassell*, 141 S.W.2d at 472–77.

⁷⁸ See *id.* at 473.

⁷⁹ See Annotation, *Conclusiveness of Manual Delivery of Deed to Grantee as an Effective Legal Delivery*, 56 A.L.R. 746 (1928).

as the deed was delivered. The Rule was concerned with nonvested future interests, not with present interests.⁸⁰

The Rule did apply to the other interests created by the deed. Possession of those interests was postponed until a future time.⁸¹ Those interests either were vested at their creation or not. This Article describes interests not vested at their creation as “nonvested,” although they are often called contingent interests.⁸²

The concept of “vesting” is key to application of the Rule.⁸³ In order to be valid under the Rule, an interest “must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”⁸⁴ The following is a useful definition of “vest”:

A future interest is *vested* if it meets two requirements: first, that there be no *condition precedent* to the interest's becoming a present estate other than the *natural expiration* of those estates that are prior to it in possession; and second, that it be *theoretically* possible to identify who would get the right to possession if the interest should become a present estate *at any time*.⁸⁵

⁸⁰ See *supra* notes 50–52 and accompanying text.

⁸¹ See *Hassell*, 141 S.W.2d at 477.

⁸² See, e.g., GRAY, *supra* note 4, § 9; 3 POWELL, *supra* note 2, § 20.04.

⁸³ See Jesse Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 Ky. L.J. 1, 11 (1960) [hereinafter Dukeminier, *Kentucky Perpetuities Reform*].

⁸⁴ See GRAY, *supra* note 4, § 201.

⁸⁵ THOMAS A. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 66–67 (2d ed. 1984). The complementary definition of nonvested interests, often called contingent interests, has been described as follows: “[A] contingent remainder is *either* subject to a condition precedent (in addition to the natural expiration of prior estates) *or* owned by unascertainable persons, *or both*.” *Id.* at 73 (emphasis in original). Professor Gray’s definition of “vested” is somewhat similar: “A remainder is vested if, at every moment during its continuance, it becomes a present estate, whenever and however the preceding freehold estates determine.” GRAY, *supra* note 4, § 9. Professor Gray wrote, “A remainder is contingent [nonvested] if, in order for it to become a present estate, the fulfillment of some condition precedent, other than the determination of the preceding freehold estates, is necessary.” *Id.*

The definition of “vest” is often not expressed as easily as the quote by Bergin and Haskell suggests. For instance, Professor Dukeminier, a leading proponent of reform of the Rule during the last half of the twentieth century, wrote, “[V]est has many different meanings, depending upon the context in which the word is used.” He then explained “vest” by using four classes of vested interests: “‘vest in possession,’ ‘indefeasible vested in interest,’ ‘vest in interest with possession postponed,’ and ‘vest in interest subject to open,’” Dukeminier, *Kentucky Perpetuities Reform*, *supra* note 83, at 15.

Borron, Simes, & Smith wrote:

Whether an interest is vested or nonvested is determined by identifying the exact property interests created by a grant.

Courts applied the Rule at the creation of the interest using the what-might-happen test. When the courts used this test, they considered remote possibilities. One of the most common remote possibilities was that the law presumed that a living person could have another child.⁸⁶ This remote possibility was so common that Professor Leach named it the “fertile octogenarian” rule.⁸⁷ A court applying the Rule must take this possibility into account and would have to consider that any additional children born to the couple would join the group of children who would take possession whenever the interest became possessory.

The drafters of *Restatement of the Law of Property* named the interest granted to the grantor’s children “vested subject to open.”⁸⁸ This widely

It is believed that no single satisfactory test can be stated which will, by itself, serve to distinguish the vested and contingent remainder. The test referred to in the Restatement is extremely helpful, and, if properly applied, will enable one to predict the classification in a high percentage of cases. Yet, it does not separate the contingent remainders in terms of the language which will create it, nor distinguish the vested remainders in similar terms. It must be accompanied by, or preceded by, the application of other rules dealing with construction before a given limitation can be properly said to come within its scope.

1 BORRON, SIMES, & SMITH, *supra* note 33, § 141. Later in the same section, they provide this statement of the meaning of vest: “In general, the cases may be classified as to whether the remainder is or is not to an unascertained person, and as to whether or not there are words of condition precedent.” *Id.*

⁸⁶ See *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (1787). As applied to men, and now possibly for women, the presumption may have validity. See also Peg Tyre, *A New Generation Gap*, NEWSWEEK, Jan. 19, 2004, at 68:

Aggressive new fertility treatments are making it possible for those in midlife and older to have children. . . . More than 8,000 men 50 and older became fathers in 2002. Dr. Marc Goldstein, chief of male reproductive medicine at New York Presbyterian-Weill Medical College, says the cutoff age for people seeking fertility treatment is dissolving.

In a recent article, two writers explained several reproductive techniques that, in their opinion, pose a serious threat to the Rule. See Sharon Hoffman & Andrew P. Morriss, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575 (2004).

⁸⁷ Leach, *Perpetuities Perspective*, *supra* note 8, at 731. There was also a complimentary rule that a young child could have a child. Professor Leach called this the “precocious toddler” rule.

⁸⁸ See RESTATEMENT OF PROP.: FUTURE INTERESTS § 157 (1936).

recognized category of vested interests is often referred to as a class gift. “A class consists of a group of people who are designated to share an interest without regard to the condition(s) precedent on their taking a share in the interest.”⁸⁹ The creator of a gift is thought to be group-minded.⁹⁰ Typically, a class gift is to someone’s children, heirs, siblings, or others who share some common characteristics.⁹¹ A class gift is flexible as to the number of class members. As time passes, potential class members may be born into the class, or they may die and leave the class.⁹² Class gifts are common.

In *Hassell*, the gift to the grantor’s children fits the criteria of a class gift. The “children” were to be all of the couple’s children alive when the grantor’s wife Dora died.⁹³

A special rule applied to class gifts, they are considered nonvested for purposes of the Rule.⁹⁴ Professor Dukeminier called this special rule “The All-or-Nothing Rule”⁹⁵ and explained, “Under the Rule against Perpetuities, a class gift is either valid for all class members or valid for none. A class gift cannot be partially valid and partially void. If the interest of any member of the class possibly can vest too remotely, the entire class gift is invalid.”⁹⁶ As part of the ordinary property rules, there were class-closing rules that applied to class gifts of future interests that would become possessory at the death of prior possessory interests. The class would close—that is, final membership in the class of the couple’s children would be determined—when the interest became possessory.⁹⁷ This is also the point in time that the interest would vest.⁹⁸ People could be born after the class interest was created and become members of the class until it became possessory.⁹⁹ However, unless the creator of the interest imposed a condition of survivorship, a member of the class could

⁸⁹ 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 30.09(a).

⁹⁰ See 2 BORRON, SIMES, & SMITH, *supra* note 33, §§ 611–612.

⁹¹ See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 30.09(a).

⁹² See 2 BORRON, SIMES, & SMITH, *supra* note 33, § 632.

⁹³ See *Hassell v. Sims*, 141 S.W.2d 472, 474 (Tenn. 1940).

⁹⁴ See *Leach, Nutshell*, *supra* note 5, at 648–49 (“[A] class gift is not ‘vested’ within the meaning of that word as used in the Rule against Perpetuities until the interest of each member of the class is vested.”).

⁹⁵ See Dukeminier, *Modern Guide*, *supra* note 3, at 1891.

⁹⁶ *Id.*

⁹⁷ See *id.* at 1892.

⁹⁸ See Dukeminier, *Kentucky Perpetuities Law*, *supra* note 83, at 18–20.

⁹⁹ See 2 BORRON, SIMES, & SMITH, *supra* note 33, §§ 632, 634.

die and not lose his interest—that person’s interest would go “to his heir, next of kin or devisee.”¹⁰⁰

To apply the Rule, a court must determine whether the interest being examined “must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”¹⁰¹ To do that, the court would look for a “measuring life.” Professor Dukeminier wrote, “Because the Rule against Perpetuities is a rule of logical proof, you must look for a life that works in making the proof required.”¹⁰² The law required that the measuring life be a person alive at the creation of the interest, and that the interest vest at the death of this person or within twenty-one years after that person’s death.¹⁰³

The children’s interest followed the wife’s interest. Because it was a class gift, it was a nonvested interest when it was created. The grantor’s wife was a suitable measuring life. She was alive at the time the interest was created, and the interest would vest in the children no later than the time of her death. Because the interest would vest no later than the time of her death, the children’s interest did not violate the Rule.

The interest granted to the couple’s grandchildren must be examined next. No grandchildren had been born when the grantor created the interest.¹⁰⁴ An interest created in an unborn person or group of unborn persons is nonvested when created.¹⁰⁵

¹⁰⁰ See *id.* § 632.

¹⁰¹ See GRAY, *supra* note 4, § 201.

¹⁰² Dukeminier, *Modern Guide*, *supra* note 3, at 1873.

¹⁰³ [T]here may be a validating life—that is, a person from among the relevant lives about whom you can say, ‘The interest in question will necessarily vest or fail during this person’s life or at his death or within twenty-one years after his death.’ The validating life (traditionally known as the measuring life) is the person you are looking for in order to validate the interest You will find a validating life, if you find one at all, *only among persons who can affect vesting*. All other persons are irrelevant to the search Therefore, you should test each of these relevant persons to see if the interest will vest or fail during that person’s life or within twenty-one years after that person’s death. If there is no person among this group of relevant lives by whom the requisite proof can be made, the interest is void unless it must vest or fail within twenty-one years [of its creation]. *Id.*

¹⁰⁴ See *Hassell v. Sims*, 141 S.W.2d 472, 473 (Tenn. 1940).

¹⁰⁵ See 1 BORRON, SIMES, & SMITH, *supra* note 33, § 152. Such a gift was not vested because it would not be possible to “identify who would get the right to possession if the interest should become a present estate at any time.” BERGIN & HASKELL, *supra* note 85, at 67.

The grandchildren's interest would vest at the death of all of the grantor's children, the point in time at which the class of grandchildren would close and membership in the class would be determined. After that time, the children could have no additional children. Thus, we would be able to identify those persons who would take possession if the interest became possessory at that time. Possession awaited only the natural termination of the prior interest; no condition precedent other than the natural expiration of the prior interest existed. The requirements for vesting would be satisfied at the first moment all of the couple's children were dead.

Application of the Rule required the court to determine measuring lives, those lives that the court would determine were the lives in being at the creation of the interest. The grantor, his wife, and some of his children were potential measuring lives. They were all alive at the creation of the interest. Measuring lives needed to be alive when the interest was created, the date of the deed. Not all of the children could be measuring lives. The grantor might have an additional child after he delivered the deed, and the wife might die the day after the child was born. That child might live for more than twenty-one years following the grantor's and his wife's deaths. The interest might vest more than twenty-one years after the death of those persons alive at the creation of the interest. Therefore, the grandchildren's interest did not satisfy the requirements of the Rule and was void.¹⁰⁶

Because the invalid interest was void and of no effect, the grantor retained this interest after he executed and delivered the deed.¹⁰⁷ Upon the widow's death or remarriage, the land described in the deed would go to the couple's children for life. At the death of the last of their children to die, the land would revert to the grantor's estate for distribution pursuant to a valid will or by intestate succession to the grantor's heirs, unless he deeded this interest in the land to some other person prior to his death.

¹⁰⁶ In *Hassell*, the court determined that the interest of the grandchildren violated the common law Rule and was therefore void. See *Hassell*, 141 S.W.2d at 477.

¹⁰⁷ The *Hassell* court found that until "the death of the grantor's children survived by children, the fee remains in the grantor, or in his heirs in case of his death." *Id.* at 474. Thus, the grantor inadvertently retained a reversionary interest in the land.

Illustration 2

Application of the Rule did not always result in invalidation of every interest which the court examined. Courts decided each case based upon its own facts.

Consider a variation of Illustration 1: Assume that exactly the same interests were created by a testator's valid will instead of by a lifetime deed—the will gave the property to testator's wife for life as long as she remained his widow, then to their children for life, and then the remainder to their grandchildren. Assume that the testator's wife and children survived him, but that no grandchildren had been born at the time of his death.

First, the court would determine which interests the will created, and then the court would apply the Rule to those interests. The gift of a life estate to the testator's widow was the first interest the will created. The wife would receive a present interest. The Rule does not apply to present interests.

The next interest the will created was the life estate in their children. This was a class gift, which, for purposes of the Rule, a court considered nonvested when created. This interest would not violate the Rule. The wife was alive at the testator's death. The class would close at the wife's death, the time the interest would become possessory. She satisfied the requirements for a measuring life. The children's life interest would be valid. It would vest at the end of the measuring life, well within the time allowed by the Rule.

No grandchildren were alive at the time their interest was created. An interest created in a group of unborn persons is not vested when created. Their interest was a nonvested class gift.

We know that the testator could have no more children after his death. All of his children were alive at his death. The grandchildren's interest will vest—or fail to vest because no grandchildren were alive when the last of the grantor's children died—at the death of the last of the testator's children to die. The children are the appropriate measuring lives; they were all alive, and the interest will vest or not at the death of the last of them. The grandchildren's interest would be valid under the Rule.

The distinction between interests created by deeds (or other lifetime transfers), and interests created by a will or other instrument that become effective at or after the death of the creator of the interest, is very important. Language appropriate in one situation may not be appropriate in the other. It is a relatively common mistake for grantors inadvertently to use language appropriate in an instrument that creates interests at or

after death in an instrument that creates interests during the lifetime of the creator of the interest.¹⁰⁸

D. Additional Remote Possibilities

During the discussion of Illustration 1, we encountered two of the remote possibilities that are common when applying the what-might-happen approach, the fertile octogenarian and the precocious toddler.¹⁰⁹ Many of the difficulties that caused nonvested future interests to fail are caused by these and other remote possibilities. Professor Leach presented a catalog of these possibilities.¹¹⁰

The third remote possibility Professor Leach listed is known as the “unborn widow” case.¹¹¹

T has a son, A, 45 years old. The son has a wife and grown children. T leaves property in trust “to pay the income to A for his life, then to pay the income to A’s widow, if any, for her life and then to pay the principal to the children of A then living.”¹¹²

The gift to A’s children violates the Rule. A’s living children have a nonvested remainder.¹¹³ After T’s death, A’s wife might die. Thereafter, A might marry another woman who was not alive at T’s death and therefore not available to be a measuring life for the children’s interest. The children’s interest would not vest and become possessory until the new wife died. The new wife might die more than twenty-one years after lives in being at the creation of the interest, too remote for the Rule.¹¹⁴

¹⁰⁸ See, e.g., *Ryan v. Ward*, 64 A.2d 258 (Md. 1949). The settler created an irrevocable living trust. The scrivener used language appropriate for a testamentary trust: “[S]hall pay the net income . . . upon the death of the last surviving child of the Grantor’s said son, who shall be living at the time of the death of the Grantor.” *Id.* at 260. This caused the interest following the Grantor’s son’s children to violate the Rule. See *id.* at 263–66. If the language had read, “[S]hall pay the income until the death of the last surviving child of the Grantor’s son, who shall be living at the time this trust was created,” Grantor could have avoided violating the Rule.

¹⁰⁹ See *supra* note 87.

¹¹⁰ See Leach, *Nutshell*, *supra* note 5, at 643–46 (discussing among others, the fertile octogenarian and precocious toddler rules).

¹¹¹ See *id.*

¹¹² *Id.*

¹¹³ They must survive A’s widow in order to obtain possession, a condition precedent other than the natural termination of the prior estate.

¹¹⁴ The likelihood of all this occurring is very remote. Professor Leach wrote, “Of course, everybody knows that A will not marry a woman 45 years his junior; but it is a

Professor Leach called another remote possibility the “administrative contingency.”¹¹⁵ Here there is a gift made by a will that is only distributed upon complete probate of the estate. Of course, something might postpone completion of the probate of the estate, delaying delivery of the gift until too late to satisfy the Rule. There could be a drawn out tax contest or lawsuit, or the estate might remain open to receive or make mortgage payments. These possibilities are not likely, but they are “a mathematical possibility.”¹¹⁶

In his discussion of remote possibilities, Professor Dukeminier included discussion of two of the less commonly listed remote possibilities. The first of these he called the “magic gravel pit.”¹¹⁷ In this case, a grantor devised gravel pits into trust, with a direction to the trustee “to work them until the pits were exhausted, and then to sell them.”¹¹⁸ Of course, the pits might be worked for longer than the period allowed by the Rule, making the trust invalid.¹¹⁹ Professor Dukeminier’s other less commonly listed remote possibility was named the “interminable war” case.¹²⁰ This was a devise to a person’s relatives “who should survive the war.”¹²¹ Because the war might last longer than the period allowed by the Rule, the entire interest was invalid.¹²²

Courts widely recognized and applied remote possibilities. The what-might-happen test was the traditional approach to the Rule.¹²³

mathematical possibility.” Leach, *Nutshell*, *supra* note 5, at 644. One might recall the marriage of Vickie Lynn Marshall, a.k.a. Anna Nicole Smith, to J. Howard Marshall II on June 27, 1994. Marshall was sixty-three years older than she on the date of their marriage. See Anna Nicole Smith, http://en.wikipedia.org/wiki/Anna-Nicole_Smith (last visited Oct. 22, 2006). Ms. Smith’s quest for money from Marshall’s estate reached the Supreme Court. See *Marshall v. Marshall*, ___ U.S. ___, 126 S. Ct. 1735 (2006).

¹¹⁵ See Leach, *Nutshell*, *supra* note 5, at 644.

¹¹⁶ Professor Leach included four other examples in his list. See *id.* at 644–45.

¹¹⁷ See Dukeminier, *Modern Guide*, *supra* note 3, at 1879.

¹¹⁸ *Id.*

¹¹⁹ See *id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See *id.*

¹²³ See *supra* text accompanying notes 55–58; 3 BORRON, SIMES, & SMITH, *supra* note 33, § 1228.

