

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

**Uniform Statutory Rule
Against Perpetuities**

September 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

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GEORGE DEUKMEJIAN, Governor

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September 14, 1990

To: **The Honorable George Deukmejian**
 Governor of California, and
 The Legislature of California

This recommendation proposes enactment of the Uniform Statutory Rule Against Perpetuities in place of the existing law concerning perpetuities. The Uniform Statute employs a 90-year wait-and-see period, instead of the common law's period based on lives in being plus 21 years, during which nonvested interests are given the chance to vest or fail.

The recommendation would make several related changes, including provisions restricting leases to commence in the future to a 30-year period, recognizing trusts for pets, and limiting honorary trusts to a 21-year period. The recommendation also makes other technical, conforming changes.

This recommendation was prepared pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

Roger Arnebergh
Chairperson

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RECOMMENDATION

Background

The common law rule against perpetuities invalidates attempts to create interests in property that would remain contingent for more than the lives of certain people alive when the interest was created plus 21 years. The rule is now most commonly known in Professor Gray's formulation: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."¹ A central purpose of the rule is to mediate between those who seek to determine the disposition of their property years after death and those in future generations who wish to control the property, free of the dead hand.

In general, the rule permits a person to create property interests that will vest in his or her grandchildren who reach 21 years of age, but not to create interests that will vest only in great grandchildren.² The common law rule can operate harshly, however, since the rule invalidates a disposition if there is any conceivable possibility that it will violate the rule, regardless of whether it is likely to do so, and regardless of how reasonable the disposition appears. Individuals who draft their own wills or trusts without expert advice can easily run afoul of the rule, but many lawyers have also failed the test, notwithstanding the prominent position the rule enjoys in the law school curriculum.³

The history of the rule against perpetuities in California is convoluted and confusing. From the early constitutional provision that "[n]o perpetuities shall be allowed except for

1. J. Gray, *The Rule Against Perpetuities* § 201 (4th ed. 1942).

2. See Halbach, *Rule Against Perpetuities*, in *California Will Drafting Practice* § 12.30, at 566 (Cal. Cont. Ed. Bar 1982).

3. See, e.g., *Lucas v. Hamm*, 56 Cal. 2d 583, 592, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) ("[F]ew, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman.").

eleemosynary purposes,"⁴ the rule has developed through decades of judicial interpretation, reassessment, and refinement, and periodic legislative attempts at clarification.⁵ California law includes the common law rule against perpetuities, with its lives in being plus 21 years,⁶ as well as an alternative 60-year period in gross.⁷ The harshness of judging the validity of nonvested interests at the time of their creation is mitigated by a *cy pres* provision permitting reform of instruments to avoid violation of the rule.⁸ Knowledgeable lawyers will also insert a perpetuity saving clause as appropriate to avoid violating the rule against perpetuities.

National movements for reform of perpetuities law have culminated in the Uniform Statutory Rule Against Perpetuities,⁹ approved by the National Conference of Commissioners on Uniform State Laws in 1986.¹⁰ In the three years since it was approved, the Uniform Statute has been enacted in eleven states — Connecticut, Florida, Georgia, Massachusetts, Michigan, Minnesota, Montana, Nebraska,

4. Former Cal Const. art. XX, § 9 (repealed 1970); now stated in Civil Code § 715.

5. See generally 4 B. Witkin, *Summary of California Law Real Property*, §§ 377-404, at 568-92 (9th ed. 1987); Halbach, *Rule Against Perpetuities*, in *California Will Drafting Practice* §§ 12.1-12.54, at 547-79 (Cal. Cont. Ed. Bar 1982); Halbach, *id.*, §§ 12.1-12.54, at 229-35 (Cal. Cont. Ed. Bar Supp. 1989); Simes, *Perpetuities in California Since 1951*, 18 *Hastings L.J.* 247 (1967); Taylor, *A Study Relating to the "Vesting" of Interests Under the Rule Against Perpetuities*, 9 Cal. L. Revision Comm'n Reports 909, 910-15 (1969); Turrentine, *A Study To Determine Whether the Sections of the Civil Code Prohibiting Suspension of the Absolute Power of Alienation Should Be Repealed*, 1 Cal. L. Revision Comm'n Reports G-11 (1957); *Recommendation Relating to Suspension of the Absolute Power of Alienation*, 1 Cal. L. Revision Comm'n Reports G-5 (1957); Comment, *Rule Against Perpetuities: The Second Restatement Adopts Wait and See*, 19 *Santa Clara L. Rev.* 1063, 1081-91 (1979); Note, *California Revises the Rule Against Perpetuities—Again*, 16 *Stan. L. Rev.* 177-90 (1963).

6. Civil Code § 715.2. The section is quoted in the text *infra*.

7. Civil Code § 715.6 provides as follows:

715.6. No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code.

8. Civil Code § 715.5.

9. Unif. Statutory Rule Against Perpetuities (1986), 8A U.L.A. 159 (Supp. 1990) [hereinafter cited as "USRAP" or "Uniform Statute"]. In 1990, USRAP was incorporated into the Uniform Probate Code. See Unif. Prob. Code §§ 2-901 to 2-906 (1990).

Nevada, Oregon, and South Carolina¹¹ — and is under consideration in others.

The Uniform Statute has two principal virtues. It provides a simple, easily administered rule and it offers the best hope for achieving uniformity among the states.

Summary of USRAP

The Uniform Statute adopts a 90-year wait-and-see period during which nonvested interests have the opportunity to work out, without the need to engage in speculation on possibilities required under the common law rule against perpetuities. The Uniform Statute accomplishes this by retaining the common law rule as a validating rule,¹² but suspends its operation as an invalidating rule for the 90-year wait-and-see period running from the creation of the interest.¹³

The 90-year waiting period was chosen by the drafters of the Uniform Statute as an approximation of (or proxy for) the common law period of lives in being plus 21 years.¹⁴ On

10. USRAP has also been approved by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers.

11. See 1989 Conn. Acts 44; Fla. Stat. Ann. § 689.225 (West Supp. 1990); Ga. Code Ann. §§ 44-6-200 to 44-6-206 (Supp. 1990); 1989 Mass. Acts 668; Mich. Comp. Laws Ann. §§ 554.71-554.78 (West Supp. 1990); Minn. Stat. Ann. §§ 501A.01-501A.07 (effective Jan. 1, 1991) (West 1990); Mont. Code Ann. §§ 70-1-801 to 70-1-807 (1989); Neb. Rev. Stat. §§ 76-2001 to 76-2008 (Supp. 1989); Nev. Rev. Stat. §§ 111.103-111.1039 (Supp. 1989); 1989 Or. Rev. Stat. Ann. §§ 105.950-105.975 (1989); S.C. Code Ann. §§ 27-6-10 to 27-6-80 (Law. Co-op Supp. 1989).

12. The Prefatory Note to USRAP distinguishes between the validating and invalidating sides of the common law rule as follows:

Validating Side of the Common-law Rule: A nonvested property interest is valid when it is created (initially valid) if it is then *certain* to vest or terminate (fail to vest) — one or the other — no later than 21 years after the death of an individual then alive.

Invalidating Side of the Common-law Rule: A nonvested property interest is invalid when it is created (initially valid) if there is no such certainty.

13. See USRAP § 1(a)(2), (b)(2), (c)(2). For a fuller discussion, see the Prefatory Note to USRAP.

14. See the Prefatory Note to USRAP. For background on the 90-year period, see Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 575-90 (1986); Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 Cornell L. Rev. 157 (1988).

petition of an interested person, a court may exercise a *cy pres* power to reform the disposition to approximate the donative transferor's manifested plan of distribution. The right of reformation does not arise until it is necessary. Generally, a disposition that violates the common law rule is not in need of reformation until the 90-year period expires or, in the case of a class gift, when a member of a class is entitled to enjoyment of a share before the expiration of the 90-year period.¹⁵

The Uniform Statute would also make other changes which are discussed below and in the comments to the sections in the proposed legislation.

USRAP and California Law Compared

Statement of the Rule Against Perpetuities

Civil Code Section 715.2 provides the basic California rule in the following language:

715.2. No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities.

The Uniform Statute provides a simplified form of this rule, holding that a "nonvested property interest is invalid" unless "when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive" or it "vests or terminates within 90 years after its creation."¹⁶ Thus, the common law rule against perpetuities

15. Reformation may also be had before the expiration of the 90-year period in the unlikely case where an interest can vest beyond the 90-year period but not before. See USRAP § 3(3) & comment.

16. See USRAP § 1(a). Special applications of the rule are provided for powers of appointment. See USRAP § 1(b)-(c).

continues as a validating principle, but the invalidating side of the rule is postponed in operation during the 90-year waiting period. No major changes would be made in the validating side of the rule by substituting the language of the Uniform Statute for the California provision.¹⁷

Cy Pres

In 1963, California enacted a *cy pres* rule permitting reformation of a disposition of property that otherwise would violate the rule against perpetuities "if and to the extent" that it can be reformed or construed to comply with the rule and to give effect to the general intent of the creator of the interest "whenever that general intent can be ascertained."¹⁸ Reformation can take place at any time after creation of the interest. Although the *cy pres* rule provides an opportunity to avoid some harsh applications of the rule against perpetuities, its reliance on judicial remedies is inefficient and potentially expensive.

The Uniform Statute also provides a *cy pres* rule, as noted above, but makes resort to it unlikely because the 90-year waiting period should solve most problems before reformation would be necessary. Since the common law rule does not act to invalidate a disposition until the 90-year period has expired, the right of reformation under the Uniform Statute does not generally arise until it becomes useful, i.e., at the end of the waiting period. However, in the case of a class gift, where a member of a class is entitled to enjoyment of a share before that time, the disposition may be reformed on petition of an interested person. The *cy pres* standard under the Uniform Statute differs from the California standard, providing for

17. The subsidiary doctrines of the common law rule are approved or disapproved in Comment G to Section 1 of USRAP. A revised form of this comment is set out in the Background to Probate Code Section 21201 of the proposed legislation *infra*.

18. Civil Code § 715.5; see also Note, *California Revises the Rule Against Perpetuities — Again*, 16 Stan. L. Rev. 177, 186-90 (1963).

reformation in the manner that "most closely approximates the transferor's manifested plan of distribution."¹⁹

Exclusions from Rule

By common law and statute, some types of interests are excluded from the coverage of the rule against perpetuities. The Uniform Statute explicitly excludes a variety of interests and in some respects would change California law.

Commercial Transactions. The California rule has been applied to commercial transactions, e.g., where a lease is to commence on completion of construction.²⁰ The Uniform Statute does not apply to commercial (nondonative) transactions.²¹ The period of a life in being plus 21 years is not relevant to commercial transactions.²² It makes no sense to apply a rule based on family-oriented donative transfers to interests created by contract whose nature is determined by negotiations between the parties. Limitations on the duration of commercial interests is better handled directly.²³

Charitable Dispositions. California law has always permitted perpetuities for eleemosynary purposes.²⁴ The Uniform Statute also is inapplicable to interests held by "a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision."²⁵

19. USRAP § 3; see also Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 595-98 (1986).

20. See, e.g., *Wong v. Di Grazia*, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963); *Haggerty v. Oakland*, 161 Cal. App. 2d 407, 417-21, 326 P.2d 957 (1958).

21. See USRAP § 4(1) & comment.

22. See Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 599-600 (1986).

23. See, e.g., Civil Code §§ 717-719 (limitations on duration of leases), 882.020-882.040 (ancient mortgages and deeds of trust), 883.210-883.270 (termination of dormant mineral rights).

24. Civil Code § 715 (continuing former Cal. Const. art. XX, § 9); see also 4 B. Witkin, *Summary of California Law Real Property* § 399, at 587-88 (9th ed. 1987).

25. USRAP § 4(5).

Insurance and Retirement Plans. By statute, California exempts trusts of hospital service contracts, group life insurance, group disability insurance, group annuities, profit-sharing, and retirement plans from the rule against perpetuities.²⁶ The Uniform Statute exempts similar property interests from the statutory rule against perpetuities in different language.²⁷ The recommended legislation would continue much of the California language in addition to the exemptions in the Uniform Statute.

Additional Exceptions. The Uniform Statute provides other explicit exemptions from the rule, including a fiduciary's administrative powers (as opposed to distributive powers),²⁸ a trustee's discretionary power to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in income and principal,²⁹ a power to appoint a fiduciary,³⁰ and any property interest, power of appointment, or arrangement that was not subject to the common law rule against perpetuities.³¹

Miscellaneous Matters

The invalidating side of the common law rule also strikes down various nonvested dispositions such as leases to commence in the future, nonvested options in gross, nonvested easements in gross, and honorary trusts. The Uniform Statute postpones the invalidating operation of the common law rule for 90 years and thus presents the possibility that these kinds of peripheral interests would exist for 90 years, with no way to invalidate them.

