

First Supplement to Memorandum 89-53

Subject: Study L-3013 - Uniform Statutory Rule Against Perpetuities
(Comments from Professor Dukeminier)

We have received a letter from Professor Jesse Dukeminier commenting on the draft *Tentative Recommendation Proposing the Uniform Statutory Rule Against Perpetuities*, attached to Memorandum 89-59. A copy of Professor Dukeminier's letter is attached to this supplement. (See Exhibit 1.) Professor Dukeminier believes that the existing California rule has worked well and should not be replaced by the wait-and-see scheme of the uniform act. He discusses a number of arguments against adopting USRAP in response to the staff draft distributed with the memorandum.

Also attached to this supplement is an article by Professor Ira Bloom, which Professor Dukeminier asked us to circulate. (See Exhibit 2.) Professor Bloom's article provides an overview of the controversy from a different perspective. He concludes that the wait-and-see approach is undesirable in any form.

Respectfully submitted,

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CA LAW REV. COMM'N

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June 9, 1989

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R E C E I V E D

Mr. John H. DeMouly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear John:

Re: USRAP

I have received your staff draft recommending the adoption in California of the Uniform Statutory Rule against Perpetuities, replacing Cal. Civ. Code § 715.5, which provides for judicial reformation of any interest that violates the Rule against Perpetuities. I wish to restate my opposition to it in summary fashion (well, at least in shorter form than my article).

I.

The Testimonials

I turn first to the testimonials, to get them out of the way of the issue. I observe in them the Uniform Steamroller in action. These testimonial letters are by most distinguished professors, many of them friends of mine, but almost all of whom are associated with the Uniform Laws in one connection or the other. It is important for the Commission to note that my article in UCLA Law Review criticizing USRAP was published after USRAP had been circulated among the Uniform Professorial Group and approved by the relevant bodies. The views expressed in these testimonials would be entitled to more credence, I suggest, had not the authors already committed themselves to USRAP before my criticism appeared. It is quite natural for persons to rise to defend their creative product from subsequent attack.

Although I am portrayed in some of these letters as the principal (or only) opponent of USRAP, this is so far from the truth as to border on misrepresentation. The opponents of wait-and-see are numerous and well-known, at least in academic circles. Indeed, it is particularly telling of what scholars outside the Uniform Group think of USRAP to observe that, since USRAP was promulgated, all of the published scholarly articles (save the Reporter's) have been negative or unenthusiastic about USRAP. I include my article, The Uniform Statutory Rule against Perpetuities: Ninety Years in Limbo, 34 UCLA

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L. Rev. 1023 (1987); Professor Bloom's article, Perpetuities Refinement: There Is an Alternative, 62 Wash. L. Rev. 23 (1987) (strongly preferring cy pres to USRAP); Professor Haskell's A Proposal for a Simple and Socially Effective Rule against Perpetuities, 66 N.C. L. Rev. 545 (1988) (arguing for the Delaware statute referred to below); and Professor Fletcher's Perpetuities: Basic Clarity, Muddled Reform, 63 Wash. L. Rev. 791 (1988) (arguing for wait-and-see as relevant events unfold plus cy pres).

II.

The Issue

The issue before the Commission is not what kind of wait-and-see statute is preferable, a matter I debated with Professor Waggoner. It is whether wait-and-see for 90 years is preferable to the cy pres doctrine we have in California.

Since this is the issue, the Commission should have the benefit of Professor Bloom's highly-regarded article comparing wait-and-see and cy pres. See Bloom, 62 Wash. L. Rev. 23, supra. It is not mentioned in the materials sent me. Bloom's article is far and away the best comparison of wait-and-see and cy pres yet published. With great care and insight, Bloom extensively documents the case against wait-and-see with empirical factual studies. He is quite critical of USRAP. His article, published a few months earlier than my own, makes a powerful case for specific correctives and cy pres. I am sending you a copy, and I ask you to circulate copies of it to persons who receive probate material from you. My UCLA Law Review article did not discuss cy pres in any depth; it only criticized USRAP. Now that the Commission is asked to recommend replacing our cy pres statute with wait-and-see, the bar should have before it the best case for cy pres of which I am aware.

I hope the Commission will not take the view that USRAP should be adopted just because it is a Uniform law. The fact that it is a Uniform law does not necessarily make it better than existing California law. Some Uniform laws have not been adopted in any state. Several have been adopted only in a few. The California Law Revision Commission has an obligation, I suggest, to resist the drum beat of the Uniform Group and decide independently whether USRAP is better for California than our existing reformation statute.

III.

What's Wrong with USRAP

The criticisms of wait-and-see have been three:

1. Wait-and-see extends the power of the dead hand to control property.

2. Wait-and-see makes title uncertain for the waiting period. Not knowing whether an interest is valid may cause serious inconvenience to the parties.

3. Perpetuities violations are so rare that wait-and-see legislation, with potential adverse consequences, is not justified. As Professor Bloom says, quoting Dean Richard Maxwell of UCLA in a similar situation, USRAP is tantamount to using "an atomic cannon to kill a gnat." Bloom, 62 Wash. L. Rev. at 25.

I address here only the extension of dead-hand control. USRAP, in my judgment, will extend the effective reach of the dead hand by about 50 percent and will validate for 90 years many trusts that are unsuitable or objectionable from a viewpoint of public policy. To understand this, we must consider what the effect of a 90-year waiting period will be on different kinds of will and trust drafters.

A. Trusts drafted by lawyers. Experienced estate planners almost always insert a perpetuities saving clause in their trust instruments. The saving clause is intended only to cure any overlooked perpetuities violation; it is not intended to actually govern the duration of the trust (save when a miraculous violation occurs). My inquiries of lawyers and trust companies in California and New York (see Dukeminier, 34 UCLA L. Rev. at 1045-46) revealed that almost all trusts end within 60 years. When governed by traditional perpetuities law, trusts rarely are drafted so as to exceed 60 years in actual duration.

A 90-year perpetuities period gives lawyers an easy way to draft a 90-year trust. Will they do this? It seems highly likely they will where tax savings can be gained thereby. Raymond Young of Boston, a member of the USRAP drafting committee, predicted in 12 Probate Notes 245 (1987) that under USRAP lawyers would draft 90-year trusts to avoid the generation-skipping transfer tax.¹ Mr. Young wrote:

[T]he 90 year permissible period for vesting (with perhaps another eighty years additional for vested interests to run their course), coupled with a generation skipping transfer tax exemption of \$1 million (\$2 million per married couple), may lead to a great increase in long term trusts. Professional fiduciaries and financial planners can be expected to market such trusts aggressively, with testators feeling that this is an opportunity they must take advantage of.

1. The Internal Revenue Code of 1986 imposed a generation-skipping transfer tax of 55% at the death of the life beneficiary of a trust, when estate tax is not imposed on that event. This effectively ends the exemption of life estates from death transfer taxes. The Code provides an exclusion from GST tax of \$1 million (\$2 million per married couple) settled in a trust for as long as the local perpetuities period allows.

The estate planning literature is now beginning to generate suggestions that lawyers should draft "perpetuities period" trusts to take advantage of the generation-skipping tax exemption. See, for example, Plaine, 13 Prob. Notes 18 (1987).

Professor Bloom agrees with Mr. Young. If a 90-year perpetuities period is adopted, he writes, "the estate planning bar will likely encourage their wealthy clients to prolong the duration of trusts to obtain tax benefits." Bloom, 62 Wash. L. Rev. at 54.

In his report to the California Law Revision Commission recommending USRAP, Mr. Collier suggests that lawyers will not start drafting 90-year trusts. The USRAP Drafting Committee, he reports,

made inquiries in the State of Wisconsin, which has no rule against perpetuities [applicable to trusts] in its law, and found that there was no tendency of trusts from other jurisdictions to move into Wisconsin to avoid the limitation of the rule against perpetuities nor was there any practice among Wisconsin lawyers, so far as could be ascertained, to write documents creating trusts in perpetuity. Notwithstanding Civil Code Section 715.6, lawyers in California do not normally draft 60-year trusts.

The past practice of Wisconsin lawyers is not surprising. They drafted trusts lasting about as long as those drafted by California lawyers because these trusts are suitable for any reasonable client's needs. In California, lawyers have not taken advantage of the maximum perpetuities period allowed by lives in being plus 21 years; their clients don't need it to carry out their plans. Neither have California lawyers drafted 60-year trusts. A 60-year trust doesn't fit the actual lives and deaths of the client's beneficiaries, and if the client is interested in a really long trust, the lawyer can create a trust for about 100 years using actual lives. The generation-skipping tax, however, drastically changes this picture by putting tax pressure on clients and lawyers to draft long-term trusts.

I do not see in Mr. Collier's report nor in the staff report any reference to the generation-skipping transfer taxation exemption and its probable effect on the increase in long-term trusts. This ought not to be hidden under a lot of technical discussion. The proponents of USRAP ought to come right out and say that an advantage of USRAP is that it enables estate planners to easily draft a long-term (90-year) trust for clients seeking tax advantages.

Now it may be asked: "Well, if lawyers are going to draft long-term trusts to take advantage of GST tax exemptions, why not make it easy for them by using a 90-year period rather than lives-in-being-plus-21-years to govern the trust duration?" That is a fair question, and an important one for the Commission to face. My answer is this: I do not believe in making it too easy to draft long-term dynastic trusts. Persons who want such trusts should go to experienced estate planners who can, under the common law Rule, draft a

trust lasting approximately 100 years, and the law should put pressure on dynasts to seek an expert's knowledge and competence. In drafting trusts to last several generations, and through unpredictable changes in circumstances, knowledgeable estate planners put in appropriate powers (both in the trustee and in the beneficiaries) to give flexibility to deal with changes in the family, in the tax laws, or in the economy. Thus families whose ancestor consulted a knowledgeable specialist have little to fear from a trust. But families whose ancestor consulted a nonspecialist, who "easily" drafted a 90-year trust, may be straitjacketed with unsuitable and unchangeable provisions.

If the public is served by routing people who want dynastic trusts to knowledgeable specialists, then the law should not make it easy for others to create these trusts. Mr. Raymond Young's remarks quoted above implicitly contain a warning: If 90-year trusts are permitted, he expects "professional fiduciaries and financial planners . . . to market such trusts aggressively." Will such trusts be well-drafted, and individualized for the particular family, or will they be routinized -- resulting in many problems later? There is, I submit, a substantial risk of the latter.

In addition to opening the public to dangers from inexpert estate planners, USRAP may bring do-it-yourself books into the 90-year trust market. The do-it-yourself wills shelf in the UCLA law library is bulging and well-thumbed. As I look at it, one book that jumps out at me is Dacey's *How to Avoid Probate!*; complete with will and trust forms of every sort. If a 90-year perpetuities period is adopted, I would expect Dacey's publishers to have a new form for a 90-year trust, and probably a badly drafted one. If you think that millionaires do not consult Dacey and similar manuals, you should remember that, with rising real estate prices, there are many ordinary, middle-class Californians sitting on million-dollar houses. Some of these people, fearing the effect of federal estate and generation-skipping taxes on their inheritable capital, may decide to use easy 90-year trust forms, with unfortunate results for their beneficiaries. It will be sad if the law lets this happen.

Because it is difficult to understand, the Rule against Perpetuities exerts a socially beneficial pressure against the easy creation of long-term trusts. Perhaps it is debatable whether the increase in dead-hand control from the rich seeking private tax benefits is in society's interest. But, in any event, it is surely not in society's interest to make it easy for the dead hand to increase its grasp.

B. Trusts in homemade wills. Apart from controlling family trusts, another purpose of the Rule against Perpetuities is to protect the public from testators exercising their power over resources in socially objectionable ways for a long period after their deaths. USRAP permits these caprices to continue for 90 years. Here are some examples (variations on actual cases):

1. A bequest in trust for the care of my dog Trixie and her progeny.
2. A bequest in trust forever to take care of my private family mausoleum.
3. A bequest in trust forever to serve free California wine at the state bar conventions.
4. A bequest in trust forever to support the Rock Mountain Hunting Club.
5. A bequest in trust for 200 years, to accumulate the income, and then to pay accumulated income and principal to my oldest descendant bearing my surname then living.

The first four of these bequests are void because the noncharitable purpose trusts can endure more than lives in being plus 21 years. The fifth bequest is also void for violation of the Rule. Under USRAP the trusts established under these bequests are apparently valid for 90 years!

The extension of dead-hand control in these cases to 90 years seems highly objectionable as a matter of public policy. Remember: The 90-year period is not applicable only to trusts drafted by lawyers. It is applicable to trusts drafted by anyone. It is applicable to what Professor Langbein calls the "trailer park" practice of law.

IV.

The Virtues of Cy Pres

The cy pres statute in California limits itself to what I regard as the only proper object of perpetuities reform: curing the perpetuities violation. It has very little potential for extending the dead hand, certainly none at all for creating 90-year trusts. Almost without exception, cy pres has been approved by academics. The only disagreement is whether reformation should take place immediately, at the testator's death (as California law provides), or at the end of a wait-and-see period.

The main objection to immediate cy pres is that reformation of a perpetuities violation requires a lawsuit, which is costly. If we wait and see, reformation may not be necessary. On the other hand, a reformation lawsuit at the end of 90 years might be a nightmare. Professor Bloom predicts it will result in complex litigation with "staggering fees" to ascertain the testator's intent after 90 years. Bloom, 62 Wash. L. Rev. at 46. Professor Fletcher observes, "The Uniform Act postpone[s] the availability of reformation for a very long time. Evidence will be sketchy and unreliable; affected people will not be able to plan, and the opportunity to effect a substantial

shortening of the time for certainty will have passed." Fletcher, 63 Wash. L. Rev. at 838 n.64.

The objection to immediate cy pres -- the cost of a lawsuit -- seems considerably overstated. California Civ. Code §715.5, providing for cy pres, was enacted in 1963. In the 26 years since there apparently have been only two reported cases in California reforming perpetuities violations. In one, an age contingency of 25 was reduced to 21 in order to save the gift. Estate of Ghiglia, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974). In the other, the draftsman had overlooked the presumption of fertility; the court saved the gift by construing the class of beneficiaries to exclude unborn children of unborn children. Estate of Grove, 70 Cal. App. 3d 355, 138 Cal. Rptr. 684 (1977). Two cases in 27 years does not support a claim of costly litigation.

The reason why there is little litigation under a cy pres statute, I suggest, is that perpetuities violations rarely occur and when they do they fall into known fact patterns. The reform a court will adopt in a particular fact pattern usually is either ruled by precedent or is fairly obvious. The two California cases cited above are examples of the two most common violations of the perpetuities rule: (1) inserting age contingencies over 21 and (2) overlooking the presumption of fertility (the "fertile octogenarian").² The California courts have indicated how these will be dealt with, so lower court judges can construe similar wills accordingly. The "unborn widow" problem has been specifically solved by a statutory provision that a gift to the widow of a person alive at the testator's death is conclusively presumed to be a gift to a person in being. Cal. Civ. Code § 715.7. These two California cases and the statute solve the three problems that are always used to justify reform.

If the Commission takes seriously a claim that our cy pres statute has resulted in costly fees in unreported litigation, I think it should undertake an empirical study among lawyers to assay the validity of this claim. If this claim can be supported, there is a very easy solution: Adopt the specific correctives to perpetuities violations provided by the New York statutes, and use cy pres only when these specific correctives are not applicable. This is Professor Bloom's preferred solution.

As for myself, seeing no evidence that cy pres results in costly litigation, I believe the California statute is an excellent -- indeed, the best -- perpetuities reform. I would stick with it.

2. In research I did into over a hundred years of Kentucky cases in 1960, I found that 55% of perpetuities violations involved an overlooked presumption of fertility and 22% involved excessive age contingencies. Dukeminier, Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 3, 110-12 (1960).

V.

The Second Best Alternative: Abolish
the Rule against Perpetuities Entirely
and Have Only a 110-Year Perpetuities Period

USRAP is a contraption worthy of Rube Goldberg. It preserves the common law Rule, with all its ancient lore and technicalities. It preserves the ephemeral distinction between vested and contingent interests, the distinction between "vested in interest" and "vested in possession," the class gifts rule and the exceptions for gifts to subclasses and per capita gifts. These are not abolished. In fact, they are spelled out on page after page after page in USRAP and its commentary.

USRAP makes it terribly hard for teachers. On the one hand, we are supposed to teach students the common law Rule, which has not been abolished, while on the other hand, we must tell them that no instrument they draft can possibly violate the Rule during their lifetimes. Does anyone think the students will have any interest in learning the technicalities of the Rule?

There is merit in the argument that we ought to get rid of all this ancient learning. And there is a fairly easy way of doing this: Abolish the common law Rule's application to trusts and provide that no trust can endure more than 110 years. Delaware has done this. Delaware Code Ann. tit. 25 § 503 (Supp. 1988), enacted in 1986, provides that the common law Rule against Perpetuities does not apply to trusts. At the end of 110 years, each trust must terminate, if it has not already terminated, and the principal is distributed as provided in the trust instrument or, if there is no provision, to the income beneficiaries.

As I understand it, the reason why USRAP does not abolish the common law Rule is because the 90-year period might be too short to cover some very exceptional trust where the life beneficiary was an infant when the trust was created. The life beneficiary might live longer than 90 years and thus the remainder might vest at the end of a life in being more than 90 years after creation of the trust. The Delaware statute takes that possibility into account by providing for a 110-year period; no one -- in this country -- lives to 110.

USRAP makes it very easy for the dead hand to extend its power for 90 years. This is, I have argued, very objectionable. Nonetheless, if USRAP had really simplified the law and abolished all the arcane mysteries of the Rule against Perpetuities, as applied to trusts, there would be something good to say about USRAP. It would have done us a good in exchange for the bad. But there are no compensating benefits in USRAP.

If the Law Revision Commission decides that the dead hand's reach should be extended for a period of years in gross, then I strongly urge it to abolish application of the Rule against Perpetuities to trusts. If we must have more dead-hand rule, for private tax benefits, the public should get a compensating

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benefit. The Delaware statute is preferable to USRAP. Professor Haskell recommends the Delaware approach in his article in 66 N.C. L. Rev. 545, referred to above.

I am far from convinced, however, that the Delaware statute is preferable to cy pres.

VI.

USRAP and Restrictions on Land Use

USRAP is inconsistent with the policy underlying Cal. Civ. Code § 885.030. Under this statute powers of termination (including what are sometimes known as possibilities of reverter and rights of entry) are valid for 30 years only. After that time, they terminate. A comparable executory interest will be valid for 90 years under USRAP. To illustrate:

Illustration 1: Q conveys land to Charity, but if it ceases to use the land for designated charitable purpose, Q has power of termination. Q's power ends after 30 years under Cal. Civ. Code § 885.030.

Illustration 2: Q conveys land to Charity, but if it ceases to use the land for designated charitable purpose, then to A and her heirs. A has an executory interest valid for 90 years under USRAP.

Surely it makes no difference in policy whether Q or A holds the forfeiture interest; either interest ties up the use of land. Q and A should be treated alike and given the same time period for the existence of their interests.

As I recall, this matter arose before the Commission many years ago when § 885.030 was recommended. At that time, the executory interest case (Illustration 2) was not dealt with because executory interests are almost always drafted so as to violate the Rule against Perpetuities. It was assumed that void executory interests would be reformed by a court to be valid either for A's life or for 21 years. They were thus deemed to have approximately the same duration as powers of termination (30 years). If USRAP is adopted, however, executory interests are valid for 90 years, which is three times as long as the period applicable to powers of termination.

USRAP brings a potential malpractice trap here. A lawyer can get the USRAP 90-year period for his client Q by using two pieces of paper: First piece, Q conveys as in Illustration 2; second piece, A (a straw) conveys her executory interest to Q. Q now has an executory interest good for 90 years. If a lawyer does not use two pieces of paper when the client asks for a forfeiture restraint for as long as the law allows, is the lawyer guilty of malpractice?

VII.

The Staff's Reasons

The Commission staff draft, at page 9, summarizes its reasons for supporting USRAP. I have responded to the fourth and fifth reasons earlier in this letter. I now have some brief comments on the first three reasons given by the staff.

First, the staff draft says USRAP is "an easily administered rule, eliminating a number of complexities and ambiguities associated with the traditional rule." This is a most mysterious claim, unless made tongue-in-cheek. USRAP does not abolish the complexities of the common law Rule. They all remain with us and are spelled out at excruciating length in the staff commentary.

As for the claim that USRAP is "easily administered," only a wild Irish imagination could so portray a statute that requires 70 single-spaced typed pages to explain! Anyone who contemplates voting for USRAP should try to read it through. It is tough going, tougher than Gray's original classic. (And Gray claimed, too, that he was describing a "clear and simple" rule!) Understanding USRAP is especially difficult because of the use of idiosyncratic language -- such as "validating side of the rule" and "invalidating side of the Rule" -- which is not in the current vocabulary of lawyers.

The staff's second reason for supporting USRAP is that it offers a significant degree of unity among the states. I believe the staff is overly optimistic. I have labored in this field for 35 years, and unified reform is an illusion. In fact, Professor Leach did not favor it; he thought states should be laboratories for different reforms, and time would tell which was better.

The key state in any unified reform is New York, which has far more wealth in private trusts than any other state. New York reformed the Rule in 1960 by adopting specific cy pres correctives for most perpetuities violations. I understand that New Yorkers are quite satisfied with this. The center of opposition to wait-and-see has been New York. Professor Powell, who taught at Columbia for almost 40 years and wrote a great treatise on property, led the opposition. The opposition continues in professors in many New York law schools: Professors Berger at Columbia, Bloom at Albany, Feters at Syracuse, and Rohan at St. John's. The New York legislature has always been more jealous of the power of the dead hand than any other legislature. Before the 1960 reforms, New York had the tightest perpetuities rule of any state. The New York estate planning bar -- highly experienced and knowledgeable and well-compensated -- has carefully guarded its territory. I cannot believe the New York estate planning bar would want to open the door to financial advisers peddling 90-year trusts. I am told by professors and lawyers in New York that USRAP has no chance of adoption there.

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As for the other states, the opposition to wait-and-see continues to be widespread, strong, and unabating. Many states have reform legislation enacted in the 1950s and 1960s, which -- judging from the reported cases -- has resulted in few problems. Likely these states will prefer to stay with a tried and workable reform like cy pres than to risk adopting a statute as controversial as USRAP. For example, in a recent Mississippi case, *Estate of Anderson*, 541 So.2d 423 (1989), the Supreme Court extensively reviewed all perpetuities reform and announced it was completely satisfied with its own reforms, which include cy pres. The court specifically referred to USRAP and said, "there would appear no need here for legislation on the subject."

Professor Bloom concludes that USRAP will not be adopted by a significant number of states because the Rule against Perpetuities is "not creating any real problems in this country. . . . Adoption of this complex system to deal with the isolated violations [of the Rule]. . . cannot be justified." Bloom, 62 Wash. L. Rev. at 58.

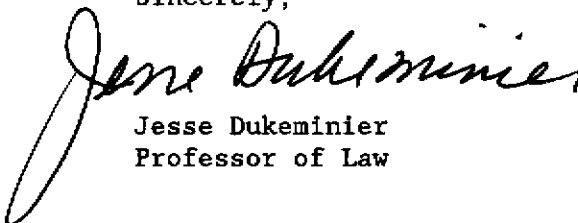
The third reason the staff draft presents for USRAP is that USRAP eliminates commercial transactions from the Rule. It is my belief that the California Supreme Court went a long way in doing just that in *Wong v. Di Grazia*, 60 Cal. 2d 525, 386 P.2d 817 (1963). But if a specific statute on the matter is desirable, it can be a short statute of a paragraph.