E. Interests Created in Property Held in Trust

Application of the Rule did not determine directly how long a trust might last.¹²⁴ Instead, the Rule applied to beneficial interests created in a trust.¹²⁵

Illustration 3

The interests in the testamentary trust created in a Nebraska case, *Hauschild v. Hauschild*,¹²⁶ provide a good illustration of how the Rule applies to interests created by a trust. The testator's will gave most of his property, including his farm, to a trust. The testator gave his wife Emma occupancy of the home on their farm for as long as she lived or desired to live there. He also gave his wife the income from the trust for her life. After her death, the trust property was to be divided into equal shares for their three children, Charlotte, Harold, and Eileen. The case dealt with Charlotte's and Harold's shares, which were to remain in trust. The two were to receive the income from their share for so long as he or she lived, and at death, the share was to descend to his or her lineal descendants by right of representation.¹²⁷

The gifts to the three children, Charlotte, Harold, and Eileen, were to named persons who were alive at the testator's death. These interests vested immediately upon the husband's death. There was no condition precedent other than the natural expiration of the prior interest, Emma's life interest, and at all times it was possible to identify these named persons. The Rule did not apply to vested interests.

Harold and Charlotte argued that the gifts to their lineal descendants violated the Rule and were void (thus claiming that they would own the fee rather than life interests). The court rejected this assertion noting that the descendants would be determined at the deaths of Harold and Charlotte, both of whom were lives in being at the time the testator died and established the trust.¹²⁸

¹²⁴ 10 POWELL, *supra* note 2, § 72.12[1].

¹²⁵ See Dukeminier, *Modern Guide*, *supra* note 3, at 1910.

¹²⁶ 126 N.W.2d 192 (Neb. 1964).

¹²⁷ *Id.* at 194.

¹²⁸ *Id.* at 196. The two life beneficiaries also argued that the trustee might take more than a life in being plus twenty one years to make an allocation of their shares. (If the court agreed, the interests would be void.) The court rejected this stating, "Although there might be some delay in making an actual distribution, the right to share in an equal division of the property accrues immediately upon the death of the widow. This is sufficient to comply with the vesting requirement of the rule against perpetuities." *Id.* at

F. Powers of Appointment

Powers of appointment add flexibility to a trust.¹²⁹ Use of powers of appointment allows the grantor to postpone decisions about distribution of income and trust property so that the holder of the power of appointment can consider later developments.¹³⁰

In order to create a power of appointment, the creator of the trust, called the donor, must give to one or more named persons, called the donees, the power to determine who will receive trust property, in what shares the property will be divided, and when the property will be received.¹³¹ The donor creates this power by using a specific provision in the trust.

There are two ways a power of appointment might violate the Rule. First, the donee who can exercise the power of appointment might be able to exercise it after the time allowed by the Rule.¹³² If that could happen, the entire power of appointment and any interests created by its exercise would be void.¹³³ Second, an exercise of a valid power of appointment might create one or more interests that violate the Rule.¹³⁴ If that happens, only those interests that violate the Rule would be void.¹³⁵

Illustration 4

Often, a testator will create a testamentary trust to provide for the testator's surviving family members. In *Camden Safe Deposit and Trust Co. v. Scott*,¹³⁶ the testator's trust provided for two equal shares, one for each of his two daughters who survived him. Following the death of each

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¹²⁹ See 3 A. JAMES CASNER & JEFFREY N. PENNELL, *ESTATE PLANNING* § 12.0 (6th ed. 2003).

¹³⁰ See *id.*; RESTATEMENT (SECOND) OF PROP: DONATIVE TRANSFERS § 11.1 (1986) (“A power of appointment is authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property.”).

¹³¹ See 62 AM. JUR. 2D *Powers of Appointment and Alienation* § 2 (2005) (explaining that a power of appointment is a power or authority conferred by a donor upon another, called a donee, to appoint the persons who are to receive an estate or an income therefrom after the donee's or testator's death or after the termination of an existing right or interest).

¹³² See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.08(I); Dukeminier, *Modern Guide*, *supra* note 3, at 1902.

¹³³ See *id.*

¹³⁴ See *id.*; 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.08(I).

¹³⁵ This is an application of the Rule in which the court only voided an invalid provision. See Dukeminier, *Modern Guide*, *supra* note 3, at 1895–97.

¹³⁶ 189 A. 653 (N.J. Ct. Err. App. 1937).

daughter, the daughter's share of the trust was divided into one share for each of her children who survived her. A continuing trust was to hold the share of each granddaughter for life and the share of each grandson until the grandson reached age thirty. Income was to be paid to each grandchild after that grandchild reached age twenty-one. Income was also to be paid for education of each grandchild who was a minor. If either of the testator's daughters died without surviving issue, the share of that daughter was to be distributed as directed by the daughter's will. If there was no such direction, the deceased daughter's share would pass to the other sister or to the issue of the other sister.¹³⁷ When any granddaughter died, or if any grandson died before reaching age thirty without surviving issue, the share of that grandchild was to be distributed according to that grandchild's will. If no appointment was made, the share would pass to that grandchild's remaining brothers and sisters, and if none, to the testator's remaining grandchildren. The provisions of the testator's will also created a power of appointment in each grandchild.¹³⁸

All of the interests owned by the daughters, including their powers of appointment, met the requirements of the Rule. The daughters were alive at the time the testator died, and they enjoyed the income interests immediately. The daughter's interests were present interests to which the Rule did not apply.

However, the powers of appointment given to the grandchildren violated the Rule. The daughters were each alive. Either or both might have had an additional child. Thus the class of their respective children could not serve as measuring lives for the powers of appointment because measuring lives must be alive at the time the interest was created. The grandchildren's powers of appointment might be exercised more than twenty-one years after the daughters died, more than twenty-one years after the death of persons alive at the time the powers of appointment were created. The powers of appointment violated the Rule and were void *ab initio*.

The validity of interests created by the exercise of a valid power of appointment is determined on a case-by-case basis; the newly created interests might be valid or invalid.¹³⁹ The time from which the validity of

¹³⁷ This provision of William's will created a power of appointment in each daughter. Each daughter who died without issue had the "authority, other than as an incident to beneficial ownership of property, to designate recipients of beneficial interests in property." RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 (1986).

¹³⁸ See *Camden Safe Deposit*, 189 A. at 374–75.

¹³⁹ See 3 BORRON, SIMES, & SMITH, *supra* note 33, § 1112.

the interests should be measured depends upon whether the power of appointment is general or special, or could be presently exercised or exercised only by will.¹⁴⁰

This second-look doctrine has been applied to the exercise of special powers of appointment and to testamentary general powers of appointment.¹⁴¹ This doctrine allows the courts to consider those facts that occur between the time the power of appointment is created and the time it is exercised. Courts cannot consider such facts for presently exercisable general powers of appointment. Thus, courts determine the validity of all special powers of appointment and testamentary general powers of appointment as of the time the deed or will that created the power is effective, but also take into consideration those facts that develop between the time the power is created and the time it is exercised by using the second-look doctrine. However, courts determine the validity of presently exercisable general powers of appointment at the time the deed or will that created the power is effective, without using the second-look doctrine.¹⁴²

Illustration 5

The facts of a Massachusetts case, *Bundy v. United States Trust Co. of New York*,¹⁴³ provide an opportunity to examine the invalidity of an interest created by the exercise of a power of appointment. In 1865, Anna and her husband created a trust to manage her property. She retained an unrestricted power of appointment that she could exercise by a deed or by her will.¹⁴⁴

¹⁴⁰ See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.08(I). A power of appointment is considered presently exercisable if the donee can exercise the power during her lifetime. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.4(1). A power of appointment is considered a testamentary power if it can only be exercised by the donee's will. See *id.* § 11.5(2). A general power of appointment is one by which the donee can appoint the property to herself, her estate, her creditors, or the creditors of her estate. See *id.* § 11.4(1). This definition reflects the significant impact that federal tax law had on the law of powers of appointment. See *id.*, Reporter's Tax Note to § 11.4, at 19–21. Any other power of appointment is a special (non-general) power of appointment. See *id.* § 11.4(2). A general power of appointment that is exercisable both during lifetime and by will is treated as a presently exercisable power for purposes of determining whether an exercise of the power created an interest that violates the Rule. See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.08(I).

¹⁴¹ See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.08(I).

¹⁴² See *id.*

¹⁴³ 153 N.E. 337 (Mass. 1926).

¹⁴⁴ See *id.* at 338.

Anna died in 1874 survived by her daughters, Harriett and Anna, and by her grandchild, Carlotta, all of whom were alive when the trust was created.¹⁴⁵ Anna's will exercised her power of appointment by creating a new trust for Carlotta. By the trust's terms, Carlotta's share remained in trust with income paid to her mother during her minority, and upon reaching majority, the trust was to pay the income directly to Carlotta for her life. At Carlotta's death, trust property was to be distributed as directed in Carlotta's last will and testament,¹⁴⁶ but if she died without a valid will, the trust distributed the property to her issue, her mother, or her aunts, Harriett and Anna.

Carlotta died in 1924, leaving a valid will that exercised her power of appointment by giving the property to her own trust. The income from Carlotta's trust was to be paid to or on behalf of her two adopted children Emily and Martha "in such amounts and in such shares as my trustee," in his discretion, deem advisable.¹⁴⁷ Any income amounts not paid out to or for Emily and Martha were payable to Carlotta's cousins Louise and Josephine in equal shares. If one of the cousins were dead, the income would be distributed to that cousin's issue per stirpes, or if both were dead, to the issue of each of them per stirpes.¹⁴⁸ If one of Carlotta's adopted children should die leaving issue, the trustee was to pay income to that child's issue as the trustee deemed advisable "during the continuance of the trust."¹⁴⁹ If both of Carlotta's adopted children were dead, the trust would divide the property into two shares, one for Emily's then living issue per stirpes and one for Martha's then living surviving issue per stirpes. If one of the adopted children did not leave surviving issue, then to the issue of the other. In default of any issue of Emily and Martha, the trust property would go to Carlotta's cousins, Louise and Josephine, in the same manner.¹⁵⁰

Anna retained a valid power of appointment. she could exercise the power no later than at her death. Thus, she could not exercise the power later than the death of a person alive at the creation of the power, well within the time allowed by the Rule.

¹⁴⁵ See *id.* (explaining that Anna retained a presently exercisable general power of appointment).

¹⁴⁶ By this provision, Carlotta received a testamentary general power of appointment. See *id.* at 338.

¹⁴⁷ *Id.* at 339.

¹⁴⁸ See *id.*

¹⁴⁹ *Id.*

¹⁵⁰ See *id.*

Carlotta was alive when Anna created the trust.¹⁵¹ The interests Anna gave to her in the original trust through her exercise of the power of appointment were both valid. Her interest in the trust vested in her when Anna created the trust.¹⁵² The trust gave Carlotta the power of appointment during her lifetime. This power of appointment was valid, held by a person alive when the trust was created.¹⁵³

The doctrine of relation back was a special rule that courts used when applying the Rule to the exercise of a power of appointment.¹⁵⁴ “The act of exercising a power [of appointment] is literally read back into the instrument that created the power as if the donee had taken a pen and filled in a blank of the original instrument.”¹⁵⁵ Therefore, the court would examine the interests created by Carlotta’s exercise of her power of appointment as if they had been created on the date that Anna and her husband created the original trust.¹⁵⁶

The income interest Carlotta gave to her adopted children did not vest in them at her death. The income was to be paid to them in the trustee’s discretion.¹⁵⁷ Exercise of that discretion was a condition precedent other than the natural termination of the prior estate, causing the interest to fail the test for “vest.” The alternate income interests of Carlotta’s cousins were also not vested. The income remained subject to the conditions precedent that the trustee exercise the discretion to make payments and that there was a surplus available to pay the cousins. Both of these were conditions precedent other than the natural termination of the prior estate. The trustee might not distribute property until more than twenty-one years after Carlotta’s death, the death of the only measuring life available. All

¹⁵¹ See *id.* at 339.

¹⁵² The only condition precedent was surviving her grandmother’s death, the natural termination of the prior estate. At all times a court could determine who would take the interest.

¹⁵³ The power could only be exercised by Carlotta’s will—at the death of a life in being at the creation of the interest.

¹⁵⁴ The “appointee [the recipient of the property] takes from the donor [the creator of the power of appointment] rather than from the donee [the person who exercised the power of appointment].” 3 POWELL, *supra* note 2, § 33.03[1].

¹⁵⁵ *Id.* See also GRAY, *supra* note 4, § 524.

¹⁵⁶ *Ligget v. Fid. & Columbia Trust Co.*, 118 S.W.2d 720, 722 (Ky. 1938) (“It is well settled . . . that an estate which is transferred under a power of appointment is considered as passing under the will of the donor or creator [of] the power of appointment.”). The court in *Bundy* did not mention this rule. However, it could not have made its decision without applying it. See *Bundy*, 153 N.E. at 338–40.

¹⁵⁷ See *id.* at 338.

of these interests might not vest within the time allowed by the Rule. These interests violated the Rule and were void *ab initio*.

By the exercise of her power of appointment, Carlotta also gave the final interest in her trust to the issue of her adopted children.¹⁵⁸ This interest also violated the Rule. The adopted children were not alive at the time Anna created the original trust,¹⁵⁹ so they could not be measuring lives. Carlotta's adopted children might live for more than twenty-one years after Carlotta's death, so the trust might continue for more than twenty-one years after the death of the only person who could be the measuring life for these interests. These interests violated the Rule and were void *ab initio*.¹⁶⁰ This Illustration demonstrates that the exercise of a valid power of appointment might create interests that violate the Rule. Clearly the use of powers of appointment can raise difficult issues.

G. Conclusion

The common law Rule is a very technical rule that is sometimes difficult to understand and apply. The application of the Rule often frustrates the intention of the creator of the interest.¹⁶¹ We should welcome reform that will increase the chances of implementing the intention of the creator of property interests instead of frustrating that intent by voiding some of those property interests, as well as reform that will simplify the operation of the Rule.

III. STATUTORY REFORM OF THE RULE AGAINST PERPETUITIES

A. Kentucky—an Example of Early Comprehensive Statutory Reform

The late Professor Jesse Dukeminier led an effort¹⁶² that resulted in the Kentucky legislature's 1960 adoption of comprehensive statutory perpetuities reform.¹⁶³ The legislature first codified the common law

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at 339.

¹⁶⁰ In *Bundy*, the court found that the same interests were invalid. The court looked to Anna's will to determine who should inherit the property in Carlotta's trust; that will gave the property to Carlotta's "issue." At that time, Massachusetts did not consider adopted children issue, so the property was given to Carlotta's estate to be distributed by intestate succession. *See Bundy*, 153 N.E. at 339.

¹⁶¹ *See GRAY, supra* note 4, § 629 (noting that the object of the Rule was "to defeat intention").

¹⁶² *See Dukeminier, Kentucky Perpetuities Law, supra* note 83, at 4–5.

¹⁶³ *See KY. REV. STAT. ANN.* § 381.215 (LexisNexis 2002). Not all early statutory reform of the Rule was as comprehensive as Kentucky's. *See, e.g., Estates Act, 1947 Pa.*

Rule,¹⁶⁴ but also enacted wait-and-see and reformation provisions that made significant changes in the way courts would apply the Rule.¹⁶⁵

The wait-and-see statute is easy to explain and apply.¹⁶⁶ When the wait-and-see approach is used, courts apply the facts as they actually have developed, limited to the outermost time allowed by the Rule.¹⁶⁷ Courts applied the common law Rule to interests at the time they were created, looking forward in time, using the what-might-happen approach.¹⁶⁸

Illustration 6

The facts of the Kentucky case, *Three Rivers Rock Co. v. Reed Crushed Stone Co., Inc.*,¹⁶⁹ provide a good example of how the wait-and-

Laws, P.L. 100, § 4.

The statutory Rule in Kentucky eliminated confusion created by application of a prior statute. "Since its enactment, the [prior] statute ha[d] been applied indiscriminately to restraints of alienation of vested estates and to the remote vesting of an estate. The failure to distinguish between the two situations . . . resulted in much confusion." Taylor v. Dooley, 297 S.W.2d 905, 907 (Ky. 1956). In Kentucky, a common law rule now governs restraints on alienation. See Caudle v. Smither, 427 S.W.2d 227 (Ky. 1968); Gilbert v. Union College, 343 S.W.2d 829 (Ky. 1961).

¹⁶⁴ KY. REV. STAT. ANN. § 381.215.

¹⁶⁵ See *id.* § 381.216. It is generally agreed that the wait-and-see movement began with Professor Leach's 1952 article, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*. See Leach, *Perpetuities Perspective*, *supra* note 8. See, e.g., Bloom, *Perpetuities Alternative*, *supra* note 31, at 23. Professor Dukeminier became a strong advocate for the wait-and-see approach. See, e.g., Dukeminier, *Kentucky Perpetuities Law*, *supra* note 83; Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985) [hereinafter Dukeminier, *Measuring Lives*]; Dukeminier, *Modern Guide*, *supra*, note 3.

¹⁶⁶ See KY. REV. STAT. ANN. § 381.216:

In determining whether an interest would violate the Rule the period of perpetuities shall be measured by actual rather than possible events; provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest.

¹⁶⁷ See *Three Rivers Rock Co. v. Reed Crushed Store Co., Inc.*, 530 S.W.2d 202, 205 (Ky. 1975):

The "wait and see doctrine" is a rule which permits consideration of events occurring after inception of the instrument which are relevant to the vesting of a future interest, so that if the contingency upon which the interest is limited actually occurs within the period of the rule, the interest is valid.

See also 10 POWELL, *supra* note 2, § 75A.02[2][b].

¹⁶⁸ Kentucky followed this approach. See, e.g., Curtis v. Citizens Bank & Trust Co., 318 S.W.2d 33 (Ky. 1958); Taylor, 297 S.W.2d at 907-08.

¹⁶⁹ 530 S.W.2d 202.

see approach works and of the impact that it has on the operation of the Rule. The case involved parties that were competitors—each operated limestone quarries in close proximity to one other.

Prior to December 19, 1961, Mr. and Mrs. Tramble operated a limestone quarry on land they owned, and Mr. Jones, a neighbor, operated a different limestone quarry on land he owned.¹⁷⁰

On December 19, 1961, Mr. and Mrs. Tramble executed and delivered an option to Mr. Jones giving him the right to purchase an easement and right-of-way over the land the Trambles owned.¹⁷¹

In 1962, Jones leased his land and quarry to Three Rivers Rock (“Three Rivers”), which continued to operate the quarry. In March 1968, Jones also assigned his option to Three Rivers. Five days later, the Trambles sold their land and assigned their option to Reed Crushed Rock. At that point, Three Rivers owned the option to purchase an easement and right-of-way over the land that its competitor Reed owned.¹⁷²

In November 1968, almost seven years after the option was created, Three Rivers notified Reed that it had exercised the option and tendered the first payment. Reed responded by a written notice to Three Rivers that it did not recognize the option. Three Rivers sued for specific performance. The option did not contain a provision that limited the time in which it could be exercised.¹⁷³

If the court decided this case using the common law Rule, it would have used a what-might-happen approach.¹⁷⁴ It is not difficult to construct the court’s probable analysis. There was no deadline within which the option was to be exercised. With no measuring lives, the option had to be certain to be exercised within twenty-one years of its creation.¹⁷⁵ But the option might have been exercised thirty, fifty, or one hundred years after it became effective, long after the expiration of the time allowed by the Rule. The option would clearly have violated the common law Rule and been void *ab initio*.