26. Civil Code §§ 715.3, 715.4.

27. USRAP § 4(6).

28. USRAP § 4(2). This provision specifically lists the power to sell, lease, or mortgage property, and the power to determine principal and income.

29. USRAP § 4(4).

30. USRAP § 4(3).

31. USRAP § 4(7).

The proposed law places a 30-year limit on the period of time that commencement of a lease may be postponed.³² The marketable title statutes provide sufficient remedies to handle any practical problems presented by nonvested options and easements.³³

The proposed law recognizes the validity of a trust for the care of a designated domestic or pet animal that may be performed by the trustee for the life of the animal.³⁴ A 21-year limit is placed on other honorary trusts.³⁵ Although such trusts are uncommon, this provision avoids the possibility that such trusts could exist for 90 years under the wait-and-see period of the Uniform Statute before termination.

The proposed law also includes a provision clarifying the interrelation of the Uniform Statute and the generation-skipping transfer tax as to certain pre-1986 irrevocable trusts.³⁶

32. See proposed Civil Code Section 715. This section is drawn from a draft prepared by the USRAP Drafting Committee (on file in the Commission's office as Exhibit 14 to Memorandum 90-22, Jan. 1, 1990).

33. See Civil Code §§ 884.010-884.030 (options), 887.010-887.090 (easements). In a separate study, the Commission is considering additional revisions of the marketable title statute to treat executory interests in the same manner as powers of termination under Civil Code Sections 885.010-885.070.

34. This provision is drawn from a tentative draft of Section 2-907(b) of the Uniform Probate Code (1990).

35. This provision is drawn from a tentative draft of Section 2-907(a) of the Uniform Probate Code (1990).

36. See USRAP § 1(e) (1990). Irrevocable trusts created before September 25, 1986, were "grandfathered" so that the generation-skipping transfer tax does not apply, but all interests in such trusts must vest within 21 years after lives in being at the creation of the trust or the trust is "ungrandfathered." See Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2). The risk, at one time, was that exercise of a power of appointment in a grandfathered trust could be exercised in a manner that violated this regulation, though not the Uniform Statute, thereby subjecting the trust to the generation-skipping transfer tax. The regulation is in the process of amendment to recognize the 90-year period under USRAP. See letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990).

Application to Existing Interests

The proposed law applies to all interests, whether created before or after January 1, 1992, the proposed operative date.³⁷ The 90-year wait-and-see period would afford nonvested interests under existing instruments the chance to work out in the normal course of events without any need to seek reformation. In other words, retroactive application of the proposed law would not have the effect of invalidating any vested interests.³⁸ Instruments would not have to be reviewed or redrafted even though they were executed before the operative date of the new law. Perpetuity saving clauses used under existing law would continue to be valid and useful under the proposed law, and there would be no advantage in redrafting in an effort to employ the 90-year period in a perpetuity saving clause.³⁹

Applying one rule to all nonvested interests, regardless of their date of creation, has a number of advantages over a dual system. It avoids the need to determine which law applies in a particular case and the expense and trouble resulting from the incorrect determination. It makes unnecessary any republication or reexecution of pre-operative date instruments to come under the new law.⁴⁰

37. The Uniform Statute is drafted to apply prospectively from the date of creation of the interest. See USRAP § 5(a). This approach then requires special rules as to transitional issues. See, e.g., USRAP § 5(b).

38. The proposed law provides explicitly that it would not disrupt any settlements among interested persons.

39. The proposed law makes ineffective an attempt to use a two-pronged perpetuity saving clause to suspend vesting until the later of (1) 90 years or (2) 21 years after specified lives in being. See proposed Prob. Code § 21209; USRAP § 1(e) (1990). Thus there is no advantage to redrafting perpetuity saving clauses in light of the new 90-year wait-and-see period. Lawyers who draft for initial validity under the common-law rule should continue with business as usual. See Unif. Prob. Code General Comment to Part 9 of Article 2 (1990).

40. Under USRAP, the opportunity to come under the new law exists because the statute would apply to interests "created" after the operative date by execution of an instrument. However, wills and testamentary trusts operate at a future time and can be revoked, revised, and republished at any time before death. There is also the possibility that an instrument would inadvertently be brought under the new statute when a will or trust is revised for some other purpose. This problem is avoided by applying the proposed law to all interests.

Illustration

The operation of the common law, the California rule, and the Uniform Statute can be seen by way of an example: Suppose that *A* gives property in a testamentary trust to his daughter *D* for life, and the remainder to *D*'s children who reach 25. Assume that *D* is alive at *A*'s death.

This disposition would fail under the common law rule since the remainder interest could fail to vest within 21 years after the *D*'s death.

Under California law, the interest could be saved by a petition to reform the disposition under Civil Code Section 715.5 to accomplish *A*'s general intentions. The court could reduce the required age of *D*'s children from 25 to 21 years.⁴¹ Or, in appropriate circumstances, the will might be construed to provide that the remainder beneficiaries included only *A*'s grandchildren alive at *A*'s death.⁴² Legal scholars have also urged that courts consider inserting an appropriate perpetuities saving clause in the course of reformation to preserve the 25-year contingency where possible.⁴³

Under the Uniform Statute, we would wait up to 90 years following *A*'s death to see if the rule has been violated. In a normal case, this will be more than enough time and the property will pass as directed.⁴⁴ If the rule is violated at the end of the waiting period, such as where a grandchild was born after *A*'s death and will not reach age 25 before the 90th

41. See, e.g., *Estate of Ghiglia*, 42 Cal. App. 3d 433, 442-43, 116 Cal. Rptr. 827 (1974) (required age reduced from 35 to 21 years).

42. See, e.g., *Estate of Grove*, 70 Cal. App. 3d 355, 363-65, 138 Cal. Rptr. 684 (1977) (distribution to grandnephews and grandnieces alive at testator's death).

43. See, e.g., Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. Rev. 1023, 1071-72 (1987) (insert saving clause immediately when disposition found to violate rule); Restatement (Second) of Property (Donative Transfers) § 1.5 comment d & Reporter's Note 5 (1983) (reformation in age contingency situations at end of wait-and-see period).

44. For a more detailed discussion of this type of case, see Example (3) in the comment to USRAP § 3 (set out in revised form in the Background to Probate Code Section 21220 of the proposed legislation *infra*).

anniversary of A's death, reformation would be appropriate under the Uniform Statute.⁴⁵

Conclusion

The Commission recommends adoption of the Uniform Statute in California for a number of reasons.⁴⁶ The Uniform Statute (1) provides an easily administered rule, eliminating a number of complexities and ambiguities associated with the traditional rule, (2) offers the prospect for a significant degree of unity among the states, (3) eliminates the inappropriate coverage of commercial transactions from the rule, (4) reinforces the *cy pres* approach that is already a part of California law, and (5) avoids the need to litigate the validity of dispositions that will work out under their terms within the 90-year wait-and-see period.

45. Reformation may take place under USRAP before the 90-year period has expired since some of A's grandchildren may have reached age 25. These grandchildren would be entitled to petition for reformation and it would be appropriate for the court to hold the share of the grandchild under 25 until the 90th anniversary of A's death. See USRAP § 3(2) & comment.

46. See also the study by the Commission's consultant on this subject, Charles A. Collier, Jr., *The Uniform Statutory Rule Against Perpetuities* (February 1989) (on file at Commission's office).

PROPOSED LEGISLATION

Note. This recommendation includes an Appendix of edited versions of the official comments to the Uniform Statutory Rule Against Perpetuities (USRAP) and to the version of USRAP included in Sections 2-901 to 2-906 of the Uniform Probate Code (1990) prepared by the National Conference of Commissioners on Uniform State Laws. The comments of the Uniform Commissioners have been edited to provide references to the relevant sections in this recommendation, to eliminate material that is not relevant to this recommendation, and to refer to California statutory and case law. As revised, the background comments retain material of potential interest to lawyers, judges, and other interested persons seeking detailed guidance to the recommended legislation.

Probate Code §§ 21200-21231 (added). Uniform Statutory Rule Against Perpetuities and Related Provisions

PART 2. PERPETUITIES

CHAPTER 1. UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Article 1. General Provisions

§ 21200. Short title

21200. This chapter shall be known and may be cited as the Uniform Statutory Rule Against Perpetuities.

Comment. Section 21200 provides a short title for this chapter and is the same as Section 6 of the Uniform Statutory Rule Against Perpetuities (1990). As to the construction of uniform acts, see Section 2(b). This part applies to nonvested property interests regardless of whether they were created before or after January 1, 1992. See Section 21202.

§21201. Common law rule against perpetuities superseded

21201. This chapter supersedes the common law rule against perpetuities.

Comment. Section 21201 is the same in substance as part of Section 9 of the Uniform Statutory Rule Against Perpetuities (1990). This chapter supersedes the common law rule against perpetuities, which was specifically incorporated into California law by former Civil Code Section 715.2 and related sections. See Section 21202 (application of part).

Background. For background on Section 21201, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2543 *infra*.

§21202. Application of part

21202. (a) Except as provided in subdivision (b), this part applies to nonvested property interests and unexercised powers of appointment regardless of whether they were created before, on, or after January 1, 1992.

(b) This part does not apply to any property interest or power of appointment the validity of which has been determined in a judicial proceeding or by a settlement among interested persons.

Comment. Subdivision (a) of Section 21202 applies the new statutory rule against perpetuities to nonvested property interests and unexercised powers of appointment whether created before, on, or after January 1, 1992, except as provided in subdivision (b). This rule differs from Section 5 of the Uniform Statutory Rule Against Perpetuities (1990).

Article 2. Statutory Rule Against Perpetuities**§ 21205. Statutory rule against perpetuities as to nonvested property interests**

21205. A nonvested property interest is invalid unless one of the following conditions is satisfied:

(a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive.

(b) The interest either vests or terminates within 90 years after its creation.

Comment. Section 21205 is the same in substance as Section 1(a) of the Uniform Statutory Rule Against Perpetuities (1990). This section, along with Sections 21206-21208, supersedes former Civil Code Section 715.2. See also Sections 21230 (validating lives), 21231 (spouse as life in being).

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21205 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a nonvested

property interest that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is nevertheless valid if it does not actually remain nonvested when the allowable 90-year waiting period expires.

For additional background on Section 21205, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2551 *infra*.

§ 21206. Statutory rule against perpetuities as to general power of appointment not presently exercisable because of condition precedent

21206. A general power of appointment not presently exercisable because of a condition precedent is invalid unless one of the following conditions is satisfied:

(a) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive.

(b) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

Comment. Section 21206 is the same in substance as Section 1(b) of the Uniform Statutory Rule Against Perpetuities (1990). See Comment to Section 21205. See also Sections 21230 (validating lives), 21231 (spouse as life in being).

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21206 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a power of appointment that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is nevertheless valid if the power ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires.

For additional background on Section 21206, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2564 *infra*.

§ 21207. Statutory rule against perpetuities as to nongeneral power of appointment or general testamentary power of appointment

21207. A nongeneral power of appointment or a general testamentary power of appointment is invalid unless one of the following conditions is satisfied:

(a) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive.

(b) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

Comment. Section 21207 is the same in substance as Section 1(c) of the Uniform Statutory Rule Against Perpetuities (1990). See Comment to Section 21205. See also Sections 21230 (validating lives), 21231 (spouse as life in being).

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21207 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a power of appointment that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is

nevertheless valid if the power ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires.

For additional background on Section 21207, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2564 *infra*.

§ 21208. Possibility of posthumous birth disregarded

21208. In determining whether a nonvested property interest or a power of appointment is valid under this article, the possibility that a child will be born to an individual after the individual's death is disregarded.

Comment. Section 21208 is the same in substance as Section 1(d) of the Uniform Statutory Rule Against Perpetuities (1990). This section supersedes part of the first sentence of former Civil Code Section 715.2 which served the same purpose as to a period of gestation.

Background. For background on Section 21208, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2573 *infra*.

§ 21209. Construction of "later of" language in perpetuity saving clause

21209. If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (1) seeks to disallow the vesting or termination of any interest or trust beyond, (2) seeks to postpone the vesting or termination of any interest or trust until, or (3) seeks to operate in effect in any similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period that exceeds 21 years after the death of the survivor of the specified lives.