VIII.

Conclusion

I believe California's simple cy pres statute has worked well and is far preferable to the formidably complex provisions of USRAP. I hope the Commission will recommend leaving our statute in place, and not recommend that we embark on the uncharted and troubled waters of a 90-year wait-and-see period.

Sincerely,



Jesse Dukeminier
Professor of Law

JD/2018/dhb

Enc: Bloom Article

EXHIBIT 2

PERPETUITIES REFINEMENT: THERE IS AN ALTERNATIVE

Ira Mark Bloom*

A new uniform law is in the offing: a Uniform Statutory Rule Against Perpetuities (USRAP).¹ The law is based on the wait-and-see approach to the common law Rule Against Perpetuities.² Under this approach, a waiting period is prescribed to see whether the contingency which renders a nonvested interest void under the common law Rule actually occurs.

The wait-and-see cause was initially championed by Professor Leach, who in 1952 asked: "Why should we not 'wait and see' to determine whether the contingency happens within the period of the Rule?"³ By 1979, Professor Casner, Reporter for the Restatement (Second) of Property, convinced the American Law Institute to adopt a version of the wait-

* Professor of Law, Albany Law School of Union University, B.B.A. 1966, City College of New York; J.D. 1969, Syracuse University. The author expresses his appreciation to Martin Belsky, Dean of Albany Law School, and to Professors Samuel Fetters (of Syracuse), John Gaubatz (of Miami), Kenneth Joyce (of Buffalo), John Peschel (of NYU), and John Welsh (of Albany) for their helpful comments. The valuable student assistance of Arthur Jackman, Jr., Karen Martell, and David Prusik is gratefully acknowledged.

1. The National Conference of Commissioners on Uniform State Laws approved a Uniform Statutory Rule Against Perpetuities (USRAP) at its August, 1986 meeting in Boston, Massachusetts. UNIF. STATUTORY R. AGAINST PERPETUITIES (1986) [hereinafter Act or USRAP]. The Act is the culmination of three years of work by the Drafting Committee on the Uniform Statutory Rule Against Perpetuities Act, including its Reporter-Draftsman, Professor Lawrence Waggoner of the Michigan Law School. See Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 INST. ON EST. PLAN. ¶ 700 (1986) [hereinafter Waggoner, *Progress Report*].

The Conference has completed all work on the statutory portion of the USRAP, including review by the Conference's Style Committee. The Prefatory Note and Comments to the Act must still be finalized, however. Letter to the author from Professor Lawrence Waggoner (Sept. 19, 1986).

Official publication of the USRAP, with Prefatory Note and Comments, is expected in early 1987. The Act will also be submitted to the House of Delegates of the American Bar Association for its anticipated approval in early 1987. Telephone interview with John M. McCabe, Legislative Director, National Conference of Commissioners on Uniform State Laws (Aug. 12, 1986).

Professor Waggoner graciously furnished the author with advance copies of his *Progress Report* article and various USRAP drafts. When appropriate, this article provides page references to the Prefatory Note and Comments contained in the April 30, 1986 draft version of the USRAP. UNIF. STATUTORY R. AGAINST PERPETUITIES (Discussion Draft Apr. 1986) [hereinafter DRAFT USRAP (Spring 1986)]. Subject to minor changes and polishing, it is anticipated that the official version of the Act will be comparable to the Spring 1986 Draft.

2. The wait-and-see component of the Uniform Statutory Rule Against Perpetuities (USRAP) is set forth *infra* note 71.

3. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 730 (1952) [hereinafter Leach, *Reign of Terror*].

and-see approach.⁴ If the USRAP is widely adopted by the states,⁵ the wait-and-see advocates will have succeeded in affecting "a fundamental modification of the common law Rule Against Perpetuities."⁶

The purpose of this article is twofold: first, to demonstrate why, in response to Professor Leach's basic question, we should not "wait-and-see"; second, to offer constructive alternatives to the wait-and-see approach.

Part I of this article identifies those areas of agreement between wait-and-see advocates⁷ and opponents,⁸ including the acknowledged desirability for some rule against perpetuities. In part II, the case for wait-and-see is summarized and the three major wait-and-see methods are described. These methods include: (1) the causal relationship method, (2) a measuring lives version under the Restatement (Second) of Property, and (3) the newly-unveiled proxy method under the USRAP. A recent debate between Professors Dukeminier and Waggoner highlights the controversy among

4. At the American Law Institute Proceedings in 1978, Director Herbert Wechsler set the stage for the debate over wait-and-see: "[T]he rule against perpetuities that I first learned about fifty years ago and never imagined that people would ever argue about (laughter), or was sufficiently important to argue about, is going to be the subject of a great debate." *Proceedings of 1978 Annual Meeting*, 55 A.L.I. PROC. 45 (1978) [hereinafter *1978 ALI Proceedings*] (remarks of Dir. Wechsler).

In the end—after two years of heated debate—Professor Casner prevailed over Professors Powell, Berger, Lusky, and other wait-and-see opponents. *Id.* at 222-309; *Proceedings of 1979 Annual Meeting*, 56 A.L.I. PROC. 424-81, 483-91, 521 [hereinafter *1979 ALI Proceedings*]. The wait-and-see approach is reflected in Chapter I of the volume on donative transfers: *RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) §§ 1.1-1.6* (1983).

5. At its August, 1986 meeting, the National Conference of Commissioners on Uniform State Laws recommended that the USRAP be enacted in all the states. See *infra* notes 201-07 and accompanying text for the status in early 1986 of the Rule Against Perpetuities in the United States.

6. L. WAGGONER, *FUTURE INTERESTS IN A NUTSHELL* 300 (1981) [hereinafter *L. WAGGONER, NUTSHELL*].

7. The late Professor Leach is the acknowledged godfather of the wait-and-see movement. As Professor Waggoner notes: "[T]hrough his writings [he] became such a devoted proponent of the concept that it has come to be identified with him." *Id.* at 293; see R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 192-93 (1966) [hereinafter *LYNN*]. Professor Leach's colleague, Professor Casner, significantly advanced the wait-and-see cause by his efforts as Reporter for the Restatement (Second) of Property. See *supra* note 4. Other advocates include Professors Dukeminier and Waggoner, and the late Professor Maudsley. See *infra* note 9 (citing recent publications by Dukeminier and Waggoner); Maudsley, *Perpetuities: Reforming the Common-Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355 (1975) [hereinafter *Maudsley, How to Wait and See*].

8. The late Professors Mechem, Powell, and Simes steadfastly opposed the wait-and-see approach. See, e.g., Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965 (1959) [hereinafter *Mechem, Further Thoughts*]; Powell, *How Far Should Freedom of Disposition Go?*, 26 A.B. REC. 8 (1971); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179 (1953) [hereinafter *Simes, The "Wait and See" Doctrine*]. Other opponents include Professors Berger and Lusky. See *1978 and 1979 ALI Proceedings*, *supra* note 4; Fetters, *Perpetuities: The Wait-and-see Disaster*, 60 CORNELL L. REV. 380 (1975) [hereinafter *Fetters, The Wait-and-see Disaster*]; 5A R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 827F[3] (P. Rohan ed. 1985). The Rohan work provides an extensive perpetuities bibliography for works before 1980. *Id.* at ¶ 827G.

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scholars regarding the appropriate methodology under a wait-and-see approach.⁹

Part III presents the case against the wait-and-see approach by addressing several underlying, but unfounded, assumptions. The most crucial assumption under wait-and-see is that a severe enough problem exists to warrant its adoption. Research, however, reveals a perpetuities violation averaging only one relevant case per year during the eight-year period, 1978-1985.¹⁰

Part IV makes the case for refining the common law Rule, based in part on a critique of an erroneous decision by the Indiana Supreme Court in 1985.¹¹ In addition, a statutory scheme for refinement is offered. Although the statutory package partially relies on existing or proposed solutions, the overall package has never been detailed.

In the end, rejection of wait-and-see legislation generally, and the USRAP specifically, is urged. Adopting the wait-and-see approach to the common law Rule Against Perpetuities would be tantamount to buying and using "an atomic cannon to kill a gnat."¹²

1. AREAS OF AGREEMENT BETWEEN WAIT-AND-SEE ADVOCATES AND OPPONENTS

There is a general consensus concerning various aspects of the Rule Against Perpetuities. That the Rule serves a useful societal purpose by

9. Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985) [hereinafter Dukeminier, *The Measuring Lives*]; Waggoner, *Perpetuities: Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714 (1985) [hereinafter Waggoner, *Perspective*]; Dukeminier, *A Response By Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985); Waggoner, *Rejoinder By Professor Waggoner*, 85 COLUM. L. REV. 1739 (1985); Dukeminier, *Final Comment by Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985) [hereinafter Dukeminier, *Final Comment*].

10. Perpetuities cases for the twenty-one-year period, 1957-1977, were identified in a memorandum by Professor Powell, RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) 127, 143, 148-54 (Tent. Draft No. 1, 1978), reprinted in 5A R. POWELL, THE LAW OF REAL PROPERTY ¶ 827H [hereinafter Powell Memorandum]. For purposes of this article, I have updated Professor Powell's efforts by identifying American cases during the eight-year period, 1978-1985, which involved the Rule Against Perpetuities. A Lexis search in 1986 produced all cases containing the phrase "Rule Against Perpetuities." In addition, cases (including cases published in the New York Law Journal) which were digested under the heading "Perpetuities" were identified.

The relevant cases from this universe are those which would be governed by the wait-and-see approach to the common law Rule Against Perpetuities under the USRAP. See *infra* note 71 and accompanying text. Cases which did not void an interest under the common law Rule, as well as cases which did not specifically involve a question of validity, are not considered relevant cases.

11. *Merrill v. Wimmer*, 481 N.E.2d 1294 (Ind. 1985), vacating 453 N.E.2d 356 (Ind. Ct. App. 1983). *Merrill* is discussed *infra* in text accompanying notes 221-34.

12. The quotation was Professor (then Dean) Richard Maxwell's description of California's legislative response in 1963 to a commercial transaction case. Dukeminier, *Perpetuities Revision in California: Perpetual Trusts Permitted*, 55 CALIF. L. REV. 678 (1967) [hereinafter Dukeminier, *Perpetuities Revision*].

limiting dead hand control is a viewpoint almost unanimously accepted.¹³ Further, most would agree that the perpetuities time period—lives in being plus 21 years—establishes an acceptable outer limit for dead hand control.¹⁴ An English Law Reform Committee concluded as follows: "In the absence of any compelling reasons, whether based on public policy or otherwise (and we can see none), we prefer to leave the permitted period as it is"¹⁵

There is also general agreement on how the common law Rule operates. Based on Gray's formulation,¹⁶ interests which will not necessarily vest (or fail to vest) within lives in being plus 21 years are void from their inception.¹⁷ Moreover, vested interests which must either vest (or fail to vest) within the perpetuities period may be invalidated under the infectious invalidity doctrine.¹⁸ Professor Leach described the doctrine's application as follows:

When part of the gifts in a will or trust violate the Rule, the courts inquire whether what is left can stand by itself . . . without serious distortion of the dispositive scheme of the testator or settlor. If the answer is negative then other gifts—prior, concurrent, or subsequent—are also stricken out.¹⁹

The doctrine of infectious invalidity suggests another point of agreement. The transferor's intent should be carried out unless effectuation of

13. The English Law Reform Committee which recommended the wait-and-see approach stated as follows: "Granted the necessity for placing some time limit on the vesting of future interests, which we take to be beyond argument" LAW REFORM COMMITTEE, FOURTH REPORT, CMND. NO. 18, ¶ 5 (1956) (emphasis added) [hereinafter ENGLISH REPORT].

The Restatement (Second) of Property provides extensive justification for a rule against perpetuities. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) 8-10 (1983) (Introductory Note); see also L. SIMES, PUBLIC POLICY AND THE DEAD HAND 58-63 (1955) [hereinafter, L. SIMES, PUBLIC POLICY].

14. See, e.g., L. SIMES, PUBLIC POLICY, *supra* note 13, at 68. ("[T]he period of the Rule would seem still to be a workable and practical one."); Waggoner, *Progress Report*, *supra* note 1, ¶ 703.4 ("[T]he traditional period works well enough as it is."). Although Professor Casner suggested the appropriateness of shortening the period, he detected no movement to warrant a departure from the traditional period in the Restatement (Second), 1978 *ALI Proceedings*, *supra* note 4, at 226-27 (remarks of Professor Casner).

15. ENGLISH REPORT, *supra* note 13, at 6.

16. "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." J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942) [hereinafter GRAY]. See generally Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982).

17. The common law Rule also applies to powers of appointment, including whether a power was validly created and if so, whether it was validly exercised. See L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1271-1277 (2d ed. 1956 & Supp. 1985).

18. *Id.* §§ 1262-1264; see *infra* note 239 and accompanying text (providing recent examples of infectious invalidity doctrine).

19. Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124, 1147 (1960) [hereinafter Leach, *Hail Pennsylvania!*].

that intent contravenes the public policy behind the Rule Against Perpetuities.²⁰ Further, most would agree that a transferor did not intend to extend dead hand control for too long a period, even though the Rule may be violated by some technicality.²¹ All would agree that Professor Leach masterfully identified the major areas of technical violation: the administrative contingency, the fertile octogenarian, and the unborn widow.²² There is less agreement on whether a violation caused only because an age requirement exceeds 21 years constitutes a technical violation;²³ this article assumes that such violations are technical. Finally, the article treats the all-or-nothing rule as falling within the technical violations area.²⁴

There is also agreement that perpetuities violations caused by technicalities may be avoided by competent drafting.²⁵ For example, the unborn widow problem can be avoided by specifying in the instrument that the widow must have been alive when the interest was effectively created.²⁶ At a minimum, a violation can be avoided by a saving clause. Professor Casner could not have put it more simply:

[T]here is absolutely no reason why anybody drafting a trust today should violate the rule against perpetuities. All you have to do is to put in a provision that 21 years after the death of A, B, C and D—naming people—this trust will terminate²⁷

20. For example, an A. L. I. member stated: "The objective of the law in this area, to me, should be to carry out the conveyor's intent to the greatest extent possible, subject only to restrictions on public policy." 1978 ALI Proceedings, *supra* note 4, at 269 (remarks by John H. Young).

21. Professor Waggoner considers all perpetuities violations to be mistakes. See Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1719-20, 1782-85 (1983) [hereinafter Waggoner, *Perpetuity Reform*].

22. See Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643-46 (1938) [hereinafter Leach, *Perpetuities in a Nutshell*]. The literature has been overwhelmed with illustrations and discussions of these traps. See, e.g., Waggoner, *Progress Report*, *supra* note 1, ¶ 701.2 nn.9-11; Waggoner, *Perpetuity Reform*, *supra* note 21, at 1726-47; L. WAGGONER, *NUTSHELL*, *supra* note 6, at 198-216 (three classic booby traps). USRAP drafts also provide examples and discussion of these traps. See, e.g., UNIF. STATUTORY R. AGAINST PERPETUITIES at 25-27 (Discussion Draft Feb. 1986) (examples 9-11) [hereinafter DRAFT USRAP (Winter 1986)]. Presumably these examples will appear in the official version of the Act. See *supra* note 1.

23. See Waggoner, *Perpetuity Reform*, *supra* note 21, at 1726, 1748.

24. Under this rule, class gifts may be invalidated if there is a possibility of fluctuation in the class beyond the perpetuities period. See Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 HARV. L. REV. 1329 (1938) [hereinafter Leach, *Gifts to Classes*].

25. See, e.g., Waggoner, *Perpetuity Reform*, *supra* note 21, at 1724-26.

26. See, e.g., *DeMello v. DeMello*, 19 Mass. App. Ct. 68, 471 N.E.2d 406 (1984), *review denied*, 393 Mass. 1106, 474 N.E.2d 182 (1985).

27. 1978 ALI Proceedings, *supra* note 4, at 240. A saving clause (referred to by some as a "savings clause") also provides for a "gift over" on trust termination. See *infra* note 178 (example of saving clause).

Finally, there is a unanimous feeling among those who come in contact with it that the common law Rule Against Perpetuities is exceedingly complex. These include law students, law professors, lawyers, judges, legislators, tax personnel, and, of course, nonlawyers. Gray spoke as follows:

There is something in the subject which seems to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar. The study and practice of the Rule against Perpetuities is indeed a constant school of modesty. A long list might be formed of the demonstrable blunders with regard to its 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.²⁸

Professor Leach also acknowledged the Rule's complexity: "I confess to some predisposition to being overwhelmed on this subject."²⁹

II. THE CASE FOR THE WAIT-AND-SEE APPROACH TO THE COMMON LAW RULE AGAINST PERPETUITIES

A. *Rationale*

The wait-and-see approach developed in response to the alleged harshness of the common law Rule Against Perpetuities.³⁰ Under the common law Rule, a nonvested interest must be validly created; that is, it

28. GRAY, *supra* note 16, at xi.

29. Leach, *Forward to J. DUKEMINIER, PERPETUITIES LAW IN ACTION*, at v (1962). Professor Leach's difficulties with the Rule are suggested in his famous Nutshell article wherein he provided the following example to illustrate the severability doctrine:

[E]xample 34. T bequeaths \$1000 to the first son of A who shall become a clergyman; but if no son of A becomes a clergyman, then to B. [The gift over to B "if no son of A becomes a clergyman" plainly includes at least two contingencies: (a) A having no son—which must occur, if at all, at A's death; (b) A having one or more sons, none of whom becomes a clergyman—which cannot be known until the death of A's sons, a time well beyond the period of perpetuities.] A dies without ever having had a son. Nevertheless, the gift to B fails.

Leach, *Perpetuities in a Nutshell*, *supra* note 22, at 655.

The reader (typically a law student) is clearly left with the impression that the disposition to the first son of A is valid. In fact, the disposition to the first son of A is invalid for the same reason that the disposition to B is invalid. The event—a son of A becoming a clergyman—will not necessarily occur within lives in being and 21 years. In effect, the \$1000 was not validly disposed of under Leach's example.

To his credit, Professor Dukeminier recently acknowledged an error he made in a wait-and-see problem in his widely-adopted casebook, *WILLS, TRUSTS AND ESTATES* (with S. Johanson). Dukeminier, *The Measuring Lives*, *supra* note 9, at 1706 n.152.

30. See Leach, *Reign of Terror*, *supra* note 3.

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must be certain on the effective date of creation that the contingency or contingencies which make the interest nonvested will be resolved within the perpetuities period. Under this what-might-have-been approach, nonvested interests can be voided under the Rule despite the virtual certainty of the remote event actually occurring within the perpetuities period.

Wait-and-see advocates object to the common law Rule which operates "in a sledge-hammer fashion" to defeat the transferor's intention.³¹ The title of one of Professor Leach's articles evokes our sympathies (and enrages us about the injustices of the common law Rule): *Slaying the Slaughter of the Innocents*.³² The injustices of invalidity are further compounded. Property winds up in the hands of unintended—instead of intended—beneficiaries.³³

The advocates further condemn the Rule because it penalizes the intended beneficiaries for the mistakes of lawyers.³⁴ Because violations can easily be avoided, the common law Rule only traps the unwary lawyer.³⁵ Further, it is alleged that the wealthy will not suffer because they have competent counsel.³⁶ As described by Professor Dukeminier, "[T]he wait-and-see doctrine is presented as consumer-protection legislation for the average consumer of legal services."³⁷

B. Wait-and-see Solutions

According to wait-and-see advocates, a system must be designed "to grant interests that would have been invalid under the common law Rule a reasonable chance to be valid."³⁸ Under such a system, a drastic reduction in litigation would allegedly result because the remote event would most likely occur within the waiting period.³⁹

31. Waggoner, *Progress Report*, *supra* note 1, ¶ 701.

32. Leach, *Perpetuities: Slaying the Slaughter of the Innocents*, 68 *LAW Q. REV.* 35 (1952).

33. See, e.g., Maudsley, *How to Wait and See*, *supra* note 7, at 364. After positing that perpetuities violations are caused by mistakes, Professor Waggoner invokes the equitable principle of preventing unjust enrichment as a doctrinal basis for the wait-and-see approach. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1719-20. See generally Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 *U. PA. L. REV.* 521 (1982).

34. See, e.g., 1978 *ALI Proceedings*, *supra* note 4, at 273-74 (remarks of Dean Robert A. Stein).

35. *Id.*

36. See W. LEACH & O. TUDOR, *THE RULE AGAINST PERPETUITIES* 228 (1957); see also *infra* note 190 and accompanying text.

37. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1649. The Restatement (Second) of Property provides the following justification: "The adoption of the wait-and-see approach . . . is largely motivated by the equality of treatment that is produced by placing the validity of all non-vested interests on the same plane, whether the interest is created by a skilled draftsman or one not so skilled." *RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS)*, ch. 1, Introduction, at 13 (1983).

38. Waggoner, *Perspective*, *supra* note 9, at 1717.

39. 1978 *ALI Proceedings*, *supra* note 4, at 249 (remarks of Professor Casner).

Whatever wait-and-see system is constructed, its essential operation involves waiting to see whether a nonvested interest actually vests or terminates within some time period. Assuming the event does not occur within the prescribed time period, the current advocates agree with the Restatement (Second) position⁴⁰ that courts should have the *cy pres* power to reform the interest, which, on "waiting and seeing," eventually turns out to be invalid.⁴¹

The current dispute, evidenced by a recent debate between Professors Dukeminier and Waggoner, involves the appropriate method for marking off the perpetuities waiting period.⁴² Three major alternatives have been suggested: (1) the causal-lives method, (2) a formula method to identify lives, and (3) a period-in-gross approach. The first two alternatives provide a system for identifying the measuring lives; the third alternative is a proxy for the time period produced under a measuring lives approach. Draft versions of the Uniform Statutory Rule Against Perpetuities (USRAP) recommended only the second and third alternatives.⁴³

Professor Dukeminier recently provided a comprehensive discussion of the causal-lives method.⁴⁴ It involves three steps. First, identify those lives in being who are causally connected to vesting. Second, test for certainty of vesting within the lifetimes of the identified persons plus 21 years. Third, if it cannot be said with absolute certainty that the event will occur within 21 years after the death of any identified person, wait and see whether the event actually occurs within 21 years after the deaths of those identified persons—the measuring lives.

Professor Waggoner argues that the process for identifying causal lives raises perplexing problems.⁴⁵ As the reporter for the committee drafting the USRAP, he rejected the causal-lives method "because it was concluded that even perpetuity scholars, to say nothing of non-experts in the field, cannot agree on the precise meaning of [the causal-lives] language."⁴⁶

40. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5 (1983).

41. See, e.g., Dukeminier, *The Measuring Lives*, *supra* note 9, at 1713. The Uniform Statutory Rule, drafted by Professor Waggoner, also provides for *cy pres* reformation after the waiting period. USRAP § 3 (1986) (set forth and discussed *infra* text accompanying notes 135-48). The English version of wait-and-see does not have a *cy pres* component. Perpetuities and Accumulations Act 1964, § 3(1). See R. MAUDSLEY, *THE MODERN LAW OF PERPETUITIES* 232 (1979) [hereinafter R. MAUDSLEY, *THE MODERN LAW*].