The wait-and-see approach played an important role in the court’s analysis of the *Three Rivers* case. The court first determined that the Rule applied to the option. The court wrote,

¹⁷⁰ See *id.* at 204.

¹⁷¹ See 1960 Ky. Acts, ch. 167, § 9 (effective July 1, 1960).

¹⁷² See *id.*

¹⁷³ See *id.* at 204–05.

¹⁷⁴ Kentucky courts had used this approach. See *Curtis v. Citizens Bank & Trust Co.*, 318 S.W.2d 33 (Ky. 1958); *Taylor v. Dooley*, 297 S.W.2d 905 (Ky. 1956).

¹⁷⁵ See 3 BORRON, SIMES, & SMITH, *supra* note 33, § 1226.

[A]n option . . . creates an interest which is subject to vesting at a future time. We are of the opinion that options . . . created after the effective date of the 1960 perpetuities act . . . are subject to the Rule. . . . We are further of the opinion that the appellant [Three Rivers] is entitled to the benefit of the ‘wait and see’ doctrine (KRS 381.216), since it sought to enforce the option within twenty-one years after its execution.¹⁷⁶

By using the wait-and-see approach—that is, deciding the case based upon the facts as they actually developed—it was clear that the exercise of the option occurred less than eight years after the option became effective, well within the time the statutory Rule allowed. Therefore, the option was valid and enforceable.

The wait-and-see approach makes a fundamental change in the Rule’s application. Gone is the what-might-happen approach. Gone are all the remote possibilities that caused interests to be declared invalid. Courts now will decide cases based on the actual facts as they develop, not by use of remote possibilities. In evaluating interests by the facts as they actually develop, some nonvested future interests will be saved from violation of the Rule.¹⁷⁷ That approach allows Courts to carry out the creator’s intentions for those interests, and it allows the actual recipients of those interests to possess and enjoy them.

However, measuring lives remain important. Interests “must vest, if at all, not later than twenty-one (21) years after some life in being at the creation of the interest.”¹⁷⁸ If they do not, as determined by the facts as they actually develop, courts will declare such interests invalid *ab initio*.

Adoption of the wait-and-see doctrine has had a beneficial effect. It drastically reduced the number of reported cases. In the years 1940 through 1949, there were twelve reported Kentucky state court cases that involved the common law Rule.¹⁷⁹ In the years 1950 through 1959, there

¹⁷⁶ *Three Rivers*, 530 S.W.2d at 208.

¹⁷⁷ *See id.*

¹⁷⁸ KY. REV. STAT. ANN. § 381.215 (LexisNexis 2002).

¹⁷⁹ *See Tuttle v. Steele*, 135 S.W.2d 436 (Ky. 1940); *Fox v. Burgher*, 148 S.W.2d 342 (Ky. 1941); *McGaughey v. Spencer County Bd. of Educ.*, 149 S.W.2d 519 (Ky. 1941); *Goodloe’s Tr. v. Goodloe*, 166 S.W.2d 836 (Ky. 1942); *Maddox v. Keeler*, 177 S.W.2d 568 (Ky. 1944); *Ford v. Yost*, 186 S.W.2d 896 (Ky. 1944); *Smith v. Fowler*, 190 S.W.2d 1015 (Ky. 1945); *Mitchell v. Deegan*, 192 S.W.2d 715 (Ky. 1946); *Cambron v. Pottinger*, 193 S.W.2d 412 (Ky. 1946); *Letcher’s Tr. v. Letcher*, 194 S.W.2d 984 (Ky. 1946); *Epperson v. Clintonville Cemetery Co.*, 199 S.W.2d 628 (Ky. 1947); *Trosper v.*

were fourteen reported Kentucky state court cases that involved the common law Rule.¹⁸⁰ In the remainder of the twentieth century, a span of forty years, there were only ten reported Kentucky state court cases that involved the Rule.¹⁸¹ Of these, three of the first four cases involved interests created prior to the enactment of the statutory Rule and did not involve the statutory Rule. Thus, Kentucky state courts only decided seven cases involving the new statutory Rule during the first forty years that statute was in effect. The reduced number of cases decided under the statutory Rule likely is attributable entirely to application of the wait-and-see doctrine—courts did not use the reformation provision of the statute to decide any of the seven cases decided under the statutory Rule.

Illustration 7

Kentucky's reformation statute,¹⁸² enacted as part of the 1960 perpetuities reform, allows a court to reform some interests otherwise invalid in order to comply with the statutory Rule—if this can be done without substantially violating the intent of the creator of the interest.

There are no reported Kentucky decisions in which courts applied the reformation statute. A Hawaii case, *In re Estate of Chun Quan Yee*

Shoemaker, 227 S.W.2d 177 (Ky. 1949).

¹⁸⁰ See *Johnson v. Johnson*, 229 S.W.2d 743 (Ky. 1950); *Egner v. Livingston County Bd. of Educ.*, 230 S.W.2d 448 (Ky. 1950); *Campbell v. Campbell*, 230 S.W.2d 918 (Ky. 1950); *Bates v. Bates*, 236 S.W.2d 943 (Ky. 1950); *First Nat'l Bank & Trust Co. of Lexington v. Purcell*, 244 S.W.2d 458 (Ky. 1951); *Thornton v. Kirtley*, 249 S.W.2d 803 (Ky. 1952); *Barren County Bd. of Educ. v. Jordan*, 249 S.W.2d 814 (Ky. 1952); *Thomas v. Utterback*, 269 S.W.2d 251 (Ky. 1954); *Taylor v. Dooley*, 297 S.W.2d 905 (Ky. 1956); *Bach v. Pace*, 305 S.W.2d 528 (Ky. 1957); *Johnson v. Pittsburgh Consolidation Coal Co.*, 311 S.W.2d 537 (Ky. 1958); *Sorrell v. Tenn. Gas Transmission Co.*, 314 S.W.2d 193 (Ky. 1958); *Tex. Eastern Transmission Corp. v. Carman*, 314 S.W.2d 684 (Ky. 1958); *Curtis v. Citizens Bank & Trust Co. of Lexington*, 318 S.W.2d 33 (Ky. 1958).

¹⁸¹ See *Gilbert v. Union College*, 343 S.W.2d 829 (Ky. 1961); *Mounts v. Roberts*, 388 S.W.2d 117 (Ky. 1965) (1904 deed); *Atkinson v. Kish*, 420 S.W.2d 104 (Ky. 1967) (Decedent died in 1917 and left valid will.); *Caudle v. Smither*, 427 S.W.2d 227 (Ky. 1968) (1957 living trust); *Three Rivers Rock Co. v. Reed Crushed Stone Co., Inc.*, 530 S.W.2d 202 (Ky. 1975); *Hatcher v. Southern Baptist Theological Seminary*, 632 S.W.2d 251 (Ky. 1982); *Ky.-W. Va. Gas Co. v. Martin*, 744 S.W.2d 745 (Ky. Ct. App. 1987); *Univ. of Louisville v. Isert*, 742 S.W.2d 571 (Ky. Ct. App. 1987); *Farris v. Laurel Explosives, Inc.*, 797 S.W.2d 487 (Ky. Ct. App. 1990); *Dennis v. Bird*, 941 S.W.2d 486 (Ky. Ct. App. 1997).

¹⁸² See KY. REV. STAT. ANN. § 381.216 (“Any interest which would violate said rule as thus modified shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest.”).

Hop,¹⁸³ illustrates the application of reformation of interests. Chun died in 1954. His will created a trust for his wife and issue. His wife, four sons, and twelve daughters survived him.¹⁸⁴ His trust was to terminate “upon the death of my wife . . . or thirty (30) years from the date of my death, whichever shall last occur.”¹⁸⁵

The court found that the trust clearly violated the Rule.¹⁸⁶ The court gave no reasons for this conclusion, but its reasoning easily can be constructed. The common law Rule required that remote possibilities be considered—the what-might-happen approach. His wife and all of his children might die one year after his death. The trust then would terminate twenty-nine or thirty years after Chun died.¹⁸⁷ This termination would be more than twenty-one years after the deaths of all the lives in being at his death, longer than the Rule allowed. Therefore, the interests in the trust that followed the wife’s interest would all be invalid.

The court chose a different path. The court wrote that the policy reasons supporting the Rule were “not inconsistent with the application of the doctrine of equitable approximation of a testamentary trust.”¹⁸⁸ The court found,

The wishes of the testator could have been accomplished exactly as he wished without violating the Rule if the attorney who drafted the will had specified that the trust was to continue until 21 years after the death of the last survivor of his wife and all of his issue living at the time of his death but not to exceed 30 years from the date of his death.¹⁸⁹

Thus, the trust was reformed so that, in effect, it would terminate at the time his wife and all his issue living at his death were dead, but no longer than twenty-one years after his death.¹⁹⁰ The courts saved the trust from invalidity in a slightly modified form. The court’s decision carried out the essence of Chun’s intent. Reformation of interests in appropriate cases

¹⁸³ 469 P.2d 183 (Haw. 1970).

¹⁸⁴ *See id.* at 184.

¹⁸⁵ *Id.*

¹⁸⁶ *See id.* at 186.

¹⁸⁷ The trust language required the trust to terminate at his wife’s death or thirty years after his death, whichever occurred last. *See id.* at 184.

¹⁸⁸ *Id.* at 184.

¹⁸⁹ *Id.* at 186–87.

¹⁹⁰ *See id.* at 187.

allows courts to save some interests that otherwise would violate the Rule.¹⁹¹

Not all interests that violate the Rule can be reformed, however. The Kentucky Court of Appeals in 1987 encountered such a case in *University of Louisville v. Isert*.¹⁹² The testatrix's will created a trust to pay tuition to the descendants of her two named children, their spouses, or both, and if tuition was not paid to these persons, the University could provide tuition for "any deserving students."¹⁹³ The trust provided that the University was trustee.¹⁹⁴

The testatrix's children sued seeking a determination that the trust was not a charitable trust and that it violated the Rule.¹⁹⁵ After affirming the trial court's determination that the trust was a private noncharitable trust, the court turned its attention to the University's contention that the court should reform the trust by applying the reformation statute. The court found that the will's language did not provide for ultimate vesting of the trust property.¹⁹⁶ The court refused to provide such a provision, utilizing a long-standing rule that courts will not add a provision to a will.¹⁹⁷ Consequently, there was no reformation of the will. Courts cannot reform all interests that violate the Rule.

B. New York—Tinkering with the Rule

The New York legislature followed a different path to reform. Prior to 1960, courts interpreted New York's statutory rule against suspension of alienation of property as its Rule Against Perpetuities.¹⁹⁸ In 1958, the New York legislature replaced its previous two-lives statutory rule¹⁹⁹ with a single-life statutory rule against suspension of alienation of property.²⁰⁰ In 1960, the legislature adopted a common law Rule Against Perpetuities as

¹⁹¹ Courts can also accomplish reformation as implemented by the Hawaii Supreme Court by application of a statute such as Kentucky's reformation statute.

¹⁹² 742 S.W.2d 571 (Ky. Ct. App. 1987).

¹⁹³ See *id.* at 572.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.* No doubt the children would have inherited the trust property if the trust violated the Rule.

¹⁹⁶ See *id.* at 575.

¹⁹⁷ See *id.* at 575–76.

¹⁹⁸ See *Schlerth v. Schlerth*, 66 N.E. 130 (N.Y. 1903); *Symphony Space, Inc. v. Pergola Prop., Inc.*, 669 N.E.2d 799, 803 (N.Y. 1996).

¹⁹⁹ See *Symphony Space*, 669 N.E.2d at 803; Margaret Valentine Turano, Practice Commentaries, N.Y. EST. POWERS & TRUSTS LAW § 172 (McKinney 2002).

²⁰⁰ See 1958 N.Y. Laws, ch. 153, § 1.

its new statutory rule against suspension of alienation.²⁰¹ In 1965, the legislature adopted a rule against remote vesting, using the language of the common law Rule Against Perpetuities.²⁰² Today these rules are codified together as Estate, Powers and Trusts Law section 9-1.1.²⁰³ New York courts apply these sections as the New York Rule Against Perpetuities.²⁰⁴

In 1966, as part of legislation that created the New York Estates, Powers and Trusts Law, the legislature adopted rules that were intended to remove some of the Rule's harshness.²⁰⁵ It enacted a series of new provisions that removed several remote possibilities from consideration²⁰⁶

²⁰¹ 1960 N.Y. Laws, ch. 448, §§ 1–2.

²⁰² 1965 N.Y. Laws, ch. 670, § 1.

²⁰³ See N.Y. EST. POWERS & TRUSTS LAW § 9-1.1:

(a)(1) The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred.

(2) Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years. Lives in being shall include a child conceived before the creation of the estate but born thereafter. In no case shall the lives measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult.

(b) No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.

²⁰⁴ See *Metro. Transp. Auth. v. Bruken*, 492 N.E.2d 379, 381 (N.Y. 1986): In New York, an owner's power to dispose of property is limited by three rules. The first two, known as the Rule against Perpetuities, are found in subdivision (a) and (b) of New York Estate, Powers and Trust Law section 9-1.1. . . . The Rule declares that no estate in property shall be valid (1) if the instrument conveying it suspends the power of alienation longer than lives in being at the creation of the interest plus 21 years, and (2) unless it must vest, if at all, before the expiration of the same period.

New York courts commonly refer to the rule that this Article calls the Rule Against Perpetuities as "the rule against remote vesting." *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d 457, 460–61 (App. Div. 1982). See also *Symphony Space*, 669 N.E.2d at 804.

²⁰⁵ See 1966 N.Y. Laws, ch. 952.

²⁰⁶ See *id.* Pt. 1, Art. 9, § 9-1.3(c)–(e). These provisions are now codified as N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c)–(e).

and created a presumption that the creator of an interest in property intended to create a valid interest.²⁰⁷ The legislature also added a reformation statute.²⁰⁸

The legislature removed several of the more commonly encountered remote possibilities. New York Estate, Powers and Trusts Law section 9-1.3(c) currently provides that when a gift is made to a person who may not be born yet and is referred to “as the spouse of another without other identification [by name], it shall be presumed that such reference is to a person in being on the effective date of the instrument [that created the interest].”²⁰⁹ This provision eliminates the case of the unborn widow.²¹⁰

In an earlier case, the court in *In re Wilson's Will*²¹¹ used this modern statute by analogy. The decedent died in 1922. His will created a trust. The income was to go to the decedent's adopted son for life, and at his death, the net income was to be paid to the adopted son's widow. The adopted son died in 1967. The statute, enacted in 1965, long after the decedent's death, could not be applied. The court wrote, “The rule of construction . . . may be applied independent of the statute since it states a reasonable presumption which does not depend upon the statute for its justification.”²¹² The court cited several cases in support of its decision.²¹³ Because the court used the presumption, the decedent's provision for the widow received full effect.

²⁰⁷ See 1966 N.Y. Laws, ch. 952, Pt. 1, Art. 9, § 9-1.3(b). This provision is now codified as N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(b).

²⁰⁸ See 1966 N.Y. Laws, ch. 952, Pt. 1, Art. 9, § 9-1.2. This provision is now codified as N.Y. EST. POWERS & TRUSTS LAW § 9-1.2. For an illustration of reformation, see *supra* Illustration 7 accompanying notes 187–201.

²⁰⁹ N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c).

²¹⁰ See Margaret Valentine Turano, Practice Commentaries, N.Y. EST. POWERS & TRUSTS LAW 172 (McKinney 2002). The unborn widow rule was discussed above.

²¹¹ 314 N.Y.S.2d 642 (N.Y. Surr. Ct. 1970).

²¹² See *id.* at 644.

²¹³ See *id.* (citing *Matter of Friend*, 28 N.E.2d 377 (N.Y. 1940); *Matter of Irving's Estate*, 74 N.Y.S.2d 165 (N.Y. Surr. Ct. 1947); *Matter of Wainwright's Estate*, 82 N.Y.S.2d 345 (N.Y. Surr. Ct. 1948)).

New York Estate, Powers and Trusts Law section 9-1.3(d)²¹⁴ removed various cases of administrative contingency from consideration. These are cases in which vesting of one or more interests would be contingent upon the probate of the will, settlement of the estate, determination of tax issues, and other events.²¹⁵

New York Estate, Powers and Trusts Law section 9-1.3(e) deals with interests contingent upon the ability of a person to have a child. It removed two remote possibilities from consideration. At common law, courts presumed that an old man or woman past childbearing years was able to have a child.²¹⁶ Second, courts also presumed a child was able to have a child.²¹⁷ These two presumptions are now statutorily removed from consideration in New York.²¹⁸

²¹⁴ See N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(d) (McKinney 2002):

Where the duration or vesting of an estate is contingent upon the probate of a will, the appointment of a fiduciary, the location of a distributee, the payment of debts, the sale of assets, the settlement of an estate, the determination of questions relating to an estate or transfer tax or the occurrence of any specified contingency, it shall be presumed that the creator of such estate intended such contingency to occur, if at all, within twenty-one years from the effective date of the instrument creating such estate.

²¹⁵ See N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(d). Parts of this subsection continue prior common law rules and prior statutory rules long used to prevent violations of the Rule in New York. See, e.g., *Alexander v. Dolan*, 276 N.Y.S.2d 896, 897 (N.Y. App. Div. 1967).

The problem of the slothful executor involves the performance of a future administrative task by an executor, or perhaps a trustee or other fiduciary. Suppose a testator devised Blackacre to A for life, then to those of A's issue who are alive at the final distribution of A's estate and their heirs. It is possible that all of A's issue alive at A's death might die, leaving issue surviving them. These issue also might live for more than twenty-one years after the death of the last to die of the issue who survived A's death, and then the estate would be distributed. The Rule might be violated, so the devise would fail. See Dukeminier, *Modern Guide*, *supra* note 3, at 1878–79.