Comment. Section 21209 is the same in substance as Section 1(e) of the Uniform Statutory Rule Against Perpetuities. This section is

intended to invalidate a two-pronged perpetuity saving clause *to the extent* that it attempts to employ a period of time extending beyond the traditional perpetuities period of lives in being plus 21 years. The effect of this rule is that there is no advantage to be gained by inserting such a "later of" clause in an instrument. A standard perpetuity saving clause in use before enactment of USRAP continues to be appropriate. Consequently, instruments should not be redrafted in an attempt to apply a "later of" 90 years or lives-in-being-plus-21- years test. This section also prevents the loss of grandfathered status under the federal generation-skipping transfer tax involving exercise of a nongeneral power of appointment under a pre-1986 irrevocable trust. See Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988) [as proposed to be amended].

Background. For additional background on Section 21209, adapted from the official explanation of Section 1(e) of the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2575 *infra*.

Article 3. Time of Creation of Interest

§ 21210. When nonvested property interest or power of appointment created

21210. Except as provided in Sections 21211 and 21212, the time of creation of a nonvested property interest or a power of appointment is determined by other applicable statutes or, if none, under general principles of property law.

Comment. Section 21210 is the same in substance as Section 2(a) of the Uniform Statutory Rule Against Perpetuities (1990), with the addition of the reference to other statutory provisions. The cross-reference in Section 2(a) of the uniform statute to the prospective application provision (§ 5(a)) is omitted because this part applies to all interests regardless of their date of creation. See Section 21202. This section supersedes Civil Code Section 1391.1(a)(2).

Background (adapted from Prefatory Note to Uniform Statute). This article defines the time when, for purposes of this chapter, a nonvested property interest or a power of appointment is created. The period of time allowed by Article 2 (commencing with Section 21205) (statutory rule against perpetuities) is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 21202, with certain exceptions, provides that this chapter applies to nonvested property interests and powers of appointment regardless of whether they were created before, on, or after January 1, 1992.

For additional background on Section 21210, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2579 *infra*.

§ 21211. Postponement of time of creation of nonvested property interest or power of appointment in certain cases
21211. For purposes of this chapter:

(a) If there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (1) a nonvested property interest or (2) a property interest subject to a power of appointment described in Section 21206 or 21207, the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(b) A joint power with respect to community property held by individuals married to each other is a power exercisable by one person alone.

Comment. Section 21211 is the same in substance as Section 2(b) of the Uniform Statutory Rule Against Perpetuities (1990). Section 21211(a) supersedes Civil Code Sections 716 and 1391.1(a). The reference to the Uniform Marital Property Act in Section 2(b) of the Uniform Statutory Rule Against Perpetuities is not included in Section 21211(b) because it is unnecessary in light of the definition of community property in Section 28. See Comment to Section 28.

Background (adapted from Prefatory Note to Uniform Statute). Section 21211 provides that, if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest (or a property interest subject to a power of appointment described in Section 21206 or 21207), the time of creation of the nonvested property interest or the power of appointment is postponed until the power to become unqualified beneficial owner ceases to exist. This is in accord with existing common law.

For additional background on Section 21211, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2580 *infra*.

§ 21212. Time of creation of nonvested property interest or power of appointment arising from transfer to trust or other arrangement

21212. For purposes of this chapter, a nonvested property interest or a power of appointment arising from a transfer of

property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

Comment. Section 21212 is the same in substance as Section 2(c) of the Uniform Statutory Rule Against Perpetuities (1990).

Background (adapted from Prefatory Note to Uniform Statute). Section 21212 provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable trust. Arguably, at common law, each transfer starts the period of the rule running anew as to that transfer. This difficulty is avoided by Section 21212.

For additional background on Section 21212, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2585 *infra*.

Article 4. Reformation

§ 21220. Reformation

21220. On 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 applicable provision in Article 2 (commencing with Section 21205), if any of the following conditions is satisfied:

(a) A nonvested property interest or a power of appointment becomes invalid under the statutory rule against perpetuities provided in Article 2 (commencing with Section 21205).

(b) A class gift is not but might become invalid under the statutory rule against perpetuities provided in Article 2 (commencing with Section 21205), and the time has arrived when the share of any class member is to take effect in possession or enjoyment.

(c) A nonvested property interest that is not validated by subdivision (a) of Section 21205 can vest but not within 90 years after its creation.

Comment. Section 21220 is the same in substance as Section 3 of the Uniform Statutory Rule Against Perpetuities (1990). Section 21220 supersedes Civil Code Section 715.5 (reformation or construction to avoid violation of rule against perpetuities).

Background (adapted from Prefatory Note to Uniform Statute). Section 21220 directs a court, on petition of an interested person, to reform a disposition within the limits of the allowable 90-year period, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: (1) when a nonvested property interest or a power of appointment becomes invalid under the statutory rule; (2) when a class gift has not but still might become invalid under the statutory rule and the time has arrived when the share of a class member is to take effect in possession or enjoyment; and (3) when a nonvested property interest can vest, but cannot do so within the allowable 90-year waiting period. It is anticipated that the circumstances requisite to reformation under this section will rarely arise, and consequently that this section will seldom need to be applied.

For additional background on Section 21220, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2586 *infra*.

Article 5. Exclusions from Statutory Rule Against Perpetuities

§ 21225. Exclusions from statutory rule against perpetuities

21225. This chapter does not apply to any of the following:

(a) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (1) a premarital or postmarital agreement, (2) a separation or divorce settlement, (3) a spouse's election, (4) or a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (5) a contract to make or not to revoke a will or trust, (6) a contract to exercise or not to exercise a power of appointment, (7) a transfer in satisfaction of a duty of support, or (8) a reciprocal transfer.

(b) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income.

(c) A power to appoint a fiduciary.

(d) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal.

(e) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision.

(f) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse.

(g) A property interest, power of appointment, or arrangement that was not subject to the common law rule against perpetuities or is excluded by another statute of this state.

(h) A trust created for the purpose of providing for its beneficiaries under hospital service contracts, group life insurance, group disability insurance, group annuities, or any combination of such insurance, as defined in the Insurance Code.

Comment. Subdivisions (a)-(g) of Section 21225 are the same in substance as Section 4 of the Uniform Statutory Rule Against Perpetuities (1990). Subdivision (e) supersedes former Civil Code Section 715 (no perpetuities allowed except for eleemosynary purposes). For a statutory exclusion under (g), see Health & Safety Code § 8559 (cemeteries). Subdivision (h) restates former Civil Code Section 715.4 without substantive change. For other limitations on interests not subject to the statutory rule against perpetuities, see, e.g., Civil Code §§ 715 (leases to commence in future), 883.010-883.270 (mineral rights), 884.010-884.030 (unexercised options), 885.010-885.070 (powers of termination), 887.010-887.090 (abandoned easements).

Background (adapted from Prefatory Note to Uniform Statute). Section 21225 identifies the interests and powers that are excluded from the Statutory Rule Against Perpetuities. This section is in part declaratory of existing common law. All the exclusions from the common law rule recognized at common law and by statute in this state are preserved. In line with long-standing scholarly commentary, Section 21225(a) excludes nondonative transfers from the statutory rule. The rule against perpetuities is an inappropriate instrument of social policy to use as a control on such arrangements. The period of the rule — a life in being plus 21 years — is suitable for donative transfers only.

For additional background on Section 21225, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1990), see the Appendix at page 2594 *infra*.

CHAPTER 2. RELATED PROVISIONS

§ 21230. Validating lives

21230. The lives of individuals selected to govern the time of vesting pursuant to Article 2 (commencing with Section 21205) of Chapter 1 may not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.

Comment. Section 21230 restates the second sentence of former Civil Code Section 715.2 without substantive change. This collateral rule applies in determining validity under Sections 21205(a), 21206(a), and 21207(a).

§ 21231. Spouse as life in being

21231. In determining the validity of a nonvested property interest pursuant to Article 2 (commencing with Section 21205) of Chapter 1, an individual described as the spouse of

an individual alive at the commencement of the perpetuities period shall be deemed to be an individual alive when the interest is created, whether or not the individual so described was then alive.

Comment. Section 21231 restates former Civil Code Section 715.7 without substantive change. This rule of construction applies in determining validity under Sections 21205(a), 21206(a), and 21207(a).

REPEALED SECTIONS AND CONFORMING REVISIONS

**Heading for Article 3 (commencing with Section 715)
(amended)**

SEC. . The heading of Article 3 (commencing with Section 715) of Chapter 1 of Title 2 of Part 1 of Division 2 of the Civil Code is amended to read:

**Article 3. ~~Restraints Upon Alienation~~ *Duration of Leases*
Civil Code § 715 (repealed). Perpetuities disallowed except for
eleemosynary purposes**

~~715. No perpetuities shall be allowed except for
eleemosynary purposes.~~

Comment. Former Section 715 is generally superseded by the Uniform Statutory Rule Against Perpetuities in Probate Code Sections 21200-21225. See Prob. Code § 21225(e) (interests held by charities and government that are excluded from rule).

Civil Code § 715 (added). Lease to commence in future

715. A lease to commence at a time certain or upon the happening of a future event becomes invalid if its term does not actually commence in possession within 30 years after its execution.

Comment. Section 715 is a new provision that places a 30-year limit on leases that might have been voidable future interests under the rule against perpetuities provided in former Civil Code Section 715.2.

Civil Code § 715.2 (repealed). Rule against perpetuities

~~715.2. No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of~~

~~gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities.~~

Comment. Former Section 715.2 is superseded by the Uniform Statutory Rule Against Perpetuities in Probate Code Sections 21205-21208. See also Prob. Code § 21201 (common law rule against perpetuities superseded). The substance of the limitation on the class of measuring lives in the second sentence of former Section 715.2 is restated in Probate Code Section 21230.

Civil Code § 715.3 (repealed). Rule against perpetuities as to profit-sharing and retirement plans

~~715.3. No trust heretofore or hereafter created forming part of a profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries or forming part of a retirement plan formed primarily for the purpose of providing benefits for employees on or after retirement shall be deemed invalid as violating Section 715.2 of this code; and the income arising from such property, real or personal, held in such trust may be permitted to accumulate until the fund is sufficient, in the opinion of the trustee or trustees thereof, to accomplish the purposes of the trust.~~

Comment. The exception to the rule against perpetuities in the first clause of former Section 715.3 is superseded by Probate Code Section 21225(f) (exclusion from coverage of Uniform Statutory Rule Against Perpetuities). The exception from the prohibition on accumulations in the second clause of former Section 715.3 is continued in Section 724(b).

Civil Code § 715.4 (repealed). Rule against perpetuities as to insurance trusts

~~715.4. No trust heretofore or hereafter created for the purpose of providing for the beneficiaries of such trust under hospital service contracts, group life insurance, group disability insurance, group annuities, or any combination of such insurance, as defined in the Insurance Code, shall be deemed invalid as violating Section 715.2 of this code.~~

Comment. Former Section 715.4 is restated without substantive change in Probate Code Section 21225(h) (exclusion from coverage of Uniform Statutory Rule Against Perpetuities).

Civil Code § 715.5 (repealed). Reformation

~~715.5. No interest in real or personal property is either void or voidable as in violation of Section 715.2 of this code if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.~~

Comment. Former Section 715.5 is superseded by Probate Code Section 21220 (reformation under Uniform Statutory Rule Against Perpetuities).

Civil Code § 715.6 (repealed). Vesting within 60 years

~~715.6. No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code.~~

Comment. Former Section 715.6 is superseded by the Uniform Statutory Rule Against Perpetuities, in particular, Probate Code Sections 21205-21207.

Civil Code § 715.7 (repealed). Spouse as life in being

~~715.7. In determining the validity of a future interest in real or personal property pursuant to Section 715.2 of this code, an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a "life in being" at such time whether or not the individual so described was then in being.~~

Comment. Former Section 715.7 is restated without substantive change in Probate Code Section 21231.

Civil Code § 716 (repealed). Exclusion of time during which interest is destructible

~~716. The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power~~

~~of destruction is not to be included in determining the permissible period for the vesting of an interest within the rule against perpetuities.~~

Comment. Former Section 716 is superseded by Probate Code Section 21211.

Civil Code § 716.5 (repealed). Validity of trusts

~~716.5. (a) A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which future interests in property must vest under this title, if the interest of all the beneficiaries must vest, if at all, within that time.~~

~~(b) If a trust is not limited in duration to the time within which future interests in property must vest under this title, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond that time.~~

~~(c) Whenever a trust has existed longer than the time within which future interests in property must vest under this title, the following shall apply:~~

~~(1) It shall be terminated upon the request of a majority of the beneficiaries.~~

~~(2) It may be terminated by a court of competent jurisdiction upon the petition of the Attorney General or of any person who would be affected thereby if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected thereby.~~

Comment. Subdivision (a) of former Section 716.5 is not continued because it is unnecessary. The validity of trusts is governed generally by the Trust Law. See Prob. Code § 15000 *et seq.* The Uniform Statutory Rule Against Perpetuities applies only to nonvested interests. See, e.g., Prob. Code § 21205.