42. See *supra* note 9 and accompanying text.

43. See UNIF. STATUTORY R. AGAINST PERPETUITIES (Discussion Draft Aug. 1985) (second alternative) [hereinafter DRAFT USRAP (Summer 1985)]; DRAFT USRAP (Spring 1986), *supra* note 1 (third alternative). The Uniform Statutory Rule Against Perpetuities adopts a 90-year proxy period. See *infra* note 71.

44. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1654-74.

45. Waggoner, *Perspective*, *supra* note 9, at 1718-26.

46. DRAFT USRAP (Spring 1986), *supra* note 1, at 9.

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The wait-and-see method under the Restatement (Second) of Property differs from the causal-lives method. Adopted by the American Law Institute in 1979 at Professor Casner's urging,⁴⁷ this method purports to identify the measuring lives by prescribing specific categories.⁴⁸ As Professor Dukeminier explains, however, persons who were initially listed as measuring lives may cease to be so and persons not initially listed may later become measuring lives under both the causal-lives and Restatement methods.⁴⁹

Professor Dukeminier attacked the Restatement (Second)/Waggoner-backed approach on several grounds: "It is at best an artificial solution, at worst an extension of the dead hand far beyond the necessities of the case"⁵⁰

Each side masterfully assailed the other's position in the recent debate. Professor Dukeminier stated: "The Restatement criterion for measuring lives . . . contains enough puzzles to keep perpetuities lawyers in court (and in fees!) for years."⁵¹ Professor Waggoner countered:

The questions go on and on. The bottom line is that the simple one-sentence statute that Dukeminier touts as *the* solution to wait-and-see leaves so many questions in doubt that, as Dukeminier says of the Restatement, it "contains enough puzzles to keep perpetuities lawyers in court (and in fees!) for years."⁵²

Professor Waggoner also conceded that problems exist under any system which uses measuring lives to wait-and-see. He acknowledged "[t]he administrative burden of tracing a somewhat rotating group of measuring lives, along with the problems of who the measuring lives should be and how to identify them."⁵³ He then raised "a fundamental question deserving of serious consideration: should actual measuring lives be used at all?"⁵⁴

As an alternative, Professor Waggoner suggested a period-in-gross method as an approximation—proxy—for the period determined by using

47. See *supra* note 4.

48. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 (1983). There are 33 pages of discussion under this section, together with 21 illustrations. *Id.* at 48-80. Professor Kurtz recently explained Iowa's law, which virtually adopted the Restatement (Second) method. Kurtz, *The Iowa Rule Against Perpetuities—Reform at Last. Restatement Style: Wait-and-See and Cy Pres.* 69 IOWA L. REV. 705 (1984).

49. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1672-73, 1681-1701.

50. *Id.* at 1711.

51. *Id.* at 1694. Professor Dukeminier later concluded: "So much for the Restatement list. It may take years of learned analysis and litigation to solve its sphinxine riddles." *Id.* at 1701.

52. Waggoner, *Perspective*, *supra* note 9, at 1724. The one-sentence statute of which Professor Waggoner speaks is set forth *infra* note 150.

53. Waggoner, *Perspective*, *supra* note 9, at 1724.

54. *Id.*

measuring lives and 21 years.⁵⁵ Although the conclusion to be drawn is unclear, Professor Dukeminier chose not to respond directly to this alternative. One can assume that his major objection would lie with the tendency of a period-in-gross method to unnecessarily and undesirably extend dead hand control. Indeed, Professor Waggoner anticipated this objection:

To be sure, cases can rightly be posed that show that a fixed period of years would allow some families to continue trusts through (or into) more generations than other families. Considering the great benefits of the period-of-years approach, I doubt that this "advantage" to families with shorter longevities is troublesome enough to reject the approach out of hand.⁵⁶

Professor Waggoner actively pursued a period-in-gross method. In November of 1985, Waggoner authored a 100-year-in-gross version of the USRAP.⁵⁷ This version abandons the "conventional" measuring lives approach to wait-and-see.⁵⁸ The 100-year period allegedly approximates the waiting period which would be produced if a competent attorney employed a well-conceived saving clause.⁵⁹ Regarding the factor of dead hand control, Waggoner urged: "Aggregate dead hand control will not be increased beyond what is already possible by competent drafting under the common law Rule."⁶⁰

Professor Waggoner refines his thinking about the period-in-gross method in his most recent article: *A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*.⁶¹ He determines for hypothetical families that the average age of the youngest life in being at the creation of a nonvested interest would be 6 years. Since that child would have a life expectancy of 69 years under the 1985 Statistical Abstract, adding 21 years produces a period-in-gross of 90 years.⁶² Waggoner leaves the exact number of years-in-gross open-ended—somewhere between 90 and 95 years, the latter based on the life expectancy of an infant (74), plus 21 years.

55. *Id.* at 1726-28.

56. *Id.* at 1728.

57. UNIF. STATUTORY R. AGAINST PERPETUITIES (Discussion Draft Nov. 1985) (100-year period in gross version) [hereinafter DRAFT USRAP (Fall 1985)].

58. The "conventional" measuring lives methodology is acknowledged in this draft. *Id.* at 6.

59. *Id.* at 6-12, see *infra* notes 162-79 and accompanying text.

60. DRAFT USRAP (Fall 1985), *supra* note 57, at 11.

61. Waggoner, *Progress Report*, *supra* note 1.

62. *Id.* ¶ 704. Alternatively, Waggoner suggests a floating period based on actuarial expectancies. *Id.* An earlier draft prescribed the proxy method:

The allowable period is 21 years plus the number of years of remaining life expectancy of a [new-born infant] [[5]-year old], rounded off to the nearest whole number, designated in the Total column of the table titled "Expectation of Life and Expected Deaths, by Race, Sex, and Age," or its successor, in the Statistical Abstract of the United States published by the United States Bureau of the Census for the year in which the nonvested property interest or power of appointment was created.

DRAFT USRAP (Winter 1986), *supra* note 22, at 6.

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Whatever period is adopted under the proxy method,⁶³ Professor Waggoner predicts: "The benefit of wait-and-see [will be] provided without the costs associated with it."⁶⁴

As approved by the National Conference of Commissioners on Uniform State Laws, the USRAP provides a 90-year proxy period,⁶⁵ plus a cy pres reformation provision.⁶⁶ The Act, however, is prospective in application, in that it will only apply to interests created after enactment of the legislation by a state.⁶⁷ At the same time, the USRAP sanctions judicial reformation of preexisting documents containing a perpetuities violation.⁶⁸

III. THE CASE AGAINST THE WAIT-AND-SEE APPROACH TO THE COMMON LAW RULE AGAINST PERPETUITIES

A. *The Assumption of Frequent Invalidation Under the Common Law Rule*

The case for wait-and-see rests on a critical assumption: the existing common law Rule causes problems because it frequently invalidates future interests based on unlikely post-creation events. A draft version of the USRAP explains: "[The] Rule is harsh because it *so often* invalidates interests"⁶⁹

Relevant perpetuities cases during the eight-year period, 1978-1985, were analyzed to determine the frequency of invalidation.⁷⁰ "Relevant" refers to those reported perpetuities cases in the United States which (1)

63. Professor Waggoner mentions another possible solution:

Instead of replacing the proxy approach for marking off the allowable waiting period, the modified version might introduce in limited form a generationally fixed period *in addition to* the period marked off by the proxy. The proposal might, for example, be to provide that an interest that would have been invalid under the common-law Rule is valid nevertheless (1) if it vests within the lifetime of or at the death of a grandchild of the transferor, whether or not that grandchild was in being at the creation of the interest, or (2) if it vests within the allowable period marked off by whichever of the proxies now under consideration the Drafting Committee selects.

Waggoner, *Progress Report*, *supra* note 1, ¶ 703.4 n.22.

64. *Id.* ¶ 704.

65. USRAP § 1 (1986), set forth and discussed *infra* note 71.

66. USRAP § 3 (1986), set forth and discussed *infra* in text accompanying notes 137-48. It is predicted that the cy pres issue will arise infrequently. DRAFT USRAP (Spring 1986), *supra* note 1, at 61.

67. USRAP § 5(a) (1986).

68. *Id.* § 5(b). Judicial insertion of a saving clause into the offending instrument by using the lives determined under the Restatement (Second) list is recommended. DRAFT USRAP (Spring 1986), *supra* note 1, at 93-94. There is no guidance, however, on the gift over portion of the judicially inserted saving clause, i.e., who will take if the nonvested interest does not vest 21 years after the death of the surviving measuring life.

69. DRAFT USRAP (Winter 1986), *supra* note 22, at 8 (emphasis added).

70. See *supra* note 10 (describing research methods).

ultimately involved invalidation of a future interest under the common law Rule Against Perpetuities, and (2) would be subject to the Statutory Rule Against Perpetuities of the USRAP.⁷¹

For the eight years, 1978–1985, research confirms the voiding of an interest under the common law Rule Against Perpetuities in the following number of reported appellate cases:

1978: One ⁷²	1982: None
1979: Two ⁷³	1983: None ⁷⁶
1980: One ⁷⁴	1984: None ⁷⁷
1981: None ⁷⁵	1985: Two ⁷⁸

71. The Uniform Statutory Rule Against Perpetuities adopted by the National Conference in August, 1986 provides in part as follows:

SECTION 1. STATUTORY RULE AGAINST PERPETUITIES

(a) A nonvested property interest is invalid unless:

- (1) when the interest is created, it is certain either to vest or to terminate within the lifetime of an individual then alive or within 21 years after the death of that individual, or
- (2) the interest either vests or terminates within 90 years after its creation.

USRAP § 1(a) (1986).

Section 1(a) (1) essentially codifies the common law Rule subject to the minor qualification by section 1(d) that "the possibility that a child will be born to an individual after the individual's death is disregarded." See DRAFT USRAP (Spring 1986), *supra* note 1, at 21–32; see *supra* note 1 (explaining reliance upon Spring 1986 draft). Section 1(a)(2) provides the wait-and-see component of the Rule—a 90-year waiting period. See DRAFT USRAP (Spring 1986), *supra* note 1, at 32–36. Other portions of Section 1 provide comparable rules for testing whether a power of appointment is validly created. USRAP § 1(b) & (c) (1986); see DRAFT USRAP (Spring 1986), *supra* note 1, at 38–40.

Section 4 provides seven classes of exclusions from the Statutory Rule under Section 1, including (inapplicability in the nondonative transfer area. USRAP § 4 (1986). Accordingly, the approximately 25 cases from 1978 through 1985 involving perpetuities violations in the commercial (nondonative transfer) area are not considered "relevant." See *infra* text accompanying notes 314–21. The Act also excludes interests, powers, and other arrangements which were not subject to the common law rule or are excluded by another statute. USRAP § 4(7).

This article also excludes donative transfers involving royalty interests. See *Drach v. Ely*, 10 Kan. App. 2d 149, 694 P.2d 1310 (royalty interest created under will violated Rule), *rev'd*, 237 Kan. 654, 703 P.2d 746 (1985) (vested mineral interest not void under the Rule). Although such donative transfers were not excluded from the Act, it was not because the Drafting Committee believed such transactions should be subject to the Statutory Rule. To the contrary, the Drafting Committee believed that certain mineral interests, created by either donative or nondonative transactions, should be invalidated if not vested within a 40-year period. DRAFT USRAP (Spring 1986), *supra* note 1, at 81–84. Ultimately, the committee believed it preferable to provide mineral interest rules through separate legislation. Letter to the author from Prof. Waggoner (May 19, 1986).

72. *Connecticut Bank & Trust Co. v. Brody*, 174 Conn. 616, 392 A.2d 445 (1978) (1922 testamentary trust). Although Connecticut earlier adopted a limited form of wait-and-see, the statute only applies to interests created after October 1, 1955. CONN. GEN. STAT. ANN. § 45-98 (West 1981).

73. *Walker v. Bogle*, 244 Ga. 439, 260 S.E.2d 338 (1979) (1978 will); *Nelson v. Kring*, 225 Kan. 499, 592 P.2d 438 (1979).

74. *Dickerson v. Union Nat'l Bank*, 268 Ark. 292, 595 S.W.2d 677 (1980) (1967 testamentary trust). In *Berry v. Union Nat'l Bank*, 262 S.E.2d 766 (W. Va. 1980), the court exercised its reformation power to save an interest which would have been voided under the common law Rule.

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There were also two lower court New York cases involving invalidity based on the manner of exercising a power of appointment.⁷⁹

In summary, the analysis discloses only eight relevant perpetuities cases during the 1978–1985 period.⁸⁰ In effect, there was, on the average, but one relevant perpetuities case per year in the United States.⁸¹

The inescapable conclusion is that no problem of frequent invalidation presently exists under the common law Rule Against Perpetuities. Thus, the case for the wait-and-see approach cannot be justified on this basis.

The same conclusion was reached in earlier periods. In 1955, Professor Simes argued: "I do not think that the hard cases which he [Professor Leach] discusses are of sufficiently frequent occurrence to cause us to overturn the fundamental bases of the Rule."⁸² In 1959, Professor Mechem asked: "[H]as there really been a reign of terror, a slaughter of the innocents [as suggested by Professor Leach]?"⁸³ Mechem's conclusions:

I doubt it. For one thing, I think if such a charge could be documented, Mr. Leach would have done it. If I am not mistaken, in none of his articles has he collected authorities tending to show that any very great number of wills have currently been the innocent victims of the rule. I have not counted noses (if cases have noses) and I do not assume to set myself up as an authority, but I

75. The court in *May v. Hunt*, 404 So. 2d 1373 (Miss. 1981), validated a disposition under the common law Rule, but reformed the trust to comply with a unique Mississippi rule on restraining alienation. *Id.* at 1380–81.

76. See *Merrill v. Wimmer*, 453 N.E.2d 356 (Ind. App. 1983), *vacated*, 481 N.E.2d 1294 (1985) (intermediate appellate court exercised its reformation power to save an interest); see also *infra* text accompanying note 226.

77. *Barton v. Parrott*, 25 Ohio Misc. 2d 8, 495 N.E.2d 973 (Ct. Com. Pl. 1984), involved a will provision which empowered trustees to establish an annual horserace. Because the trustees were authorized to use the property beyond the perpetuities period, this honorary trust was declared void. See generally L. SIMES & A. SMITH, *supra* note 17, § 1394. *Barton* is not considered a relevant case since it involved a trust duration issue, as distinct from the USRAP which tests the validity of nonvested interests and powers of appointment. See *supra* note 71.

78. *Merrill v. Wimmer*, 481 N.E.2d 1294 (Ind. 1985) (discussed *infra* at notes 221–34 and accompanying text); *Commerce Union Bank v. Warren County*, No. 85-12-011 (Tenn. Ct. App. 1985). *Commerce Union Bank* was reversed in 1986 by the Supreme Court of Tennessee, 707 S.W.2d 854 (Tenn. 1986) (discussed *infra* note 219).

79. *In re Will of Grunbaum*, 122 Misc. 2d 645, 471 N.Y.S.2d 513 (Surr. 1984); *In re Harden*, N.Y.L.J., Sept. 17, 1985, at 13, col. 6 (N.Y. Co. Surr.).

80. This number includes a 1985 Tennessee case which, on appeal in 1986, was held not to violate the common law Rule. See *supra* note 78. There were no reported cases during the eight-year period, 1978–1985, which declared a power of appointment invalidly created. See *supra* note 71 describing subsections (b) and (c) of the USRAP (relating to validity of created powers).

81. During this eight-year period, there were three Canadian cases digested under "Perpetuities": *Re Roberts*, 82 D.L.R. 3d 591 (Ont. H.C. 1978); *Re Manning*, 84 D.L.R. 3d 715 (Ont. App. 1978); *Re Lawson*, 33 N.B.2d 462 (Q.B. 1981). No violation of the common law Rule was found in any of these cases.

82. L. SIMES, *PUBLIC POLICY*, *supra* note 13, at 64.

83. Mechem, *Further Thoughts*, *supra* note 8, at 966.

have been browsing through advance sheets and reading perpetuities cases for quite a number of years and it is not my impression that the casualty rate is high. . . . [Even assuming] three or four casualties a year. . . . [or] [d]ouble that . . . it's still a trifle.⁸⁴

Based on Professor Powell's identification of 28 cases of invalidity during the 21-year period, 1957-1977,⁸⁵ Professor Berger similarly concluded: "[W]e are asked, in order to deal with the occasional instances where an incompetent lawyer fails to adhere to the limitations of the rule, to accept this beguiling principle of wait-and-see."⁸⁶

Professor Leach responded to Professor Mechem by suggesting other sources of perpetuities problems apart from appellate opinions in which invalidity was found.⁸⁷ These included: (1) cases in which the gift was upheld on appeal after being held invalid (or valid) in the trial court, (2) cases which were settled, either before or after, a trial court ruling, and (3) cases where the issue existed but was never raised. Each point bears scrutiny.⁸⁸

First, Leach suggested that appellate cases validating a disposition were relevant. Although he acknowledged that such cases could not illustrate the harsh consequences of the Rule because interests were not invalidated, his concern stemmed from the legal fees which indirectly diminish the property intended for the beneficiary.⁸⁹ Professor Leach's concern is a valid

⁸⁴ *Id.*

⁸⁵ Powell Memorandum, *supra* note 10, at 143, 148-54. According to Professor Waggoner's analysis, 22 of these cases involved violations of a noncommercial nature. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1784 n.162.

⁸⁶ 1979 ALI Proceedings, *supra* note 4, at 454 (remarks of Professor Berger).

⁸⁷ Leach, *Hail Pennsylvania*, *supra* note 19, at 1131-32. In reply, Professor Mechem observed: "I can only say that in my experience the reported cases normally afford at least a rough index to the activity in a given area, and they do not suggest to me that the Rule is causing a 'slaughter of the innocents.'" Mechem, *A Brief Reply to Professor Leach*, 108 U. Pa. L. Rev. 1155 (1960).

⁸⁸ As Professor Lynn stated: "But Leach's position with respect to reforming the Rule is that of the advocate. His briefs are persuasive, but they are not invulnerable." Lynn, *Reforming the Common Law Rule Against Perpetuities*, 28 U. Chi. L. Rev. 488, 491 (1961). In fact, Professor Leach may have overlooked a possible category of unreported or undetectable cases. See *Merrill v. Wimmer*, 481 N.E.2d 1294 (Ind. 1985) (discussing unreported trial court decision); *Millwright v. Romer*, 322 N.W.2d 30, 31 (Iowa 1982) (citing *in re Summers*, 292 N.W.2d 877 (Iowa Ct. App. 1979)). There is no evidence that this category is significant. See *supra* note 87 (Professor Mechem's observation).

⁸⁹ *Sears v. Coughlin*, 329 Mass. 340, 108 N.E.2d 563 (1952). Leach pointed to *Sears* as follows: "But the list of parties occupies four full pages of the printed record (229 pages); and after all possible consolidations eight briefs were submitted (417 pages) and six counsel argued orally. The total fees allowed to dozens of counsel and guardians *ad litem* in the main estate and a half-dozen subsidiary estates is a matter of public record, but the additional fees charged to individual clients who stood to lose millions upon an affirmance will never be known; let each have his guess as to the probable total."

Leach, *Hail Pennsylvania*, *supra* note 19, at 1131.

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one, and the existence of validating litigation does suggest a reason to refine the Rule.⁹⁰

Second, Professor Leach pointed to settlement activity in the perpetuities area. Indeed, he suggested that the all-or-nothing result of litigation encouraged settlement.⁹¹ In an effort to discover the volume of settlement activity during the 1978-1985 period, court personnel for the surrogate's courts of three major New York counties (representing a combined population of over 3 million) were contacted.⁹² The results were rather startling: *There was not even one case settled in these three courts during the eight-year period.*

Mr. Richard B. Covey, one of this country's leading wealth transmission practitioners, was also contacted.⁹³ Mr. Covey advised that he had never participated in an out-of-court settlement of a perpetuities case, nor had he ever heard of such a practice.

Finally, Professor Leach was concerned about cases where a perpetuities violation existed but was not detected:

So, my learned friends will say, what harm is done in these cases? Only this: if the defect is voluntarily revealed or an astute internal revenue agent spots it, then the person who has not asserted his rights will find himself subjected to a gift tax liability. Is this the way we want the Rule to work?⁹⁴

When written in 1960, the federal gift tax exemption level was \$30,000.⁹⁵ Leach's argument may have had some merit, assuming he was correct that perpetuities violations are confined to dispositions by the less wealthy. The federal gift tax exemption equivalent is now \$600,000.⁹⁶ On Leach's assumption, there will be no federal gift tax problem. If, on the other hand, perpetuities violations also occur among the wealthy, there should be no federal gift tax problem because the gift tax value of a future

90. See *infra* Part IV.

91. Leach, *Hail Pennsylvania*, *supra* note 19, at 1132.

92. In 1983, the combined population of Bronx, Erie (Buffalo), and New York Counties was approximately 3,600,000. 1984-85 NEW YORK STATE STATISTICAL YEARBOOK 23 (11th ed. 1985).

93. Mr. Covey, a graduate of Harvard College and Columbia Law School, is a partner in the New York City law firm of Carter, Ledyard & Milburn. He is the author of *THE MARITAL DEDUCTION AND CREDIT SHELTER DISPOSITIONS AND THE USE OF FORMULA PROVISIONS* (1984) and *GENERATION-SKIPPING TRANSFERS IN TRUST* (3d ed. 1978). He is also the editor and primary author of *Practical Drafting*, a new will and trust drafting service. Mr. Covey serves as special tax counsel to the American Bankers' Association for trust and estate tax matters and speaks frequently at continuing legal education programs and tax institutes. He is a Visiting Adjunct Professor at the University of Miami School of Law, from which he received an Honorary Doctor of Laws degree.

94. See Leach, *Hail Pennsylvania*, *supra* note 19, at 1132.

95. I.R.C. § 2521, repealed by Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001(b)(3), 90 Stat. 1520 (1976).

96. For gifts after 1986, a credit (not to exceed \$192,000) is allowed against gift tax imposed. I.R.C. § 2505(a). Because the gift tax imposed on a taxable gift of \$600,000 is \$192,000, the credit is equivalent to a gift tax exemption of \$600,000.

interest based on some remote contingency would likely be insignificant.⁹⁷ Finally, Leach made the unlikely assumption—he cited no examples—that an agent would uncover a violation not previously detected.⁹⁸

B. Other Assumptions Justifying the Wait-and-see Approach to the Common Law Rule Against Perpetuities

The case for wait-and-see is premised on other assumptions. These proffered assumptions do not bear up under scrutiny any better than the assumption of frequent invalidation.

Assumption #1: The common law Rule significantly frustrates the transferor's intent by allowing unintended beneficiaries to obtain property.

Consider a disposition, variations of which are commonly offered by wait-and-see advocates:

T devised property in trust to pay income to child *A* for life. After *A*'s death, the corpus is to be equally divided among such of *A*'s children as reach 25. *T* left the residue of his estate to *B*.⁹⁹

T, a widow, was survived by *A* who was childless at the time. The remainder to *A*'s children is void under the common law Rule. The interest passes to *B*.