Suppose that a person deeded Blackacre to A for life, then to B after A's will is admitted to probate. There could be many reasons for a long delay in the admission of A's will to probate—a will contest, lethargy, etc. The delay could last until more than twenty-one years after everyone alive at the creation of the interest might be dead; the interest might violate the Rule. B's interest is void. Professor Dukeminier cited two cases to support this result: *Prime v. Hyne*, 267 Cal. Rptr. 170 (1968), and *Miller v. Weston*, 189 P. 610 (Colo. 1920). See Dukeminier, *Modern Guide*, *supra* note 3, at 1879.

²¹⁶ This was usually called the fertile octogenarian rule. Professor Leach also used this phrase. See Leach, *Perpetuities Perspective*, *supra* note 8, at 732.

²¹⁷ This was often called the precocious toddler rule.

²¹⁸ Modern reproductive technology enables older people to have children. Professor Singer gives an example of an older woman arranging for implantation of her frozen

Section 9-1.3(e) deals with these situations. First, the statute presumes that a male child can have a child at and over, but not under, age fourteen, and that a female can have a child at and over age twelve, but not above age fifty-five.²¹⁹ In addition, the statute provides that as to a living person evidence can be “given to establish whether he or she is able to have a child at the time in question.”²²⁰ Third, the statute disregards the possibility of adoption when the validity of an interest “depends upon the possibility of a person to have a child at some future time.”²²¹ The statute’s provisions regarding age and adoption apply only to determine the validity of interests during application of the Rule.²²²

New York Estate, Powers and Trusts Law section 9-1.3 also provides rules of construction that allow courts to save certain interests from invalidity because of application of the Rule.²²³ New York Estate, Powers and Trusts Law section 9-1.3(b) provides, “It shall be presumed that the creator intended the estate to be valid.”²²⁴

Illustration 8

A New York Court of Appeals case, *Morrison v. Piper*,²²⁵ provides an example of application of this presumption that a creator intended the estate to be valid. In 1977, a grantor conveyed by deed land on which a residence was situated to her nephew. The grantor retained a contiguous thirty-acre parcel. The deed contained “mutual rights of first refusal (‘preemptive rights’).”²²⁶ The deed granted the nephew a right of first refusal in the thirty acres retained by his aunt, and specifically provided,

embryo in a younger woman who bears the child for her. See JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 323 (2001). Examples of older men fathering children are becoming more common. See, e.g., Tyre, *supra* note 86, at 68. Cf. Hoffman & Morriss, *supra* note 86.

²¹⁹ See N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e)(1).

²²⁰ See *id.* § 9-1.3(e)(2) (“In the case of a living person, evidence may be given to establish whether he or she is able to have a child at the time in question.”).

²²¹ See *id.* § 9-1.3(e)(3) (“Where the validity of a disposition depends upon the ability of a person to have a child at some future time, the possibility that such person may have a child by adoption shall be disregarded.”).

²²² See *id.* § 9-1.3(e)(4).

²²³ See *id.* § 9-1.3(a) (“Unless a contrary intent appears, the rules of construction provided in this section govern with respect to any matter affecting the Rule.”).

²²⁴ *Id.* § 9-1.3(b).

²²⁵ 566 N.E.2d 643 (N.Y. 1990).

²²⁶ See *id.* at 644. If either party received an offer for purchase of the property from a third person, the other party could exercise an option to purchase the property for the purchase price contained in that offer.

“This right of refusal is intended to bind the party of the first part [grantor], her heirs and assigns only during the life of Robert C. Morrison [grantee], the party of the second part and those persons who directly take as a result of a gift by him or by his death.”²²⁷ The grantor died in 1979, and her three sisters inherited her property. In 1984, the sisters partitioned their land by deed. Each deed recognized the nephew’s right of first refusal, and the nephew joined each deed, showing his consent to the transactions.²²⁸

In 1987, two of the sisters sold their land to third-party buyers. They did not give the nephew an opportunity to exercise his right of first refusal. These transactions closed in March 1988, with title to each parcel deeded to the buyers. In July 1988, the nephew sued to enforce his rights. The trial court refused to enforce the nephew’s right of first refusal. The court stated that it was unclear whether the grantee’s consent to the 1984 partition terminated his rights. The court also ruled that his right of first refusal violated the Rule and therefore was unenforceable. The New York Supreme Court, Appellate Division, affirmed the trial court because it believed that the right of first refusal violated the Rule.²²⁹

The New York Court of Appeals first determined that the Rule applied to the right of first refusal. According to the court, a right of first refusal resembled an option to purchase; both created interests in land that might vest at some future time.²³⁰ The court distinguished *Metropolitan Transportation Authority v. Bruken*,²³¹ in which it had refused to apply the Rule to governmental and commercial transactions that involved governmental or public interests.²³² This case involved a private transaction that did not implicate any governmental or public interests.

Because the grantee’s rights of first refusal were subject to the Rule, the court had to decide whether they violated the Rule.²³³ The court noted that the statute now provided, “Unless a contrary intent appears . . . [i]t

²²⁷ *Id.* The deed also provided that the aunt (grantor) would have a right of first refusal if the nephew sold the land she had deeded to him.

²²⁸ *See id.* at 645.

²²⁹ *See id.* at 645–46.

²³⁰ *See id.* at 645.

²³¹ 492 N.E.2d 379 (N.Y. 1986).

²³² *See Morrison*, 566 N.E.2d at 646.

²³³ Note that the court already knew that in fact the rights were exercised within the time allowed by the Rule. The rights were created in 1977 and exercised eleven years later in 1988. Also, the nephew was still alive at the time of his exercise of his rights. *See id.* at 648.

shall be presumed that the creator [of the interests] intended the estate to be valid.”²³⁴ The court gave two reasons why the interest was good. First, the deed language creating the rights stated, “[Grantor] and [Grantee] covenant and agree that *during their life each shall have a right of first refusal.*”²³⁵ Second, the court found that the lower courts had disregarded

what the statutory presumption was designed to prevent: EPTL 9 - 1.1(b) and the common-law rule of construction which it codifies embody the unexceptional propositions that parties who make grants of real property interests presumably intend their grants to be effective and that reviewing courts should, if at all possible, avoid constructions which frustrate their intended purposes.²³⁶

The court found no language in the instrument that suggested that the original parties intended or contemplated any remote exercise of the right of first refusal.²³⁷ The court also found that the circumstances surrounding the conveyance supported this result. Thus, the right of first refusal did not violate the Rule and was fully enforceable.

The New York reformation of the Rule is effective to save some interests. However, it lacks the broader reach of modern comprehensive reform. The addition of the wait-and-see approach would be a significant improvement.

C. The Uniform Statutory Rule Against Perpetuities

USRAP,²³⁸ promulgated in 1986, proved to have considerable influence.²³⁹ Twenty-seven jurisdictions in the United States²⁴⁰ adopted it, and it remains in effect in at least twenty-two of them.²⁴¹

This Article submits that section 1(a) is the most important section of USRAP. This new, unique, two-part provision provides: “A nonvested

²³⁴ See *id.* at 646 (quoting N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(a)–(b) (McKinney 2002)).

²³⁵ *Id.* at 647.

²³⁶ *Id.* at 648.

²³⁷ See *id.* (“There is nothing in the language of the deed—if read as a whole ... — suggesting that the parties had the intention of creating invalid remote interests which defendants’ construction imputes to them.”).

²³⁸ See UNIF. STATUTORY RULE AGAINST PERPETUITIES, 8B U.L.A. 223 (2001).

²³⁹ See *id.*

²⁴⁰ See *supra* note 22.

²⁴¹ See *supra* notes 23–25 for the jurisdictions that repealed or modified USRAP after adopting it.

property interest is invalid unless: (1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or (2) the interest either vests or terminates within 90 years after its creation.²⁴² Section 1(a)(1) is a direct descendant of Professor Gray's classic formulation of the Rule.²⁴³ However, section 1(a)(2) is a radically new form of wait-and-see, a form that uses a fixed term of years²⁴⁴ as an alternate wait-and-see perpetuities period.²⁴⁵

1. *Wait-and-See*

Prior to USRAP, the wait-and-see approach required a court to consider the facts as they developed in place of using the what-might-happen approach.²⁴⁶ Courts did not consider the initial validity of an interest. Thus the wait-and-see approach significantly modified application of the common law Rule, which required use of the what-might-happen approach.

USRAP applies a different approach. First, it asks, is the interest valid under the historic common law test.²⁴⁷ If it is not, the decision about validity of the interest is postponed.²⁴⁸ Later, a court must evaluate the interest by the alternate ninety-year wait-and-see provision of section 1(a)(2).²⁴⁹ Generally, this will not take place until the ninety-year period has elapsed.²⁵⁰ If the interest vests at any time within the ninety-year time

²⁴² See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a), 8B U.L.A. 236 (2001).

²⁴³ See *id.*, pref. n., 8B U.L.A. 226–27.

²⁴⁴ None of the wait-and-see provisions prior to USRAP used a fixed term of years. Because the wait-and-see provision is a term of years, “perpetuities period” is an appropriate phrase.

²⁴⁵ See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1 cmt. 8B U.L.A. 238–39.

²⁴⁶ A typical statute was much like Kentucky's wait-and-see statute. See KY. REV. STAT. ANN. § 381.216 (LexisNexis 2002).

²⁴⁷ See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(1), 8B U.L.A. 236; Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities* 21 REAL PROP. PROB. & TR. J. 569, 572 (1986) [hereinafter Waggoner, *USRAP*].

²⁴⁸ See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(2), 8B U.L.A. 236; Waggoner, *USRAP*, *supra* note 247, at 572.

²⁴⁹ See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(2), 8B U.L.A. 236.

²⁵⁰ As Professor Dukeminier stated,

This [section 1(a)(2)] is a wait-and-see provision, which stays the court's hand for 90 years. Generally, *no interest can be declared void for 90 years*. . . . If the Uniform Statute is enacted, no interest created thereafter can be declared in violation of the Rule against Perpetuities for 90 years after the date of its creation. All interests are valid for this period.

period, it will be valid; if it does not vest within that time, it will not be valid.

Development of this wait-and-see provision evolved as the drafters of USRAP met. They “follow[ed] the lead of . . . Restatement (Second) of Property (Donative Transfers) . . . in adopting . . . [the wait-and-see approach]” even though the wait-and-see approach was not adopted widely then.²⁵¹ Prior to USRAP, the usual wait-and-see approach had been to use the common law Rule’s measuring lives who were in being at the creation of the interest plus twenty-one years. Courts, however, would use the actual facts as they had developed up to the time the interest was evaluated.²⁵² Because there was disagreement about who the measuring lives should be and how to determine them, the drafters believed that a fixed term of years would render this disagreement moot.²⁵³

The drafters likened the wait-and-see approach to a statutory savings clause.²⁵⁴ Careful consideration of the perpetuities saving clause function of the wait-and-see approach led them to adopt a fixed-term wait-and-see approach.²⁵⁵ The drafters of USRAP believed that a fixed-term Rule was superior to the conventional approach, which they believed had two serious disadvantages. First, it was difficult to describe measuring lives in a wait-and-see statute.²⁵⁶ Second, the measuring lives were difficult to determine and apply to particular facts, especially in determining which of several measuring lives was the survivor and when the measuring life died.²⁵⁷ The drafters found drafting a sound statutory provision far more

Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1024–25 (1987) (emphasis in the original) [hereinafter Dukeminier, *Ninety Years in Limbo*].

²⁵¹ Waggoner, *USRAP*, *supra* note 247, at 572. See also UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 226 (Supp. 2006).

²⁵² See Waggoner, *USRAP*, *supra* note 247, at 573; UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 226.

²⁵³ See Waggoner, *USRAP*, *supra* note 247, at 592; UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 226–27.

²⁵⁴ Waggoner, *USRAP*, *supra* note 247, at 574; UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 226–27.

²⁵⁵ See UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 227–30. The saving clause principal was also noted by RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, ch.1, introductory cmt. (1983).

²⁵⁶ See Waggoner, *USRAP*, *supra* note 247, at 575; see also UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 227.

²⁵⁷ See Waggoner, *USRAP*, *supra* note 247, at 575; UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 227. The wait-and-see approach requires keeping track of lives in being, births and deaths, and more, in order to reconstruct events

difficult than drafting a sound perpetuities savings clause in an instrument.²⁵⁸

The drafters also found that the use of actual measuring lives when applying the wait-and-see approach was not designed to provide a wait-and-see period that would end at a logical or natural point as to each disposition. Instead, this approach to wait-and-see often exceeded the point of actual vesting, providing a margin-of-safety function.²⁵⁹ The drafters believed that a fixed term of years filled the margin-of-safety function “just as well.”²⁶⁰ Thus, they adopted a ninety-year period as “a reasonable approximation of—a proxy for—the period of time that would, *on average*, be produced through the use of a set of actual measuring lives identified by statute and then adding the traditional twenty-one-year tack-on period after the death of the survivor.”²⁶¹ The drafters chose the ninety-year term as a result of an informal study, which concluded that ninety years constituted a reasonable approximation of the average period of time competent drafting under the common law Rule allowed.²⁶² Attorneys could continue to draft in the usual way—indeed, this was recommended²⁶³—and attorneys would not need to learn new drafting procedures.²⁶⁴

as they actually occur, so that at a later time it can be determined whether or not the Rule was actually violated. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 228. According to the drafters, this imposes a significant administrative burden not present when the common law Rule’s what-might-happen approach is used. *See id.* As Professor Dukeminier pointed out, “[T]he measuring lives for the wait-and-see period should be the same lives relevant under the what-might-happen test. . . .” Dukeminier, *Modern Guide*, *supra* note 3, at 1881. The use of a fixed term of years avoids this administrative burden and performs “a margin-of-safety function” that replicates the use of the what-might-happen approach and its use of measuring lives. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 228.

²⁵⁸ *See* Waggoner, *USRAP*, *supra* note 247, at 575–76; *see also* UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 227–28.

²⁵⁹ *See* Waggoner, *USRAP*, *supra* note 247, at 577; *see also* UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 229.

²⁶⁰ Waggoner, *USRAP*, *supra* note 247, at 577; *see also* UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 229.

²⁶¹ UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 227; *see also* Waggoner, *USRAP*, *supra* note 247, at 575.

²⁶² *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 230. Professor Waggoner explained the rationale behind this proposal. *See* Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 162 (1988).

²⁶³ *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 231.

²⁶⁴ *See id.*

The proposed ninety-year period drew immediate reaction. Professor Bloom proposed that a reformed version of the common law Rule should be adopted in place of USRAP.²⁶⁵ Professor Dukeminier argued that the ninety-year wait-and-see approach was outrageous and that it should be based strictly on the common law Rule, with a reformation of the interests that violated the Rule.²⁶⁶ In the end, USRAP prevailed.²⁶⁷

USRAP also includes reformation²⁶⁸ and rules governing the powers of appointment.²⁶⁹

Illustration 9

Let us return to *Three Rivers Rock Co. v. Reed Crushed Stone Co., Inc.*,²⁷⁰—the case used in Illustration 6—in order to examine the change USRAP brought to the wait-and-see approach. Recall that a husband and wife gave an option to purchase an easement and a right-of-way to their neighbor in December 1961.²⁷¹ The neighbor assigned the option to Three Rivers in March 1968.²⁷² Three Rivers exercised the option in November 1968.²⁷³

The option contained no deadline by which it had to be exercised. However, under common law an option owned by a corporation had to be exercised within twenty-one years.²⁷⁴ If the court had applied the common law Rule, the court would have speculated that the option might be exercised more than twenty-one years after creation; thus, it would be void.

The court decided *Three Rivers* using the traditional wait-and-see approach. Therefore, the court could take into account the facts as they developed. Because Three Rivers exercised the option in fewer than seven years, it, in fact, did not violate the Rule and was valid.

USRAP's wait-and-see provision is a ninety-year fixed term. Although generally the interest need not be evaluated until the ninety

²⁶⁵ See Ira Mark Bloom, *Perpetuities Refinement: There is an Alternative*, 62 WASH. L. REV. 23 (1987).

²⁶⁶ See Dukeminier, *Ninety Years in Limbo*, *supra* note 250, at 1055.

²⁶⁷ Widespread enactment may be the best measure of a Uniform Act. See *supra* note 22 and accompanying text.

²⁶⁸ See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 3, 8B U.L.A. 273.

²⁶⁹ See *id.* §§ 1(b)–(d), 2, 8B U.L.A. 267.

²⁷⁰ 530 S.W.2d 202, 205 (Ky. 1975).

²⁷¹ See *id.* at 204.

²⁷² See *id.*

²⁷³ See *id.*

²⁷⁴ See 3 BORRON, SIMES, & SMITH, *supra* note 33, § 1226.

years have elapsed, Three Rivers exercised the option in fewer than seven years after its creation. Thus, the court would have held the option to be valid. It should be clear that if Three Rivers had not exercised the option sixty or seventy years after its creation, it would not be declared invalid. Only if the option were not exercised during the ninety-year perpetuities period would it be declared invalid under the USRAP approach. USRAP's wait-and-see provision provides a very significant change in the application of the Rule.

An empirical study conducted by Professor Mary Louise Fellows validated the use of the ninety-year wait-and-see period in USRAP.²⁷⁵ Professor Fellows found that USRAP "frequently provides essentially the same remedies for perpetuity violations as [conventional] immediate perpetuity reformation whenever the remedy under immediate reformation is the insertion of a savings clause. The great strength of the USRAP is that it avoids unnecessary perpetuity litigation and minimizes the risk of perpetuity litigation."²⁷⁶ The study refuted critics' claims that USRAP's "deferred perpetuity reformation would cause undue uncertainty and confusion."²⁷⁷ The study found the costs minimal and the benefits substantial.²⁷⁸

Professor Fellows found that typically the ninety-year period led to the same result that a court would have reached using measuring lives.²⁷⁹ A substantially longer perpetuity period resulted "[o]nly in the unusual family situations in which adult children had not yet had their own children."²⁸⁰

Professor Fellows included the following in her findings:

The case analysis demonstrates that: (1) except in highly unusual situations, the ninety-year measuring rod will replicate the results obtained by using a measuring rod geared to lives of younger generation members alive when the transferor creates nonvested interests; (2) the

²⁷⁵ See Mary Louise Fellows, *Testing Perpetuities Reform: A Study of Perpetuities Cases 1984–1989*, 25 REAL PROP. PROB. & TR. J. 597, 599 (1991) ("The purpose of this article is to subject the USRAP to an empirical test to determine how it would perform if applied to the dispositions and family situations found in the perpetuities cases reported between 1984 and 1989.").