Former Section 716.5(b) concerning the ineffectiveness of a trust provision making the trust indestructible is restated in Probate Code Section 15413 without substantive change.

The special rules for terminating a trust after the perpetuity period provided in former Section 716.5(c) are restated in Probate Code Section 15414 without substantive change.

Civil Code § 722 (amended). Time limit on accumulations

722. Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules ~~prescribed in this Title in relation~~ relating to future interests.

Comment. Section 722 is amended to reflect relocation of statutes concerning perpetuities to the Probate Code. See Prob. Code §§ 21200-21231 (superseding former Civil Code §§ 715-716.5).

Civil Code § 724 (amended). Time limit on accumulations

724. (a) An accumulation of the income of property may be directed by any will, trust or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, for the benefit of one or more persons objects or purposes, but may not extend beyond the time ~~in this title~~ permitted for the vesting of future interests.

(b) *Notwithstanding subdivision (a), the income arising from real or personal property held in a trust forming part of a profit-sharing plan of an employer for the exclusive benefit of its employees or their beneficiaries or forming part of a retirement plan formed primarily for the purpose of providing benefits for employees on or after retirement may be permitted to accumulate until the fund is sufficient, in the opinion of the trustee or trustees, to accomplish the purposes of the trust.*

Comment. Section 724 is amended to reflect the revision and relocation of the statutes concerning perpetuities to the Probate Code. See Prob. Code §§ 21200-21231 (superseding former Civil Code §§ 715-716.5). Subdivision (b) restates the last clause of former Section 715.3 relating to accumulations without substantive change.

Civil Code § 773 (amended). Limitations on future estates

773. Subject to the rules of this title, and of Part 1 of this division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be

created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in ~~Section 715.2~~ *by the statutory rule against perpetuities in Article 2 (commencing with Section 21205) of Chapter 1 of Part 2 of Division 11 of the Probate Code.*

Comment. Section 773 is amended to refer incorporate the new statutory rule against perpetuities which supersedes the rule provided by former Section 715.2. See Prob. Code §§ 21200-21231 (statutory rule against perpetuities).

Civil Code § 1391 (added). Applicable rule against perpetuities

1391. The statutory rule against perpetuities provided by Part 2 (commencing with Section 21200) of Division 11 of the Probate Code applies to powers of appointment governed by this part.

Comment. Section 1391 is a new section providing a cross-reference to the statutory rule against perpetuities. See Prob. Code §§ 21200-21231.

Civil Code § 1391.1 (repealed). Beginning of permissible period for powers of appointment

~~1391.1. The permissible period under the applicable rule against perpetuities with respect to interests sought to be created by an exercise of a power of appointment begins:~~

~~(a) In the case of an instrument exercising a general power of appointment presently exercisable by the donee alone, on the date the appointment becomes effective.~~

~~(b) In all other situations, at the time of the creation of the power.~~

Comment. Subdivision (a) of former Section 1391.1 is superseded by Probate Code Section 21211(a). Subdivision (b) is superseded by Probate Code Section 21210.

Civil Code § 1391.2 (repealed). Facts and circumstances affecting validity of interests created by exercise of power of appointment

~~1391.2. When the permissible period under the applicable rule against perpetuities begins at the time of the creation of a power of appointment with respect to interests sought to be created by an exercise of the power, facts and circumstances existing at the effective date of the instrument exercising the power shall be taken into account in determining the validity of interests created by the instrument exercising the power.~~

Comment. Former Section 1391.2 is superseded by the statutory rule against perpetuities. See Prob. Code §§ 21206-21207 (statutory rule against perpetuities as to powers of appointment), 21220 (reformation). The second-look doctrine, formerly codified in this section, is a part of the common law carried forward in the Uniform Statutory Rule Against Perpetuities (1990). See the Background to Prob. Code §§ 21206-21207.

Prob. Code § 15211 (added). Honorary trust

15211. A trust for a noncharitable corporation or unincorporated society or for a lawful noncharitable purpose may be performed by the trustee for only 21 years, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration.

Comment. Section 15211 is a new provision that places a 21-year limit on trusts that were voidable under the rule against perpetuities provided in former Civil Code Section 715.2. Section 15211 is drawn from Section 2-907(a) of the Uniform Probate Code (Tent. Draft 1990). This section adopts a 21-year limitation in place of the 90-year period that would otherwise apply under the Uniform Statutory Rule Against Perpetuities. See Section 21205.

Prob. Code § 15212 (added). Trust for care of designated animal

15212. A trust for the care of a designated domestic or pet animal may be performed by the trustee for the life of the animal, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration.

Comment. Section 15212 is a new provision that provides a special rule applicable to a trust for a specific domestic or pet animal. This section is intended to clarify the law as to such trusts which may have been voidable under the rule against perpetuities provided in former Civil Code Section 715.2. On the death of the designated animal, the trust permitted by Section 15212 terminates. For rules governing the disposition of property at termination of a trust, see Section 15410. Section 15212 is drawn from Section 2-907(b) of the Uniform Probate Code (Tent. Draft 1990).

Prob. Code § 15413 (added). Effect of provision that trust may not be terminated

15413. A trust provision, express or implied, that the trust may not be terminated is ineffective insofar as it purports to be applicable after the expiration of the longer of the periods provided by the statutory rule against perpetuities, Article 2 (commencing with Section 21205) of Chapter 1 of Part 2 of Division 11.

Comment. Section 15413 continues former Civil Code Section 716.5(b) without substantive change, and with modifications to reflect the enactment of the Uniform Statutory Rule Against Perpetuities. See Section 21200 *et seq.* This section applies the longer of the two time periods applicable under the statutory rule: (1) lives in being plus 21 years or (2) 90 years after creation of the interest. See Sections 21205-21207. See also Section 21225(d) (rule against perpetuities does not apply to discretionary power of trustee to distribute principal to beneficiary having indefeasibly vested interest).

Prob. Code § 15414 (added). Termination of trust after perpetuity period

15414. Notwithstanding any other provision in this chapter, if a trust continues in existence after the expiration of the longer of the periods provided by the statutory rule against perpetuities, Article 2 (commencing with Section 21205) of Chapter 1 of Part 2 of Division 11, the trust may be terminated in either of the following manners:

(a) On petition by a majority of the beneficiaries.

(b) On petition by the Attorney General or by any person who would be affected by the termination, if the court finds that the termination would be in the public interest or in the

best interest of a majority of the persons who would be affected by the termination.

Comment. Section 15414 restates former Civil Code Section 716.5(c) without substantive change, and with modifications to reflect the enactment of the Uniform Statutory Rule Against Perpetuities. See Section 21200 *et seq.* The introductory clause recognizes that this section is an exception to the general rules concerning trust termination provided in this chapter. Termination under this section is permissible after the expiration of the longer of the two time periods applicable under the statutory rule: (1) lives in being plus 21 years or (2) 90 years after creation of the interest. See Sections 21205-21207. As to judicial proceedings for termination, see Section 17200(b)(13).

APPENDIX

BACKGROUND TO SECTION 21201

*[Adapted from Comment G to Section 1 of the
Uniform Statutory Rule Against Perpetuities (1986)]*

As provided in Section 21201, this chapter supersedes the common law rule against perpetuities (common law rule) and the statutory provisions previously in effect, replacing them with the statutory rule against perpetuities (statutory rule) set forth in Article 2 (commencing with Section 21205) and by the other provisions in this chapter.

Unless excluded by Section 21225, the statutory rule applies to nonvested property interests and to powers of appointment over property or property interests that are nongeneral powers, general testamentary powers, or general powers not presently exercisable because of a condition precedent. The statutory rule does not apply to vested property interests. See, e.g., X's interest in Example (23) in the Background to this section. Nor does the statutory rule apply to presently exercisable general powers of appointment. See, e.g., G's power in Example (19) in the Background to Section 21206; G's power in Example (1) in the Background to Section 21211; A's power in Example (2) in the Background to Section 21211; X's power in Example (3) in the Background to Section 21211; A's noncumulative power of withdrawal in Example (4) in the Background to Section 21211.

G. Subsidiary Common Law Doctrines: Whether Superseded by This Chapter

The courts, in interpreting the common law rule, developed several subsidiary doctrines. This chapter does not supersede those subsidiary doctrines except to the extent the provisions of this chapter conflict with them. As explained below, most of these common law doctrines remain in full force or in force in modified form.

1. Constructional Preference for Validity

Professor Gray in his treatise on the common law rule against perpetuities declared that a will or deed is to be construed without regard to the rule, and then the rule is to be "remorselessly" applied to the provisions so construed. J. Gray, *The Rule Against Perpetuities* § 629 (4th ed. 1942). Some courts may still adhere to this proposition. *Colorado Nat'l Bank v. McCabe*, 143 Colo. 21, 353 P.2d 385 (1960). Most courts, it is believed, would today be inclined to adopt the proposition put by the Restatement of Property § 375 (1944), which is that where an instrument is ambiguous — that is, where it is fairly

susceptible to two or more constructions, one of which causes a rule violation and the other of which does not — the construction that does not result in a rule violation should be adopted. The California rule favors construction for validity. See, e.g., *Civil Code* § 3541; *Wong v. Di Grazia*, 60 Cal. 2d 525, 539-40, 386 P.2d 817, 35 Cal. Rptr. 241 (1963); *Estate of Phelps*, 182 Cal. 752, 761, 190 P. 17 (1920); *Estate of Grove*, 70 Cal. App. 3d 355, 362-63, 138 Cal. Rptr. 684 (1977). Other cases supporting this view include: *Southern Bank & Trust Co. v. Brown*, 271 S.C. 260, 246 S.E.2d 598 (1978); *Davis v. Rossi*, 326 Mo. 911, 34 S.W.2d 8 (1930); *Watson v. Goldthwaite*, 345 Mass. 29, 34-35, 184 N.E.2d 340 (1962); *Walker v. Bogle*, 244 Ga. 439, 260 S.E.2d 338 (1979); *Drach v. Ely*, 237 Kan. 654, 703 P.2d 746 (1985).

The constructional preference for validity is not superseded by this chapter, but its role is likely to be different. The situation is likely to be that one of the constructions to which the ambiguous instrument is fairly susceptible would result in validity under Section 21205(a), 21206(a), or 21207(a), but the other construction does not necessarily result in invalidity; rather it results in the interest's validity being governed by Section 21205(b), 21206(b), or 21207(b). Nevertheless, even though the result of adopting the other construction is not as harsh as it is at common law, it is expected that the courts will incline toward the construction that validates the disposition under Section 21205(a), 21206(a), or 21207(a).

2. Conclusive Presumption of Lifetime Fertility

At common law, all individuals — regardless of age, sex, or physical condition — are conclusively presumed to be able to have children throughout their entire lifetimes. This principle is not superseded by this chapter, and in view of the widely accepted rule of construction that adopted children are presumptively included in class gifts, the conclusive presumption of lifetime fertility is not unrealistic. Since even elderly individuals probably cannot be excluded from adopting children based on their ages alone, the possibility of having children by adoption is seldom extinct. See, generally, *Waggoner, In re Lattouf's Will and the Presumption of Lifetime Fertility in Perpetuity Law*, 20 San Diego L. Rev. 763 (1983). Under this chapter, the main force of this principle is felt as in Example (7) in the Background to Section 21205, where it prevents a nonvested property interest from passing the test for initial validity under Section 21205(a).

For a California case approving the common law rule, see *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 184-85, 187 P. 425 (1920).

3. Act Supersedes Doctrine of Infectious Invalidity

At common law, the invalidity of an interest can, under the doctrine of infectious invalidity, be held to invalidate one or more otherwise valid interests created by the disposition or even invalidate the entire disposition. The question turns on whether the general dispositive scheme of the transferor will be better carried out by eliminating only the invalid interest or by eliminating other interests as well. This is a question that is answered on a case-by-case basis. Several items are relevant to the question, including who takes the stricken interests in place of those the transferor designated to take. For the rule applied in California, see, e.g., *Estate of Willey*, 128 Cal. 1, 11, 60 P. 471 (1900) (severance allowed); *Estate of Troy*, 214 Cal. 53, 59-65, 3 P.2d 930 (1931) (severance allowed); *Estate of Gump*, 16 Cal. 2d 535, 547, 107 P.2d 17 (1940) (severance allowed); *Estate of Van Wyck*, 185 Cal. 49, 63, 196 P. 50 (1921) (severance denied); *Sheean v. Michel*, 6 Cal. 2d 324, 329, 57 P.2d 127 (1936) (severance denied).