In the abstract, it is difficult to quarrel with the point that *T*'s intent has been frustrated by invalidating the remainder interest. But consider that *T*'s intent was equivocal—she only wanted her grandchildren to take if they reached 25. Should we be so concerned with frustrating equivocal intent? Further, *T* never knew any of her grandchildren—none had been born within her lifetime. Should we be so concerned if (1) property will not reach persons not in existence at the time of the disposition, and (2) a transferor provides a scheme of distribution in an arbitrary fashion without regard to the eventual need or status of unborn persons? Arguments for this kind of dead hand control—which may be frustrated—make little sense when the power of appointment device is taken into account.¹⁰⁰

97. See, e.g., *Commissioner v. Cardeza's Estate*, 5 T.C. 202 (1945), *aff'd*, 173 F.2d 19 (3d Cir. 1949). For the same reason, state gift taxation, applicable in a handful of states, will not be a factor.

98. If a recent ruling is any indication, the likelihood of detection is remote. In Priv. Ltr. Rul. 8234151 (May 23, 1982), the Service erroneously recognized a provision that terminated a trust 21 years and 11 months after lives-in-being. Under the Rule, actual—not prescribed—periods of gestation are permissible. See L. SIMES & A. SMITH, *supra* note 17, § 1224.

99. See, e.g., Leach, *Perpetuities in a Nutshell*, *supra* note 22, at 648 (Example 24).

100. As Professor Leach wrote: "The power of appointment is the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." Leach, *Powers of Appointment*, 24 A.B.A. J. 807 (1938).

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Assume in the above example that the age was limited to 21, rather than age 25. The remainder interest would then have been validly created. If *A* died survived by one child, age 3, *B* would be entitled to the income from the property for at least 18 years.¹⁰¹ Indeed, if the child died under 21, *B* would then be entitled to the trust property. Can it be said that *B*, who after *A*'s death would become the owner of the trust property if the disposition was based on age 25, was really an unintended beneficiary?

By voiding the remote interest,¹⁰² the intended beneficiaries will not take under the instrument, but this does not mean they will never take. The "unintended beneficiaries" will probably be the parents of the intended (and usually) unborn beneficiaries. In turn, the parents will likely pass the property on to the intended beneficiaries and do so in a less rigid manner than under the original disposition.

Of course, there may be instances of unintended benefit. The point is that the assumption is not necessarily correct.¹⁰³

Assumption #2: The wait-and-see approach to the common law Rule Against Perpetuities will cause minimal inconvenience, through litigation or otherwise.

On one level, wait-and-see advocates have effectively put the uncertainty of waiting to see into perspective. A waiting period is necessary under the traditional common law Rule approach to see whether the validly-created interest under the Rule actually vests or terminates during the period. Accordingly, the uncertainty under wait-and-see is no more objectionable.¹⁰⁴

a. Inconvenience During the Waiting Period

Professor Casner once contended that, apart from rare *cy pres* litigation, litigation will "evaporate, because when you wait and see the interests will

101. In a few states, the minor child of *A* would be entitled to the interim income by special legislation. See, e.g., CAL. CIV. CODE § 733 (West 1954); N.Y. EST. POWERS & TRUSTS LAW § 9-2.3 (McKinney 1967) (income that has not been disposed of passes to "persons presumptively entitled to the next eventual interest (estate)").

102. Professor Lusky, speaking for the wait-and-see opponents, stated: "Our position is simply that killing a future interest is not the equivalent of murder." 1978 ALI Proceedings, *supra* note 4, at 257 (remarks of Professor Lusky).

103. Cf. Waggoner, *Perpetuity Reform*, *supra* note 21.

104. See Maudsley, *How to Wait and See*, *supra* note 7, at 364-65. Because most dispositions are in trust, earlier objections to the lack of marketability under wait-and-see will not be pursued in this article. See Simes, *The "Wait and See" Doctrine*, *supra* note 8, at 188-90. Nor does there appear to be a marketability problem under non-trust dispositions. 1978 ALI Proceedings, *supra* note 4, at 273 (remarks of Fairfax Leary, Jr., an A.L.I. member).

vest in time."¹⁰⁵ More recently, Professors Dukeminier and Waggoner have predicted substantial litigation under wait-and-see methods which require identification of measuring lives.¹⁰⁶

Professor Waggoner now argues against "traditional" wait-and-see methods which use actual measuring lives because administrative burdens will be imposed during the waiting period.¹⁰⁷ He notes that, unlike the common law Rule, these wait-and-see methods require actual tracing of individuals' lives, deaths, marriages, divorces, births, adoptions in and out of families and so on.¹⁰⁸ He concludes that "keeping track of and reconstructing these events to determine the survivor and the time of the survivor's death imposes an administrative burden wise to avoid."¹⁰⁹ It should be noted that the attending administrative expenses will diminish the benefits for the beneficiaries.

Assuming, *arguendo*, that a period-in-gross (proxy) method will not entail the administrative burdens identified by Professor Waggoner, will there be no inconveniences during the waiting period? Will litigation under a proxy method be unnecessary? Consider the following hypothetical:

In 1987, *T* devised property in trust to child *A* for life, remainder to *A*'s children for life, remainder to *A*'s grandchildren who are alive at the death of the survivor of *A*'s children. *T* is survived by *A* and 3 children (*W*, *X*, and *Y*).

Shortly before dying in 2027, *A* allegedly fathers child *Z*. Does *Z* receive a share of the income during the trust period? If yes, will trust termination occur when the survivor of *W*, *X*, *Y*, and *Z* dies or when the survivor of *W*, *X*, and *Y* dies? What should the trustee do?¹¹⁰

At *A*'s death, the trustee would like instructions from a court on whether *Z* is entitled to share in the trust, and if so, when will the trust terminate. Assuming *Z* is determined to be a child of *A*,¹¹¹ a court might allow *Z* to receive income, in part because her inclusion would not violate the common law Rule Against Perpetuities.¹¹² But should a court determine

105. 1978 ALI Proceedings, *supra* note 4, at 249 (remarks of Professor Casner).

106. See *supra* notes 51, 52 and accompanying text.

107. Waggoner, *Perspective*, *supra* note 9, at 1724-25.

108. Waggoner, *Progress Report*, *supra* note 1, ¶ 703.2.

109. *Id.*

110. A trustee is entitled to instructions from the court regarding such matters as the proper construction of the instrument and the identity of the trust beneficiaries. See RESTATEMENT (SECOND) OF TRUSTS § 259 (1959).

111. Other cases may initially involve adoption questions—adoption out, adoption in, fraudulent adoption, and equitable adoption. See generally Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 YALE L. REV. 711 (1984). A recent case, *In re Estate of Best*, 66 N. Y.2d 151, 485 N. E.2d 1010 (1985), involved burn-out-of-wedlock and adoption issues.

112. See L. SIMES & A. SMITH, *supra* note 17, § 649. Because *T* made a class gift to *A*'s children, *Z*, if determined to fall within the class, should receive income for as long as possible.

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whether the trust will terminate if Z survives her siblings by the half-blood or should it wait-and-see whether Z actually survives? Assuming a court should defer construction until the problem actually arises,¹¹³ how should the court decide the construction issue if Z is the survivor and the children of W, X, and Y demand distribution? Should a court construe the will—sometime in the twenty-first century—to limit trust duration to the class of A's children alive at T's death, or should it allow inclusion of afterborns? If the court decides that the trust will not terminate until Z dies, deferred cy pres litigation may be necessary.

In re Estate of Pearson,¹¹⁴ a 1971 Pennsylvania Supreme Court decision, provides an actual example of litigation under a wait-and-see statute. The court had to construe Pennsylvania's wait-and-see statute which offered—and still offers—no guidance on determining the measuring lives.¹¹⁵ Professor Waggoner provided the terms of the testamentary trust and relevant facts:

The income was to be paid to the testator's brothers and sisters for their lives, apparently with cross remainders [in income] until the death of the last one; upon the death of the last surviving brother or sister, the income was to be paid to the testator's nieces and nephews until the death of the last surviving niece or nephew; upon the death of the last surviving niece or nephew, the income was to be paid to the testator's grandnieces and grandnephews until the death of the last surviving grandniece or grandnephew; and so on [income to younger generation beneficiaries "as long as there are living legal heirs"] until there were no more income beneficiaries, at which time the corpus of the trust was to be delivered to charitable organizations. At his death in 1967, the testator was survived by six brothers and sisters, thirteen nephews and nieces, and twenty-nine grandnephews and grandnieces.¹¹⁶

113 See RESTATEMENT (SECOND) OF TRUSTS § 259 comment c (1959) (no advance instructions on questions which may never arise).

114 442 Pa. 172, 275 A.2d 336 (1971).

115 Effective since 1948, the Pennsylvania wait-and-see statute provides:

Rule against perpetuities

(a) General—No interest shall be void as a perpetuity except as herein provided.

(b) Void interest-exceptions—Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events any interest not then vested and any interest to members of a class the membership of which is then subject to increase shall be void.

20 PA. CONS. STAT. ANN. § 6104(a)(b) (Purdum 1975).

The statute may apply to interests created before 1948. 20 PA. CONS. STAT. ANN. § 6104(d) (Purdum 1985 Supp.) (as amended, effective June 27, 1978); see Levin, *Section 6104(d) of the Pennsylvania Rule Against Perpetuities: The Validity and Effect of the Retroactive Application of Property and Probate Law Reform*, 25 VILL. L. REV. 213 (1980).

116 L. WAGGONER, NUTSHELL, *supra* note 6, at 301-02; Waggoner, *Perpetuity Reform*, *supra* note 21, at 1764. Portions of Professor Waggoner's Michigan article were adapted from his Nutshell work. *Id.* at 1718 n. 4.

Professor Waggoner extensively analyzed *Pearson*, including the court's mishandling of the wait-and-see concept.¹¹⁷ He strenuously objected to the failure of the court to articulate any standard for determining measuring lives. He also deplored the court's refusal to decide whether the charities' remainder interests were initially vested; a finding which would have resulted in validity under Pennsylvania law.¹¹⁸ According to Professor Waggoner, this refusal constituted an "unwarranted extension of the wait-and-see modification beyond its proper sphere."¹¹⁹ It also may have cost the estate a valuable estate tax charitable deduction.¹²⁰

Three assumptions will be made about *Pearson*: (1) the trust was effective in 1987; (2) the controlling statute was a 90-year proxy version under a wait-and-see approach; and (3) Pennsylvania's class gift constructional rules applied. Under these rules, Pennsylvania courts presumably carry out a testator's intention by including as many persons within a class as possible.¹²¹

At some point during trust administration, it will be necessary to determine whether any afterborn nieces and nephews (perhaps unlikely because of elderly parents) and any afterborn grandnephews and grandnieces (most likely) will be beneficiaries under the trust. Further litigation may be required to identify beneficiaries in even younger generations. Because the interests of all of these beneficiaries might vest by the year 2077, a court properly applying the wait-and-see concept should refuse to determine validity before that date.¹²² Most likely, some interests in the trust will not vest by the year 2077. At that time, deferred *cy pres* litigation will be necessary.¹²³

In re Frank,¹²⁴ a 1978 decision by the Supreme Court of Pennsylvania, is another example of litigation under a wait-and-see regime. In *Frank*, the court was faced with a construction issue: whether a woman who was married after, but alive at, trust creation in 1927, was a beneficiary for trust termination purposes. After noting the retroactive application of Pennsylvania's wait-and-see statute,¹²⁵ the court determined that including the

117. L. WAGGONER, NUTSHELL, *supra* note 6, at 301-23; Waggoner, *Perpetuity Reform*, *supra* note 21, at 1762-76.

118. Pennsylvania's wait-and-see statute does not apply if an interest would not have been subject to the common law Rule. 20 PA. CONS. STAT. ANN. § 6104(b)(1) (Purdon 1975). See *In re Frank*, 480 Pa. 116, 389 A.2d 536 (1978) (discussed *infra* notes 124-27 and accompanying text).

119. L. WAGGONER, NUTSHELL, *supra* note 6, at 313.

120. See *id.* at 305. Charitable deductions for transfers in trust after July 31, 1969, must comply with strict rules. See I.R.C. §§ 2055(e)(2), 2522(c)(2).

121. See *McDowell Nat'l Bank v. Applegate*, 479 Pa. 300, 388 A.2d 666 (1978).

122. See L. WAGGONER, NUTSHELL, *supra* note 6, at 303.

123. See *infra* notes 135-48 and accompanying text.

124. 480 Pa. 116, 389 A.2d 536 (1978).

125. See *supra* note 115.

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woman would not violate the common law Rule Against Perpetuities as applied to gifts in default of exercising a power of appointment.¹²⁶ *Frank* raises questions about subsequent constructional cases vis-a-vis both Pennsylvania's and other wait-and-see systems.¹²⁷

As under other wait-and-see versions, the USRAP will apply only if the common law Rule is violated.¹²⁸ Indeed, wait-and-see advocates have always acknowledged the necessity for litigation. "[A]s Professor Leach himself pointed out . . . a lawsuit is often necessary to establish that a traditional perpetuity violation exists"¹²⁹ In fact, the hypothetical case and the actual cases of *Pearson* and *Frank* suggest that the most frequently litigated issue under any wait-and-see system will be whether the common law Rule was violated.¹³⁰ In turn, construction cases will be necessary to determine if persons, typically afterborns, are includable within a class.¹³¹ If included, the common law Rule may be violated.¹³² If

126. *Frank* was a 4-3 decision. The majority considered the actuality that the woman was alive at trust creation—an approach not inconsistent with the common law Rule's treatment of gifts in default of exercising a power under the second-look doctrine. See *Sears v. Coolidge*, 329 Mass. 340, 108 N. E.2d 563, (1952). See *supra* note 115 (quoting statute). Two of the three dissenters—equating the second-look doctrine with the wait-and-see approach—objected to a construction which would render the interest void under the common law Rule as it was understood in 1927. *In re Frank*, 480 Pa. 116, 389 A.2d at 543-44; accord L. SIMES & A. SMITH, *supra* note 17, § 1276.

127. Because *Frank* did not involve a construction which would violate the common law Rule, applying a wait-and-see approach was not necessary for decision. Cf. *infra* note 134 and accompanying text (suggested approach under the USRAP).

128. USRAP § 1 (1986); see DRAFT USRAP (Spring 1986), *supra* note 1, at 21-51. Professor Dukeminier, however, advocates eliminating the common law Rule altogether. See *infra* notes 150 and 256 and accompanying text; accord Maudsley, *How to Wait and See*, *supra* note 7, at 370-73.

129. L. WAGGONER, NUTSHELL, *supra* note 6, at 319.

130. An income tax analogy comes to mind. In 1954, Congress enacted a scholarship provision (I.R.C. § 117) to end the case-by-case litigation over whether a receipt constituted an excludable gift. H.R. REP. NO. 1337, 83d Cong., 2d Sess. 16, reprinted in 1954 U.S. CODE CONG. & ADMIN. NEWS 4017, 4041. Since then, the major litigation issue has been whether the receipt constitutes a scholarship (in effect, a gift) or compensation for services. See *Bingler v. Johnson*, 394 U.S. 741 (1969), and progeny of cases. Once a receipt is determined to constitute a scholarship, complex scholarship rules apply.

131. Tax issues may also arise. For example, assume a beneficiary has a vested remainder interest but predeceases certain income beneficiaries who take as a class. Although the remainder interest will be estate taxable, its value effectively depends on when the decedent's successor will obtain possession. In turn, that question depends on who are the members of the class. Inevitably, the *Bosch* doctrine (Commissioner v. Estate of Bosch, 387 U.S. 456 (1967)) will require federal courts to pass on the propriety of lower state court decisions. See Note, *Bosch and the Binding Effect of State Court Adjudication Upon Subsequent Federal Tax Litigation*, 21 VAND. L. REV. 825 (1968).

Valuation questions may also arise when an executor seeks to defer payment of taxes. See I.R.C. § 6163 (extension of time for payment on value of future interests); see also *In re Estate of Gunderson*, 93 Wn. 2d 808, 613 P.2d 1135 (1980) (complex formula to defer state death taxes).

132. See *Connecticut Bank & Trust Co. v. Brady*, 174 Conn. 616, 392 A.2d 445 (1978).

excluded, the preferred result under existing law, there may be no perpetuities violation.¹³³ As reporter for the USRAP, Professor Waggoner expects that courts will incline towards a construction resulting in validity under the common law Rule.¹³⁴

The ultimate impact of litigation during the wait-and-see period will be diminished benefits for the intended beneficiaries as a result of fees of lawyers—the unintended beneficiaries. Although the actual size of the *Pearson* estate was not disclosed, 6 law firms representing 40 clients were ordered to be paid from the estate. In *Frank*, there were 5 law firms representing various beneficiaries.

b. Inconvenience at the End of the Waiting Period

Most wait-and-see advocates agree on what should happen in the event that an interest has neither terminated nor vested within whatever waiting period obtains: deferred cy pres litigation.¹³⁵ The transferor's intent will be carried out as nearly as possible, "thereby holding the unavoidable enrichment of unintended takers to a minimum."¹³⁶

The deferred cy pres section under the USRAP provides as follows:

REFORMATION. Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by [the statutory rule against perpetuities] if:

- (1) a nonvested property interest or a power of appointment becomes invalid under [the statutory rule];
- (2) a class gift is not but might become invalid under [the statutory rule] and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or
- (3) a nonvested property interest that is not validated by [the statutory rule] can vest but not within 90 years after its creation.¹³⁷

133. See, e.g., *Joyner v. Duncan*, 299 N.C. 565, 264 S.E.2d 76 (1980); *Underwood v. MacKendree*, 242 Ga. 666, 251 S.E.2d 264 (1978). See generally RESTATEMENT OF PROPERTY § 375 (1944).

134. See DRAFT USRAP (Spring 1986), *supra* note 1, at 46. Litigation during the waiting period may also be necessary under the USRAP reformation statute. See *infra* note 145 and accompanying text.

135. See *supra* note 41 and accompanying text.

136. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1782.

137. USRAP § 3 (1986).

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In addition to 7 single-spaced pages of discussion of the section including 6 complex examples, the USRAP offers the Restatement (Second) as an additional reference.¹³⁸

The complexity of the deferred cy pres approach can be illustrated by an example under the above-quoted statute.¹³⁹ Although that example suggests the precise method of reformation, the actual reform ordered by a court will depend on the transferor's "manifested plan of distribution." This may include invalidation of the interest, along with invalidation of valid interests under the doctrine of infectious invalidity.¹⁴⁰ The Restatement (Second)

138. DRAFT USRAP (Spring 1986), *supra* note 1, at 60-67.

139. *Example (3)—Age Contingency in Excess of 21.* T devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30. T was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when T died.

Since the remainder interest in favor of A's children who reach 30 is a class gift, at common law (*Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817)) and under this Act . . . the interests of *all* potential class members must be valid or the class gift is totally invalid. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at T's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. There is no validating life, and the class gift is therefore not validated [under the common law Rule]. . . .

Under [the statutory wait-and-see rule]. . . the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after T's death. If in fact there is an afterborn child (Z), and if upon A's death, Z has at least reached an age such that he cannot be alive and under the age of 30 on the 90th anniversary of T's death, the class gift is valid. (Note that at Z's *birth* it would have been certain that he could *not* be alive and under the age of 30 on the 90th anniversary of T's death; nevertheless, the class gift could not *then* have been declared valid because, A being alive, it was *then* possible for one or more additional children to have later been born to or adopted by A.)

Although unlikely, suppose that at A's death (prior to the expiration of the 90-year period), Z's age was such that he could be alive and under the age of 30 on the 90th anniversary of T's death. Suppose further that at A's death X and Y were over the age of 30. Z's interest and hence the class gift as a whole is not yet invalid under the Statutory Rule because Z might die under the age of 30 within the 90-year period following T's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after T's death. Consequently, the prerequisites to reformation set forth in subsection (2) are satisfied, and a court would be justified in reforming T's disposition to provide that Z's interest is contingent on reaching the age he can reach if he lives to the 90th anniversary of T's death. This would render Z's interest valid so far as the Statutory Rule Against Perpetuities is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to reach the required age under the reformed disposition, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Id. at 63-65.

140. Courts are urged not to apply the infectious invalidity doctrine. See DRAFT USRAP (Spring 1986), *supra* note 1, at 61.

provides that the ultimate impact of death taxes is a relevant factor in fashioning the relief.¹⁴¹ Despite the lengthy discussions of deferred cy pres under both documents, neither provides guidance for a court to determine what the manifested plan of distribution was in a particular case.

Consider existing judicial difficulty in ascertaining the intent (the manifested plan of distribution) of a decedent: "[P]robing the minds of persons long dead as to what they meant by words used when they walked this earth in the flesh is, at best, perilous labor."¹⁴² Ascertaining such intent some 90 years after death will be even more perilous. Deferred cy pres will require judges (who will not likely have been born at the time of the transferor's death) to divine the manifested plan of distribution and prescribe a scheme which best approximates that plan. Such a judge will also have to be expert or become expert in state and federal taxation, because the tax impact will be a relevant factor.¹⁴³

Enactment of deferred cy pres legislation will add a class of unintended beneficiaries: unborn lawyers. The staggering fees Professor Leach complained about may be commonplace in deferred cy pres litigation.¹⁴⁴

For four principal reasons, the response that deferred cy pres litigation will arise only infrequently is unfounded. First, subsections (2) and (3) of the reformation statute ensure that litigation will occur well before the proxy period expires. Under subsection (2), the process can be invoked as soon as one member of a class could call for distribution.¹⁴⁵ Second, the frequency of litigation is mere conjecture.¹⁴⁶ For example, adoptions (fraudulent or otherwise) which can extend trust duration for a considerable period are not taken into account. Third, no account is taken of potential litigation to determine whether the common law Rule was violated; deferred cy pres can be invoked only if the common law Rule was violated.¹⁴⁷

141. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5, at 87 (1983) (illustration K).

142. See *North Carolina Nat'l Bank v. Goode*, 298 N.C. 485, 487, 259 S.E.2d 288, 291 (1979) (quoting with approval *Gatling v. Gatling*, 239 N.C. 215, 221, 79 S.E.2d 466, 471 (1954)).

143. Relevant tax systems may include federal and state transfer tax systems (gift, estate and/or inheritance and generation-skipping systems), as well as income tax systems.

144. See *supra* text accompanying note 89.

145. See *supra* note 139 (example illustrating early litigation). Similarly, early litigation is possible when a nonvested interest cannot vest within the wait-and-see period. See *DRAFT USRAP* (Spring 1986), *supra* note 1, at 60 (discussing Subsection (3), quoted *supra* in text accompanying note 137).

146. Professor Casner predicted litigation in no more than 10% of the cases. *1979 ALI Proceedings*, *supra* note 4, at 456-57.

147. Courts will have to determine the effect of a prior, but erroneous, decision holding that an interest violates the common law Rule. See *Merrill v. Wimmer*, 481 N.E.2d 1294 (Ind. 1985) (discussed *infra* text accompanying notes 221-34). In effect, res judicata and related questions will be presented. Compare *Dickerson v. Union Nat'l Bank*, 268 Ark. 292, 595 S.W.2d 677 (1980) (no res judicata), with *Rollins v. May*, 603 F.2d 487 (4th Cir. 1979) (opinion of district court adopted by court of appeals) (res judicata bar).

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Fourth, even wait-and-see advocates recognize the likelihood of deferred cy pres litigation. Both the Restatement (Second) of Property and the USRAP contain numerous examples—none of them far-fetched—of when deferred cy pres litigation will be necessary.¹⁴⁸

Assumption #3: The wait-and-see approach to the common law Rule Against Perpetuities simplifies the law.