²⁷⁶ *Id.* at 671 (footnote omitted).

²⁷⁷ *Id.*

²⁷⁸ *See id.*

²⁷⁹ *See id.*

²⁸⁰ *Id.* (footnote omitted).

trusts are likely to terminate well within the perpetuity periods defined by either measuring rod, and, therefore, neither measuring rod allows dead hand control to persist any further than necessary or any further than the other²⁸¹

2. *Reformation and Other Provisions*

USRAP also provides for deferred reformation of invalid interests.²⁸² If an interest continues to be invalid, as measured by the ninety-year wait-and-see period, an interested party may petition the court for reformation of the interest.²⁸³ The court will try to reform the interest to make it valid and consistent with the intent of the creator of the interest.²⁸⁴ Reformation of a particular interest may or may not be possible. The drafters thought that reformation seldom would be used.²⁸⁵ Reformation under USRAP is virtually identical to that provided in Kentucky,²⁸⁶ except that reformation is not to occur unless an interest is not valid at the end of the ninety-year wait-and-see period.

USRAP contains other provisions, going beyond previous efforts. Several of the provisions deal with the powers of appointment and interests created by the exercise of powers of appointment. Sections 1(b) and (c) deal with the validity of powers of appointment.²⁸⁷ Section 2 provides rules that determine the time at which nonvested interests or powers of appointments are created or deemed to be created.²⁸⁸

Section 1(d) provides that when “a nonvested property interest or a power of appointment” is measured by USRAP’s common law form, “the

²⁸¹ *Id.* at 601.

²⁸² See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 3, 8B U.L.A. 273–74 (2001).

²⁸³ *See id.*

²⁸⁴ *See id.* § 3 cmt., 8B U.L.A. 274:

This section [3] requires a court, upon petition of an interested person, to reform a disposition *whose validity is governed by the wait-and-see element of Section 1(a)(2)* . . . so that the reformed disposition is within the limits of the 90-year period allowed by those subsection, in the manner deemed by the court most closely to approximate the transferor’s plan of distribution.

²⁸⁵ *See id.*

²⁸⁶ See KY. REV. STAT. ANN. § 381.216 (LexisNexis 2002).

²⁸⁷ See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(b)–(c), 8B U.L.A.

238–39.

²⁸⁸ *See id.* § 2, 8B U.L.A. 267.

possibility that a child will be born to an individual after that individual's death is disregarded."²⁸⁹ This section is not intended to change the rule that a child in gestation is alive for purposes of the Rule.²⁹⁰ Instead, this provision is aimed at solving perpetuity problems caused by advances in medical science.²⁹¹

Section 1(e) provides a method to govern provisions in instruments that use "later-of" language when creating interests or controlling the vesting of interests.²⁹² This section intends to coordinate USRAP with provisions governing the Generation-Skipping Transfer Tax (GST).²⁹³

Section 4 defines interests and powers that are exempt from USRAP.²⁹⁴ Section 5 requires prospective application of the rules established in USRAP.

USRAP continues to have considerable influence.²⁹⁵ Today it is the statutory Rule in at least twenty-two jurisdictions in the United States.²⁹⁶ No other form of the Rule is in effect in nearly as many jurisdictions.²⁹⁷

IV. THERE IS A CONTINUING NEED FOR THE RULE AGAINST PERPETUITIES UNDER STATE LAW

We will begin by considering the policies that the Rule implements. Then we will examine what subsequently took place in the states that have repealed the Rule.²⁹⁸ Third, we will determine whether federal law should or can substitute for the Rule under state law.

²⁸⁹ *Id.* § 1(d), 8B U.L.A. 238.

²⁹⁰ See Waggoner, *USRAP*, *supra* note 247, at 592.

²⁹¹ Modern reproductive technology creates situations in which a person's child may be born years after a person dies. See, e.g., Hoffman & P. Morriss, *supra* note 86, at 592–600. The proper rules to deal with issues raised by modern technology are beyond the scope of this Article.

²⁹² See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(e), 8B U.L.A. 238.

²⁹³ See *id.* § 1 cmt., 8B U.L.A. 252–55.

²⁹⁴ See *id.* § 4, 8B U.L.A. 279–80.

²⁹⁵ See *supra* text accompanying note 22.

²⁹⁶ See *supra* text accompanying notes 22–25.

²⁹⁷ See *supra* note 15.

²⁹⁸ Alaska, Idaho, New Jersey, Rhode Island, South Dakota, and Wisconsin repealed the Rule. See *supra* notes 23, 26, and accompanying text. More recently, Colorado and Utah adopted a one-thousand-year Rule. See *supra* note 25 and accompanying text.

A. Policies Implemented by the Rule Against Perpetuities

Professor Gray asserted that the Rule furthered alienation of property.²⁹⁹ It seems clear that the judges and chancellors who developed the Rule originally sought that goal.³⁰⁰ Other writers asserted that an additional important objective of the Rule was to reduce control of property by the dead.³⁰¹ The late Professor Lewis M. Simes, a leading authority on future interests and the Rule during the middle third of the twentieth century, agreed.³⁰² The Rule implemented the following two policies: “The common understanding among law students, practitioners, and law professors appears to be that the rule announced in *The Duke of Norfolk’s Case*³⁰³ was intended to limit ‘dead hand control’ and promote the ‘free alienability of property.’”³⁰⁴ The drafters of both the *Restatement of the Law of Property* and the *Restatement (Second) of the Law of Property* believed that the Rule furthered several additional policies. The drafters believed that the Rule struck an appropriate balance between the desires of current owners and the desires of future owners of property as to the current and future ownership and use of the property.³⁰⁵ Current owners might seek to control the property long into the future, perhaps indefinitely; future owners would want to make their own decisions, perhaps even to sell the property. The drafters of both *Restatements* believed that the balance struck by the Rule was socially desirable.³⁰⁶

Other policy reasons stated by the drafters of the *Restatements* also carry significant weight. The drafters believed that the Rule contributed to appropriate utilization of society’s wealth in two ways.³⁰⁷ The Rule

²⁹⁹ See GRAY, *supra* note 4, § 2.

³⁰⁰ Professor Gray carefully traced the development of the Rule. See *id.* §§ 123–200.

³⁰¹ See LYNN, *supra* note 33, at 9–10. See also 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.02.

³⁰² See Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 708–26 (1955) [hereinafter Simes, *Policy*].

³⁰³ (1682) 22 Eng. Rep. 931 (Ch.).

³⁰⁴ Tye J. Klooster, *Are the Justifications for the Rule Against Perpetuities Still Persuasive?*, 30 ACTEC NOTES 95, 97 (2004) (footnotes omitted).

³⁰⁵ See RESTATEMENT OF PROP.: PERPETUITIES, introductory n., at 2129 (1944); see also RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, introductory n., at 8 (1983).

³⁰⁶ See RESTATEMENT OF PROP.: PERPETUITIES, introductory n., at 2132–33 (1944); see also RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, introductory n., at 8 (1983).

³⁰⁷ See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, introductory n., at 9; see also RESTATEMENT OF PROP.: PERPETUITIES, introductory n., at 2130.

minimized the fears held by current owners of property interests of loss of investments, since contingent future interests would be invalid.³⁰⁸ The Rule also prohibited future interests that would prevent or severely impede the sale of land. Thus, the Rule increased the possibility that specific property would be owned by some person who could act on “an available mode for its utilization.”³⁰⁹

The drafters also thought that the Rule helped to keep property responsive to the needs of current owners.³¹⁰ Ownership of property divided by successive interests lessens the value of the individual interests. It also diminishes the total purchasing power of wealth in property subject to successive ownership. These disadvantages decrease the ability of future owners of property to carry out their desires. Minimization of this fear encourages development and use of property; it also encourages investment in property.³¹¹ The Rule maintains a suitable balance of these competing interests.³¹²

Keeping property sufficiently free of nonvested future interests also responds to society’s “stress on individualism and rest[s] upon the acceptance of a society organized upon a competitive theory.”³¹³ The drafters of the original *Restatement* concluded,

From this review of diverse purposes served by the rule against perpetuities, it is fair to conclude that the social interest in preserving property from excessive fettering

³⁰⁸ See RESTATEMENT OF PROP.: PERPETUITIES, introductory n., at 2130.

³⁰⁹ RESTATEMENT OF PROP.: PERPETUITIES, introductory n., at 2130; see also RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, introductory n., at 9. These might be viewed as part of dead hand control.

³¹⁰ See RESTATEMENT OF PROP.: PERPETUITIES, introductory n., at 2131; RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, introductory n., at 9.

³¹¹ RESTATEMENT OF PROP.: PERPETUITIES, introductory n., at 2131; RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, introductory n., at 9.

³¹² See RESTATEMENT OF PROP.: PERPETUITIES, introductory n., at 2132; RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, introductory n., at 10. The balance of interests also relates to dead hand control.

³¹³ RESTATEMENT OF PROP.: PERPETUITIES, introductory n., at 2132. The *Restatement (Second)* also acknowledged the writing of Professor George Haskins, who thought the final form of the Rule extended the perpetuities period from a life in being to a life in being plus twenty-one years, and was, therefore, a rule *for* perpetuities instead of a rule *against* perpetuities. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, introductory n., at 10 (citing George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origin of the Rule Against Perpetuities*, 126 U.P.A.L. REV. 19, 46 (1977)). Later Professor Haskins made the same argument in his article “*Inconvenience and the Rule for Perpetuities*,” 48 MO. L. REV. 451 (1983).

rests partly upon the necessities of maintaining a going society controlled primarily by its living members, partly upon the social desirability of facilitating the utilization of wealth, partly upon the social desirability of keeping property responsive to the current exigencies of its current beneficial owners, and partly upon the competitive basis of modern society.³¹⁴

Thus, the Rule implements several important policies. These policies are important to our society, as evidenced by the significant legislative adoption of USRAP³¹⁵ and by retention of the Rule by most other states.³¹⁶

B. Statutory “Repeal” of the Rule Against Perpetuities

Six states have repealed the Rule.³¹⁷ Nevada enacted a 360-year Rule,³¹⁸ and Colorado and Utah each enacted a 1000-year Rule,³¹⁹ thereby eliminating use of the Rule for 360 years, for 1000 years, or forever. Of these states, Rhode Island repealed the Rule, and Colorado and Utah enacted their 1000-year Rules without enacting a substitute for the Rule.³²⁰ In five of the repealing states, enactment of a statutory rule against unreasonable restraint of alienation accompanied the repeal of the Rule.³²¹ Only Idaho’s statute limits the new rule to real property.³²² Colo-

³¹⁴ RESTATEMENT OF PROP.: PERPETUITIES, introductory n., at 2132–2133; *see also* John G. Shively, Note, *The Death of the Life in Being—The Required Federal Response to State Abolition of the Rule Against Perpetuities*, 78 WASH. U. L.Q. 371, 378–79 (2000); Butler, *supra* note 29.

³¹⁵ *See supra* note 22 and accompanying text. The issue of whether or not private express trusts should be subject to the Rule is beyond the scope of this Article. It is the author’s opinion that such trusts should be subject to the Rule. While a trustee may have free alienability of the property, the dead hand issue remains. The owners of future interests may want to retain, sell or change the use of the property; but the trustee may disagree. Interests in trusts generally are not freely alienable. Trust beneficiaries clearly are subject to dead hand control. *See, e.g.*, Simes, *Policy*, *supra* note 302, at 721–26; French, *supra* note 31; Chaffin, *supra* note 31; Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003).

³¹⁶ *See supra* note 15.

³¹⁷ *See supra* text accompanying notes 26.

³¹⁸ *See* NEV. REV. STAT. § 111.1031(1)(b) (2005).

³¹⁹ *See* COLO. REV. STAT. § 15-11-1102.5 (2006); UTAH CODE ANN. § 75-2-1203 (2003), *amended by* 2003 Utah Laws ch. 301.

³²⁰ *See* R.I.Gen. Laws § 34-11-38 (Supp. 2005), COLO. REV. STAT. § 15-11-11025 (2006); UTAH CODE ANN. § 75-2-1201 (Supp. 2006).

³²¹ *See* ALASKA STAT. § 34.27.100 (2004); IDAHO CODE ANN. § 55-111 (2003); N.J. STAT. ANN. § 46:2F-10(a)(1) (West Supp. 2006); S.D. CODIFIED LAWS § 43-5-1 (1997);

rado, Rhode Island, and Utah, the jurisdictions that repealed the Rule without enacting a statutory rule against unreasonable restraint on alienation, each use common law rules against restraint on alienation.³²³

The common law rule against unreasonable restraints on alienation is related to, but is not always consistent with, the Rule.³²⁴ Although both rules serve the same general purpose, they operate in different ways.³²⁵

Common law rules against restraint on alienation are not uniform across the United States.³²⁶ Most cases hold that the right to alienate property is inherent in fee simple interests.³²⁷ Thus, courts generally invalidate provisions that unreasonably prohibit further alienation.³²⁸ For instance, a provision stating that a transferee may not transfer property to another person is unreasonable; common law rules against restraint on alienation invalidate such provisions.³²⁹ However, the same common law rules sometimes uphold provisions that would return the property to the grantor upon violation of such restrictions.³³⁰ Thus, the common law rule against restraints on alienation operates in a very different way than did the common law Rule.

It appears that the new statutory rules against restraint on alienation of property are based upon a preexisting New York statute. "Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not

WIS. STAT. ANN. § 700.16(1)(a) (West 2001).

³²² See IDAHO CODE ANN. § 55.111 (2003).

³²³ See, e.g., *Income Realty & Mortgage, Inc. v. Columbia Sav. & Loan Ass'n*, 661 P.2d 257 (Colo. 1983); *Malouff v. Midland Fed. Sav. & Loan Ass'n*, 509 P.2d 1240 (Colo. 1973); *Atchison v. City of Englewood*, 463 P.2d 297 (Colo. 1969); *Cloud v. Ass'n of Owners, Satellite Apartment Bldg., Inc.*, 857 P.2d 435 (Colo. Ct. App. 1993); *Bliven v. Borden*, 185 A. 239 (R.I. 1936); *Manierre v. Welling*, 78 A. 507 (R.I. 1911); *Redd v. W. Sav. & Loan Co.*, 646 P.2d 761 (Utah 1982); *Page v. Page*, 394 P.2d 612 (Utah 1964); *Smith v. Osguthorpe*, 58 P.3d 854 (Utah. Ct. App. 2002).

³²⁴ See Merrill I. Schnebley, *Restraints upon the Alienation of Interests: I*, 44 YALE L.J. 961, 962 (1935).

³²⁵ See GRAY, *supra* note 4, § 2.1.

³²⁶ See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 29.03(b).

³²⁷ See *id.*

³²⁸ See *id.* § 29.02; see, e.g., *Imerys Marble Co. v. J.M. Huber Corp.*, 577 S.E.2d 555 (Ga. 2003).

³²⁹ See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 29.02.

³³⁰ See *id.*; see, e.g., *Loveland v. CSX Transp. Co.*, 622 So. 2d 1120 (Fla. Dist. Ct. App. 1993).

more than twenty-one years³³¹ The New Jersey statute illustrates the new statutory rules against unreasonable restraint on alienation:

A future interest or trust is void if it suspends the power of alienation for longer than the permissible period. The power of alienation is the power to convey to another an absolute fee in possession of land, or full ownership of personalty. The permissible period is within 21 years after the death of an individual or individuals then alive.³³²

Note how similar this is to the common law Rule.

These new statutory rules simply are surrogates for the Rule, especially because they require full alienability within lives in being plus twenty-one years, the same period as the common law Rule.³³³ These new rules implement the policies underlying the Rule that Professor Gray, the drafters of both *Restatements*, and others have asserted. The new rules differ only in being called rules against restraint on alienation, instead of a rule against perpetuities.

Suppose that while alive, Owner deeded Blackacre to his wife for life, then to his children for their lives as joint tenants with right of survivorship, and then to the heirs of the last of his children to die. The grant to the children's heirs would fail under both the common law Rule and the new statutory rule against restraint on alienation. Neither rule has a wait-and-see provision, so courts must examine interests at their creation using the what-might-happen approach.³³⁴ Because Owner was

³³¹ N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(a)(2) (McKinney 2002).

³³² N.J. REV. STAT. § 46:2F-10(a)(1) (2003). Idaho uses twenty-five years after the death of lives in being. See IDAHO CODE ANN. § 55-111 (2003). Alaska, South Dakota, and Wisconsin use thirty years after the death of lives in being. See ALASKA STAT. § 34.27.100(a)(1) (2004); S.D. CODIFIED LAWS § 43-5-1 (1997); WIS. STAT. § 700.16(1)(a) (2001).

³³³ While phrased somewhat differently with in each of the five states, the effect of the new rules against restraint on alienation of property is to require full alienability within twenty-one years after the death of lives in being at the creation of interests. Note that prior to 1960, New York's predecessor statutory rules against restraint on alienation were interpreted as New York's Rule Against Perpetuities. See *supra* note 200 and accompanying text.

³³⁴ In *Riley v. Rowan*, 965 P.2d 191 (Idaho 1998), the Idaho Supreme Court heard a case in which the instrument created a life estate and a remainder. The life tenant was still alive. The court was faced with a contention that the Idaho statutory rule against restraint on alienation was violated. The court determined that the remainder would vest at the death of the life tenant. In doing so, and without noting it, the court examined the interest

alive when he created the deed, he could have an additional child born after completion of the transfer. Following the birth of this child, Owner and all of his other children might die within two or three years. The child born after the grant might live for thirty or forty years after Owner and the other children have died. The grant to the heirs of the last surviving child would violate the Rule because it might vest later than lives in being at the creation of the interest plus twenty-one years.³³⁵ That grant would violate the statutory rules against restraint on alienation because there might not be heirs who could join in alienating the property until later than lives in being at the creation of the interests plus twenty-one years.³³⁶

Courts that have applied the new statutory rules against unreasonable restraint on alienation have applied the rules at the creation of the interests, as courts did with the common law Rule—without use of the wait-and-see approach or reformation.

Thus, in five of the states that abolished the Rule, the new statutory rules against restraint on alienation replace the Rule and accomplish similar results—to invalidate interests that will prevent timely alienation of property.