The doctrine of infectious invalidity is superseded by Section 21220, under which the court, on petition of an interested person, is required to reform the disposition to approximate as closely as possible the transferor's manifested plan of distribution when an invalidity under the statutory rule occurs.

4. Separability.

The common law's separability doctrine is that when an interest is expressly subject to alternative contingencies, the situation is treated as if two interests were created in the same person or class. Each interest is judged separately; the invalidity of one of the interests does not necessarily cause the other one to be invalid. This common law principle was established in *Longhead v. Phelps*, 2 Wm. Bl. 704, 96 Eng. Rep. 414 (K.B. 1770), and is followed in this country. L. Simes & A. Smith, *The Law of Future Interests* § 1257 (2d ed. 1956); 6 *American Law of Property* § 24.54 (A. Casner ed. 1952); *Restatement of Property* § 376 (1944). Under this doctrine, if property is devised "to B if X-event or Y-event happens," B in effect has two interests, one contingent on X-event happening and the other contingent on Y-event happening. If the interest contingent on X-event but not the one contingent on Y-event is invalid, the consequence of separating B's interest into two is that only one of them, the one contingent on X-event, is invalid. B still has a valid interest — the one contingent on the occurrence of Y-event.

The separability principle is not superseded by this chapter. As illustrated in the following example, its invocation will usually result in one of the interests being initially validated by Section 21205(a) and the validity of the other interest being governed by Section 21205(b).

Example (22) — Separability case. G devised real property “to A for life, then to A’s children who survive A and reach 25, but if none of A’s children survives A or if none of A’s children who survives A reaches 25, then to B.” G was survived by his brother (B), by his daughter (A), by A’s husband (H), and by A’s two minor children (X and Y).

The remainder interest in favor of A’s children who reach 25 fails the test of Section 21205(a) for initial validity. Its validity is, therefore, governed by Section 21205(b) and depends on each of A’s children doing any one of the following things within 90 years after G’s death: predeceasing A, surviving A and failing to reach 25, or surviving A and reaching 25.

Under the separability doctrine, B has two interests. One of them is contingent on none of A’s children surviving A. That interest passes the test for initial validity under Section 21205(a); the validating life is A. B’s other interest, which is contingent on none of A’s surviving children reaching 25, fails the test for initial validity under Section 21205(a). Its validity is governed by Section 21205(b) and depends on each of A’s surviving children either reaching 25 or dying under 25 within 90 years after G’s death.

Suppose that after G’s death, A has a third child (Z). A subsequently dies, survived by her husband (H) and by X, Y, and Z. This, of course, causes B’s interest that was contingent on none of A’s children surviving A to terminate. If X, Y, and Z had all reached the age of 25 by the time of A’s death, their interest would vest at A’s death, and that would end the matter. If one or two, but not all three of them, had reached the age of 25 at A’s death, B’s other interest — the one that was contingent on none of A’s surviving children reaching 25 — would also terminate. As for the children’s interest, if the after-born child Z’s age was such at A’s death that Z could not be alive and under the age of 25 at the expiration of the allowable waiting period, the class gift in favor of the children would be valid under Section 21205(b), because none of those then under 25 could fail either to reach 25 or die under 25 after the expiration of the allowable 90-year waiting period. If, however, Z’s age at A’s death was such that Z could be alive and under the age of 25 at the expiration of the allowable 90-year waiting period, the circumstances requisite to reformation under Section 21220(b) would arise, and the court would be justified in reforming G’s disposition by reducing the age contingency with respect to Z to

the age he would reach on the date when the allowable waiting period is due to expire. See Example (3) in the Background to Section 21220. So reformed, the class gift in favor of A's children could not become invalid under Section 21205(b), and the children of A who had already reached 25 by the time of A's death could receive their shares immediately.

5. *The "All-or-Nothing" Rule with Respect to Class Gifts*

The common law applies an "all-or-nothing" rule with respect to class gifts, under which a class gift stands or falls as a whole. The all-or-nothing rule, usually attributed to *Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), is commonly stated as follows: If the interest of any potential class member might vest too remotely, the entire class gift violates the rule. Although this chapter does not supersede the basic idea of the much-maligned "all-or-nothing" rule, the evils sometimes attributed to it are substantially if not entirely eliminated by the wait-and-see feature of the statutory rule and by the availability of reformation under Section 21220, especially in the circumstances described in Section 21220(b)-(c). For illustrations of the application of the all-or-nothing rule under this chapter, see Examples (3), (4), and (6) in the Background to Section 21220.

For application and interpretation of the all-or-nothing rule California, see, e.g., *Estate of Troy*, 214 Cal. 53, 56-58, 3 P.2d 930 (1931); *Estate of Grove*, 70 Cal. App. 3d 355, 361-62, 138 Cal. Rptr. 684 (1977); *Estate of Ghiglia*, 42 Cal. App. 3d 433, 438-41, 116 Cal. Rptr. 827 (1974).

6. *The Specific Sum Doctrine*

The common law recognizes a doctrine called the specific sum doctrine, which is derived from *Storrs v. Benbow*, 3 De G.M. & G. 390, 43 Eng. Rep. 153 (Ch. 1853), and states: If a specified sum of money is to be paid to each member of a class, the interest of each class member is entitled to separate treatment and is valid or invalid under the rule on its own. The specific sum doctrine is not superseded by this chapter.

The operation of the specific sum doctrine under this chapter is illustrated in the following example.

Example (23) — Specific sum case. G bequeathed "\$10,000 to each child of A, born before or after my death, who attains 25." G was survived by A and by A's two children (X and Y). X but not Y had already reached 25 at G's death. After G's death a third child (Z) was born to A.

If the phrase "born before or after my death" had been omitted, the class would close as of G's death under the common law rule of construction known as the rule of convenience: The

after-born child, Z, would not be entitled to a \$10,000 bequest, and the interests of both X and Y would be valid upon their creation at G's death. X's interest would be valid because it was initially vested; neither the common law rule nor the statutory rule applies to interests that are vested upon their creation. Although the interest of Y was not vested upon its creation, it would be initially valid under Section 21205(a) because Y would be his own validating life; Y will either reach 25 or die under 25 within his own lifetime.

The inclusion of the phrase "before or after my death," however, would probably be construed to mean that G intended after-born children to receive a \$10,000 bequest. See *Earle Estate*, 369 Pa. 52, 85 A.2d 90 (1951). Assuming that this construction were adopted, the specific sum doctrine allows the interest of each child of A to be treated separately from the others for purposes of the statutory rule. For the reasons cited above, the interests of X and Y are initially valid under Section 21205(a). The nonvested interest of Z, however, fails the test for initial validity under Section 21205(a); there is no validating life because Z, who was not alive when the interest was created, could reach 25 or die under 25 more than 21 years after the death of the survivor of A, X, and Y. Under Section 21205(b), the validity of Z's interest depends on Z's reaching (or failing to reach) 25 within 90 years after G's death.

7. *The Sub-Class Doctrine*

The common law recognizes a doctrine called the sub-class doctrine, which is derived from *Cattlin v. Brown*, 11 Hare 372, 68 Eng. Rep. 1318 (Ch. 1853), and states: If the ultimate takers are not described as a single class but rather as a group of subclasses, and if the share to which each separate subclass is entitled will finally be determined within the period of the rule, the gifts to the different subclasses are separable for the purpose of the rule. *American Security & Trust Co. v. Cramer*, 175 F. Supp. 367 (D.D.C. 1959); *Restatement of Property* § 389 (1944). The sub-class doctrine is not superseded by this chapter.

The operation of the sub-class doctrine under this chapter is illustrated in the following example.

Example (24) — Sub-class case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to the children of such child." G was survived

by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. A now has died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the children of a child of A is treated separately from the others. This allows the remainder interest in favor of X's children and the remainder interest in favor of Y's children to be validated under Section 21205(a). X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the children of Z fails the test for initial validity under Section 21205(a); there is no validating life because Z, who was not alive when the interest was created, could have children more than 21 years after the death of the survivor of A, X, and Y. Under Section 21205(b), the validity of the remainder interest in favor of Z's children depends on Z's dying within 90 years after G's death.

Note why both of the requirements of the sub-class rule are met. The ultimate takers are described as a group of sub-classes rather than as a single class: "children of the child so dying," as opposed to "grandchildren." The share to which each separate sub-class is entitled is certain to be finally determined within a life in being plus 21 years: As of A's death, who is a life in being, it is certain to be known how many children he had surviving him; since in fact there were three, we know that each sub-class will ultimately be entitled to one-third of the corpus, neither more nor less. The possible failure of the one-third share of Z's children does not increase to one-half the share going to X's and Y's children; they still are entitled to only one-third shares. Indeed, should it turn out that X has children but Y does not, this would not increase the one-third share to which X's children are entitled.

Example (25) — General testamentary powers — sub-class case. G devised property in trust, directing the trustee to pay income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to such persons as the one so dying shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A.

The general testamentary powers conferred on each of A's children are entitled to separate treatment under the principles of

the sub-class doctrine. See above. Consequently, the powers conferred on X and Y, A's children who were living at G's death, are initially valid under Section 21207(a). But the general testamentary power conferred on Z, A's child who was born after G's death, fails the test of Section 21207(a) for initial validity. The validity of Z's power is governed by Section 21207(b). Z's death must occur within 90 years after G's death if any provision in Z's will purporting to exercise his power is to be valid.

8. *Duration of Indestructible Trusts — Termination of Trusts by Beneficiaries*

The widely accepted view in American law is that the beneficiaries of a trust other than a charitable trust can compel its premature termination if all beneficiaries consent and if such termination is not expressly restrained or impliedly restrained by the existence of a "material purpose" of the settlor in establishing the trust. Restatement (Second) of Trusts § 337 (1959); 4 A. Scott, *The Law of Trusts* § 337 (3d ed. 1967). California law varies this rule by giving the court discretion in applying the material purposes doctrine, except as to a restraint on disposition of the beneficiaries' interests. See Section 15403.

A trust that cannot be terminated by its beneficiaries is called an indestructible trust. It is generally accepted that the duration of the indestructibility of a trust, other than a charitable trust, is limited to the applicable perpetuity period. See Restatement (Second) of Trusts § 62 comment o (1959); Restatement (Second) of Property (Donative Transfers) § 2.1 & Legislative Note & Reporter's Note (1983); 1 A. Scott, *The Law of Trusts* § 62.10(2) (3d ed. 1967); J. Gray, *The Rule Against Perpetuities* § 121 (4th ed. 1942); L. Simes & A. Smith, *The Law of Future Interests* §§ 1391-93 (2d ed. 1956). In California this rule is provided by statute. See Prob. Code § 15414 (continuing substance of former Civil Code § 716.5). Nothing in this chapter supersedes this principle. One modification, however, is necessary: As to trusts that contain a nonvested property interest or power of appointment whose validity is governed by the wait-and-see element adopted in Section 21205(b), 21206(b), or 21207(b), the courts can be expected to determine that the applicable perpetuity period is 90 years.

BACKGROUND TO SECTION 21205

*[Adapted from Comments A-C to Section 1 of the
Uniform Statutory Rule Against Perpetuities (1986)]*

A. General Purpose

Sections 21205-21207 set forth the statutory rule against perpetuities (statutory rule). As provided in Section 21201, the statutory rule supersedes the common law rule against perpetuities (common law rule) and prior statutes. See the Comment to Section 21201.

1. *The Common Law Rule's Validating and Invalidating Sides*

The common law rule against perpetuities is a rule of initial validity or invalidity. At common law, a nonvested property interest is either valid or invalid as of its creation. Like most rules of property law, the common law rule has both a validating and an invalidating side. Both sides are derived from John Chipman Gray's formulation of the common law rule:

No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

J. Gray, *The Rule Against Perpetuities* § 201 (4th ed. 1942). From this formulation, the validating and invalidating sides of the common law rule are derived as follows:

Validating Side of the Common Law Rule. A nonvested property interest is valid when it is created (initially valid) if it is then certain to vest or terminate (fail to vest) — one or the other — no later than 21 years after the death of an individual then alive.

Invalidating Side of the Common Law Rule. A nonvested property interest is invalid when it is created (initially invalid) if there is no such certainty.

Notice that the invalidating side focuses on a lack of certainty, which means that invalidity under the common law rule is not dependent on actual post-creation events but only on possible post-creation events. Actual post-creation events are irrelevant, even those that are known at the time of the lawsuit. It is generally recognized that the invalidating side of the common law rule is harsh because it can invalidate interests on the ground of possible post-creation events that are extremely unlikely to happen and that in actuality almost never do happen, if ever.