A critical flaw in wait-and-see systems is the attendant complexity.¹⁴⁹ Each variation begins with the common law Rule and adds on layers of complexity.

Professor Dukeminier extols the virtues of the causal relationship principle because it replaces the what-might-have-been test of the common law Rule.¹⁵⁰ On analysis, however, it is clear that the common law must first be understood to identify the measuring lives.¹⁵¹ Additionally, Professor Waggoner demonstrates how difficult identifying measuring lives will be by this method.¹⁵² Professor Dukeminier, however, feels that the courts will be able to handle any problems: "[T]his gives . . . judges too little [credit] I do not doubt that judges can reason just as logically, once they see that the measuring lives for wait-and-see are the persons you test for a validating life at common law."¹⁵³ Professor Dukeminier's optimism is not confirmed by the judicial experience to date.¹⁵⁴

The USRAP adopts a 90-year proxy method, but the wait-and-see component will not apply if an interest does not violate the common law Rule.¹⁵⁵ If, as agreed, the common law Rule is not well understood, is it reasonable to expect that a Uniform Statutory Rule Against Perpetuities

148. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5, at 81-87 (1983); DRAFT USRAP (Spring 1986), *supra* note 1, at 61-67.

149. Professor Schuyler observed: "[I]f simplicity is a worthy purpose of perpetuity reform, then, on balance, the game of wait-and-see may be hardly worth the candle." Schuyler, *Should the Rule Against Perpetuities Discard Its Vest? (Part II)*, 56 MICH. L. REV. 887, 941 (1958).

150. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1711-13. He would displace the common law Rule with the following sentence: "No interest is good unless it vests within twenty-one years after the death of all persons in being when the interest is created who can affect the vesting of the interest." *Id.*, at 1713.

151. Dukeminier, *Final Comment*, *supra* note 9, at 1747.

152. Waggoner, *Perspective*, *supra* note 9, at 1714-24.

153. Dukeminier, *Final Comment*, *supra* note 9, at 1747.

154. See, e.g., *Merrill v. Wimmer*, 481 N.E.2d 1294 (Ind. 1985) (discussed *infra* text accompanying notes 221-34). Professor Volkmer discusses three Nebraska cases involving a perpetuities issue which the court (and attorneys) failed to detect. Volkmer, *The Law of Future Interests in Nebraska (Part I)*, 18 CREIGHTON L. REV. 259, 278-81 (1985).

155. USRAP § 1 (1986) (discussed *supra* note 71); see Waggoner, *Progress Report*, *supra* note 1, ¶ 701.1.

with an added wait-and-see component will be better understood? Professor Waggoner thinks not. Consider his concerns as a result of the *Pearson* decision:

It is uncertain how competently the courts will administer the wait and see modification. In working a fundamental modification of the Rule Against Perpetuities, the wait and see concept constitutes an enormous disturbance of settled law in a highly technical and indeed arcane area [T]he danger and uncertainty is that some courts, perhaps many courts, operating under a wait and see regime may misunderstand and misapply the concept. Thus there is the risk of muddled opinions, and of a decline in the quality of jurisprudence in the perpetuity area. To be somewhat more specific, there is even the risk that the wait and see modification would not be restricted to its proper sphere—interests which violate the common law Rule in its traditional form. It would be unfortunate indeed if a court operating under a wait and see regime were to refuse to adjudge the validity of an interest which was valid under the traditional possibilities test on the fallacious ground that the new law requires that we wait to see what actually happens. Raising the spectre of such a misdirected result, or indeed the danger of misconceived judgments even if the operation of wait and see is restricted to its proper sphere, might be dismissed as far-fetched were it not for the fact that the *Pearson* decision shows that the danger is real.¹⁵⁶

Professor Waggoner also points to another decision which raised "suspicions about courts' ability to administer wait and see."¹⁵⁷ Notwithstanding his misgivings, Professor Waggoner would depend on courts to identify "the various chains of events that will render the interest valid and/or conversely the various chains of events that will render it invalid."¹⁵⁸

The latest available complete version of the USRAP is a remarkably complex document.¹⁵⁹ It contains over 80 single-spaced pages. There are 25 complex examples under just one of the sections¹⁶⁰—a number which exceeds the actual invalidating cases during the 8-year period, 1978–1985, by over 300 percent.

The reader might bear in mind the plight of the legislator who will be expected to consider the merits of the USRAP. A Kentucky legislator's response to wait-and-see is instructive: "[T]his is the most complex subject

156. L. WAGGONER, NUTSHELL, *supra* note 6, at 310–11 (emphasis in original).

157. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1776 n.153 (citing *Phelps v. Shropshire*, 254 Miss. 777, 183 So. 2d 158 (1966), wherein the court confused the wait-and-see doctrine with the common law severability doctrine).

158. L. WAGGONER, NUTSHELL, *supra* note 6, at 320. He adds the following caveat: "In order for this approach to work properly, however, the courts must be able to handle it competently." *Id.* at 321. A proxy method does not obviate the need to identify chains of events; vesting or termination will still depend on the individual family situation.

159. DRAFT USRAP (Spring 1986), *supra* note 1.

160. The example set out *supra* in note 139 illustrates the type of example under the USRAP.

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ever brought up in the legislature, and I'm not going to vote for something I don't understand."¹⁶¹

Assumption #4: The wait-and-see approach to the common law Rule Against Perpetuities will not unreasonably extend dead hand control because it merely adds a standard saving clause to an instrument.

Wait-and-see advocates claim that their system merely introduces a well-conceived saving clause into an instrument.¹⁶² Consider Professor Casner's description of wait-and-see: "All this really does is to give a person who has not had the good fortune of putting himself in skilled hands the opportunity to have the same benefit."¹⁶³

Although this argument has egalitarian appeal in the guise of consumer-protection, it fails to take into account the differences between standard saving clauses and the saving clause injected into instruments under wait-and-see. The standard saving clause ensures compliance with the Rule but usually terminates a trust well before the maximum allowable period. In contrast, the injected saving clause, especially one based on a 90-year period as sanctioned by the USRAP, encourages dead hand control and fosters litigation.

Professor Waggoner uses the saving clause feature to justify a waiting period of 80 to 100 years.¹⁶⁴ He illustrates how a disposition otherwise violative of the Rule—a disposition conditioned on unborn grandchildren attaining an age in excess of 21—can be saved.¹⁶⁵ All the drafter need do is insert a saving clause which will require trust termination 21 years after the death of the last survivor of a designated group. To assure that young children will be included, Professor Waggoner suggests a group comprised of the surviving descendants of the testator's parents or grandparents.¹⁶⁶ Since such a group will likely contain a young child, adding 21 years to the child's actuarial life expectancy produces a period-in-gross of 80 to 100 years.¹⁶⁷

Professor Waggoner rejects wait-and-see methods which employ actual measuring lives because of the arbitrariness involved.¹⁶⁸ Instead he urges adoption of a USRAP based on a proxy method.¹⁶⁹ Under the USRAP, courts would also utilize the standardized 90-year time period to reform

161. See Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 Ky. L.J. 3, 57 (1960).

162. See Dukeminier, *The Measuring Lives*, *supra* note 9, at 1656 & n.25.

163. 1979 ALI Proceedings, *supra* note 4, at 456 (remarks of Professor Casner).

164. Waggoner, *Perspectives*, *supra* note 9, at 1718-19.

165. *Id.* at 1718.

166. *Id.* at 1718 n.16.

167. *Id.* at 1719.

168. *Id.* at 1726-28.

169. Waggoner, *Progress Report*, *supra* note 1, ¶ 700.

instruments which prescribe excessive waiting periods: for example, 100 or 125 years.¹⁷⁰

The dead hand control sanctioned by a 90- to 100-year waiting period would not be objectionable to Professor Waggoner. "Since lawyers operating within the Common-law Rule can and do provide such an 'over-insured' period of time for their clients' dispositions to work themselves out, it is hardly unprincipled for the law to grant a similar period of time to clients who unbeknownst to them and their families did not have expert counsel."¹⁷¹

It is appropriate to consider how a competent attorney would actually approach a perpetuities problem. Assume a client wishes to leave property in trust with income to her child for life, remainder to unborn grandchildren provided they reach age 25. The attorney would probably advise against the disposition; instead, the attorney would suggest that the child be given a special testamentary power to appoint among her issue, urging that the child seek counsel when exercising the power. Assuming the client persisted, the lawyer would not knowingly violate the Rule. Rather, he or she would accomplish the result within the perpetuities period by trying to convince the client to reduce the age to 21. Alternately, the grandchildren's interests could be made to vest in interest at 21 with delayed possession until age 25.¹⁷² In any event, the lawyer would use a saving clause to be absolutely certain of no violation.¹⁷³

A survey of various saving clause forms reveals two major types, illustrated by the forms of wait-and-see advocates:

Professor Dukeminier's form:

Notwithstanding any other provisions in this instrument, this trust shall

¹⁷⁰ The 100-year period-in-gross version provides the following example:

Example 5—Case of An Interest, As of Its Creation, Being Impossible to Vest Within the Period of the Statutory Rule. T devised property in trust, directing the trustee to divide the income, per stirpes, among T's descendants from time to time living, for 125 years. At the end of the 125-year period following T's death, the trustee is to distribute the corpus and accumulated income to T's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's (sic) descendants who are living 125 years after T's death can vest, but not within the allowable 100-year period of the Statutory Rule. The interest would violate the Common-law Rule because there is no common-law validating life. In these circumstances, a court is authorized by subsection (3) of this section, [see *supra* note 137] to reform T's disposition within the limits of the Statutory Rule. An appropriate result would be for the court to lower the period following T's death from a 125-year period to a 100-year period.

[DRAFT USRAP (Fall 1985), *supra* note 57, at 44. Cf. DRAFT USRAP (Spring 1986), *supra* note 1, at 66-67 (example of reduction from 100 to 90 years).

¹⁷¹ DRAFT USRAP (Winter 1986), *supra* note 22, at 20.

¹⁷² Cf. *In re Estate of Darling*, 219 Neb. 705, 365 N.W.2d 821 (1985) (vesting at birth, with possession postponed until age 25).

¹⁷³ The competent attorney understands that the Rule is complex, he or she has heeded Professor Casner's simple solution to avoid a violation. See *supra* text accompanying note 27.

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terminate, if it has not previously terminated, 21 years after the death of the survivor of the beneficiaries of the trust living at the date this instrument becomes effective.¹⁷⁴

Professor Casner's form:

If this trust has not terminated within 21 years after the death of the survivor of my issue living on my death, such trust shall terminate at the end of such 21-year period. . . .¹⁷⁵

As suggested by these saving clauses, people tailor dispositions based on actual family developments rather than on some abstract notion of equal waiting time.¹⁷⁶

Significantly, saving clauses in practice do not purport to extend dead hand control for a prolonged period.¹⁷⁷ Instead, they are designed to ensure compliance with the Rule; they provide for both trust termination and outright delivery of the property to prescribed persons.¹⁷⁸ Wait-and-see provides no gift over after the waiting period.¹⁷⁹ Instead, a court must determine what the transferor (dead for almost 100 years) would have intended. Further, the property may continue in trust, provided vesting in interest occurs within the prescribed period.

174. J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 841 (3d ed. 1984).

175. 3 A. CASNER, *ESTATE PLANNING* 1130 (1980).

176. Consider Professor Simes' view: "What period will take care of the normal desires of the testator who makes a family settlement by way of testamentary trusts? The answer is clear enough. It is lives in being and twenty-one years." L. SIMES, *PUBLIC POLICY*, *supra* note 13, at 68-69. See, e.g., *Read v. Legg*, 493 A.2d 1013 (D.C. App. 1985) (trust, drafted by expert using saving clause, will terminate after 60 years); *Dennis v. Rhode Island Hosp. Trust Nat'l Bank*, 571 F. Supp. 623 (D. R.I. 1983), *aff'd as modified*, 744 F.2d 893 (1st Cir. 1984) (trust termination, based on saving clause, after 71 years).

177. In addition to Professors Dukeminier's and Casner's forms, see *infra* text accompanying notes 173, 174, consider the perpetuities saving clauses recommended by Professors Freeland and Maxfield. See *infra* note 178; see also the saving (savings) clauses recommended in the following form books: J. MURPHY, *MURPHY'S WILL CLAUSES*, form 1:25 (1985); R. PARELLA & J. MILLER, *MODERN TRUST FORMS & CHECK-LISTS* § 1.3, form 1.3.05 (1st Supp. 1986); 4 J. RABKIN & M. JOHNSON, *CURRENT LEGAL FORMS*, form 9.22 (1984); R. WILKINS, *DRAFTING WILLS AND TRUST AGREEMENTS—A SYSTEMS APPROACH*, forms 15.20W, 15.21W (rev. ed. 1985).

178. Consider the form recommended by Professors Freeland and Maxfield:

MAXIMUM DURATION OF TRUST

(Awarding Rule Against Perpetuities)

Notwithstanding anything herein to the contrary, the trusts created hereunder shall terminate not later than twenty-one years after the death of the last to die of those beneficiaries who were living on the date of my death. At the end of such period all such trusts shall terminate and my Trustee shall distribute the undistributed income and principal of such trusts to the current income beneficiaries in the proportions as they are then receiving the income therefrom and if the proportions are not specified, in equal shares to such beneficiaries, absolute and free of trust.

J. FREELAND, G. MAXFIELD & C. EARLY, *FLORIDA WILL AND TRUST MANUAL C-97* (2d ed. 1984); see also forms cited *supra* note 177.

179. Professor Dukeminier recognizes this shortcoming. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1656 n.25.

If states adopt the USRAP, a 90-year period will likely become the standard in practice.¹⁸⁰ The English experience bears noting. There, lawyers commonly used a royal lives saving clause to prolong the waiting period to the maximum extent possible.¹⁸¹ A Law Reform Committee recommended adoption of a fixed period of 80 years to attract drafters away from the royal lives approach, but rejected an automatic 80-year period under its wait-and-see system: "[Y]et we do not think that such a period should automatically apply to all limitations, for if it did the period during which it would be necessary to 'wait and see' whether a limitation is valid might in many cases be undesirably extended."¹⁸² The English cases since 1964 suggest that practitioners are using the 80-year option.¹⁸³

The extension of dead hand control is objectionable. Consider Professor Powell's concerns:

Personally, I believe such a lengthening of the term substantially emasculates the whole salutary purpose of the Rule, namely to restrict the power of the dead hand To the extent that the wait-and-see rule, in fact, emasculates the rule, I believe it to be to that extent socially bad.¹⁸⁴

Professor Fetters voiced his concerns: "To select the outer limits . . . as the standard measure makes about as much sense as fixing automobile speed limits at just one mile per hour under that speed which statistically is determined to be involved in the greatest percentage of fatal automobile accidents."¹⁸⁵ As a wait-and-see advocate, Professor Dukeminier's views are significant:

But in reforming the Rule, reformers should keep clearly in view the primary purpose of the Rule: curtailing the dead hand. The measuring lives for wait-and-see should be carefully limited lest the reform yield too much ground to dead hand control. The wait-and-see saving clause should be no broader than necessary or appropriate in the specific case.¹⁸⁶

The USRAP's deferred cy pres component will also extend dead hand control. This will likely happen by default.¹⁸⁷ Unless there is a sufficient

180. See *supra* note 71 (setting forth Statutory Rule Against Perpetuities under the USRAP).

181. ENGLISH REPORT, *supra* note 13, at 6. *Léedale v. Lewis*, 1980 S.T.C. 679 (Ch.), provides an example of a royal lives clause: The Perpetuity Day 'means the day on which expires the period of twenty-one years calculated from and after the death of the last survivor of the descendants of His late Majesty King George the Fifth living at the date of this Settlement.

182. ENGLISH REPORT, *supra* note 13, at 7.

183. See, e.g., *Watson v. Holland*, [1985] 1 All E.R. 290 (Ch. 1984); see also *Re Clore* [1985] 1 W.L.R. 1290 (Ch.) (vesting date was the earlier of 80 years or 20 years after survivor of royal lives).

184. Powell Memorandum, *supra* note 10, at 136.

185. Fetters, *The Wait-and-see Disaster*, *supra* note 8, at 404.

186. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1710.

187. Professor Waggoner suggests extension by default under the causal-lives method. Waggoner, *Progress Report*, *supra* note 1, ¶ 703.3.

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amount of property involved, lawyers are not going to involve themselves in the process. Assuming the reformation process is worthwhile for lawyers, the litigation process may last for several years, further extending dead hand control.¹⁸⁸

In the final analysis, Americans have not deemed it appropriate to take "full advantage of the rule against perpetuities."¹⁸⁹ This reasonable restraint is why there is presently little concern in this country over dead hand control.

Assumption #5: The wait-and-see approach to the common law Rule Against Perpetuities is consumer-protection legislation for the average consumer of legal services.

Wait-and-see advocates portray their system as being designed for the smaller estates. Professor Leach explained:

The technicalities of the Rule against Perpetuities are well known to the estate specialists who are found in the large law firms which more often serve clients with large estates; these specialists have less difficulty in avoiding the technicalities and carrying out their clients' wishes. However, it is more difficult for the general practitioner, who often serves the small property owner, to keep abreast of the intricacies of the Rule against Perpetuities while carrying on the many other types of law practice in which he engages. This . . . [wait-and-see doctrine] tends to put the nonspecialist on a par with the specialist and thereby to protect the small-to-moderate property owner who consults the general practitioner.¹⁹⁰

Professor Leach's subsequent views provide an interesting contrast:

I daresay that the stratospheric level of the Massachusetts Bar is as sophisticated in perpetuities matters as one is likely to find, but the record is replete with instances in which its members have fallen flat on their distinguished faces with regard to trusts involving huge fortunes of our most prominent citizens.¹⁹¹

188. Cf. *May v. Hunt*, 404 So. 2d 1373 (Miss. 1981) (eight years of litigation).

189. 1979 *ALI Proceedings*, *supra* note 4, at 456 (remarks of Professor Casner). Of course, an occasional transferor utilizes the full measure of the period. See, e.g., *Klugh v. United States*, 588 F.2d 45 (4th Cir. 1978) (1881 will, final disposition in 1988); *Estate of Tower*, 323 Pa. Super. 235, 470 A.2d 568 (1983), *aff'd*, 506 Pa. 642, 487 A. 2d 820 (1984) (1889 will, final disposition not likely before twenty-first century).

190. W. LEACH & O. TUDOR, *THE RULE AGAINST PERPETUITIES* 228 (1958). Professor Dukeminier agreed:

My experience in reading hundreds of perpetuities cases tends to confirm Professor Leach's view. I have not yet found a trust or will of a Ford or Rockefeller or Mellon that violated the Rule against Perpetuities; violations usually occur in instruments prepared by lawyers of ordinary skills. Since the Rule is seldom violated by specialists handling huge sums of wealth, the wait-and-see doctrine will have minimal impact on increasing the amount of property subject to the power of the dead hand. Dukeminier, *Cleansing the Stables of Property: A River Found At Last*, 65 IOWA L. REV. 151, 162 (1979).

191. Leach, *Perpetuities: What Legislatures, Courts and Practitioners Can Do About the Follies of the Rule*, 13 U. KAN. L. REV. 351, 356 n.16 (1965) [hereinafter Leach, *Legislatures*].

Recent cases also suggest that perpetuities issues may arise in substantial estates.¹⁹²

Rather than benefiting the average consumer, wait-and-see legislation will likely benefit the wealthy consumer of legal services. Indeed, if the 90-year period-in-gross version of the USRAP is widely adopted, the estate planning bar will likely encourage their wealthy clients to prolong the duration of trusts to obtain tax benefits.¹⁹³ Nor will the deferred cy pres component of wait-and-see benefit the average consumer of legal services. Unless there is a sufficient amount involved, it is unlikely that some unborn lawyer will undertake to immerse him or herself in the arcane world of perpetuities.

Finally, a system which shields lawyers for less than competent practices is hardly consumer-protection legislation. Assuming, *arguendo*, that most interests will vest or terminate within the waiting period, the lawyer who drafted the instrument will escape any consequences for violating the common law Rule.¹⁹⁴ Incompetent lawyers should not be shielded.

Although attorneys may not be expected to master the Rule,¹⁹⁵ it is a

192. See *Wing v. Wachovia Bank & Trust Co.*, 35 N.C. App. 346, 241 S.E.2d 397, *cert. denied*, 295 N.C. 95, 244 S.E.2d 263 (1978) (involving over 60 named parties represented by six law firms); see also *May v. Hunt*, 404 So. 2d 1373, 1381 (Miss. 1981) (Sugg. J., dissenting); *First Ala. Bank v. Adams*, 382 So. 2d 1104 (Ala. 1980) (substantial amount of property).

193. Favorable tax treatment may be secured while property is in trust. See Bloom, *The Generation-Skipping Loophole: Narrowed, But Not Closed, by the Tax Reform Act of 1976*, 53 WASH. L. REV. 31 (1977) (discussing prior law). As under prior law, generation-skipping transfer tax can be postponed by prolonging trusts. I.R.C. §§ 2601-2663, as enacted by the Tax Reform Act of 1986, 99 Pub. L. No. 514, § 1431 100 Stat. _____ (1986). Professor Casner explained why the Rule Against Perpetuities appears as the first topic in the Restatement (Second) of Property:

I think it is important to note that the subject of donative transfers in property really is the foundation of the subject of estate planning, which is a term that is quite popular these days, and there are a great many people concerned about a program of appropriate estate planning. You really cannot work effectively in the field of estate planning without noting the limitations that you are operating under from the standpoint of property law, which is the basis of the entire subject. Therefore, as we develop this topic, we will from time to time examine it in the light of estate planning problems, which inject into the picture a considerable amount of taxation, income, gift, and estate taxes.

1978 ALI Proceedings, *supra* note 4, at 222-23 (remarks of Professor Casner). In effect, estate planners concerned with minimizing taxes for their clients—those with significant wealth—must understand the interplay of the Rule Against Perpetuities. See generally Bloom, *Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation*, 45 ALB. L. REV. 261 (1981).

194. Presumably it would not be malpractice to violate the common law Rule under a wait-and-see system.

195. In the famous case of *Lucas v. Hamm*, the California Supreme Court held it was not malpractice to violate the Rule, 56 Cal. 3d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1961). But see *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); *Wright v. Williams*, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975) (suggesting less tolerance for a perpetuities drafting violation). Even if a violation by a drafting attorney would constitute malpractice, in at least one state an action may not be maintained by disappointed beneficiaries under a will. See Johnston, *Avoiding Malpractice Claims That Arise Out of Common Estate Planning Situations*, 63 TAXES 780, 783-85 (1985) (discussing privity barrier in Nebraska and possibly New York). On the other hand, Iowa courts apparently recognize a

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simple matter to avoid a violation by using a saving clause. Society should not protect the lawyer who does not know enough to use a saving clause.¹⁹⁶ If such a lawyer can fail in this area, it is likely his or her services generally may not be of much value to the average consumer of legal services.

Assumption #6: There is a correct version of the wait-and-see approach to the common law Rule Against Perpetuities.

Several versions of wait-and-see have been advanced in recent years. In 1983, Professor Waggoner urged the adoption of the wait-and-see version

malpractice action, but, incredibly, require discovery of the error by lay persons within the applicable limitations period. *Millwright v. Romer*, 322 N. W. 2d 30 (Iowa 1982). *Romer* is criticized in Kurtz, *supra* note 48, at 754 n. 149. Professor Dukeminier suggests the *Romer* decision motivated Iowa to adopt its wait-and-see system. See Dukeminier, *The Measuring Lives*, *supra* note 9, at 1656 n. 23.