How do these new rules impact alienation of property? Currently, in Rhode Island, property owners can restrict or impair alienation of property by owners of future interests that they create, provided only that they do not violate the common law rule against restraint on alienation. Nonvested interests do not necessarily violate the common law rule against restraint on alienation.³³⁷ Therefore, successive nonvested future interests can be carefully created to not violate the rule against restraint on

at the time of its creation. *See also* *Meridian Bowling Lanes v. Meridian Athletic Ass'n*, 670 P.2d 1294 (Idaho 1983); *N.W. Pipeline Corp. v. Forrest Weaver Farm, Inc.*, 646 P.2d 422 (Idaho 1982); *Le Febvre v. Osterndorf*, 275 N.W.2d 154 (Wis. Ct. App. 1979).

³³⁵ Neither Owner nor his children that are alive at the time of the grant can be measuring lives because they all might die more than twenty-one years before the interest vests in the heirs of the last surviving child.

³³⁶ The statute defines restraint of the power of alienation. For example, New Jersey provides, “The power of alienation is suspended when there are no persons alive who, alone or in combination with others, can convey an absolute fee in possession of land, or full ownership of personalty.” N.J. STAT. ANN. § 46:2F-10(b) (2003). The definitions in the Alaska, South Dakota, and Wisconsin statutes are similar. *See* ALASKA STAT. § 34.27.100(b)(1) (2004); S.D. CODIFIED LAWS § 43-5-2 (1997); WIS. STAT. ANN. § 700.16.16(2) (2001). The New York statute also has a similar effect. *See* N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(a)(1) (McKinney 2002).

³³⁷ According to some commentators, it is the Rule that restricts future interests. *See* 3 BORRON, SIMES, & SMITH, *supra* note 33, § 1202.

alienation. Succeeding owners of interests in Rhode Island property will find themselves frustrated in many ways. Why should the owners of such interests modernize dwellings or other structures, or otherwise improve the property, when they only can enjoy the benefit for a relatively short time? The owners cannot exercise an opportunity to sell or develop such property for a different and economically more beneficial use. The fears and problems that led to development of the Rule will materialize. The situation will also occur in Colorado or Utah for 1000 years.

But in Alaska, Idaho, New Jersey, South Dakota, and Wisconsin, the statutory rules against restraint on alienation of property will function as a surrogate for the Rule. In these states, interests in property that cannot be alienated for longer than the time allowed by the statutes will be void. Courts will void these interests because the owners of nonvested interests either cannot be ascertained or ownership of the interests is not certain, preventing owners of those interests from joining in alienation of the property. The statutory rules maintain the alienability of the property within the same time period allowed by the common law Rule. Because the statutory rules fulfill the general purpose of the Rule, these five states might as well have retained the Rule.

These five states transferred the function of the Rule to new statutory rules against unreasonable restraints on alienation. Nothing really has changed. Thus, all but a few United States jurisdictions contain a Rule or a surrogate for the Rule.

No significant movement exists in the United States to abolish rules that implement the same policies underlying the Rule.

C. Federal Law Should Not and Cannot Implement the Functions of the Rule Against Perpetuities

1. *Property Law Is State Law*

It has been suggested that if the Rule is to continue, it should be a Rule enacted by Congress,³³⁸ but this suggestion overlooks the fact that property law is primarily created and governed by state law, not by federal law. "That the English common law is the basis of the legal institutions of all the states except Louisiana, is a proposition which every lawyer recognizes."³³⁹ Of course, legislatures and courts changed the

³³⁸ Klooster, *supra* note 304, at 97.

³³⁹ 1 AMERICAN LAW OF PROPERTY, *supra* note 5, § 1.40.

English law to fit local conditions, so that property law in the United States took on “characteristics all its own.”³⁴⁰ Another writer put it:

One of the persisting realities of American legal life is the existence of a separate and lively jurisprudence in each of the states, lying beneath a thin and often deceptive veneer of common law uniformity. . . .

Each state [to differing extents] has received the common law and the older statutory law of England as a foundational part of its general and *property* jurisprudence.³⁴¹

Congress, the federal courts, and federal agencies all recognize the primacy of state property law.

The Supreme Court routinely looks to state law to define property and rights in property. In *Pennsylvania Coal v. Mahon*,³⁴² the Court made its first decision that a regulation constituted a taking. Needing an understanding of rights in coal, Justice Holmes turned to a Pennsylvania Supreme Court opinion that defined state property law.³⁴³ Almost a decade later, the Court had to decide whether state community property rules determined how income earned by a husband or wife was taxed by the federal income tax. In a series of cases, the Court looked to the laws of four states to determine that the state community property rules governed.³⁴⁴

When a case in which the petitioner alleged that he had a property right in a one-year fixed-term contract for a non-tenured teaching position

³⁴⁰ *Id.* § 1.45.

³⁴¹ 1 THOMPSON ON REAL PROPERTY, *supra* note 1, § 7.01 (emphasis added). Much of the rest of Chapter 7, section 7.02(a) (Alabama) through section 7.02(yy) (Wyoming), traces the reception of English law into the jurisprudence of each state and the District of Columbia, especially those rules and statutes that govern real property. Development of state property law based upon English statutes and common law is also traced in 10 POWELL, *supra* note 2, ch. 4.

³⁴² 260 U.S. 393 (1922).

³⁴³ *Commonwealth v. Clearview Coal Co.*, 100 A. 820 (Pa. 1917) (“For practical purposes, the right to coal consists in the right to mine it.”).

³⁴⁴ *See Poe v. Seaborn*, 282 U.S. 101 (1930) (applying Washington law); *Goodell v. Koch*, 282 U.S. 118 (1930) (applying Arizona law); *Hopkins v. Bacon*, 282 U.S. 122 (1930) (applying Texas law); *Bender v. Pfaff*, 282 U.S. 127 (1930) (applying Louisiana law). Earlier, the Court used California law to determine the same issue for California taxpayers. *See United States v. Robbins*, 269 U.S. 315 (1926).

came before the court, the Court again turned to state property law.³⁴⁵ When the Court needed to decide whether a trade secret constituted a property right, it turned to state law.³⁴⁶ Additionally, in 1948, Congress recognized the important role of state law in determining how to tax a husband and wife's wages and salaries.³⁴⁷

Some federal law does govern state property law. Property law must meet the requirements of the United States Constitution. For example, a local zoning ordinance generally meets the requirements of the Fourteenth Amendment³⁴⁸ if the zoning ordinance's provisions are not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."³⁴⁹ But even if such a zoning law is constitutional, the zoning ordinance as applied to a particular parcel of land may be found unconstitutional if it "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense."³⁵⁰ Courts will strike down such an application of zoning.³⁵¹

Pursuant to the United States Constitution, a governmental unit may not exercise the power of eminent domain without paying just compensation for the property taken.³⁵² Direct exercise of the power of

³⁴⁵ "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

³⁴⁶ "We therefore hold that to the extent that Monsanto had an interest in its health, safety, and environmental data cognizable as a trade-secret property right under Missouri law, that property right is protected by the Takings Clause of the Fifth Amendment." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984).

³⁴⁷ *See* S. REP. NO. 80-1013 (1948), *as reprinted* in 1948 U.S.C.C.A.N. 1163, 1184: Under existing law the treatment accorded families earning the same amount of income is very different if they happen to live in the state using the community-property system or in States which use common law. Chiefly this is due to the fact that under community-property system the earnings of a married couple are considered to be one-half the property of each.

³⁴⁸ *See* U.S. CONST. amend. XIV, § 1.

³⁴⁹ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926).

³⁵⁰ *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928).

³⁵¹ *See id.*

³⁵² *See* U.S. CONST. amend. V. This amendment originally applied only to the federal government. Enactment and ratification of the Fourteenth Amendment extended the Eminent Domain Clause to the states and to subdivisions of states. *See, e.g., C.B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 266, 233-41 (1897); *Pa. Coal Co. v. Mahon*, 260

eminent domain usually presents a clear takings case, as the governmental unit acquires title to the land.³⁵³ However, unintended exercise of the power of eminent domain can occur.³⁵⁴ On occasion, land use regulation involves or allows a physical touching.³⁵⁵ In other cases, however, the regulation usually imposes too much control, amounting to a taking.³⁵⁶ Not all regulation of land is a taking.³⁵⁷

Additionally, federal statutes trump state property law. For example, the Fair Housing Act prohibits many kinds of discrimination in the sale and rental of residential housing.³⁵⁸ The Real Estate Settlement Procedures Act³⁵⁹ sets standards and guidelines for closing the sale and purchase of land.

Federal law has a significant impact on state property law, however, in only a few areas. In general, property law is not contained in the powers “delegated to the United States by the Constitution, nor prohibited by it to the States.”³⁶⁰ Property law, therefore for the most part, is “reserved to the States respectively, or to the people.”³⁶¹ From the beginnings of our country, state legislatures and courts have created the body of state property law. It would be unconstitutional for Congress to enact a Rule to regulate state property law.

U.S. 393, 415 (1922).

³⁵³ See, e.g., *Kohl v. United States*, 91 U.S. 367 (1875).

³⁵⁴ See, e.g., *United States v. Causby*, 328 U.S. 256 (1946).

³⁵⁵ See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

³⁵⁶ See, e.g., *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

³⁵⁷ See, e.g., *Penn Cent. Co. v. New York City*, 438 U.S. 104 (1978); *Tahoe-Sierra Pres. Council Transp. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

³⁵⁸ See 42 U.S.C. §§ 3601–3631 (2000 and Supp. 2006); see, e.g., *Jancik v. Dep’t of Hous. & Urban Dev.*, 44 F.3d 553 (7th Cir. 1995); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2nd Cir. 1993); *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972).

³⁵⁹ See Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified at 12 U.S.C. §§ 2601–2617 (2000)); see, e.g., *Lawyers’ Title Corp. v. Dearborn Title Corp.*, 118 F.3d 1157 (7th Cir. 1997); *United States v. Gannon*, 684 F.2d 433 (7th Cir. 1981).

³⁶⁰ U.S. CONST. amend X. “Property interest[s] . . . are not created by the Constitution,” but rather “by existing rules or understandings that stem from an independent source such as state law.” *Delaware v. New York*, 507 U.S. 490, 501–02 (1993) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

³⁶¹ *Delaware*, 507 U.S. at 501–02; *Bd. of Regents*, 408 U.S. at 577.

2. *Federal Transfer Tax Law Cannot Implement the Functions of the Rule Against Perpetuities*

a. *The Federal Gift, Estate, and Generation-Skipping Taxes Are Not Stable Enough to Implement the Functions of the Rule Against Perpetuities*

More than a decade ago, a student commentator boldly proclaimed, "Because most wealth today is in the form of financial assets rather than real property, these taxes [federal gift, estate, and generation-skipping taxes] are effective ways of controlling wealth accumulation."³⁶² It is likely that this assertion was erroneous at the time the commentator wrote it. However, developments in federal transfer tax law since that time demonstrate that the federal transfer taxes are not suited to fulfill the functions of the Rule.

Property rules need stability. People buy, sell, and invest in property, relying in significant part on the stability of property rules. The Rule is a part of property law that requires stability.

The federal gift and estate taxes are currently in a significant state of flux. The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA")³⁶³ legislated a year-by-year modification of the federal estate and gift taxes, culminating with the elimination of the estate tax³⁶⁴ and GST³⁶⁵ after the year 2009. However, these taxes are scheduled to spring back into effect in 2011, unaffected by any of the intervening changes, "as if the provisions and amendments . . . had never been enacted."³⁶⁶ During the intervening years, Congress could act again, perhaps to extend the taxes, perhaps to repeal them permanently, or perhaps to modify them in other ways.³⁶⁷ Thus far, Congress has not acted.

Initially, EGTRRA reduced the maximum gift tax rate to 35%.³⁶⁸ EGTRRA immediately reduced the maximum estate tax rate to 50% and

³⁶² Butler, *supra* note 29, at 1251 (citing G. Graham Waite, *The Practitioner's Corner: Let's Abolish the Rule Against Perpetuities*, 21 REAL EST. L.J. 93, 96 (1992)).

³⁶³ See Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified as amended in scattered sections of the Internal Revenue Code).

³⁶⁴ See I.R.C. § 2210(a).

³⁶⁵ See *id.* § 2210(c).

³⁶⁶ See Pub. L. No. 107-16, § 901(b), 115 Stat. 150.

³⁶⁷ See Dukeminier & Krier, *supra* note 315, at 1342-43.

³⁶⁸ See I.R.C. § 2501(a).

provided for additional gradual reduction in rates.³⁶⁹ Beginning in 2003, the maximum estate tax rate has been decreased 1% per year until it reaches 45% for 2007, 2008, and 2009.³⁷⁰ EGTRRA increased the amount of the taxable estates shielded from the estate tax by the unified credit to \$1 million for 2002 and 2003; to \$1.5 million for 2004 and 2005; to \$2 million for 2006, 2007, and 2008; and \$3.5 million for 2009.³⁷¹ EGTRRA changed the lifetime gift tax exemption amount in four increments.³⁷² EGTRRA reduced³⁷³ and then eliminated the Credit for State Death Taxes,³⁷⁴ and then it replaced the credit with a Deduction for State Death Taxes.³⁷⁵ Stepped-up basis for property acquired from a decedent is to be repealed after December 31, 2009,³⁷⁶ to be replaced with carry-forward basis³⁷⁷—as is currently the law for taxable gifts.³⁷⁸

EGTRRA will eliminate the GST in 2009.³⁷⁹ EGTRRA provides for a phased increase of the GST exemption amounts in an amount equal to the exemption provided by the unified credit.³⁸⁰

All of these changes will be eliminated after December 31, 2010, if Congress takes no further action.³⁸¹ The constant changes in the gift and estate taxes provide no stability to the law. This lack of stability makes the federal transfer taxes unsuitable to implement the policies underlying the Rule.

b. The Generation-Skipping Transfer Tax Encourages Perpetuities

Congress created the GST in 1976³⁸² to close what it considered to be a loophole provided by the estate tax.³⁸³ The 1976 GST was repealed

³⁶⁹ See *id.* § 2001(c)(1).

³⁷⁰ See *id.* § 2001(c).

³⁷¹ See *id.* § 2010(c).

³⁷² See *id.*

³⁷³ See *id.* §2058.

³⁷⁴ See *id.* § 2011(b).

³⁷⁵ See *id.* § 2058.

³⁷⁶ See *id.* § 1014(f).

³⁷⁷ See *id.* § 1022.

³⁷⁸ See *id.* § 1015(a).

³⁷⁹ See *id.* § 2664.

³⁸⁰ See *id.* § 2631.

³⁸¹ See Pub. L. No. 107-16, § 901, 115 Stat. 150 (2001).

³⁸² See Tax Reform Act of 1976, Pub. L. No. 94-455, § 2006, 90 Stat. 1879–90 (1976).

³⁸³ See generally H.R. REP. NO. 94-658, Pt.1 (1976), as reprinted in 1976 U.S.C.C.A.N. 2897, 3400–01.

retroactively and replaced by the current Chapter 13 of the Internal Revenue Codes which is significantly different from the prior version.³⁸⁴

The estate tax is levied on a decedent's estate,³⁸⁵ not upon those who receive an inheritance. Certain property technically not included in a decedent's estate also is subject to the estate tax.³⁸⁶ The estate tax does not differentiate between property received by persons in different generations.³⁸⁷ Congress determined that a tax should be levied at each generation and that a new tax, the GST, should be used to implement this change.³⁸⁸ The GST is a hefty tax, levied at the highest rate of the estate tax.³⁸⁹ The 1986 amendments created a GST exemption of \$1 million. Only if the total of the generation-skipping gift exceeded this amount would a tax be due.³⁹⁰ The GST provides that a decedent may allocate the GST exemption to particular gifts.³⁹¹

The GST was intended to operate in a straightforward manner.³⁹² Thus, in a jurisdiction that allows perpetual trusts, a decedent could create a trust for the decedent's child, grandchildren, and further decedents without end.³⁹³ The decedent could fund the trust with property whose value did not exceed the amount of the GST exemption.³⁹⁴ The GST exemption could be allocated to this property. The trust would provide that the income would be paid to the child for as long as the child lived. The income interest would terminate at the child's death, then would be paid to the grandchildren, and later to further descendants without end.³⁹⁵

³⁸⁴ See Tax Reform Act of 1986, Pub. L. No. 99-514, § 1431, 100 Stat. 2717 (1986).

³⁸⁵ See I.R.C. § 2001.

³⁸⁶ See, e.g., *id.* §§ 2036, 2039, 2040, 2044.

³⁸⁷ See H. R. REP. NO. 94-658, at 3400-01.

³⁸⁸ See *id.*

³⁸⁹ See Dukeminier & Krier, *supra* note 315, at 1312.

³⁹⁰ The exceptions of IRC. §§ 2642 (c) and 2611 (b) are also noted.

³⁹¹ See I.R.C. § 2631(a); see also Ira Mark Bloom, *The GST Tail Is Killing the Rule Against Perpetuities*, TORT NOTES, Apr. 24, 2000, at 569 [hereinafter Bloom, *Killing the Rule*].

³⁹² The House Report included the use of a trust when explaining generation-skipping techniques. See H. R. REP. NO. 94-658, at 3400-01. The example in the text is similar to the example used by Professor Bloom. See Bloom, *Killing the Rule*, *supra* note 391, at 569-70.

³⁹³ See Bloom, *Killing the Rule*, *supra* note 391, at 570. ("The ideal GST exempt trust would last essentially forever, that is, a perpetual trust for the creator's family: a perpetual dynastic trust.")

³⁹⁴ This example assumes the entire exemption amount is available for the trust.

³⁹⁵ Dukeminier & Krier, *supra* note 315, at 1312 ("At the death of a life tenant, the tenancy ends, leaving no transfer to be taxed."). Professor Bloom believed that an even

Usually the trust principal would significantly appreciate in value between the time the trust was created and the first income interest terminates. In one example, a trust created in 2000, with the initial property valued at \$1,030,000 (the amount of the exemption in 2000),³⁹⁶ had an income interest that ended at the child's death thirty years later. At that time, the trust property was estimated to be \$15 million.³⁹⁷ The entire trust principal would escape taxation by the estate tax. The entire trust principal would always escape taxation by the GST because the inclusion ratio was zero.³⁹⁸ Thus, none of the trust assets would be subject to either the estate tax or the GST as long as income is paid to any descendant of the decedent.³⁹⁹ The GST, in effect, provides an incentive to create trusts that last as long as possible, including perpetual trusts.⁴⁰⁰

Some members of Congress are concerned about "abuse" of the GST exclusion.⁴⁰¹ Congress may enact further amendments to the GST or provide some other remedy to the perceived problem, and Congress may or may not enact corrective legislation in the future.