2. *The Statutory Rule Against Perpetuities*

The essential difference between the common law rule and its statutory replacement is that the statutory rule preserves the common law rule's

overall policy of preventing property from being tied up in unreasonably long or even perpetual family trusts or other property arrangements, while eliminating the harsh potential of the common law rule. The statutory rule achieves this result by codifying (in slightly revised form) the validating side of the common law rule and modifying the invalidating side by adopting a wait-and-see element. Under the statutory rule, interests that would have been initially valid at common law continue to be initially valid, but interests that would have been initially invalid at common law are invalid only if they do not actually vest or terminate within the allowable waiting period set forth in Section 21205(b). Thus, the Uniform Act recasts the validating and invalidating sides of the rule against perpetuities as follows:

Validating Side of the Statutory Rule: A nonvested property interest is initially valid if, when it is created, it is then certain to vest or terminate (fail to vest) — one or the other — no later than 21 years after the death of an individual then alive. The validity of a nonvested property interest that is not initially valid is in abeyance. Such an interest is valid if it vests within the allowable waiting period after its creation.

Invalidating Side of the Statutory Rule: A nonvested property interest that is not initially valid becomes invalid (and subject to reformation under Section 21220) if it neither vests nor terminates within the allowable waiting period after its creation.

As indicated, this modification of the invalidating side of the common law rule is generally known as the wait-and-see method of perpetuity reform. The wait-and-see method of perpetuity reform was approved by the American Law Institute as part of the Restatement (Second) of Property (Donative Transfers) §§ 1.1-1.6 (1983). For a discussion of the various methods of perpetuity reform, including the wait-and-see method and the Restatement (Second)'s version of wait-and-see, see Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718 (1983).

B. Section 21205(a): Nonvested Property Interests That Are Initially Valid

1. Nonvested Property Interest

Section 21205 sets forth the statutory rule against perpetuities with respect to nonvested property interests. A nonvested property interest (also called a contingent property interest) is a future interest in property that is subject to an unsatisfied condition precedent. In the case of a class gift, the interests of all the unborn members of the class are nonvested because they are subject to the unsatisfied condition precedent of being

born. At common law, the interests of all potential class members must be valid or the class gift is invalid. As pointed out in the Background to Section 21201, this so-called all-or-nothing rule with respect to class gifts is not superseded by this chapter, and so remains in effect under the statutory rule. Consequently, all class gifts that are subject to open are to be regarded as nonvested property interests for the purposes of this chapter.

2. Section 21205(a) Codifies the Validating Side of the Common Law Rule

The validating side of the common law rule is codified in Section 21205(a) and, with respect to powers of appointment, in Sections 21206(a) and 21207(a).

A nonvested property interest that satisfies the requirement of Section 21205(a) is initially valid. That is, it is valid as of the time of its creation. There is no need to subject such an interest to the waiting period set forth in Section 21205(b), nor would it be desirable to do so.

For a nonvested property interest to be valid as of the time of its creation under Section 21205(a), there must then be a certainty that the interest will either vest or terminate — an interest terminates when vesting becomes impossible — no later than 21 years after the death of an individual then alive. To satisfy this requirement, it must be established that there is no possible chain of events that might arise after the interest was created that would allow the interest to vest or terminate after the expiration of the 21-year period following the death of an individual in being at the creation of the interest. Consequently, initial validity under Section 21205(a) can be established only if there is an individual for whom there is a causal connection between the individual's death and the interest's vesting or terminating no later than 21 years thereafter.

The individual described in Sections 21205(a), 21206(a), and 21207(a) is often referred to as the “validating life,” the term used throughout the Background Comments to this chapter.

3. Determining Whether There Is a Validating Life

The process for determining whether a validating life exists is to postulate the death of each individual connected in some way to the transaction, and ask the question: Is there with respect to this individual an invalidating chain of possible events? If one individual can be found for whom the answer is No, that individual can serve as the validating life. As to that individual there will be the requisite causal connection between his or her death and the questioned interest's vesting or terminating no later than 21 years thereafter.

In searching for a validating life, only individuals who are connected in some way to the transaction need to be considered, for they are the only ones who have a chance of supplying the requisite causal connection. Such individuals vary from situation to situation, but typically include the beneficiaries of the disposition, including the taker or takers of the nonvested property interest, and individuals related to them by blood or adoption, especially in the ascending and descending lines. There is no point in even considering the life of an individual unconnected to the transaction — an individual from the world at large who happens to be in being at the creation of the interest. See Section 21230 (validating lives). No such individual can be a validating life because there will be an invalidating chain of possible events as to every unconnected individual who might be proposed: Any such individual can immediately die after the creation of the nonvested property interest without causing any acceleration of the interest's vesting or termination. (The life expectancy of any unconnected individual, or even the probability that one of a number of new-born babies will live a long life, is irrelevant.)

Example (1) — Parent of devisees as the validating life. G devised property "to A for life, remainder to A's children who attain 21." G was survived by his son (A), by his daughter (B), by A's wife (W), and by A's two children (X and Y).

The nonvested property interest in favor of A's children who reach 21 satisfies the requirement of Section 21205(a), and the interest is initially valid. When the interest was created (at G's death), the interest was then certain to vest or terminate no later than 21 years after A's death.

The process by which A is determined to be the validating life is one of testing various candidates to see if any of them have the requisite causal connection. As noted above, no one from the world at large can have the requisite causal connection, and so such individuals are disregarded. Once the inquiry is narrowed to the appropriate candidates, the first possible validating life that comes to mind is A, who does in fact fulfill the requirement: Since A's death cuts off the possibility of any more children being born to him, it is impossible, no matter when A dies, for any of A's children to be alive and under the age of 21 beyond 21 years after A's death. (See the Background to Section 21208.)

A is therefore the validating life for the nonvested property interest in favor of A's children who attain 21. None of the other individuals who is connected to this transaction could serve as the validating life because an invalidating chain of possible post-

creation events exists as to each one of them. The other individuals who might be considered include W, X, Y, and B. In the case of W, an invalidating chain of events is that she might predecease A, A might remarry and have a child by his new wife, and such child might be alive and under the age of 21 beyond the 21-year period following W's death. With respect to X and Y, an invalidating chain of events is that they might predecease A, A might later have another child, and that child might be alive and under 21 beyond the 21-year period following the death of the survivor of X and Y. As to B, she suffers from the same invalidating chain of events as exists with respect to X and Y. The fact that none of these other individuals can serve as the validating life is of no consequence, however, because only one such individual is required for the validity of a nonvested interest to be established, and that individual is A.

4. Rule of Section 21208 (Posthumous Birth)

See the Background to Section 21208.

5. Recipients as Their Own Validating Lives

It is well established at common law that, in appropriate cases, the recipient of an interest can be his or her own validating life. See, e.g., *Rand v. Bank of California*, 236 Or. 619, 388 P.2d 437 (1964). Given the right circumstances, this principle can validate interests that are contingent on the recipient's reaching an age in excess of 21, or are contingent on the recipient's surviving a particular point in time that is or might turn out to be in excess of 21 years after the interest was created or after the death of a person in being at the date of creation.

Example (2) — Devisees as their own validating lives. G devised real property "to A's children who attain 25." A predeceased G. At G's death, A had three living children, all of whom were under 25.

The nonvested property interest in favor of A's children who attain 25 is validated by Section 21205(a). Under Section 21208, the possibility that A will have a child born to him after his death (and since A predeceased G, after G's death) must be disregarded. Consequently, even if A's wife survived G, and even if she was pregnant at G's death or even if A had deposited sperm in a sperm bank prior to his death, it must be assumed that all of A's children are in being at G's death. A's children are, therefore, their own validating lives. (Note that Section 21208 requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual

after the individual's death must be disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual.) Each one of A's children, all of whom under Section 21208 are regarded as alive at G's death, will either reach the age of 25 or fail to do so within his or her own lifetime. To say this another way, it is certain to be known no later than at the time of the death of each child whether or not that child survived to the required age.

6. Validating Life Can Be Survivor of Group

In appropriate cases, the validating life need not be individualized at first. Rather the validating life can initially (i.e., when the interest was created) be the unidentified survivor of a group of individuals. It is common in such cases to say that the members of the group are the validating lives, but the true meaning of the statement is that the validating life is the member of the group who turns out to live the longest. As the court said in *Skatterwood v. Edge*, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1697), "for let the lives be never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once."

Example (3) — Case of validating life being the survivor of a group. G devised real property "to such of my grandchildren as attain 21." Some of G's children are living at G's death.

The nonvested property interest in favor of G's grandchildren who attain 21 is valid under Section 21205(a). The validating life is that one of G's children who turns out to live the longest. Since under Section 21208, it must be assumed that none of G's children will have post-death children, it is regarded as impossible for any of G's grandchildren to be alive and under 21 beyond the 21-year period following the death of G's last surviving child.

Example (4) — Sperm bank case. G devised property in trust, directing the income to be paid to G's children for the life of the survivor, then to G's grandchildren for the life of the survivor, and on the death of G's last surviving grandchild, to pay the corpus to G's great-grandchildren then living. G's children all predeceased him, but several grandchildren were living at G's death. One of G's predeceased children (his son, A) had deposited sperm in a sperm bank. A's widow was living at G's death.

The nonvested property interest in favor of G's great-grandchildren is valid under Section 21205(a). The validating

life is the last surviving grandchild among the grandchildren living at G's death. Under Section 21208, the possibility that A will have a child conceived after G's death must be disregarded. Note that Section 21208 requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death is disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual. Thus in this example, by disregarding the possibility that A will have a conceived-after-death child, G's last surviving grandchild becomes the validating life because G's last surviving grandchild is deemed to have been alive at G's death, when the great-grandchildren's interests were created.

Example (5) — Child in gestation case. G devised property in trust, to pay the income equally among G's living children; on the death of G's last surviving child, to accumulate the income for 21 years; on the 21st anniversary of the death of G's last surviving child, to pay the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to X Charity. At G's death his child (A) was 6 years old, and G's wife (W) was pregnant. After G's death, W gave birth to their second child (B).

The nonvested property interests in favor of G's descendants and in favor of X Charity are valid under Section 21205(a). The validating life is A. Under Section 21208, the possibility that a child will be born to an individual after the individual's death must be disregarded for the purposes of determining validity under Section 21205(a). Consequently, the possibility that a child will be born to G after his death must be disregarded; and the possibility that a child will be born to any of G's descendants after their deaths must also be disregarded.

Note, however, that the rule of Section 21208 does not apply to the question of the entitlement of an after-born child to take a beneficial interest in the trust. The common law rule (sometimes codified) that a child in gestation is treated as alive, if the child is subsequently born viable, applies to this question. Thus, Section 21208 does not prevent B from being an income beneficiary under G's trust, nor does it prevent a descendant in gestation on the 21st anniversary of the death of G's last surviving child from being a member of the class of G's "then-living descendants," as long as such descendant has no then-living ancestor who takes instead.

7. *Different Validating Lives Can and in Some Cases Must Be Used*

Dispositions of property sometimes create more than one nonvested property interest. In such cases, the validity of each interest is treated individually. A validating life that validates one interest might or might not validate the other interests. Since it is not necessary that the same validating life be used for all interests created by a disposition, the search for a validating life for each of the other interests must be undertaken separately.

8. *Perpetuity Saving Clauses and Similar Provisions*

Knowledgeable lawyers almost routinely insert perpetuity saving clauses into instruments they draft. (For additional discussion of perpetuity saving clauses, see the Background to Section 21209.) Saving clauses contain two components, the first of which is the perpetuity-period component. This component typically requires the trust or other arrangement to terminate no later than 21 years after the death of the last survivor of a group of individuals designated therein by name or class. (The lives of corporations, animals, or sequoia trees cannot be used.) The second component of saving clauses is the gift-over component. This component expressly creates a gift over that is guaranteed to vest at the termination of the period set forth in the perpetuity-period component, but only if the trust or other arrangement has not terminated earlier in accordance with its other terms.

It is important to note that regardless of what group of individuals is designated in the perpetuity-period component of a saving clause, the surviving member of the group is not necessarily the individual who would be the validating life for the nonvested property interest or power of appointment in the absence of the saving clause. Without the saving clause, one or more interests or powers may in fact fail to satisfy the requirement of Section 21205(a), 21206(a), or 21207(a) for initial validity. By being designated in the saving clause, however, the survivor of the group becomes the validating life for all interests and powers in the trust or other arrangement: The saving clause confers on the last surviving member of the designated group the requisite causal connection between his or her death and the impossibility of any interest or power in the trust or other arrangement remaining in existence beyond the 21-year period following such individual's death.