196. Consider the words of Professor Casner: "Nobody who drafts a trust today, familiar with the rule against perpetuities would think of putting in a trust that did not have . . . an overall termination provisions [sic] in it." 1978 ALI Proceedings, *supra* note 4, at 240. [f, after all the attention generated, lawyers and law students do not know about saving clauses, additional publicity could be considered. Bar associations could distribute publicity to their members. Law professors should ensure that their students know that the Rule need never be violated.

Some commentators have argued that the use of saving clauses is inappropriate. See, e.g., Becker, *Understanding the Rule Against Perpetuities in Relation to the Lawyer's Role—To Construe or Construct*, 20 SAN DIEGO L. REV. 733, 759 n. 51 (1983). Professor Becker was concerned about possible deviant distribution of principal, for example, distribution of principal which excludes grandchildren. This problem, based on the indiscriminate use of saving clauses, can be avoided by a well-conceived "gift over." Consider Professor Halbach's comment in a widely-disseminated form book.

The purpose of this [gift over] provision of the saving clause is to provide for an alternative distribution if the cutoff provision terminates the trust before the main provision for distribution becomes operative. It is a difficult provision to draft because it must be adapted to the dispositive scheme of each trust and approximate the original as closely as possible.

Halbach, *Rule Against Perpetuities*, in CALIFORNIA WILL DRAFTING PRACTICE § 12.52, at 577 (1982). In short, there should be no "deviant distribution of principal" if the transferor designates the beneficiaries of the "gift over." The choices are numerous. See generally McGovern, *Perpetuities Pitfalls and How Best to Avoid Them*, 6 REAL PROP., PROB. & TR. J. 155, 175-77 (1971); Moore, *New Horizons in the Grant and Exercise of Discretionary Powers*, 15 INST. ON EST. PLAN. ¶ 600 (1981).

Professor Becker also expressed concern over premature trust termination: specifically, termination while nonbeneficiary children were still alive. Again, the problem can be avoided by discriminate use of saving clauses. Consider Professor Halbach's form and comment thereto:

Cutoff provision

Any trust created by this Will, or by the exercise of any power of appointment conferred by this will, that has not terminated sooner shall terminate twenty-one (21) years after the death of the last survivor of _____ [name or describe class of those best suited to be measuring lives] _____ living at my death.

COMMENT:

The will drafter should choose the group of measuring lives that best suits the particular situation. Halbach, *Rule Against Perpetuities*, in CALIFORNIA WILL DRAFTING PRACTICE § 12.52, at 575-76 (1982). Professor Simes argued against saving clauses, recommending instead that an attorney be sure there was no violation. L. SIMES & A. SMITH, *supra* note 17, § 1295. However laudable this ideal, practitioners will use saving clauses. The attorney's obligation is to design a well-conceived clause appropriate for the particular situation.

of the Restatement (Second) of Property: "[L]egislatures contemplating perpetuity reform should . . . enact wait-and-see statutes modeled on the *Restatement (Second)*."¹⁹⁷ During the years 1985 and 1986, Professor Waggoner authored at least four USRAP drafts, including a Restatement (Second) version and three different proxy versions.¹⁹⁸

In January, 1986, the debate between Professors Dukeminier and Waggoner was published.¹⁹⁹ Although Professor Waggoner raised the proxy method therein, Professor Dukeminier did not respond to it. After 100 pages of debate, Professor Dukeminier, who advocates a causal-lives method, concluded: "I am more convinced than ever that my proposed perpetuities reform statute is the simplest, most understandable, and most easily workable statute yet suggested."²⁰⁰

Assumption #7: There is a need for a uniform statutory Rule Against Perpetuities.

A clear diversity among the states regarding their approach to dead hand control is evident.²⁰¹ At one extreme is Louisiana which generally requires beneficiaries to be in existence at the time of transfer.²⁰² The other extreme is represented by the states of Idaho, South Dakota, and Wisconsin which

197. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1785.

198. DRAFT USRAP (Summer 1985), *supra* note 43 (Restatement (Second) version); DRAFT USRAP (Fall 1985), *supra* note 57; DRAFT USRAP (Winter 1986), *supra* note 22; DRAFT USRAP (Spring 1986), *supra* note 1. In addition, Professor Waggoner developed further variations on the proxy method. See *supra* notes 62, 63.

199. See *supra* note 9.

200. Dukeminier, *Final Comment*, *supra* note 9, at 1746.

201. In addition to some rule against perpetuities to limit remote vesting, states may have related (but varying) rules limiting dead hand control. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(a) (McKinney 1967 & 1986 Supp.) (rule against unduly suspending the power of alienation); MINN. STAT. ANN. § 501.11(6) (West 1947) (trust duration rule); ALA. CODE § 35-4-252 (1977) (very restrictive accumulation rule). See generally L. SIMES & A. SMITH, *supra* note 17, §§ 1461-1491.

202. Louisiana operates under a prohibited substitution rule. LA. CIV. CODE ANN. § 1520 (West Supp. 1986). As the Supreme Court of Louisiana recently noted: "The purpose of the prohibition is to prevent attempts to tie up property in perpetuity." *Succession of Goode*, 425 So. 2d 673, 677 n.5 (La. 1982). The principal non-trust exception to the prohibited substitution rule sanctions a usufruct-naked ownership disposition. LA. CIV. CODE ANN. § 1522 (West 1965). This arrangement is roughly equivalent to a life estate-remainder arrangement. See SA R. POWELL, *supra* note 10, ¶ 817. Indeed, the naked owner must be alive on the date of disposition. LA. CIV. CODE ANN. § 1482 (West 1965).

Trust beneficiaries must usually be alive when a trust is created. LA. REV. STAT. ANN. § 9:1803 (West 1965 & Supp. 1986). In rare cases, one or more of the settlor's descendants who are alive when the principal beneficiary dies may be substitute beneficiaries. LA. REV. STAT. ANN. §§ 9:1975, 9:1978 (West Supp. 1986). Special rules govern "class trusts." LA. REV. STAT. ANN. §§ 9:1891-9:1906 (West 1965 & Supp. 1986). See generally Oppenheim, *A New Trust Code for Louisiana—Act 338 of 1964*, 39 TUL. L. REV. 187, 208-16 (1965).

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effectively do not restrain dead hand control.²⁰³ In between are a majority of states which rely on the common law Rule exclusively; that is, states which have not adopted some wait-and-see method.²⁰⁴ Finally, there are wait-and-see jurisdictions: states which have adopted limited wait-and-see,²⁰⁵ and states which have adopted full wait-and-see,²⁰⁶ including Iowa, which effectively adopted the Restatement (Second) position.²⁰⁷

203. IDAHO CODE § 55-111 (1979); S.D. CODIFIED LAWS ANN § 43-5-6 (rev. ed. 1983); WIS. STAT. ANN. § 700.16(5) (West 1981). It is true that South Dakota and Wisconsin restrict the undue suspension of the power of alienation. WIS. STAT. ANN. § 700.16(1)(a) (West 1981 & Supp. 1985); S.D. CODIFIED LAWS ANN. § 43-5-1 (1983). For dispositions in trust, however, there will be no suspension problem if the trustee has the power to sell the trust property. WIS. STAT. ANN. § 700.16(3) (West 1981); S.D. CODIFIED LAWS ANN. § 43-5-4 (1983). Idaho has no suspension rule for personalty. IDAHO CODE § 55-111 (1979).

204. Alabama (ALA. CODE § 35-4-4 (1977)); Arizona (ARIZ. REV. STAT. ANN. § 33-261 (1974)); Arkansas (ARK. CONST. art. 2, § 19); California (CAL. CIV. CODE §§ 715.5-715.7 (Deering 1971)); District of Columbia (D.C. CODE ANN. § 45-302 (1981)); Georgia (GA. CODE ANN. § 44-6-1 (1982)); Indiana (IND. CODE ANN. § 32-1-4-1 (Burns Supp. 1985)); Michigan (MICH. COMP. LAWS ANN. § 26.491) (Callaghan rev. ed. 1984); Missouri (MO. REV. STAT. § 442.555 (1965 Supp.)); Montana (MONT. CODE ANN. § 70-1-408 (1985)); New York (N.Y. EPTL § 9-1.1(b) (McKinney 1967)); North Carolina (N.C. CONST. art. 1, § 34); North Dakota (N.D. CENT. CODE § 47-02-27 (1978)); Oklahoma (OKLA. STAT. ANN. tit. 60, §§ 75, 76 (West Supp. 1985)); Tennessee (TENN. CODE ANN. § 24-5-112 (1980)); Texas (TEX. PROP. CODE ANN. § 5.043 (Vernon 1984)); Wyoming (WYO. STAT. § 34-1-138 (republished ed. 1977)). The following states apply the common law Rule in the absence of statutory provisions: Colorado, Delaware, Hawaii, Kansas, Minnesota (only personalty), Nebraska, New Jersey, Oregon, South Carolina, Utah, and West Virginia.

Several of these states have codified refinements of the Rule. See, e.g., *infra* note 292 (cy pres statutes). California has an alternate 60-year period. CAL. CIV. CODE § 715.6 (Deering 1971). See generally L. SIMES & A. SMITH, *supra* note 17, §§ 1411-1439.

205. Connecticut (CONN. GEN. STAT. ANN. § 45-95 (West 1981)); Maine (ME. REV. STAT. ANN. tit. 33, § 101 (1978)); Maryland (MD. EST. & TRUSTS CODE ANN. § 11-103 (1974)); Massachusetts (MASS. ANN. LAWS ch. 184A, § 1 (Law. Co-op. 1977)). Florida also appears in this category. FLA. STAT. ANN. § 689.22 (West Supp. 1986). See Powell, *Florida's Statutory Rule Against Perpetuities*, 11 FLA. ST. U. L. REV. 767, 810 (1984).

206. The following states clearly employ the causal-lives method: Alaska (ALASKA STAT. § 34.27 (1985)); Kentucky (KY. REV. STAT. ANN. § 381.216 (Michie/Bobbs-Merrill 1972)); Nevada (NEV. REV. STAT. § 111.103 (1985)); New Mexico (N.M. STAT. ANN. § 47-1-17.1 (Supp. 1985)); Rhode Island (R.I. GEN. LAWS § 34-11-38 (1984)).

The wait-and-see method is unclear in the following states: Mississippi (judicially adopts wait-and-see); New Hampshire (judicially adopts wait-and-see); Ohio (OHIO REV. CODE ANN. § 2131.08 (Baldwin Supp. 1984)); Vermont (VT. STAT. ANN. tit. 27 § 501 (1975)); Virginia (VA. CODE ANN. § 55-13.1 (Supp. 1985)); Washington (WASH. REV. CODE ANN. § 11.98.130 (Supp. 1986) (trusts only)). See generally Dukeminier, *The Measuring Lives*, *supra* note 9, at 1658-59 n.30. Uncertainty also exists in Pennsylvania. See *supra* text accompanying notes 114-27. Illinois has a unique system applicable only for trusts. ILL. ANN. STAT. ch. 30, §§ 191-196 (Smith-Hurd Supp. 1985). See Schuyler, *Should the Rule Against Perpetuities Discard Its Vest*, 56 MICH. L. REV. 683, 714-15 (1958).

Professor Dukeminier also discusses wait-and-see adoptions outside the United States. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1655, 1658 n.29. See generally L. SIMES & A. SMITH, *supra* note 17, § 1411. England's complex wait-and-see system is comprehensively treated in Professor Maudsley's work. R. MAUDSLEY, *THE MODERN LAW*, *supra* note 41, at 110-95.

207. IOWA CODE ANN. § 558.68 (West Supp. 1985) (discussed in Kurtz, *supra* note 48).

Wait-and-see advocates have called for a uniform statute for over 30 years.²⁰⁸ If one had been adopted in 1979, the much-maligned Restatement (Second) method would have been employed.²⁰⁹ Is there any reason to suspect that any state, let alone a significant number of states, will adopt a USRAP based on a proxy approach? No, because dead hand rules, or the lack of them, are not creating any real problems in this country.²¹⁰ The cost of enactment is not worth the effort.²¹¹

Ultimately, a USRAP is unnecessary. Even if adopted, the USRAP would not apply to interests created before individual state enactment.²¹² In light of the recent publicity generated by the USRAP, it is doubtful whether lawyers will draft *new instruments* without inserting an appropriate saving clause.²¹³ Adoption of this complex system to deal with the isolated violations by transferors not seeking counsel,²¹⁴ and with counsel who persist in violating the Rule, cannot be justified. All violations can be handled under refinement techniques.²¹⁵

IV. REFINING THE COMMON LAW RULE AGAINST PERPETUITIES

A. *Justification*

The paucity of cases holding a nonvested interest void under the common law Rule demonstrates that the Rule is not producing harsh consequences. For this and the other reasons discussed in part III, a wait-and-see system cannot be justified. Nonetheless, the common Law rule can be refined.

Areas which need refinement are suggested by recent cases in the perpetuities area. The few cases which correctly found a violation disclose

208. See Leach, *Legislatures*, *supra* note 191, at 523.

209. To put it mildly, Professor Dukeminier takes a dim view of the A.L.I.-recommended solution in the Restatement (Second):

What Professor Percy Bordwell said of volumes 1 and 2 of the First Restatement of Property [Bordwell, Book Review, 51 Harv. L. Rev. 565, 570 (1938)], applies with particular force to the list of measuring lives in the Second Restatement: "Legislation is legislation and scholarship is scholarship, but the Institute is not a legislature and its ways are not those of scholarship."

Dukeminier, *The Measuring Lives*, *supra* note 9, at 1680-81.

210. Professor Leach noted that the absence of restrictions on dead hand control has posed no significant problems in Wisconsin. Leach, *Hail Pennsylvania*, *supra* note 19, at 1141.

211. Adoption of the USRAP would also require states to repeal or modify conflicting ancillary rules. See *supra* note 201 (identifying related rules).

212. See *supra* text accompanying note 67.

213. See *supra* note 196.

214. See, e.g., *Dickerson v. Union Nat'l Bank*, 268 Ark. 292, 595 S.W.2d 677 (1980) (holographic will).

215. See *infra* Part IV.

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familiar traps: the unborn widow situation;²¹⁶ inclusion of afterborns within a class;²¹⁷ and failing to attain an age in excess of 21 years.²¹⁸ There were no fertile octogenarian or administrative contingency cases during the period 1978-1985.²¹⁹ There were also two violations on exercising a power in favor of persons who were not alive when the power was created.²²⁰ Because it is assumed that the transferors and powerholders do not intend to violate the Rule, but merely fall into some trap, refinement to avoid invalidity would be appropriate.

Refinement is also justified to address the problem of litigation which erroneously invalidates an interest under the Rule. The recent Indiana case of *Merrill v. Wimmer*²²¹ illustrates how the common law Rule can befuddle bench and bar alike. The case involved the validity of a residuary trust created under the 1970 will of Newell Merrill (testator). The disposition may be summarized as follows:

Income to testator's three named children, A, B, and C, for the duration of the trust. When testator's youngest grandchild reaches age 25, the trust shall terminate as to two-thirds of the corpus and be divided as follows: one-sixth to A; one-sixth to A's children; one-sixth to B; and one-sixth to B's children. The other one-third shall continue in trust with income to C for life and on his death one-sixth to C's bodily issue and one-sixth to testator's grandchildren living at trust termination or the entire one-third to testator's grandchildren living at trust termination if C leaves no bodily issue.

Testator was survived by the following persons: a widow who was not provided for under the will;²²² his three children (A, B, and C) who were in

216. *Dickerson v. Union Nat'l Bank*, 268 Ark. 292, 595 S.W.2d 677 (1980) (holographic will).

217. *Connecticut Bank & Trust Co. v. Brody*, 174 Conn. 616, 392 A.2d 445 (1978). This disposition could have been construed to avoid invalidity. See *supra* note 133 and accompanying text.

218. *Walker v. Bogle*, 244 Ga. 439, 260 S.E.2d 338 (1979); *Berry v. Union Nat'l Bank*, 164 W. Va. 258, 262 S.E.2d 766 (1980), was a trust duration case in which the court reduced the period to 21 years.

219. See *Nelson v. Kring*, 225 Kan. 499, 592 P.2d 438 (1979); *Commerce Union Bank v. Warren County*, No. 85-12-11 (D. Tenn. May 16, 1985), *rev'd*, 707 S.W.2d 854 (1986), involving the voiding of an executory interest if a designated charity ceased existence. USRAP drafts suggest that such transactions should be subject to a 40-year vesting rule. See, e.g., DRAFT USRAP (Spring 1986), *supra* note 1, at 84-86 (relating to possibilities of reverter, rights of reentry and certain executory interests in realty). The 40-year rule, however, was dropped from the adopted USRAP version. See UNIF. STATUTORY R. AGAINST PERPETUITIES (Discussion Draft July 31, 1986).

On appeal in 1986, *Commerce Union Bank* was reversed, 707 S.W.2d 854 (1986). The Supreme Court of Tennessee construed the testamentary trust as creating a possibility of reverter, rather than an executory interest. As a result, it held that the common law Rule was not violated because the Rule does not apply to possibilities of reverter. See generally L. SIMES & A. SMITH, *supra* note 17, § 1239.

220. See *In re Will of Grunebaum*, 122 Misc. 2d 645, 471 N.Y.S. 2d 513 (1984); *In re Harden*, N.Y.L.J., Sept. 17, 1985, at 13, col. 6 (N.Y. Co. Surr.).

221. 481 N.E.2d 1294 (Ind. 1985), *vacating* 453 N.E.2d 356 (Ind. Ct. App. 1983).

222. The decisions do not discuss the spouse's elective share rights. See IND. CODE ANN. § 29-1-3-1 (Burns Supp. 1985).

their mid-to-late 40's; and seven grandchildren (five children of A, ages 13 to 29, and two children of B, ages 11 and 18).

Merrill was litigated in three courts. In the unreported trial decision,²²³ the court adopted a probate commissioner's findings that the corpus dispositions to A and B and their children violated the Rule Against Perpetuities,²²⁴ but that the dispositions to C with remainder over did not. A and B were each awarded one-third of the trust corpus. On appeal, counsel conceded that the intended corpus distributions to A, B, and their children violated the Rule Against Perpetuities. The three appellate judges agreed that the dispositions to C and remainders over did not violate the Rule.²²⁵

The appellate court announced it would apply the cy pres doctrine to violations under the Rule.²²⁶ Pursuant to this judicially-created power, the court construed the trust beneficiaries as those grandchildren living at testator's death.

The Supreme Court of Indiana, five justices participating, reversed and remanded. In the process, however, the court addressed the alleged perpetuities violation:

The trial court . . . correctly held that the trust provisions as to the two-thirds (2/3) share designated for [A and B] and their children were invalid under the rule (statute) against perpetuities The Court of Appeals also correctly held that trust provisions violated the statute against perpetuities.²²⁷

The Supreme Court of Indiana also suggested that the doctrine of infectious invalidity would invalidate the dispositions to C and others because "they are so interrelated with those for [A and B] that they cannot be permitted to stand alone, because such would result in significant distortion or defeat of the Testator's underlying objectives."²²⁸ This statement, however, is only dictum because the Court found that the one-third share to C and the takers after his death violated the Rule. Why? According to the court, the testator intended that this one-third share not be created until after termination of the two-thirds share, when the youngest grandchild reached 25.²²⁹ The end result was total invalidation of the trust with

223. The results of the trial court decision were discussed in the intermediate appellate court opinion.

224. Indiana has codified the common law Rule as follows:

TIME IN WHICH AN INTEREST IN REAL AND PERSONAL PROPERTY MUST VEST. — An interest in property shall not be valid unless it must vest, if at all, not later than twenty-one [21] years after a life or lives in being at the creation of the interest. It is the intention by the adoption of this chapter to make effective in Indiana what is generally known as the common law rule against perpetuities.

IND. CODE ANN. 32-1-4-1 (Burns Supp. 1985).

225. *Merrill v. Wimmer*, 453 N.E.2d 356, 359 (Ind. App. 1983).

226. *Id.* at 361-62.

227. *Merrill v. Wimmer*, 481 N.E.2d 1294, 1297 (Ind. 1985).

228. *Id.* at 1299.

229. The court acknowledged the "perplexing" effect of the trust: testator's children could not enjoy the corpus because the trust would not terminate until after their deaths. *Id.* at 1298 n.1, 1300.

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the property passing by intestacy to A, B, and C.²³⁰

Merrill was erroneously decided under the common law Rule. The corpus dispositions to A, B, and their children did not violate the common law Rule. The dispositions to A and B were indefeasibly vested from testator's death; the dispositions to their children would necessarily vest at the deaths of A and B.²³¹ Further, the disposition to C for life was good since C was a life in being and, in fact, his interest would terminate on his death. Additionally, the disposition to C's bodily issue was good since they would be determined by C's death. The only disposition violating the common law Rule, based on the construction that the trust would not terminate until the youngest grandchild reached 25, was the contingent remainder to the grandchildren surviving trust termination.²³² Only that contingent remainder interest should have passed by intestacy, presuming the doctrine of infectious invalidity would not have required any further invalidation.

The key error made by the trial judge, probate commissioner, eight appellate judges, and countless lawyers was in assuming that a violation exists if a trust could last beyond the perpetuities period. Properly understood, the Rule Against Perpetuities deals with future interests which may vest remotely and not the duration of vested interests in trust.²³³ Other courts have made this distinction and have upheld initially vested interests

230. In the process, the Indiana court declined to modify dispositions violative of the Rule Against Perpetuities.

The power or function of the court is limited in the construing of a will, that is, the interpretation of the language used by the testator, and it may not make or rewrite the will for the testator under the guise of construction, even to do equity or accomplish a more equitable division of the estate, or for the purpose of making it more liberal and just, or even though interested parties are agreeable thereto. So the courts have no right to vary or modify the terms of a will, or to reform it, even on grounds of mistake, accident, or surprise

Id. at 1299 (quoting 95 C.J.S. *Wills* § 586).

231. A, B, and their children were ready to take whenever the preceding estate of A and B terminated, i.e., when the youngest grandchild reached 25. In effect, there was no condition that these beneficiaries survive trust termination. The discredited "divide-and-pay-over rule"—a condition of survival implied until trust termination—was not discussed in the opinions. See RESTATEMENT OF PROPERTY § 260 (1944); L. SIMES & A. SMITH, *supra* note 17, §§ 657-658.

232. After the intermediate appellate court's decision, the following discussion of *Merrill* appeared: The last provision is the only one that states a condition of survival and so would be invalid if the youngest grandchild should be afterborn. All the other interests vest immediately or at birth of a grandchild, and that must be within the lifetime of the children—clearly valid. The courts did not construe it that way.

Morland, *New fiduciary decisions*, 11 EST. PLAN. 56 (1984).

There are, of course, other conditions besides surviving until a certain time which may render an interest nonvested. See, e.g., L. SIMES & A. SMITH, *supra* note 17, § 141 (enumerating various conditions rendering a remainder interest contingent).