A tax that provides an incentive for perpetual trusts is a tax that cannot implement the policies provided by the Rule. The GST is not suited to further the policies underlying the Rule.

D. Conclusion

The policies implemented by the Rule are important to society. Without the Rule, alienation of property will be hindered greatly. Dead hand control will prevail. There is no general movement to abandon the Rule. Instead, recent legislative action adopting USRAP affirms the continuing need for the Rule.

better scheme would be to allow only discretionary distribution of income, with the income kept in the trust for as long as possible." Bloom, *Killing the Rule*, *supra* note 391, at 570.

³⁹⁶ See Bloom, *Killing the Rule*, *supra* note 391, at 569.

³⁹⁷ See *id.*

³⁹⁸ See I.R.C. § 2642.

³⁹⁹ In a jurisdiction that allows perpetual trusts, the zero inclusion ratio prevents taxation until the trust terminates. See Dukeminier & Krier, *supra* note 315, at 1313.

⁴⁰⁰ See, e.g., Bloom, *Killing the Rule*, *supra* note 391; Dukeminier & Krier, *supra* note 315, at 1312–13.

⁴⁰¹ See *supra* text accompanying note 32.

V. A MODERN RULE AGAINST PERPETUITIES

A. Introduction

The Rule ought to be, and can be made to be, understood by every judge and attorney. Application of the Rule ought to be as easy as possible. The Rule would satisfy these practical requirements if it contained the following components:

1. The perpetuities measuring period should be a fixed term of years.
2. Validity of interests should be measured by actual events, not by possibilities.
3. Reformation of interests that violate the Rule at the end of the fixed term of years ought to be possible.
4. If reformation is not reasonably possible, a termination provision should be provided.
5. There should be a definition of “vested.”

The Author proposes a new statutory Rule as follows:

1. No interest in real or personal property is valid unless that interest is vested ninety years after its creation, as measured by events as they actually occur and not by possibilities.⁴⁰²
2. Unless otherwise directed by the creator of an interest in property that has not vested at the end of the ninety-year period provided by section 1 above,⁴⁰³ upon the petition of a person who owns any interest in the property,⁴⁰⁴ the interest that violates the Rule stated in section 1 shall be reformed, within the limits of the Rule, to approximate most closely the intention of the creator of the interest, if that is possible.⁴⁰⁵

⁴⁰² This proposal is based on and developed from Kentucky’s statute and USRAP. See KY. REV. STAT. ANN. § 381.215 (LexisNexis 2002); UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(2), 8B U.L.A. 223 (2001).

⁴⁰³ The creator of an interest should have the right to show an intention not to use reformation, unwise as that intention may be.

⁴⁰⁴ This language is taken from USRAP, see UNIF. STATUTORY RULE AGAINST PERPETUITIES § 3, 8B U.L.A. 223.

⁴⁰⁵ This language is adapted from the Ohio statute, see OHIO REV. CODE ANN. § 2131.08(C) (LexisNexis 2002).

3. If an interest cannot be reformed as provided in section 2 above, the court that considers reformation of the interest shall invalidate all interests in property that violate section 1 at the end of the ninety-year period. Unless the creator of the invalid interest(s) provided for this eventuality with a different provision,⁴⁰⁶ the person(s) who own(ed) the last valid interest(s) in the property shall be declared to be the owner(s) of the property in fee simple absolute (or in the lesser interest that was owned by the creator of the invalid interest(s) immediately prior to the creation of the invalid interest).
4. An interest is vested if (1) there is no condition precedent to the interest becoming a present estate other than the natural termination of those interests which are prior to it in possession, and (2) it is theoretically possible to identify the person(s) who would get possession of the property if the interest would become a present interest at any time.⁴⁰⁷

A Rule containing these provisions is the next logical evolution of the Rule. The proposed Rule departs from tradition by rejecting any use of the common law Rule. Instead, it builds upon, and goes beyond, modern reformation of the Rule. The first three components are familiar parts of modern reformation of the Rule. A termination provision would determine the final valid interests.⁴⁰⁸ A statutory Rule should define “vested” to avoid the possible problem that application of the Rule might not be understood ninety years after the creation of an interest.⁴⁰⁹ The combination of a fixed term of years, wait-and-see, reformation, a

⁴⁰⁶ The creator of an interest should have the further right to show his intention for the disposition of the property if a court determines any interest is invalid. A savings clause can provide alternate dispositions to accomplish this purpose in the event the interest is determined to be invalid.

⁴⁰⁷ This definition restates Professors Bergin and Haskell’s definition of vested. *See* BERGIN & HASKELL, *supra* note 85, at 73.

⁴⁰⁸ The termination provision is adapted from a Utah statute. *See* UTAH CODE ANN. § 75-2-1206.5 (LexisNexis 2006).

⁴⁰⁹ *See* Dukeminier, *Ninety Years in Limbo*, *supra* note 250, at 1026–27. The author does not accept the inevitability of loss of knowledge about the Rule and its application but accepts the probability that the ability to apply the Rule will be lost during the ninety year period of USRAP and the proposed Rule.

termination provision, and a definition of “vested” will assure minimum difficulty in the application of this Rule.

B. The Validity of an Interest Should Be Measured by a Fixed Term of Years

Currently, most United States jurisdictions have a Rule that incorporates or builds on the common law Rule.⁴¹⁰ Nonvested interests must vest no later than twenty-one years after the death of a life or lives in being at the creation of the interest. The time has arrived to replace completely the “twenty-one years after some life in being at the creation of the interest” requirement with a fixed term of years—a time unrelated to any life or lives in being at the creation of the interest. This change would significantly simplify application of the Rule by removing the need to use measuring lives.

The drafters of USRAP identified the need to deal with measuring lives as “a costly administrative burden.”⁴¹¹ In order to apply the common law Rule, traditional wait-and-see provisions, and USRAP, a court had to sort out lives in being at the creation of the interest by actually “tracing . . . individuals’ lives, deaths, marriages, [and] adoptions.”⁴¹² The usual wait-and-see provision imposed this burden because the Rule included a “twenty-one years after some life in being at the creation of the interest” limit⁴¹³ as the longest period that an interest could remain nonvested without violating the Rule. The burden of identifying the relevant lives and tracing the history was thought to be significant.⁴¹⁴

⁴¹⁰ USRAP, now the law in twenty-two jurisdictions, adopts this approach. *See supra* text accompanying notes 22–25; UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(1), 8B U.L.A. 223 (2001). Most other jurisdictions have a Rule based on the common law Rule but with modern reforms. *See supra* note 15 and accompanying text.

⁴¹¹ UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 227–28 (2001).

⁴¹² *Id.*

⁴¹³ The drafters of USRAP wrote, “No matter what method is used in the statute for selecting the measuring lives, and no matter how unambiguous the statutory language is, actual individuals must be identified as the measuring lives and their lives must be traced to determine who the survivor is and when the survivor dies.” UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 228 (2001).

⁴¹⁴ *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 228 (“Adding to the administrative burden [the need to keep track of births, deaths, marriages, and divorces, etc.] is the fact that the perpetuity question will often be raised for the first time long after the interest or power was created.”).

The use of measuring lives is unnecessary, however. If a fixed term of years is used as the measuring period, the history of births and deaths will be unnecessary. The only question will be, "Did the interest vest within the fixed period of time?"

Because USRAP invokes the common law Rule, it invites costly litigation to determine whether interests are initially valid. As to interests that courts determine are valid at the time of creation, the investment of time and money may prove worthwhile. But as to interests that courts determine are not valid at the time of creation, that investment of time and money is wasted because the ninety-year fallback wait-and-see provision of section 1(a)(2) must be invoked.⁴¹⁵ Although those interests were initially invalid, if, at or before the end of the ninety-year period, the interests actually vest, the initial determination is useless. Interests found valid because of the ninety-year wait-and-see provision are fully valid in every respect.⁴¹⁶ A Rule that waits to see how actual events develop, without encouraging an initial determination of invalidity, will save the time and money that would have been spent on reaching the initial determination. There will also be a psychological savings, as families will not be torn apart by litigation.⁴¹⁷ It is time for a Rule that does not examine interests at the time of creation.

There should be less concern with the ninety-year term of USRAP than with other fixed periods. Several states have adopted a statutory Rule that uses a fixed term of years in whole or in part, though sometimes only for trusts.⁴¹⁸ Concern exists that the time period adopted should be correlated to federal transfer tax rules or provisions adopted or implemented by Congress.⁴¹⁹

A ninety-year period is suggested for two reasons. First, it has received extraordinary approval by state legislatures.⁴²⁰ Second, after promulgation of USRAP was called to the attention of the Department of

⁴¹⁵ See *id.*, § 1(a)(2), 8B U.L.A. 296.

⁴¹⁶ See *id.*, pref. n., 8B U.L.A. 244; Waggoner, *USRAP*, *supra* note 247, at 592.

⁴¹⁷ The use of a declaratory judgment action to establish the validity of interests before the end of the ninety-year period should be an available remedy.

⁴¹⁸ See, e.g., DEL. CODE ANN., tit. 25, § 503(b) (Supp. 2004) (adopting one hundred years for trusts of real property); FLA. STAT. ANN. § 689.225(2)(f) (West Supp. 2006) (adopting 360-year period for trusts); WASH. REV. CODE ANN. § 11.98.130 (West 2006) (adopting a 150-year period for trusts).

⁴¹⁹ Congress is concerned about dynasty trusts. See *supra* text accompanying note 32.

⁴²⁰ See *supra* text accompanying note 22.

Treasury, the Department issued a letter indicating its intent “to amend the GST regulation to treat the 90-year period as the equivalent of a lives-in-being-plus-21-years period.”⁴²¹ Implementation of a sort has already occurred.⁴²²

Many clients may wish to provide for succeeding generations using estate plans that will look very much like those used when the common law Rule was in place.⁴²³ Professor Fellows already has demonstrated that interests created by implementation of those plans will seldom result in interests that would violate the new Rule.⁴²⁴ Careful use of appropriate savings clauses will protect interests created by implementing these plans. If clients seek the maximum time for their trusts to exist, then one can draft the trust instruments to accomplish this.

C. Wait-and-See Using Actual Events

As discussed above, the first section of the proposed Rule reads as follows:

1. No interest in real or personal property is valid unless it vests within ninety years of its creation as measured by events as they actually occur, and not by possibilities.

A fixed-term Rule is a wait-and-see Rule,⁴²⁵ and the wait-and-see approach has been widely accepted in the United States.⁴²⁶

By requiring use of the facts as they actually occur, the wait-and-see approach removes from consideration all theoretical possibilities that the Rule might be violated, including all of the remote possibilities identified by Professor Leach⁴²⁷ and others.⁴²⁸ Using the wait-and-see approach greatly simplifies application of the Rule and frequently allows courts to

⁴²¹ See UNIF. STATUTORY RULE AGAINST PERPETUITIES, 8B U.L.A. 230 (2001) (referencing Letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy) to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990)).

⁴²² See Treas. Reg. § 26.2601-1(b)(4)(A)(ii) (discussing effective date of implementation).

⁴²³ See UNIF. STATUTORY RULE AGAINST PERPETUITIES, pref. n., 8B U.L.A. 231 (“With respect to the planning and drafting end of the practice, the Uniform Act requires no modification of current practice and no new learning.”).

⁴²⁴ See Fellows, *supra* note 275, at 598.

⁴²⁵ See Dukeminier, *Ninety Years in Limbo*, *supra* note 250, at 1024.

⁴²⁶ See *supra* note 15.

⁴²⁷ See Leach, *Perpetuities Perspective*, *supra* note 8, at 731–34.

⁴²⁸ See, e.g., Dukeminier, *Modern Guide*, *supra* note 3, at 1876–80.

carry out the intent of creators of interests by avoiding invalidity without the need for reformation.⁴²⁹ The wait-and-see approach has proved to be most useful.⁴³⁰

Illustration 10

The importance of the wait-and-see approach is demonstrated forcefully by a comparison of the Kentucky *Three Rivers* case⁴³¹ (the basis for Illustration 7⁴³²) with the New York *Symphony Space* case.⁴³³ Recall that in *Three Rivers* an option to purchase an easement was subject to the Rule.⁴³⁴ The option, created in 1961 after the Kentucky legislature had adopted the wait-and-see approach, was exercised in 1968, less than seven years after its creation.⁴³⁵ If the court had used the common law's what-might-happen approach, the court would have found the option invalid because of the possibility the option would be exercised more than twenty-one years after its creation.⁴³⁶ But because the wait-and-see statute directed the courts to examine the validity of the option by taking the actual facts into account, the court found the option valid.⁴³⁷

The New York *Symphony Space* case⁴³⁸ provides a stark contrast to *Three Rivers*. Broadwest Realty Corporation ("Broadwest") owned a two-story building in upper west Manhattan, which housed a theater and commercial space. Broadwest suffered losses from operating the building, and Symphony Space, a not-for-profit corporation, had rented the theater for various engagements.⁴³⁹

In 1978, Symphony Space purchased the entire building for \$10,010, a price substantially below-market value, and, as part of the transaction, leased the commercial space back to Broadwest for \$1 per year, while Symphony Space retained full possession of the theater. Broadwest remained liable to pay the existing \$243,000 mortgage until the end of 2003 and also retained some maintenance obligations. Symphony Space

⁴²⁹ See, e.g., *Three Rivers Rock Co. v. Reed Crushed Rock Co., Inc.*, 530 S.W.2d 202 (Ky. 1975).

⁴³⁰ See *supra* notes 169–81.

⁴³¹ 530 S.W.2d 202.

⁴³² See text accompanying notes 182–97.

⁴³³ See *Symphony Space, Inc. v. Pergola Prop. Inc.*, 669 N.E.2d 799 (N.Y. 1996).

⁴³⁴ See *Three Rivers*, 530 S.W.2d at 208.

⁴³⁵ See *id.* at 224.

⁴³⁶ See *id.* at 206.

⁴³⁷ See *id.* at 208.

⁴³⁸ See 669 N.E. 2d 799.

⁴³⁹ See *id.* at 800.

gave Broadwest a twenty-five-year \$10,000 promissory note and mortgage, with full payment due December 31, 2003. The parties carefully constructed the transaction to provide long-term economic benefits to both parties. Once the parties completed the original transaction, the buyer obtained a property tax exemption for the entire building and the seller realized a planned cash-flow savings exceeding \$140,000 per year.⁴⁴⁰

As part of the entire transaction, Broadwest received an unconditional option to repurchase the entire building. Broadwest could exercise the option after July 1, 1979, but closing of the repurchase could take place only in 1987, 1993, 1998, or 2003. The purchase price varied depending upon the year in which the closing would take place. Unfortunately, the attorneys for the parties apparently failed to consider the consequences of violating the Rule.⁴⁴¹

Broadwest owned two additional properties contiguous to the theater building. In 1981, Broadwest sold its leasehold interest and option in the theater building and its interests in the other two buildings to a nominee, who immediately transferred the interests to Pergola Properties, Inc., Bradford W. Swett, Casandium Limited, and Darenth Consultants, as tenants in common.⁴⁴²

The new owners converted one of the contiguous buildings to a cooperative, which proved successful. The value of the entire property rose significantly. In 1988, assuming that the option to repurchase was enforceable, the combined properties were appraised at \$27 million. If the option was not enforceable, the value of the leasehold and the contiguous properties would have been \$5.5 million.⁴⁴³

In January 1985, Mr. Swett alleged that Symphony Space had defaulted on payments on the promissory note. Mr. Swett then served notice that he was exercising the option on behalf of all four owners. The closing was to be on May 6, 1985. Symphony Space disputed the alleged default status and that Mr. Swett acted for all four owners. Symphony Space then sued for a declaratory judgment that the option was invalid. Shortly thereafter, Pergola also served a notice of default and attempted to exercise either the option contingent upon default or, in the alternative, the option not contingent upon Symphony Space's default. This closing

⁴⁴⁰ *See id.* at 800–01.

⁴⁴¹ *See id.*

⁴⁴² *See id.* at 801–02.

⁴⁴³ *See id.* at 802.

date was to be on July 10, 1985. The dispute was not resolved. In 1987, Pergola again served notice of exercise of the option, with closing to be on September 11, 1987. Symphony Space did not appear at any of the proposed closings.⁴⁴⁴

Symphony Space's lawsuit to have the option declared invalid continued. The trial court granted Symphony Space's motion for summary judgment, finding that the Rule applied to the option, that the option violated the Rule, and that Symphony Space could exercise its option to redeem the mortgage. The trial court also dismissed defendants' countersuit seeking rescission of the entire transaction. The New York Supreme Court, Appellate Division, affirmed.⁴⁴⁵

The New York Court of Appeals found that options historically were subject to the Rule, even if they were part of a commercial transaction. The court recognized that important recent New York cases, decided after enactment of the perpetuities reform legislation, held that options of this type continued to be subject to the Rule, even though some "preemptive rights" were not.⁴⁴⁶ Thus, the court ruled that options to purchase real property remained subject to the Rule.⁴⁴⁷

Pergola and the other exercisers of the option sought to have the court determine that the option's language did not permit exercise beyond the time allowed by the Rule. The fact that the option could be exercised in 2003, more than twenty-one years after its creation, however, was an insurmountable obstacle to their argument.⁴⁴⁸

The court was asked to apply New York's Estate, Property and Trusts Law section 9-1.3, which it termed a "savings statute."⁴⁴⁹ The court ruled that the option's express terms prevailed over the statute because the statute applied "only if 'a contrary intention' [did] not appear in the instrument."⁴⁵⁰ Thus, the reformation statute did not apply.

The defendants also asked the court to adopt the wait-and-see approach.⁴⁵¹ The court responded that it had "long refused to 'wait and

⁴⁴⁴ *See id.*

⁴⁴⁵ *See id.*

⁴⁴⁶ *See id.* at 802–03. In *Metropolitan Transportation*, these preemptive rights were identified as rights of first refusal. *See Metro. Transp. Auth. v. Bruken*, 492 N.E.2d 379, 382 (N.Y. 1986).

⁴⁴⁷ *See Symphony Space*, 669 N.E.2d at 806.

⁴⁴⁸ *See id.* at 806–07.

⁴⁴⁹ *See id.* at 807.