Example (6) — Valid saving clause case. A testamentary trust directs income to be paid to the testator's children for the life of the survivor, then to the testator's grandchildren for the life of the survivor, corpus on the death of the testator's last living grandchild to such of the testator's descendants as the last living grandchild shall by will appoint; in default of appointment, to the

testator's then-living descendants, per stirpes. A saving clause in the will terminates the trust, if it has not previously terminated, 21 years after the death of the testator's last surviving descendant who was living at the testator's death. The testator was survived by children.

In the absence of the saving clause, the nongeneral power of appointment in the last living grandchild and the nonvested property interest in the gift-in-default clause in favor of the testator's descendants fail the test of Sections 21205(a) and 21207(a) for initial validity. That is, were it not for the saving clause, there is no validating life. However, the surviving member of the designated group becomes the validating life, so that the saving clause does confer initial validity on the nongeneral power of appointment and on the nonvested property interest under Sections 21205(a) and 21207(a).

If the governing instrument designates a group of individuals that would cause it to be impracticable to determine the death of the survivor, the common law courts have developed the doctrine that the validity of the nonvested property interest or power of appointment is determined as if the provision in the governing instrument did not exist. See cases cited in Restatement (Second) of Property (Donative Transfers) Reporter's Note No. 3, at 45 (1983). See also Restatement (Second) of Property (Donative Transfers) § 1.3(1) comment a (1983); Restatement of Property § 374 & comment 1 (1944); 6 American Law of Property § 24.13 (A. Casner ed. 1952); 5A R. Powell, *The Law of Real Property* ¶ 766[5] (1985); L. Simes & A. Smith, *The Law of Future Interests* § 1223 (2d ed. 1956). If, for example, the designated group in Example (6) were the residents of X City (or the members of Y Country Club) living at the time of the testator's death, the saving clause would not validate the power of appointment or the nonvested property interest. Instead, the validity of the power of appointment and the nonvested property interest would be determined as if the provision in the governing instrument did not exist. Since without the saving clause the power of appointment and the nonvested property interest would fail to satisfy the requirements of Sections 21205(a) and 21207(a) for initial validity, their validity would be governed by Sections 21205(b) and 21207(b).

The application of the above common law doctrine, which is not superseded by this chapter and so remains in full force, is not limited to saving clauses. It also applies to trusts or other arrangements where the period thereof is directly linked to the life of the survivor of a designated group of individuals. An example is a trust to pay the income to the

grantor's descendants from time to time living, per stirpes, for the period of the life of the survivor of a designated group of individuals living when the nonvested property interest or power of appointment in question was created, plus the 21-year period following the survivor's death; at the end of the 21-year period, the corpus is to be divided among the grantor's then-living descendants, per stirpes, and if none, to the XYZ Charity. If the group of individuals so designated is such that it would be impracticable to determine the death of the survivor, the validity of the disposition is determined as if the provision in the governing instrument did not exist. The term of the trust is therefore governed by the allowable 90-year period of Section 21205(b), 21206(b), or 21207(b) of the statutory rule.

9. Additional references

Restatement (Second) of Property (Donative Transfers) § 1.3(1) & comments (1983); Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718, 1720-26 (1983).

C. Section 21205(b): Wait-and-See — Nonvested Property Interests Whose Validity Is Initially in Abeyance

Unlike the common law rule, the statutory rule against perpetuities does not automatically invalidate nonvested property interests for which there is no validating life. A nonvested property interest that does not meet the requirements for validity under Section 21205(a) might still be valid under the wait-and-see provisions of Section 21205(b). Such an interest is invalid under Section 21205(b) only if in actuality it does not vest (or terminate) during the allowable waiting period. Such an interest becomes invalid, in other words, only if it is still in existence and nonvested when the allowable waiting period expires.

1. The 90-Year Allowable Waiting Period

Since a wait-and-see rule against perpetuities, unlike the common law rule, makes validity or invalidity turn on actual post-creation events, it requires that an actual period of time be measured off during which the contingencies attached to an interest are allowed to work themselves out to a final resolution. The statutory rule against perpetuities establishes an allowable waiting period of 90 years. Nonvested property interests that have neither vested nor terminated at the expiration of the 90-year allowable waiting period become invalid.

As explained in the Prefatory Note to the Uniform Statutory Rule Against Perpetuities (1986), the allowable period of 90 years is not an arbitrarily selected period of time. On the contrary, the 90-year period represents a reasonable approximation of — a proxy for — the period of

time that would, on average, be produced through the use of an actual set of measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor.

2. *Technical Violations of the Common Law Rule*

One of the harsh aspects of the invalidating side of the common law rule, against which the adoption of the wait-and-see element in Section 21205(b) is designed to relieve, is that nonvested property interests at common law are invalid even though the invalidating chain of possible events almost certainly will not happen. In such cases, the violation of the common law rule could be said to be merely technical. Nevertheless, at common law, the nonvested property interest is invalid.

Cases of technical violation fall generally into discrete categories, identified and named by Professor Leach in *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938), as the fertile octogenarian, the administrative contingency, and the unborn widow. The following three examples illustrate how Section 21205(b) affects these categories.

Example (7) — Fertile octogenarian case. G devised property in trust, directing the trustee to pay the net income therefrom “to A for life, then to A’s children for the life of the survivor, and upon the death of A’s last surviving child to pay the corpus of the trust to A’s grandchildren.” G was survived by A (a female who had passed the menopause) and by A’s two adult children (X and Y).

The remainder interest in favor of G’s grandchildren would be invalid at common law, and consequently is not validated by Section 21205(a). There is no validating life because, under the common law’s conclusive presumption of lifetime fertility, which is not superseded by this chapter (see the Background to Section 21201), A might have a third child (Z), conceived and born after G’s death, who will have a child conceived and born more than 21 years after the death of the survivor of A, X, and Y.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren’s interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G’s death. The chance that the grandchildren’s remainder interest will become invalid under Section 21205(b) is negligible.

Example (8) — Administrative contingency case. G devised property “to such of my grandchildren, born before or after my death, as may be living upon final distribution of my estate.” G was survived by children and grandchildren.

The remainder interest in favor of A's grandchildren would be invalid at common law, and consequently is not validated by Section 21205(a). The final distribution of G's estate might not occur within 21 years of G's death, and after G's death grandchildren might be conceived and born who might survive or fail to survive the final distribution of G's estate more than 21 years after the death of the survivor of G's children and grandchildren who were living at G's death.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. Since it is almost certain that the final distribution of G's estate will occur well within this 90-year period, the chance that the grandchildren's interest will be invalid is negligible.

Example (9) — Unborn widow case. G devised property in trust, the income to be paid "to my son A for life, then to A's spouse for her life, and upon the death of the survivor of A and his spouse, the corpus to be delivered to A's then living descendants." G was survived by A, by A's wife (W), and by their adult children (X and Y).

Unless the interest in favor of A's "spouse" is construed to refer only to W, rather than to whoever is A's spouse when he dies, if anyone, the remainder interest in favor of A's descendants would be invalid at common law, and consequently is not validated by Section 21205(a). There is no validating life because A's spouse might not be W; A's spouse might be someone who was conceived and born after G's death; she might outlive the death of the survivor of A, W, X, and Y by more than 21 years; and descendants of A might be born or die before the death of A's spouse but after the 21-year period following the death of the survivor of A, W, X, and Y.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the descendants remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the descendants remainder interest will become invalid under the statutory rule is small.

3. Age Contingencies in Excess of 21

Another category of technical violation of the common law rule arises in cases of age contingencies in excess of 21 where the takers cannot be

their own validating lives (unlike Example (2), above). The violation of the common law rule falls into the technical category because the insertion of a saving clause would in almost all cases allow the disposition to be carried out as written. In effect, the statutory rule operates like the perpetuity-period component of a saving clause.

Example (10) — Age contingency in excess of 21 case. G 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.” G 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 G died.

The remainder interest in favor of A’s children who reach 30 is a class gift. At common law, the interests of all potential class members must be valid or the class gift is totally invalid. *Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817). This chapter does not supersede the all-or-nothing rule for class gifts (see the Background to Section 21201), and so the all-or-nothing rule continues to apply under this chapter. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G’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. The class gift would be invalid at common law and consequently is not validated by Section 21205(a).

Under Section 21205(b), however, the possibility of the occurrence of this chain of events does not invalidate the children’s remainder interest. The interest becomes invalid only if an interest of a class member remains nonvested 90 years after G’s death.

Although unlikely, suppose that at A’s death Z’s age is such that he could be alive and under the age of 30 at the expiration of the allowable waiting period. Suppose further that at A’s death X or Y or both is over the age of 30. The court, upon the petition of an interested person, must under Section 21220 reform G’s disposition. See Example (3) in the Background to Section 21220.

BACKGROUND TO SECTIONS 21206 AND 21207

*[Adapted from Comments D-F to Section 1 of the
Uniform Statutory Rule Against Perpetuities (1986)]*

D. Sections 21206(a) and 21207(a): Powers of Appointment That Are Initially Valid

Sections 21206 and 21207 set forth the statutory rule against perpetuities with respect to powers of appointment. A power of appointment is the authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in or powers of appointment over property. Restatement (Second) of Property (Donative Transfers) § 11.1 (1986). The property or property interest subject to a power of appointment is called the “appointive property.”

The various persons connected to a power of appointment are identified by a special terminology. The “donor” is the person who created the power of appointment. The “donee” is the person who holds the power of appointment, i.e., the powerholder. The “objects” are the persons to whom an appointment can be made. The “appointees” are the persons to whom an appointment has been made. The “takers in default” are the persons whose property interests are subject to being defeated by the exercise of the power of appointment and who take the property to the extent the power is not effectively exercised. Restatement (Second) of Property (Donative Transfers) § 11.2 (1986).

A power of appointment is “general” if it is exercisable in favor of the donee of the power, the donee’s creditors, the donee’s estate, or the creditors of the donee’s estate. A power of appointment that is not general is a “nongeneral” power of appointment. Restatement (Second) of Property (Donative Transfers) § 11.4 (1986).

A power of appointment is “presently exercisable” if, at the time in question, the donee can by an exercise of the power create an interest in or a power of appointment over the appointive property. Restatement (Second) of Property (Donative Transfers) § 11.5 (1986). A power of appointment is “testamentary” if the donee can exercise it only in the donee’s will. Restatement of Property § 321 (1940). A power of appointment is “not presently exercisable because of a condition precedent” if the only impediment to its present exercisability is a condition precedent, i.e., the occurrence of some uncertain event. Since a power of appointment terminates on the donee’s death, a deferral of a power’s present exercisability until a future time (even a time certain) imposes a condition precedent that the donee be alive at that future time.

A power of appointment is a “fiduciary” power if it is held by a fiduciary and is exercisable by the fiduciary in a fiduciary capacity. A power of appointment that is exercisable in an individual capacity is a “nonfiduciary” power. As used in this chapter, the term “power of appointment” refers to “fiduciary” and to “nonfiduciary” powers, unless the context indicates otherwise.

Although Gray’s formulation of the common law rule against perpetuities (see the Background to Section 21205) does not speak directly of powers of appointment, the common law rule is applicable to powers of appointment (other than presently exercisable general powers of appointment). The principle of Sections 21206(a) and 21207(a) is that a power of appointment that satisfies the common law rule against perpetuities is valid under the statutory rule against perpetuities, and consequently it can be validly exercised, without being subjected to a waiting period during which the power’s validity is in abeyance.

Two different tests for validity are employed at common law, depending on what type of power is at issue. In the case of a nongeneral power (whether or not presently exercisable) and in the case of a general testamentary power, the power is initially valid if, when the power was created, it is certain that the latest possible time that the power can be exercised is no later than 21 years after the death of an individual then in being. In the case of a general power not presently exercisable because of a condition precedent, the power is initially valid if it is then certain that the condition precedent to its exercise will either be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then in being. Sections 21206(a) and 21207(a) codify these rules. Under either test, initial validity depends on the existence of a validating life. The procedure for determining whether a validating life exists is essentially the same procedure explained in Part B, above, pertaining to nonvested property interests.

Example (11) — Initially valid general testamentary power case.

G devised property “to A for life, remainder to such persons, including A’s estate or the creditors of A’s estate, as A shall by will appoint.” G was survived by his daughter (A).

A’s power, which is a general testamentary power, is valid as of its creation under Section 21207(a). The test is whether or not the power can be exercised beyond 21 years after the death of an individual in being when the power was created (G’s death). Since A’s power cannot be exercised after A’s death, the validating life is A, who was in being at G’s death.

Example (12) — Initially valid nongeneral power case. G devised property “to A for life, remainder to such of A’s descendants as A shall appoint.” G was survived by his daughter (A).