233. See L. SIMES & A. SMITH, *supra* note 17, § 1391; RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.1 (1983); DRAFT USRAP (Spring 1986), *supra* note 1, at 87-90. See generally Downing, *The Duration and Indestructibility of Private Trusts*, 16 CASE W. RES. L. REV. 350 (1965).

or interests which would vest (or fail to vest) within the perpetuities period, despite possession being delayed beyond the perpetuities period.²³⁴

Refinement is also indicated by those American cases—approximately 20 during the eight-year period, 1978 to 1985—which found no perpetuities violation. These fit into various categories: upholding or construing a saving clause,²³⁵ declaring an interest valid which could not conceivably be invalid under the Rule,²³⁶ and construing a document to prevent a violation.²³⁷

Litigation upholding a saving clause seems unnecessary. Virtually every American case considering the question has upheld a saving clause. In *Hagemann v. National Bank & Trust Co.*,²³⁸ however, the court held that a clause did not save a violation despite a requirement for trust termination within the period. The court objected to the gift over component of the clause, a provision for the same beneficiaries who would have taken if the trust terminated after the period. But if an interest must vest—indeed become possessory—within the perpetuities period because of a saving clause, dead hand control will not extend too far.

The reason for much of the validating (and invalidating) litigation lies in the operation of the Rule. A violation will enable other parties to succeed to the interest. Thus, an attack is encouraged. If the attack is successful, *Merrill* suggests that, under the doctrine of infectious invalidity, valid interests or even the trust may be voided.²³⁹

234. See, e.g., *May v. Hunt*, 404 So. 2d 1373, 1375 (Miss. 1981) ("Citing the elementary principle that the rule against perpetuities does not apply to vested interests . . ."); *Burt v. Commercial Bank & Trust Co.*, 244 Ga. 253, 260 S.E.2d 306 (1979) (overruling *Burton v. Hicks*, 220 Ga. 29, 136 S.E.2d 759 (1964)).

235. *Norton v. Georgia R.R. Bank & Trust*, 253 Ga. 596, 322 S.E.2d 870 (1984); *In re Estate of Schmitz*, 214 Neb. 28, 332 N.W.2d 666 (1983); *First Nat'l Bank v. Hampson*, 88 Ill. App. 3d 1057, 410 N.E.2d 1109 (1980); *First Ala. Bank v. Adams*, 382 So. 2d 1104 (Ala. 1980).

236. *Cotham v. First Nat'l Bank*, 287 Ark. 167, 697 S.W.2d 101 (1985); *In re Estate of Darling*, 219 Neb. 705, 365 N.W.2d 821 (1985); *Hulsh v. Hulsh*, 431 So. 2d 658 (Fla. Dist. Ct. App.), *cert. denied*, 440 So. 2d 352 (Fla. 1983); *Hudson v. deLaval*, 382 So. 2d 1124 (Ala. 1980); *Donahue v. Watson*, 411 N.E.2d 741 (Ind. App. 1980); *Dickson v. Renfro*, 263 Ark. 718, 569 S.W.2d 66 (1978); *Wing v. Wachovia Bank & Trust Co.*, 35 N.C. App. 346, 241 S.E.2d 397, *cert. denied*, 295 N.C. 95, 244 S.E.2d 263 (1978). See also cases cited *supra* note 234 for further examples.

237. *Criss v. Omaha Nat'l Bank*, 213 Neb. 379, 329 N.W.2d 842 (1983); *Sherrod v. Sherrod*, 65 N.C. App. 252, 308 S.E.2d 904 (1983); *Chicago Title & Trust Co. v. Schwartz*, 120 Ill. App. 3d 324, 458 N.E.2d 151 (1983); *In re Estate of Rosenzweig*, 88 A.D.2d 619, 450 N.Y.S.2d 436 (N.Y. App. Div. 1982); *Joyner v. Duncan*, 299 N.C. 565, 264 S.E.2d 76 (1980); *Lewis v. Green*, 389 So.2d 235 (Fla. Dist. Ct. App. 1980), *cert. denied*, 397 So.2d 778 (Fla. 1981); *Austin v. Dobbins*, 219 Va. 930, 252 S.E.2d 588 (1979); *Underwood v. MacKendree*, 242 Ga. 666, 251 S.E.2d 264 (1978); *Southern Bank & Trust Co. v. Brown*, 271 S.C. 260, 246 S.E.2d 598 (1978).

238. 218 Va. 333, 237 S.E.2d 388 (1977).

239. The former situation is illustrated by *Connecticut Bank & Trust Co. v. Brody*, 174 Conn. 616, 392 A.2d 445 (1978); the latter by *Hulsh v. Hulsh*, 431 So. 2d 658 (Fla. Dist. Ct. App.) (reversing lower court on point), *cert. denied*, 440 So. 2d 352 (Fla. 1983).

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Validating litigation may also take place because lawyers (and sometimes judges) do not understand the Rule well enough to recognize instances of validity.²⁴⁰ If it is not malpractice to violate the rule,²⁴¹ one would assume that it is not malpractice to litigate a perpetuities case, though it be without merit.²⁴²

Ultimately, refinement is called for to reduce (and virtually eliminate) litigation under the Rule. Why should courts invalidate interests which everyone agrees should not be invalidated? Why should court time be taken up with validating interests? Why should the share for intended beneficiaries be diminished by legal fees?

B. Suggestions for Refining the Rule

There is general agreement that the common law Rule Against Perpetuities should not invalidate an interest because of some trap, one of Leach's improbable occurrences. Over the years, many have recommended legislation to deal with the specific traps publicized by Leach. For example, Professor Mechem wrote in 1959:

So, it all seems to me rather sad. The common-law rule is sound in conception and certain in operation. All of the objections to it—mostly its operation in freak cases, to tell the truth—can be eliminated by a few simple modifications of the common-law rule. These would be non-controversial and easy to enforce. A simple solution of a problem whose scope has been greatly exaggerated.²⁴³

I assume most would agree it would also be desirable to reduce or eliminate validating litigation. Such litigation results in defeating the transferor's intent to the extent the legal fees diminish the shares of the intended beneficiaries.²⁴⁴

The common law Rule should be refined by specific legislation to meet the principal objections: invalidation because of a technical violation and undesirable validating litigation. Legislation would include specific statutory repair of the common law traps, together with the judicial power to reform any interest which still violated the Rule.²⁴⁵ The package would also

240. See, e.g., *Wing v. Wachovia Bank & Trust Co.*, 35 N.C. App. 346, 241 S.E.2d 397, cert. denied, 295 N.C. 95, 244 S.E.2d 263 (1978); *Donahue v. Watson*, 411 N.E.2d 741 (Ind. App. 1980).

241. See *supra* note 195.

242. Malpractice in the litigation is another question.

243. Mechem, *Further Thoughts*, *supra* note 6, at 983.

244. See, e.g., *Wing v. Wachovia Bank & Trust Co.*, 35 N.C. App. 346, 241 S.E.2d 397, cert. denied, 295 N.C. 95, 244 S.E.2d 263 (1978).

245. See Browder, *Construction, Reformation and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963) (hereinafter *Browder, Construction*).

include statutes encouraging saving clauses and settlement. The suggested legislation is set out in the Appendix.²⁴⁶

The first three statutes—saving clause encouragement, settlement authority and specific repairs—will be briefly explained. In addition, the justification for cy pres power will be addressed.

SAVING CLAUSE STATUTE

If a provision in an instrument terminates a nonvested property interest that has not vested 21 years after the death of the survivor of a group of individuals identified by name or by reference to an identifiable class and alive when the period of the common law Rule began to run, that interest is valid. If determining the death of the survivor would be impracticable, the validity of the property interest must be determined as if that provision did not exist.

This statute is designed to publicize and thereby encourage the use of saving clauses. It tracks the language under a draft version of the USRAP²⁴⁷ which sought to improve upon the Restatement's provision.²⁴⁸ By sanctioning saving clauses, *Hagemann*²⁴⁹ would be effectively overruled. This statute also applies to trust provisions and other arrangements whereby termination is based on a period up to 21 years after the death of specified persons.²⁵⁰

SETTLEMENT STATUTE

A court may approve a good faith compromise of a perpetuities matter if it is just and reasonable to all parties, including unborn and unascertained

246. Because the refinements are to the common law Rule, a codification of the Rule is necessary. A "simple" solution would continue or slightly modify Gray's one-line formulation. See *supra* note 16. This was the approach under the Model Rule Against Perpetuities. MODEL RULE AGAINST PERPETUITIES ACT, 9C U.L.A. 76 (1957).

A more ambitious undertaking would provide definitions, operating rules, and exceptions. See J. GAUBATZ & I. BLOOM, *ESTATES, TRUSTS AND TAXES: CASES AND MATERIALS ON THE WEALTH TRANSMISSION PROCESS* 17-11, 12 (1983) (identifying areas ripe for codification) [hereinafter J. GAUBATZ & I. BLOOM]. The USRAP moves somewhat in this direction, especially in the powers area. See USRAP § 1(b) and (c) (relating to validity of powers), § 2 (relating to when power or nonvested interest created) (1986). Ultimately, a comprehensive codification of the common law Rule could rival some of the more complex provisions under the Internal Revenue Code. Such an undertaking is beyond the purview of this article.

247. DRAFT USRAP (Summer 1985), *supra* note 43, at 3-4, 16-17, 21-23. Because American lawyers have not attempted to abuse saving clauses—including the use of "royal lives" clauses—it is not expected that the "impractical" standard will be invoked. If problems arise under the standard, there will be time enough to consider limiting the number of permissible lives. For now, violation of the impracticable standard would require a court to use its cy pres power.

248. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.3(1) (1983).

249. See *supra* note 238 and accompanying text.

250. See DRAFT USRAP (Summer 1985), *supra* note 43, at 23.

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persons. For this purpose, a guardian shall be appointed to represent unborn and unascertained persons.

Designed to publicize and thereby encourage settlements in the perpetuities area, this statute most likely would be declaratory of existing law regarding judicial authority to approve settlements.²⁵¹ Its reference to representatives of unborn and unascertained persons—guardians *ad litem*—sanctions judicial settlements which may not have been previously considered.²⁵²

Clearly, settlement is preferable to litigation under the specific repair or cy pres statutes.²⁵³ These latter provisions should also encourage settlement because they define and effectively limit the potential gain from litigation. Additionally, the settlement statute could be expanded to provide procedures for securing approval of a compromise.²⁵⁴

STATUTORY RULES OF CONSTRUCTION

(a) Unless a contrary intention appears, the rules of construction in this section apply if an interest would be void under the common law Rule.

(b) The rules of construction apply in the order set forth in the following paragraphs. A rule shall be applied only if necessary to validate an interest.

This statute provides rules of construction designed to avoid traps which result in perpetuities violations. The technique effectively requires initial determination of invalidity, but owing to the Rule's complexity, determination may be problematic. Assume, for example, invalidity is determined by applying the first two steps under the causal relationship methodology, as follows: "First, we assemble the causally-connected lives, who fix the

251. See IV A. SCOTT, *THE LAW OF TRUSTS* § 337.6 (3d ed. 1967). The proposed statute borrows, in part, from the general compromise statute under the Uniform Probate Code. See UNIF. PROBATE CODE § 3-1102, 8 U.L.A. 490-91 (1972). It may also be possible to affect an out-of-court settlement. See *id.* § 3-912; *In re Disston's Estate*, 349 Pa. 129, 36 A. 2d 457 (1944).

252. As noted, perpetuities settlements, with or without court approval, are not utilized in practice. See *supra* text accompanying notes 92, 93. The reason may be explained as follows: a perpetuities problem invariably affects unborn and unascertained persons, necessitating actual, as distinct from virtual, representation by guardians *ad litem*. In turn, the general authority of guardians *ad litem* to effectuate compromises, let alone compromises on perpetuities matters, is uncertain. See generally Begleiter, *The Guardian Ad Litem in Estate Proceedings*, 20 WILLAMETTE L. REV. 643 (1984). Under the Uniform Probate Code, however, unborn and unascertained persons may be bound by court-approved settlements. See UNIF. PROBATE CODE §§ 3-1101, 3-1102. These sections also contemplate the appointment of guardians *ad litem*. See *id.* § 3-1102 comment.

253. Settlement may be rejected if neither in good faith, nor just and reasonable. Cf. UNIF. PROBATE CODE § 3-1102(3); *Cotham v. First Nat'l Bank*, 287 Ark. 167, 697 S. W.2d 101 (1985) (rejecting settlement because there was no perpetuities violation).

254. See UNIF. PROBATE CODE § 3-1102.

limits of the perpetuities period. Second, we test each of these lives in search of a validating life.²⁵⁵ If, after testing the relevant lives in being, the interest is void under the common law Rule, constructional rules apply rather than a wait-and-see approach.²⁵⁶ In essence, the specific repair method takes care of identified problems rather than hoping that the problems disappear under the causal-lives or some other wait-and-see version.²⁵⁷

The proposed statute provides five constructional rules which apply in the absence of contrary intent. These rules would provide judges and lawyers with specific directions for obtaining a specific result: validation of an interest. In contrast to a system which fails to specify the order in which specific statutes are to be applied,²⁵⁸ the proposed approach would spare judges (and lawyers) the burden of determining the solution.

RULE 1: ADMINISTRATIVE CONTINGENCIES RULE
 RULE 2: FERTILE OCTOGENARIAN RULE
 RULE 3: UNBORN WIDOW RULE

(1) *Administrative Contingencies*

Where the duration of vesting of an interest 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, the instrument shall be construed to require such

²⁵⁵ Dukeminier, *The Measuring Lives*, *supra* note 9, at 1656.

²⁵⁶ At this point under the causal-lives method, we would wait and see whether the remote event occurred within the lifetime of a causally-related life plus 21 years. *Id.*

Professor Dukeminier proposes to eliminate the second step of the causal-lives method—testing for validity under the common law Rule. He asserts it is irrelevant whether an interest violates the common law Rule. *Id.* at 1711. Waggoner objects, noting the unnecessary administrative burdens entailed. Waggoner, *Perspective*, *supra* note 9, at 1725–26. Moreover, Professor Dukeminier's approach would not eliminate application of the common law Rule when construing instruments for both tax and non-tax purposes. See *supra* notes 131–33 and accompanying text.

²⁵⁷ Consider Professor Browder's views:

The required certainty of vesting is no hardship except in those cases where extremely unlikely possibilities of remote vesting constitute boobytraps for unwary draftsmen. Wait-and-see does remove these pitfalls. But fortunately these extreme cases appear in identifiable patterns, which can be dealt with specifically. New York this year was the first to provide such an alternative to wait-and-see. This alternative has the advantage of rendering such interests valid immediately, while under the wait-and-see rule we may have to wait for a favorable judgment until after the prescribed period of waiting is over.

Browder, *Future Interest Reform*, 35 N. Y. U. L. REV. 1255, 1276 (1960) (footnotes omitted).

²⁵⁸ See N. Y. EST. POWERS & TRUSTS LAW §§ 9-1.2, 9-1.3 (McKinney 1967 & Supp. 1986). The complex English system provides rules and an ordering scheme somewhat similar to this proposal. There is one crucial difference: England's wait-and-see regime also applies. See R. MAUDSLEY, *THE MODERN LAW*, *supra* note 41, at 110–95 (discussing Perpetuities and Accumulations Act of 1964).

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contingency to occur, if at all, within 21 years from the effective date of the instrument creating such interest.

(2) Unrealistic Birth Possibilities; Possibility of Adoption Disregarded

(A) *Where the validity of a disposition depends upon the ability of a person to have a child at some future time, it shall be presumed, subject to subparagraph (B), that a male can have a child at 14 years of age or over, but not under that age, and that a female can have a child at 12 years of age or over, but not under that age or over the age of 55 years.*

(B) *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.*

(C) *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.*

(3) Unborn Person Possibility

Where an interest would be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the interest, and such person is referred to in the instrument creating such interest as the spouse, widow, or widower of another person, it shall be conclusively presumed that such reference is to a person in being on the effective date of the instrument.

The first three rules respond to familiar traps publicized by Professor Leach: remote administrative contingencies, the fertile octogenarian, and the unborn widow.²⁵⁹ The order can effectuate the transferor's (presumed) intention; it is highly doubtful that transferors consider such fantastic possibilities.²⁶⁰ The language generally tracks New York law,²⁶¹ although

²⁵⁹ Leach, *Reign of Terror*, *supra* note 3.

²⁶⁰ Consider a testamentary disposition to sister S for life, remainder to S's widower for life, remainder to S's children who survive her widower. Assume the decedent was survived by S (60 years old) and three children, A, B, and C. S will be presumed incapable of having additional children. Hence, we will know within the lifetimes of A, B, and C whether they survive the widower, whether or not he was alive at decedent's death. By first applying the unrealistic birth construction, the unborn widower will be allowed to take. Cf. ILL. ANN. STAT. ch. 30, § 194(c) (Smith-Hurd Supp. 1985) (unborn widow statute applies before fertile octogenarian statute).

²⁶¹ See N. Y. EST. POWERS & TRUSTS LAW § 9-1.3(d) (administrative contingency), § 9-1.3(e) (fertile octogenarian), § 9-1.3(c) (unborn widow) (McKinney 1967 & Supp. 1986). The proposal contains a presumption against unrealistic birth possibilities, but does not resolve the issue of whether and to what extent a person who is born despite the presumption takes. Compare N. Y. EST. POWERS & TRUSTS LAW § 9-1.3 and Practice Commentary (McKinney Supp. 1986) (favors taking) with ILL. ANN. STAT. ch. 30, para. 194(c) (Smith-Hurd Supp. 1986) (bars taking), discussed in Schuyler, *The Statute Concerning Perpetuities*, 65 N.W. U.L. REV. 3, 40-46 (1970).

Unlike the New York and Illinois reform systems, the proposal also sanctions cy pres reformation. See *infra* notes 277-96 and accompanying text. Accordingly, violations not cured by the rules of construction can be resolved from the outset if it can be shown that a transferor contemplated the unusual, e.g., the existence of an unborn widow.

variations are possible.²⁶²

RULE 4: AGE REDUCTION RULE

(4) Reduction of Age to 21 for Vesting Purposes: Deferred Possession Allowed

(A) If an interest would be invalid under the common law rule because made to depend for its vesting upon any person attaining an age in excess of 21 years, the age contingency shall be reduced to 21 years for vesting purposes only.

(B) Notwithstanding subparagraph (A), possession of the interest shall be postponed to the age specified in the instrument or to age 50, whichever occurs sooner.

(C) Notwithstanding subparagraph (A), the person or persons entitled to the property or enjoyment thereof, from age 21 and until the age prescribed in the instrument, shall continue such entitlement.

The fourth constructional rule differs from traditional age reduction statutes.²⁶³ It requires vesting by age 21, but delays possession until the prescribed age (under 50 years) is reached. In addition, the proposed statute confirms the rights of the intended takers of interim income.²⁶⁴ Consider the following example:

T in trust to my daughter A for life, remainder to A's children who reach age 25. Residue to B. T is survived by A (a widow under age 55) and two children, ages 3 and 7.

Pursuant to Rule 4, the will provision will be construed as follows:

T to A for life, remainder to A's children who reach age 21, with payment postponed until each reaches age 25; interim income to B.

Assuming the two children alive at *T*'s death reach age 21, their interests will vest, but they will not receive possession until they reach age 25. Interim income will go to *B* as intended. Afterborn children can be included in the class.²⁶⁵

262. Professor Waggoner discusses various alternatives. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1735-55. For example, the Illinois "fertile octogenarian" statute applies to both sexes after age 65 is attained and applies after its "unborn widow" and "age reduction" provisions. ILL. ANN. STAT. ch. 30, para. 194(c) (Smith-Hurd Supp. 1986).

263. See, e.g., CONN. GEN. STAT. ANN. § 45-96 (West 1981).

264. In a few states, additional legislation may be necessary to modify "next eventual taker" rules. See *supra* note 101.

265. Under the constructional "rule of convenience," a class will close when a member can call for distribution. See L. SIMES & A. SMITH, *supra* note 17, § 640. In the text example, no afterborn children will be excluded because all potential takers will be determined at *A*'s death.

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The principal objection to age reduction statutes, that the intended beneficiary receives possession at too early an age, is solved by Rule 4.²⁶⁶ The only practical difference between the reformed and original dispositions is if an untimely death occurs between ages 21 and 25.²⁶⁷ Because the interest will be vested, the child will be entitled to transmit the interest, and the interest will be subject to federal estate tax.²⁶⁸ The intended taker in default of attaining an age in excess of 21 will still receive interim income, but cannot succeed to the property if the child dies after age 21.

Rule 4 produces two additional benefits in class gift dispositions. First, it prevents the operation of the all-or-nothing rule in excess age cases.²⁶⁹ Second, it eliminates the necessity of choosing between two constructions: reduction in age or limitation to class members alive at time of creation.²⁷⁰ By operation of Rule 4—which requires age reduction for vesting purposes only—afterborn members can be included.²⁷¹

Rule 4 would not apply when an interest is nonvested because dependent upon a person failing to attain an age in excess of 21.²⁷² Although the trap could be overcome by an age reduction statute, the transferor's intention could be better carried out under the court's cy pres power.²⁷³

RULE 5: CLASS GIFT CONSTRUCTIONAL RULE

(5) Class gift construction

If an interest would be invalid under the common law Rule by including

266. Professor Waggoner raises this objection. See Waggoner, *Perpetuity Reform*, *supra* note 21, at 1757.

267. Since such deaths are most unlikely, the rare frustration of intention may be of no great moment. *But cf.* Freund, *Three Suggestions Concerning Future Interests*, 33 HARV. L. REV. 526, 533 (1920) ("A gift at twenty-one is not logically included in a gift at twenty-five, because the former is a larger gift, and the more is not included in the less.").

268. Technically, estate taxation could be avoided by a timely disclaimer if a child died within 9 months of attaining age 21. See I.R.C. § 2518(b)(2)(B).

269. See Leach, *Perpetuities in a Nutshell*, *supra* note 22, at 646 (example 18), 649 n. 28 (example 24). See generally Leach, *Gifts to Classes*, *supra* note 24.

270. For example, the intermediate appellate court in *Merrill v. Wimmer*, 453 N.E.2d 356 (Ind. App. 1983), *vacated*, 481 N.E.2d 1294 (Ind. 1985), excluded afterborns. See *supra* text accompanying note 226. Professor Leach discussed a solution to this dilemma under a cy pres statute. J. MORRIS & W. LEACH, *THE RULE AGAINST PERPETUITIES* 35 (1956).

271. See *supra* note 265.

272. Consider the following illustration:

Bequest by T in trust, income to S for life. At the death of S, income to be divided among S's then living descendants until each reaches age 30. When any descendant reaches age 30, his share of the corpus is then to be paid to him. Upon the death of any descendant before age 30, his share of the corpus is to be added to the shares of the other living descendants. At T's death, S is an infant. *Cf.* Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979).

J. GAUBATZ & I. BLOOM, *supra* note 246, problem 17-3 at 17-32 (1983).

273. See *infra* text accompanying notes 277-96.

afterborn persons within a class, afterborns shall be excluded from the class to the extent necessary to avoid a violation under the common law Rule.

Rule 5 codifies the preference for construing class gifts in a manner which results in validation under the common law Rule.²⁷⁴ Consider the following disposition:

T to A for life, remainder to A's children for life, remainder to A's grandchildren who reach age 25. T is survived by A who is 50 years old and two children, B and C.

Rule 4 will require vesting of A's grandchildren's interests when each reaches age 21. Yet, the ultimate remainder is void because A's grandchildren will not necessarily be determined within the perpetuities period. A could have an afterborn child, D. D could have children and be the surviving child. Hence the class of grandchildren could vest outside the period. Rule 5 will require trust termination when the survivor of B and C dies. In addition, D can share in income and D's children born before B and C die can receive corpus.