⁴⁵⁰ *Id.*

⁴⁵¹ *See id.* at 808.

see' whether a perpetuities violation in fact occurs," and instead used the what-might-happen approach.⁴⁵² The court also believed that the language of the statutory Rule prevented it from adopting the wait-and-see approach. The court stated further that the utility of the wait-and-see approach was "widely debated."⁴⁵³ Given the history of the court's view of the wait-and-see approach and its doubts about the doctrine, it is doubtful that it would have adopted a wait-and-see approach, even if there had been no legislation.

The Court of Appeals unanimously affirmed the appellate court's decision. The option violated the Rule and was never valid; therefore it could not be exercised.⁴⁵⁴

Note that the option considered in *Symphony Space* was decided after enactment of New York's 1965 perpetuities reform. The option, created in 1978, was exercised in 1985 or 1987,⁴⁵⁵ much less than twenty-one years after its creation and well within the time allowed by the Rule if court had applied the wait-and-see approach.

The option considered in *Symphony Space* would not have violated the Kentucky Rule, as shown by the Kentucky Supreme Court's decision in *Three Rivers*.⁴⁵⁶ *Symphony Space* is a vivid illustration of the harshness of the what-might-happen approach. A court should no longer be able to invalidate an interest that the court knows, based upon the facts before it, did not violate the Rule. The wait-and-see approach, based upon actual facts as they develop, must be a part of the Rule in every jurisdiction in which the Rule operates. Courts should refuse to apply the what-might-happen approach. It should make no difference whether the court applies a statutory or common law Rule.

Addition of the language "as measured by events as they actually occur, and not by possibilities"⁴⁵⁷ will assist courts not already familiar with the wait-and-see approach by directing that interests be evaluated based upon the facts as they evolve and develop, not by use of the what-might-happen approach and remote possibilities.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *See id.* at 809.

⁴⁵⁵ *See id.* at 802.

⁴⁵⁶ *See Three Rivers Rock Co. v. Reed Crushed Stone Co., Inc.*, 530 S.W.2d 202 (Ky. 1975).

⁴⁵⁷ This language is contained in section 1 of the proposed Rule. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1, 8B U.L.A. 223 (2001).

D. Reformation

Reformation of interests that violate the Rule has been widely adopted in the United States.⁴⁵⁸ Even though reformation of an interest is not always possible,⁴⁵⁹ courts can reform many interests to become valid.⁴⁶⁰ According to Professor Waggoner, the reporter for USRAP, reformation “round[s] out” the savings clause principle of wait-and-see by requiring the court to provide a closely equivalent interest that approximates the intention of the creator of the interest but does not violate the Rule.⁴⁶¹ A typical interest that can be reformed is one created to last for twenty-five, forty, or another term of years after the death of a life in being at the creation of the prior interest.⁴⁶² In such cases, the courts that use reformation have determined consistently that the creator of the interest intended the interest to be valid and would have created it for a twenty-one-year period if the creator had known the law.⁴⁶³

E. Termination of Invalid Interests and Determination of Owner(s)

Once a court determines that one or more interests are invalid under the Rule and cannot be reformed,⁴⁶⁴ a court must determine the owners of the valid interests.

Because a determination of the validity of an interest will not occur until the end of the wait-and-see period, the court that determined the invalidity of the interest ought to determine who should receive the property in a continuation of the original lawsuit. This would save time, money, and the need for additional litigation.⁴⁶⁵ If this is not done, an

⁴⁵⁸ In addition to USRAP now being in effect in at least twenty-two jurisdictions, approximately fourteen other states have adopted this modification of the Rule by statute or court decision. *See supra* note 15. For a demonstration of the benefits and application of reformation, *see* text accompanying notes 182–97.

⁴⁵⁹ *See, e.g.,* *University of Louisville v. Isert*, 742 S.W.2d 571, 572 (Ky Ct. App. 1987).

⁴⁶⁰ *See, e.g.,* *Edgerly v. Barker*, 31 A. 900 (N.H. 1891); *In re Estate of Chun Quan Yee Hop*, 469 P.2d 183 (Haw. 1970); *In re Estate of Kreuzer*, 674 N.Y.S.2d 505 (App. Div. 1998).

⁴⁶¹ *See* Waggoner, *USRAP*, *supra* note 247, at 574.

⁴⁶² The creator of the interest intended for the interest to vest at a time more than twenty-one years after some life in being at the creation of the interest.

⁴⁶³ *See, e.g.,* *Edgerly*, 31 A. 900; *Chun Quan Yee Hop*, 469 P.2d at 185 n.4.; *Kreutzer*, 647 N.Y.2d 505.

⁴⁶⁴ *See, e.g.,* *Univ. of Louisville v. Isert*, 742 S.W.2d 571 (Ky. Ct. App. 1987).

⁴⁶⁵ There will be additional cost for the proposed termination proceedings. Attorneys already familiar with the litigation will be able to complete the final step at a lower cost

entirely new lawsuit would be needed to determine who should receive the property. Additionally, the Rule should require notice to all interested parties.

Utah provides a statutory “savings provision”⁴⁶⁶ for interests that are invalid at the end of the Utah Rule’s 1000-year period. The provision is illustrated by section 75-2-1206.5(1), which reads:

A property interest that becomes invalid pursuant to Section 75-2-1203 upon the expiration of the 1,000-year period shall be distributed as follows:

(1) If the property interest is payable to one person, it shall be distributed to that person. If the property interest is payable to more than one person, it shall be distributed to the persons to whom the property interest is then payable: (a) in the shares to which the persons are entitled; or (b) equally among all persons who are entitled to shares if not specified.⁴⁶⁷

The Utah statutory savings provision demonstrates the need for a court to determine who should receive the property or property interest after the determination of invalidity and the need for a court to make the determination as a continuation of the original lawsuit. If the creator of the interest made specific provision for this situation, the court ought to implement that provision. Otherwise, suggested subsection 3 of the proposed new Rule would guide the court to a proper resolution. This subsection is broad and should apply to legal and equitable interests, including interests in trusts and interests created by exercise of a power of appointment.

F. The Meaning of “Vested”

Today the distinction between vested and nonvested remainders is of little importance, except for the Rule. Contingent remainders are widely

than attorneys who started from scratch. There also will be less cost to continue the existing litigation than to start a new lawsuit. In many cases, the evidence will already be before the court.

⁴⁶⁶ See UTAH CODE ANN. § 75-2-1206.5 (Supp. 2006).

⁴⁶⁷ *Id.* § 75-1-1206.5(1). Section 75-2-1206.5(2) makes an identical provision for property interest in trusts payable at the discretion of a trustee. See *id.* § 75-2-1206.5(2).

inheritable⁴⁶⁸ and alienable.⁴⁶⁹ Statutes and court decisions have eliminated the destructibility doctrine, historically an important reason for the distinction between vested and nonvested remainders.⁴⁷⁰ Because the distinction is not widely used, Professor Dukeminier's belief that the rules necessary to understand and apply the Rule will be forgotten after ninety years⁴⁷¹ could prove correct. Therefore, having definitions and examples in the proposed Rule is useful to understand and apply the Rule in the future.

Modern courts generally seek to implement the intent of those who create interests, whether by deed, will, or trust.⁴⁷² However, in order for an interest to vest, the requirements of a vested interest must be fulfilled in addition to the intent requirement.⁴⁷³ Sometimes, determining whether the creator intended to create a vested interest or an interest that does not vest is easy, but other times it is more difficult to discern. When intent can be determined easily, courts should recognize it. But when courts cannot easily discern the intended interest, some guidelines would be helpful.

Professor Gray carefully distinguished between vested and nonvested interests:

Since contingent [nonvested] remainders have been recognized, the line between them and vested remainders is drawn as follows: A remainder is vested in A., when throughout its continuance, A., or A. and his heirs, have the right to the immediate possession, whenever and however the preceding freehold estates may determine [terminate]. A remainder is contingent [nonvested] if, in order for it to come into possession, the fulfillment of some condition precedent other than the determination

⁴⁶⁸ See 3 POWELL, *supra* note 2, § 21.03[2].

⁴⁶⁹ See *id.* § 21.02[4][v] (but noting that inalienability remains the law in Connecticut, Illinois, Maryland, and New Hampshire); see also 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 23.06.

⁴⁷⁰ See 1 BORRON, SIMES, & SMITH, *supra* note 33, §§193, 209. The destructibility rule remains the law in Florida, Oregon, Pennsylvania, Tennessee, and possibly in Mississippi.

⁴⁷¹ See Dukeminier, *Ninety Years in Limbo*, *supra* note 250, at 1026–27.

⁴⁷² See 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 28.02(a); 4 PAGE ON THE LAW OF WILLS § 30.6 (2004); 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 82.13(a)(3) (Little, Brown & Co., 4th ed. 1987).

⁴⁷³ See *Uchtroff v. Hanson*, 693 N.W.2d 790, 794 (Iowa 2005). See also 1 BORRON, SIMES, & SMITH, *supra* note 33, § 140; 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 23.11.

[termination] of the preceding freehold estates is necessary.⁴⁷⁴

The definition of “vested” in the proposed Rule incorporates both parts of Professor Gray’s definition, but uses modern terminology.⁴⁷⁵

Not all scholars agree that Professor Gray’s formulation is correct. Some authorities focus on the condition precedent language, excluding the natural termination of the prior estates.⁴⁷⁶ Other authorities focus on the inability to determine who would take possession if the interest were to come into possession at a given time.⁴⁷⁷

The drafters of the *Restatement of the Law of Property* recognized the validity of Professor Gray’s requirements for a vested interest:

When a limitation creates a remainder and it is not possible to point to any person and to say such person would take, if all interests including a prior right to a present interest should now end, this remainder is subject to a condition precedent. . . .

A remainder subject to a condition precedent can be created in favor of a presently identifiable person. In such a limitation the condition precedent consists of some event which must occur before the uncertainty, as to the taking by the identified person, is resolved, as for example, his attaining a named age. . . . A remainder subject to a condition precedent frequently is limited in favor of a person not yet in existence. . . or not now identifiable.⁴⁷⁸

Thus understood, the distinction between a vested and a nonvested interest should be based upon Professor Gray’s two requirements. If either or both of the requirements are not met, the interest is not vested.

⁴⁷⁴ GRAY *supra* note 4, § 101 (footnote omitted).

⁴⁷⁵ This wording is similar to that used by Professors Bergin and Haskell. *See supra* text accompanying note 85.

⁴⁷⁶ *See, e.g.*, 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 23.02 (“A vested remainder is a remainder that is not subject to a condition precedent.”); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.4 cmt. b (1983). (“An interest in property is a non-vested one if it is subject to an unfulfilled condition precedent. The unfulfilled condition precedent may be the occurrence or non-occurrence of some event, including the birth of the individual to whom the interest is given.”).

⁴⁷⁷ *See, e.g.*, 1 AMERICAN LAW OF PROPERTY, *supra* note 5, § 4.36.

⁴⁷⁸ RESTATEMENT OF PROP.: PERPETUITIES § 157 cmts. u & w (1936).

The distinction between a condition precedent and a condition subsequent is not always easily understood. Professor Gray offered a simple, yet effective, test:

Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested.⁴⁷⁹

This understanding can be explained with several examples. The first factor is whether the condition is part of the gift or divests the interest.⁴⁸⁰

1. O to A for life, then, if B has then passed the bar examination, to B, but if B has not yet passed the bar examination, to C.

The language incorporates the condition “if B has then passed the bar examination” into the gift; the gift itself is conditioned upon B already having passed the bar examination at A’s death. Unless B has passed the bar examination at the time of the grant, B owns a nonvested (contingent) remainder.

2. O to A for life, then to B, but if B has not yet passed the bar examination, to C.

Here the gift is to B without the condition being part of the language that made the gift. Instead, the condition is part of an executory interest, created in the same instrument.⁴⁸¹ The executory interest takes away B’s interest only if B had not passed the bar examination at the time of A’s

⁴⁷⁹ GRAY, *supra* note 4, § 108.

⁴⁸⁰ “And his heirs” is omitted in the following examples because modern statutes require a court to find a fee simple absolute unless a lesser interest is clearly intended by the grantor or unless the grantor owned a lesser interest. *See, e.g.*, N.Y. REAL PROP. LAW § 245 (McKinney 2006); OHIO REV. CODE ANN. § 5301.02 (LexisNexis 2002).

⁴⁸¹ “The term ‘executory interest’ . . . is applied to any future interest not retained by the creator of the instrument other than a remainder.” 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 26.02.

Technically, the executory interest in the example is a shifting executory interest, one created “to take effect in derogation of some other estate” 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 26.03. It would take away or replace the remainder O gave to B and give it to C.

death. This is a condition subsequent, which does not make an interest nonvested. B's remainder is vested.⁴⁸²

Although courts apply various tests,⁴⁸³ Professor Gray's test is easy to apply. In Gray's test, courts need to examine the language, either alone or in conjunction with other indicia of intent. If the condition appears before or as part of the gift itself, it is a condition precedent. If the condition appears after the gift (usually as an executory interest, which gives the interest to another person), the condition is a condition subsequent. This is an effective test, applied by many courts.⁴⁸⁴ If a grantor demonstrated a different intent, courts should carry out that intent.

The second factor is that it be theoretically possible to identify the person or persons who would take the interest if the interest were to become possessory at any time.

3. O to A for life, then to A's heirs.⁴⁸⁵

A living person has no heirs; heirs are determined by the persons who survive a decedent.⁴⁸⁶ As long as A is alive it is not theoretically possible to determine who would take possession of the interest if it became possessory at any time. The remainder given to A's heirs is contingent nonvested (contingent).

4. O to A for life, then to B.

Modern authorities describe this as a vested remainder.⁴⁸⁷ The gift is to B. B is a named person, alive at the time the gift was made. If B should die prior to A's death, B's interest will be distributed according to B's will or to B's heirs by intestate succession. Therefore, it is theoretically possible to determine who would take the interest if A died at any time. If

⁴⁸² Technically, it is vested subject to complete divestment. *See, e.g.*, 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 23.12(b).

⁴⁸³ *See* 1 BORRON, SIMES, & SMITH, *supra* note 33, § 138.

⁴⁸⁴ *See id.*

⁴⁸⁵ At common law, a gift to A for life, then to A's heirs, would have triggered the Rule in Shelley's Case, a rule of law that would convert the gift to A to one in fee simple absolute. *See Wolfe v. Shelley*, (1581) 76 Eng. Rep. 206, 1 Co. Rep. 219 (K.B.); *see, e.g.*, *Estate of Hendrickson*, 736 A.2d 540 (N.J. Super. 1999); *Society Nat'l Bank v. Jacobson*, 560 N.E.2d 217 (Ohio 1990); *Sybert v. Sybert*, 254 S.W.2d 999 (Tex. 1953). The Rule in Shelley's Case has been abrogated in all but a few United States jurisdictions. 3 POWELL, *supra* note 2, § 31.07[1].

⁴⁸⁶ *See* PAGE ON THE LAW OF WILLS, *supra* note 472, § 1.4.

⁴⁸⁷ This could be described as indefeasibly vested. *See* 3 THOMPSON ON REAL PROPERTY, *supra* note 1, § 23.12(a).

B were to die before the interest became possessory, the determination may be difficult, but it can be done.

5. O to A for life, then to A's children. At the time of the gift, A had no children.

Because A had no children at the time of the gift, it is not possible to theoretically determine who would take the interest if A should die at any time. A time gap would exist before A had a child, during which no child would be alive to be identified to take possession. The gift to A's children is nonvested.⁴⁸⁸

With this understanding of "vested," judges and attorneys should be able to understand and apply the proposed Rule ninety years after the creation of an interest or at any other time.

G. Summary

The Rule should be made to be easily understood. The Rule proposed in this Section accomplishes that purpose. The ninety-year fixed period of the proposed Rule removes the need for the use of measuring lives. The ninety-year fixed period measured by actual events is an effective wait-and-see rule, removing all remote possibilities from consideration.

Reformation of interests not vested at the end of the ninety-year period is provided for in the proposed rule, but will not always be possible. Therefore, the proposed Rule includes a provision directing the court to make a final determination that will settle the disposition of the invalid interests.

In order to avoid problems ninety years after creation of an interest, the proposed Rule defines "vested" and gives examples of vested and nonvested interests. This will allow attorneys and judges to understand and apply the proposed Rule in the future. Courts can use this Rule during and after the twenty-first century.

VI. CONCLUSION

The Rule evolved over several centuries, then achieved stability as the result of the work of Professor John Chipman Gray. But for more than half a century, new developments—wait-and-see, reformation, and

⁴⁸⁸ It should be noted that the gift to A's children is a class gift. For purposes of the Rule, class gifts are always treated as nonvested. Thus, whether A had any children alive at the time of the grant may be irrelevant.

USRAP's ninety-year wait-and-see period—significantly changed the Rule. These changes were not without opposition.⁴⁸⁹

In spite of opposition, several states enacted comprehensive statutory reforms.⁴⁹⁰ Then, USRAP successfully introduced a ninety-year wait-and-see period in at least twenty-seven states.⁴⁹¹ The wait-and-see period remains in effect in at least twenty-two of those states.⁴⁹²

Although some states repealed the Rule or enacted a Rule with a 360- or 1000-year period, only a few states truly have no Rule or surrogate for the Rule.⁴⁹³

The proposed Rule completely abandons the use of lives in being, substituting instead a fixed, number-of-years perpetuities period. Thus, the proposal completely eliminates all remote possibilities and the need to keep track of people, their births, deaths, and so on, greatly simplifying the understanding and application of the Rule. The proposed Rule utilizes wait-and-see and reformation. This means that many interests, otherwise invalid by the Rule, will be found valid. In addition, “vested” is defined to assist understanding and application of the Rule many years in the future. This is the easily understood and readily applied Rule Against Perpetuities that is needed for the future.

⁴⁸⁹ Professor Lewis M. Simes opposed the wait-and-see approach. See Lewis M. Simes, *Is the Rule Against Perpetuities Doomed? The “Wait and See” Doctrine*, 52 MICH. L. REV 179 (1953). Professor Jesse Dukeminier, an early champion of comprehensive statutory reform, strongly opposed USRAP's ninety-year wait-and-see period. See Dukeminier, *Ninety Years in Limbo*, *supra* note 250.

⁴⁹⁰ See *supra* note 15.

⁴⁹¹ See *supra* notes 22 and accompanying text.

⁴⁹² See *supra* notes 22–25 and accompanying text.

⁴⁹³ See *supra* and accompanying text notes 317–23.