Rule 5 would solve the all-or-nothing rule's operation in the majority of two-generation cases.²⁷⁵ Together with Rules 2 and 4, Rule 5 defuses the all-or-nothing rule.²⁷⁶

CY PRES STATUTE

If, after application of the foregoing statutes, an interest would be invalid under the common law Rule, a court shall reform the interest within the limits of the Rule by approximating the transferor's intention as nearly as possible. For this purpose, extrinsic evidence shall be admissible.

Specific repair statutes can address the technical violations of the common law Rule. As Professor Waggoner correctly states: "[I]nvalidity in the technical violation cases is so easily reversed by the specific statutory repair method of reform."²⁷⁷

Professor Waggoner attempts to justify a wait-and-see regime because it applies in all cases of perpetuities violation—not only those occasioned by

274. See *supra* note 133 and accompanying text. The English system has somewhat similar class gift rules which apply after the wait-and-see period. See *Perpetuities and Accumulations Act* § 4(3), (4), discussed in R. MAUDSLEY, *THE MODERN LAW*, *supra* note 41, at 143-46.

275. See Leach, *Perpetuities in a Nutshell*, *supra* note 22, at 651 (example 27).

276. Professor Leach desired the same result. See Leach, *Gifts to Classes*, *supra* note 24. The English system also defuses the all-or-nothing rule but only after its wait-and-see period. See R. MAUDSLEY, *THE MODERN LAW*, *supra* note 41, at 143-45.

277. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1719.

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a technical violation.²⁷⁸ Yet, he fails to identify cases which do not involve technical violations.²⁷⁹ His earlier words are significant:

The number of property interests which as of the date of creation are almost but not quite certain to vest if at all in due time, but which do not fall within the categories covered by the specific statutory repair method, is probably infinitesimal. Consequently the fact that the wait and see method saves from automatic invalidity *all* such interests, whereas the specific statutory repair method saves only those which fall within the fertile octogenarian, the administrative contingency, the unborn widow, and the age-contingency-in-excess-of-21 categories is rather insignificant.²⁸⁰

There is, however, a method for reaching beyond specific statutory repair by sanctioning judicial reformation: *cy pres*. The opportunity for *cy pres* exists when an interest is not saved by some repair statute. This may occur in two situations. First, a specific repair statute may be foregone because *cy pres* will better effectuate intention. Arguably, *cy pres* is a better solution when interests are invalid because trusts extend beyond 21 years,²⁸¹ and when vesting depends on the failure of a person to attain an age in excess of 21 years.²⁸²

More importantly, *cy pres* is appropriate as a backstop to specific repair statutes. Inevitably there will be a case which cannot be repaired. Consider the following:

Bequest by *T* in trust to *A* for life, remainder to *A*'s children for life (*T*'s grandchildren), remainder to *A*'s grandchildren (*T*'s great-grandchildren). *T* is survived by child *A*, who is 2 years old.

After applying the rules of construction, the remainder to *T*'s great-grandchildren is still void under the common law Rule.²⁸³

In response, it may be suggested that the above disposition is not a "technical violation," but an unreasonable attempt to extend dead hand

278. *Id.*

279. Professor Waggoner suggested that certain cases involved non-technical violations, but he did not identify these cases. *Id.* at 1784 n. 162.

280. L. WAGGONER, NUTSHELL, *supra* note 6, at 298 (emphasis in original).

281. For example, in *Berry v. Union Nat'l Bank*, 262 S. E. 2d 766 (W. Va. 1980), a trust was to last for 25 years. Although the court, applying its *cy pres* powers, reduced the duration to 21 years, a more creative solution could be found. See Priv. Ltr. Rul. 8104213 (Oct. 31, 1980) (trust termination in 32 years with saving clause).

282. See *supra* note 272. See generally Browder, *Construction*, *supra* note 245.

283. This example differs from the one in the text accompanying note 274 *supra* in one critical respect: *A* has no children. As a result, the remainder to *A*'s grandchildren cannot be validated by Rule 5. See *supra* note 261 (suggesting other cases for reformation).

control to two unborn generations.²⁸⁴ Hence, invalidation is appropriate, and the remainder should pass to the residuary or intestate takers.

The problem with invalidation is inevitable case-by-case litigation under the infectious invalidity doctrine.²⁸⁵ The Restatement of Property suggests that a court ask the following question:

[If the [testator or settlor] should now examine his proposed plan of disposition with the parts excised therefrom which have been found to offend the rule against perpetuities, would he decide that his original scheme of disposition would be more closely approximated by invalidating all . . . or part . . . of the balance, or by allowing the balance to take effect in accordance with its terms

Although otherwise valid interests will likely be sustained,²⁸⁷ the legal process—including generation of legal fees—would be involved. If a court must attempt to ascertain intent in cases of invalidity, would it not be preferable to have the court ascertain intent for a constructive purpose?²⁸⁸ Consider the words of Professor Leach:

All that is needed is to adopt the *cy pres* principle [T]he infectious invalidity rule is simply a *cy pres doctrine based upon an assumption of invalidity of the gift*—the court considers which arrangement would “more closely approximate” the testator’s wishes Just turn this idea around and perform the same process on the assumption of *validity* of the gift within the limits of the Rule—and the job is done; since there is no invalidity at all, but only reformation, there is no infectious invalidity problem.²⁸⁹

In fact, Professor Leach approved of the statutory repair method if combined with immediate *cy pres*: “Of course, it would also be possible to have the specific provisions, and, in addition, a blanket statute to take care of cases not within any of the particular provisions.” [*I agree one hundred per cent*]²⁹⁰

The objections to *cy pres*—including objections by wait-and-see opponents—are based on the necessity for litigation and the potential for rewriting wills.²⁹¹ Professor Leach stated in defense:

284. See L. WAGGONER, NUTSHELL, *supra* note 6, at 298.
 285. See *supra* text accompanying note 239.
 286. RESTATEMENT OF PROPERTY § 402 comment a (1944).
 287. See, e.g., Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979). But see Connecticut Bank & Trust Co. v. Brody, 174 Conn. 616, 392 A.2d 445 (1978).
 288. See Browder, *Construction*, *supra* note 245, at 19–20.
 289. Leach, *Hail Pennsylvania*, *supra* note 19, at 1149 (emphasis in original).
 290. *Id.* at 1150 (emphasis in original). The quoted sentence was written by Professor Simes; the parenthetical statement was Professor Leach’s comment thereto. Professor Browder urged the same solution. Browder, *Construction*, *supra* note 245, at 15.
 291. See, e.g., Powell Memorandum, *supra* note 10, at 138; L. SIMES, PUBLIC POLICY, *supra* note 13, at 78–79. Professor Simes preferred enactment of specific statutes to deal with any new situations. *Id.*

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The big incentive to perpetuities litigation, and to the threat of litigation that forces serious concession by way of compromise, is its all-or-nothing character. If the contestant wins, the proponent gets nothing. But when the issue is limited to the question of what reformation within the limits of the Rule will most closely approximate the testator's intent, the spectrum of possible choices is very narrow, hardly worth litigating.²⁹²

Professor Leach's instincts have proven to be correct. From the four states which legislatively prescribe immediate cy pres reformation,²⁹³ only two California cases have been reported. Both involved a violation based on attaining an age in excess of 21.²⁹⁴ In effect, there would have been no cy pres cases from California—our most populous state—if, in 1963, California had also adopted an age reduction construction rule. Similarly, there have been no reported cy pres cases from the five states after initial judicial adoption of the cy pres doctrine.²⁹⁵

Another feature could be added to the cy pres statute, specifically the allowance of extrinsic evidence to ascertain the transferor's intent.²⁹⁶ This measure would ensure better effectuation of the transferor's intent and in the process, would overcome any concern that a judge may arbitrarily and unwittingly rewrite a will. Finally, settlement would be further encouraged.

C. Note on Powers

This article has not specifically focused on powers of appointment. Because powers are subject to the common law Rule,²⁹⁷ invalidity can be avoided under the suggested scheme for refinement.²⁹⁸

Professor Maudsley also objected to an immediate cy pres approach. 1979 ALI Proceedings, *supra* note 4, at 464 (remarks of Professor Maudsley).

292. Leach, *Hail Pennsylvania*, *supra* note 19, at 1150.

293. California (CAL. CIV. CODE § 715.5 (Deering 1971)); Missouri (MO. REV. STAT. § 442.555 (1965 Supp.)); Oklahoma (OKLA. STAT. ANN. tit. 60, § 75.76 (West 1971 & Supp. 1985)); Texas (TEX. PROP. CODE ANN. § 5.043 (Vernon 1984)). Although these statutory provisions prescribe reformation whenever possible, the proposal contemplates reform in all situations.

294. Estate of Grove, 70 Cal. App. 3d 355, 138 Cal. Rptr. 684 (1977); *In re Estate of Ghiglia*, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974).

295. *Berry v. Union Nat'l Bank*, 164 W. Va. 258, 262 S.E.2d 766 (1980); *In re Estate of Chun Quan Yee Hop*, 52 Haw. 40, 469 P.2d 183 (1970); *In re Foster's Estate*, 190 Kan. 498, 376 P.2d 784 (1962); *Carter v. Berry*, 243 Miss. 321, 140 So. 2d 843 (1962); *Edgerly v. Barker*, 66 N.H. 434, 31 A. 900 (1891).

296. Extrinsic evidence is admissible in charitable cases involving the cy pres doctrine. See G. BOGERT & G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 437, 442 (rev. 2d ed. 1977). Extrinsic evidence, including testimony from the drafting attorney, has been admitted in infectious invalidity cases. See *In re Estate of Anziano*, 39 A.D. 2d 771, 332 N.Y.S. 2d 651 (1972), *aff'd*, 32 N.Y. 2d 875, 299 N.E. 2d 897, 346 N.Y.S. 2d 532 (1973).

297. Special rules in relation to powers may apply under the common law Rule. See L. SIMES & A. SMITH, *supra* note 17, §§ 1271-1278. See generally Berger, *The Rule Against Perpetuities as it Relates to Powers of Appointment*, 41 NEB. L. REV. 583 (1962).

298. New York case law suggests that violations will be repaired when powers are exercised invalidly

V. CONCLUSION

In response to Professor Leach's basic question: "Why should we not 'wait-and-see' . . . ?"²⁹⁹ we should not "wait-and-see" for the innumerable reasons detailed in this article. The most compelling reason is that the common law Rule has not caused any real problems.³⁰⁰ Accordingly, we should not "use . . . an atomic cannon to kill a gnat."³⁰¹

Many of the other arguments for rejecting the wait-and-see cannon confirm Professor Powell's suspicions: "The inconveniences, unavoidably generated by the proposal, as to the costliness of litigation, and as to the controversies concerning contingent rights passing from generation to generation have been neither recognized nor adequately considered."³⁰² Professor Berger's criticism of the Restatement's approach properly extends to all wait-and-see methods: "I am afraid that if we adopt the [Restatement] package . . . wait and see, and remote *cy pres*, we are creating a minefield for future generations."³⁰³

A case does exist, however, for refining the common law Rule. By refinement, any harsh results under the Rule, as well as unnecessary litigation, can be eliminated. In addition to a statute encouraging settlements, the refinement technique relies upon specific repair statutes.³⁰⁴

Detractors claim specific statutes cannot repair all conceivable situations.³⁰⁵ They also suggest the difficulty in convincing legislatures to act when a new situation arises.³⁰⁶ The response is that no new traps have been

under the common law Rule. See *In re Martin's Will*, 58 Misc. 2d 740, 296 N.Y.S. 2d 498 (1968) (applying New York's age reduction statute because exercise violated New York's suspension (but also common law) Rule). Because New York does not have a *cy pres* provision, some invalid dispositions on exercising powers will not be saved. See *In re Harden*, N.Y.L.J., Sept. 17, 1985, at 13, col. 6 (N.Y. Co. Surr.) (also applying infectious invalidity doctrine).

299. See *supra* text accompanying note 3.

300. Professor Mechem once asked: "Is the common-law rule really working so badly?" Mechem, *Further Thoughts*, *supra* note 8, at 966. The answer is, "definitely not." See also Volkmer, *The Law of Future Interests in Nebraska (Part II)*, 18 CREIGHTON L. REV. 601, 649-50 (1985).

301. Dukeminier, *Perpetuities Revision*, *supra* note 12.

302. Powell Memorandum, *supra* note 10, at 128-29.

303. 1979 ALI Proceedings, *supra* note 4, at 456 (remarks of Professor Berger). Many of Dean Rohan's reservations over the Restatement (Second) version apply to the general wait-and-see approach. See 5A R. POWELL, *supra* note 8, § 827F[3].

304. Even Professor Waggoner acknowledges the virtues of repair statutes:

In achieving the objective of perpetuity . . . [refinement], the specific statutory repair method holds the disturbance of settled law and know-how to a minimum, operates predictably, and does not interfere with the ability of a litigant to obtain at any time a final judgment that an interest is either valid or invalid. In contrast, the wait and see concept constitutes a fundamental modification of the common law Rule Against Perpetuities.

L. WAGGONER, NUTSMELL, *supra* note 6, at 300.

305. See, e.g., 1978 ALI Proceedings, *supra* note 4, at 286-87 (remarks of Dean William Schwartz).

306. See, e.g., Leach, *Legislatures*, *supra* note 191, at 358-59.

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discovered recently.³⁰⁷ Assuming, *arguendo*, the validity of the detractors' stance, the unrepaired trap will be repaired (absent settlement) under the court's cy pres power.³⁰⁸ Unlike deferred cy pres under the wait-and-see approach,³⁰⁹ cy pres reformation will be relied upon only as a last resort.³¹⁰

In the final analysis, the combination of perpetuities refinement by settlement, specific repair, and cy pres statutes is far preferable to any wait-and-see method.³¹¹ Even if there were more statutes by the former approach, it can be safely predicted that the "swell of the law" caused by the added legislation will be less than the swell resulting from litigation under the wait-and-see approach.³¹²

The wait-and-see approach has not been characterized as a "reform" measure in this article. The concept of "reform" does not encompass such elements as: solving a nonexistent problem, encouraging dead hand control, engrafting complexity, fostering litigation, and burdening future generations with problems which can be immediately resolved. In truth, wait-and-see appears to be a misguided attempt to embellish upon the common law Rule. States should seriously consider repealing their wait-and-see legislation.

The true spirit of perpetuities reform involves changing the common law Rule itself.³¹³ Various reforms have been suggested.³¹⁴ For example, the feudal concept of vesting could be discarded; this would effectively require possession within the perpetuities period.³¹⁵ But because the common law

307. This statement excludes traps under commercial transactions. Consider Professor Maudsley's view: "New problems may well arise; but if we find a solution to all those which have appeared since 1680, that should, from a practical point of view, be acceptable." R. MAUDSLEY, *THE MODERN LAW*, *supra* note 41, at 81.

308. Indeed, Professor Waggoner has extolled the cy pres (reformation) method: "In fact, however, the reformation method does not alter the Rule at all. It leaves the Rule intact and changes the disposition to conform to the Rule." *Langbein & Waggoner, supra* note 33, at 548 (emphasis in original).

309. See *supra* text accompanying notes 135-48.

310. See *supra* text accompanying notes 277-96.

311. Professor Fletcher, a wait-and-see opponent, recommended another method of perpetuities refinement. Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 *STAN. L. REV.* 459 (1968).

312. Professor Leach criticized the "penny-packet statutory method" because it results in "swelling the mass of law." Leach & Morris, *Book Review*, 54 *MICH. L. REV.* 580, 581 (1956) (reviewing L. SIMES, *PUBLIC POLICY, supra* note 13).

313. Although some would consider abrogation of the rule to be reform, most believe some rule against perpetuities is desirable. See *supra* note 13 and accompanying text. See Glenn, *Perpetuities to Purefoy: Reform by Abolition in Manitoba*, 62 *CAN. B. REV.* 618 (1984) (criticizing Manitoba's repeal of the common law Rule).

314. See, e.g., Deech, *Lives in Being Revived*, 97 *LAW Q. REV.* 593 (1981) (advocating fixed term of years in lieu of lives in being). Another reform could limit saving clauses to a period of years, e.g., 50 to 60 years.

315. This proposal was first made by Professor Simes. L. SIMES, *PUBLIC POLICY, supra* note 13, at

Rule has caused no serious problems, major changes are not appropriate. As Professor Simes cautioned: "In the United States there is a long history of attempts to substitute another type of rule for the Rule against Perpetuities. And if anything can be deduced from that history, it is this. All attempts to substitute a new rule have proved to be unsatisfactory."³¹⁶

Minor reforms may be appropriate. For example, Professor Dukeminier justifiably urges changes in the so-called "commercial transactions" area.³¹⁷ Such reformation is supported by the litigation brought during the eight-year period, 1978-1985. Of the approximately 100 reported cases, with a 25% invalidation rate, most involved commercial leases, options, and preemptive rights.³¹⁸ At the same time, commercial-type transactions can be created by a trust or will disposition.³¹⁹ Although all such violations can be avoided by a saving clause, shorter time periods are desirable.³²⁰ Lawyers and law students certainly should be cautioned about the dangers of perpetuities violations in commercial transactions³²¹ because the number of commercial violations greatly exceeds the number of violations in the donative transfer area.

An additional reform might be considered. Specifically, an attorney could be subject to malpractice liability for drafting an instrument which contains a perpetuities violation without a saving clause. Although malpractice liability is not the ultimate answer,³²² its threat may encourage

80-82. It was later embraced by Professor Schuyler. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?* 56 MICH. L. REV. 683 (1958). Illinois substantially adopted the Schuyler proposal in 1969. See Schuyler, *The Statute Concerning Perpetuities*, 65 NW. U. L. REV. 3 (1970) (discussing Illinois legislation).

316. L. SIMES, PUBLIC POLICY, *supra* note 13, at 72. Although the Illinois statute has been criticized, *Further Trends in Perpetuities*, 5 REAL PROP., PROB. & TR. J. 333, 342-45 (1970), there have been no reported cases under the system.

317. See Dukeminier, *The Measuring Lives*, *supra* note 9, at 1706-08. By limiting the Restatement (Second) to donative transfers, Professor Casner intentionally barred consideration of the Rule in relation to commercial transactions. 1978 ALI Proceedings, *supra* note 4, at 225. Professor Powell criticized this decision. Powell Memorandum, *supra* note 10, at 127. As adopted, the USRAP also excludes commercial (nondonative) transfers from its Statutory Rule Against Perpetuities. USRAP § 411 (1986).

318. See, e.g., *Siniard v. Davis*, 678 P.2d 1197 (Okla. 1984) (invalidating a commercial lease); *Buffalo Seminary v. McCarthy*, 58 N.Y.2d 867, 447 N.E.2d 76, 460 N.Y.S.2d 528 (1983) (invalidating an option); *Perry v. Brundage*, 200 Colo. 229, 614 P.2d 362 (1980) (invalidating a preemptive rights agreement).

319. See *Kaufman v. Zimmer*, 287 N.W.2d 884 (Iowa 1979).

320. USRAP drafts recommended 40-year duration rules for commercial transactions. See, e.g., DRAFT USRAP (Spring, 1986), *supra* note 1, at 77-86. These rules were deleted from the final draft. UNIF. STATUTORY R. AGAINST PERPETUITIES (Discussion Draft July 31, 1986).

321. The drafter first should ascertain whether the commercial transaction is subject to the Rule. For example, the New York Court of Appeals recently held that preemptive rights (rights of first refusal) in commercial and governmental transactions are not subject to the Rule. *Metropolitan Transit Auth. v. Bruken Realty Corp.*, 67 N.Y.2d 156, 492 N.E.2d 379, 501 N.Y.S.2d 306 (1986).

322. See *Langbein & Waggoner*, *supra* note 33, at 588-90.

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universal use of saving clauses.³²³ In the process, transferors will determine the beneficiaries on trust termination, instead of courts making that decision under a wait-and-see system.

In the end, wait-and-see must be rejected. It imposes unnecessary and unacceptable burdens for lives not yet in being. It is one thing to write a law review article arguing about wait-and-see.³²⁴ It is quite another to burden society with it.

323. See *supra* note 196.

324. Professor Waggoner remarked that it was "one thing to write a law review article" on the causal-lives method, but another to "apply [it] in actual practice." See Waggoner, *Perspective*, *supra* note 9, at 1724.

APPENDIX

SUGGESTED STATUTES TO REFINE THE COMMON LAW RULE
AGAINST PERPETUITIES

SECTION 1: SAVING CLAUSE RECOGNITION.

If a provision in an instrument terminates a nonvested property interest that has not vested 21 years after the death of the survivor of a group of individuals identified by name or by reference to an identifiable class and alive when the period of the common law Rule Against Perpetuities began to run, that interest is valid. If determining the death of the survivor would be impracticable, the validity of the property interest must be determined as if that provision did not exist.

SECTION 2: SETTLEMENT AUTHORITY

A court may approve a good faith compromise of a perpetuities matter if it is just and reasonable to all parties, including unborn and unascertained persons. For this purpose, a guardian shall be appointed to represent unborn and unascertained persons.

SECTION 3: RULES OF CONSTRUCTION

(a) Unless a contrary intention appears, the rules of construction in this section apply if an interest would be void under the common law Rule Against Perpetuities.

(b) The rules of construction apply in the order set forth in the following paragraphs. A rule shall be applied only if necessary to validate an interest under the common law Rule Against Perpetuities.

(1) *Administrative Contingencies*

Where the duration of vesting of an interest 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, the instrument shall be construed to require such contingency to occur, if at all, within 21 years from the effective date of the instrument creating such interest.

(2) *Unrealistic Birth Possibilities; Possibility of Adoption Disregarded*

(A) Where the validity of a disposition depends upon the ability of a person to have a child at some future time, it shall be presumed, subject to subparagraph (B), that a male can have a child at 14 years of age or over, but

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not under that age, and that a female can have a child at 12 years of age or over, but not under that age or over the age of 55 years.

(B) 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.

(C) 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.

(3) Unborn Person Possibility

Where an interest would be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the interest, and such person is referred to in the instrument creating such interest as the spouse, widow, or widower of another person, it shall be conclusively presumed that such reference is to a person in being on the effective date of the instrument.

(4) Reduction of Age to 21 for Vesting Purposes; Deferred Possession Allowed

(A) If an interest would be invalid under the common law Rule Against Perpetuities because made to depend for its vesting upon any person attaining an age in excess of 21 years, the age contingency shall be reduced to 21 years for vesting purposes only.

(B) Notwithstanding subparagraph (A), possession of the interest shall be postponed to the age specified in the instrument or to age 50, whichever occurs sooner.

(C) Notwithstanding subparagraph (A), the person or persons entitled to the property or enjoyment thereof, from ages 21 and until the age prescribed in the instrument, shall continue such entitlement.

(5) Class Gift Construction

If an interest would be invalid under the common law Rule Against Perpetuities by including afterborn persons within a class, afterborns shall be excluded from the class to the extent necessary to avoid a violation under the common law Rule Against Perpetuities.

SECTION 4: CY PRES AUTHORITY

If, after application of the foregoing statutes, an interest would be invalid under the common law Rule, a court shall reform the interest within the limits of the Rule by approximating the transferor's intention as nearly as possible. For this purpose, extrinsic evidence shall be admissible.