A’s power, which is a nongeneral power, is valid as of its creation under Section 21207(a). The validating life is A; the analysis leading to validity is the same as applied in Example (11), above.

Example (13) — Case of initially valid general power not presently exercisable because of a condition precedent. G devised property “to A for life, then to A’s first born child for life, then to such persons, including A’s first born child or such child’s estate or creditors, as A’s first born child shall appoint.” G was survived by his daughter (A), who was then childless.

The power in A’s first born child, which is a general power not presently exercisable because of a condition precedent, is valid as of its creation under Section 21206(a). The power is subject to a condition precedent — that A have a child — but this is a contingency that under Section 21208 is deemed certain to be resolved one way or the other within A’s lifetime. A is therefore the validating life: The power cannot remain subject to the condition precedent after A’s death. Note that the latest possible time that the power can be exercised is at the death of A’s first born child, which might occur beyond 21 years after the death of A (and anyone else who was alive when G died). Consequently, if the power conferred on A’s first born child had been a nongeneral power or a general testamentary power, the power could not be validated by Section 21207(a); instead, the power’s validity would be governed by Section 21207(b).

E. Sections 21206(b) and 21207(b): Wait-and-See — Powers of Appointment Whose Validity Is Initially in Abeyance

1. Powers of Appointment

Under the common law rule, a general power not presently exercisable because of a condition precedent is invalid as of the time of its creation if the condition might neither be satisfied nor become impossible to satisfy within a life in being plus 21 years. A nongeneral power (whether or not presently exercisable) or a general testamentary power is invalid as of the time of its creation if it might not terminate (by irrevocable exercise or otherwise) within a life in being plus 21 years.

Sections 21206(b) and 21207(b), by adopting the wait-and-see method of perpetuity reform, shift the ground of invalidity from possible to actual

post-creation events. Under these subdivisions, a power of appointment that would have violated the common law rule, and therefore fails the tests in Section 21206(a) or 21207(a) for initial validity, is nevertheless not invalid as of the time of its creation. Instead, its validity is in abeyance. A general power not presently exercisable because of a condition precedent is invalid only if in actuality the condition neither is satisfied nor becomes impossible to satisfy within the allowable 90-year waiting period. A nongeneral power or a general testamentary power is invalid only if in actuality it does not terminate (by irrevocable exercise or otherwise) within the allowable 90-year waiting period.

Example (14) — General testamentary power case. G devised property “to A for life, then to A’s first born child for life, then to such persons, including the estate or the creditors of the estate of A’s first born child, as A’s first born child shall by will appoint; in default of appointment, to G’s grandchildren in equal shares.” G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

Since the general testamentary power conferred on A’s first born child fails the test of Section 21207(a) for initial validity, its validity is governed by Section 21207(b). If A has a child, such child’s death must occur within 90 years of G’s death for any provision in the child’s will purporting to exercise the power to be valid.

Example (15) — Nongeneral power case. G devised property “to A for life, then to A’s first born child for life, then to such of G’s grandchildren as A’s first born child shall appoint; in default of appointment, to the children of G’s late nephew, Q.” G was survived by his daughter (A), who was then childless, by his son (B), who had two children (X and Y), and by Q’s two children (R and S).

Since the nongeneral power conferred on A’s first born child fails the test of Section 21207(a) for initial validity, its validity is governed by Section 21207(b). If A has a child, such child must exercise the power within 90 years after G’s death or the power becomes invalid.

Example (16) — General power not presently exercisable because of a condition precedent. G devised property “to A for life, then to A’s first born child for life, then to such persons, including A’s first born child or such child’s estate or creditors, as A’s first born child shall appoint after reaching the age of 25; in default of appointment, to G’s grandchildren.” G was

survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

The power conferred on A's first born child is a general power not presently exercisable because of a condition precedent. Since the power fails the test of Section 21206(a) for initial validity, its validity is governed by Section 21206(b). If A has a child, such child must reach the age of 25 (or die under 25) within 90 years after G's death or the power is invalid.

2. Fiduciary Powers

Purely administrative fiduciary powers are excluded from the statutory rule under Section 21225(b)-(c), but the only distributive fiduciary power that is excluded is the power described in Section 21225(d). Otherwise, distributive fiduciary powers are subject to the statutory rule. Such powers are usually nongeneral powers.

Example (17) — Trustee's discretionary powers over income and corpus. G devised property in trust, the terms of which were that the trustee was authorized to accumulate the income or pay it or a portion of it out to A during A's lifetime; after A's death, the trustee was authorized to accumulate the income or to distribute it in equal or unequal shares among A's children until the death of the survivor; and on the death of A's last surviving child to pay the corpus and accumulated income (if any) to B. The trustee was also granted the discretionary power to invade the corpus on behalf of the permissible recipient or recipients of the income.

The trustee's nongeneral powers to invade corpus and to accumulate or spray income among A's children are not excluded by Section 21225(d), nor are they initially valid under Section 21207(a). Their validity is, therefore, governed by Section 21207(b). Both powers become invalid thereunder, and hence no longer exercisable, 90 years after G's death.

It is doubtful that the powers will become invalid, because the trust will probably terminate by its own terms earlier than the expiration of the allowable 90-year period. But if the powers do become invalid, and hence no longer exercisable, they become invalid as of the time the allowable 90-year period expires. Any exercises of either power that took place before the expiration of the allowable 90-year period are not invalidated retroactively. In addition, if the powers do become invalid, a court in an appropriate proceeding must reform the instrument in accordance with the provisions of Section 21220.

F. The Validity of the Donee's Exercise of a Valid Power

1. Donee's Exercise of Power

The fact that a power of appointment is valid, either because it (1) was not subject to the statutory rule to begin with, (2) is initially valid under Sections 21206(a) or 21207(a), or (3) becomes valid under Sections 21206(b) or 21207(b), means merely that the power can be validly exercised. It does not mean that any exercise that the donee decides to make is valid. The validity of the interests or powers created by the exercise of a valid power is a separate matter, governed by the provisions of this chapter. A key factor in deciding the validity of such appointed interests or appointed powers is determining when they were created for purposes of this chapter. Under Sections 21211 and 21212, as explained in the Background to those sections, the time of creation is when the power was exercised if it was a presently exercisable general power; and if it was a nongeneral power or a general testamentary power, the time of creation is when the power was created. This is the rule generally accepted at common law (see Restatement (Second) of Property (Donative Transfers) § 1.2, comment d (1983); Restatement of Property § 392 (1944)), and it is the rule adopted under this chapter.

Example (18) — Exercise of a nongeneral power of appointment.

G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of M's descendants (except G). The trust was created by the will of G's mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his brother B's children for the life of the survivor, and upon the death of B's last surviving child, to pay the corpus of the trust to B's grandchildren. B predeceased M; B was survived by his two children, X and Y, who also survived M and G.

G's power and his appointment are valid. The power and the appointed interests were created at M's death when the power was created, not on G's death when it was exercised. See Sections 21210-21211. G's power passes the test for initial validity under Section 21207(a): G himself is the validating life. G's appointment also passes the test for initial validity under Section 21205(a): Since B was dead at M's death, the validating life is the survivor of B's children, X and Y.

Suppose that G's power was exercisable only in favor of G's own descendants, and that G appointed the identical interests in favor of his own children and grandchildren. Suppose further

that at M's death, G had two children, X and Y, and that a third child, Z, was born later. X, Y, and Z survived G. In this case, the remainder interest in favor of G's grandchildren would not pass the test for initial validity under Section 21205(a). Its validity would be governed by Section 21205(b), under which it would be valid if G's last surviving child died within 90 years after M's death.

If G's power were a general testamentary power of appointment, rather than a nongeneral power, the solution would be the same. The period of the statutory rule with respect to interests created by the exercise of a general testamentary power starts to run when the power was created (at M's death, in this example), not when the power was exercised (at G's death).

Example (19) — Exercise of a presently exercisable general power of appointment. G was the life income beneficiary of a trust and the donee of a presently exercisable general power of appointment over the succeeding remainder interest. G exercised the power by deed, directing the trustee after his death to pay the income to G's children in equal shares for the life of the survivor, and upon the death of his last surviving child to pay the corpus of the trust to his grandchildren.

The validity of G's power is not in question. A presently exercisable general power of appointment is not subject to the statutory rule against perpetuities. G's appointment, however, is subject to the statutory rule. If G reserved a power to revoke his appointment, the remainder interest in favor of G's grandchildren passes the test for initial validity under Section 21205(a). Under Sections 21210-21211, the appointed remainder interest was created at G's death. The validating life for his grandchildren's remainder interest is G's last surviving child.

If G's appointment were irrevocable, however, the grandchildren's remainder interest fails the test of Section 21205(a) for initial validity. Under Sections 21210-21211, the appointed remainder interest was created upon delivery of the deed exercising G's power (or when the exercise otherwise became effective). Since the validity of the grandchildren's remainder interest is governed by Section 21205(b), the remainder interest becomes invalid, and the disposition becomes subject to reformation under Section 21220, if G's last surviving child lives beyond 90 years after the effective date of G's appointment.

Example (20) — Exercises of successively created nongeneral powers of appointment. G devised property to A for life, remainder to such of A's descendants as A shall appoint. At his death, A exercised his nongeneral power by appointing to his child B for life, remainder to such of B's descendants as B shall appoint. At his death, B exercised his nongeneral power by appointing to his child C for life, remainder to C's children. A and B were living at G's death. Thereafter, C was born. A later died, survived by B and C. B then died survived by C.

A's nongeneral power passes the test for initial validity under Section 21207(a). A is the validating life. B's nongeneral power, created by A's appointment, also passes the test for initial validity under Section 21207(a). Since under Sections 21210-21211 the appointed interests and powers are created at G's death, and since B was then alive, B is the validating life for his nongeneral power. (If B had been born after G's death, however, his power would have failed the test for initial validity under Section 21207(a); its validity would be governed by Section 21207(b), and would turn on whether or not it was exercised by B within 90 years after G's death.)

Although B's power is valid, his exercise may be partly invalid. The remainder interest in favor of C's children fails the test of Section 21205(a) for initial validity. The period of the statutory rule begins to run at G's death, under Sections 21210-21212. (Since B's power was a nongeneral power, B's appointment under the common law relation back doctrine of powers of appointment is treated as having been made by A. If B's appointment related back no further than that, of course, it would have been validated by Section 21205(a) because C was alive at A's death. However, A's power was also a nongeneral power, so relation back goes another step. A's appointment — which now includes B's appointment — is treated as having been made by G.) Since C was not alive at G's death, he cannot be the validating life. And, since C might have more children more than 21 years after the deaths of A and B and any other individual who was alive at G's death, the remainder interest in favor of his children is not initially validated by Section 21205(a). Instead, its validity is governed by Section 21205(b), and turns on whether or not C dies within 90 years after G's death.

Note that if either A's power or B's power (or both) had been a general testamentary power rather than a nongeneral power, the

above solution would not change. However, if either A's power or B's power (or both) had been a presently exercisable general power, B's appointment would have passed the test for initial validity under Section 21205(a). (If A had the presently exercisable general power, the appointed interests and power would be created at A's death, not G's; and if the presently exercisable general power were held by B, the appointed interests and power would be created at B's death.)

2. Common Law "Second-Look" Doctrine

As indicated above, both at common law and under this chapter, appointed interests and powers established by the exercise of a general testamentary power or a nongeneral power are created when the power was created, not when the power was exercised. In applying this principle, the common law recognizes a so-called doctrine of second-look, under which the facts existing on the date of the exercise are taken into account in determining the validity of appointed interests and appointed powers. E.g., *Warren's Estate*, 320 Pa. 112, 182 A. 396 (1930); *In re Estate of Bird*, 225 Cal. App. 2d 196, 37 Cal. Rptr. 288 (1964). The common law's second-look doctrine in effect constitutes a limited wait-and-see doctrine, and is therefore subsumed under but not totally superseded by this chapter. The following example, which is a variation of Example (18) above, illustrates how the second-look doctrine operates at common law and how the situation would be analyzed under this chapter.

Example (21) — Second-look case. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of G's descendants. The trust was created by the will of his mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his children for the life of the survivor, and upon the death of his last surviving child, to pay the corpus of the trust to his grandchildren. At M's death, G had two children, X and Y. No further children were born to G, and at his death X and Y were still living.

The common law solution of this example is as follows: G's appointment is valid under the common law rule. Although the period of the rule begins to run at M's death, the facts existing at G's death can be taken into account. This second look at the facts discloses that G had no additional children. Thus the possibility of additional children, which existed at M's death

when the period of the rule began to run, is disregarded. The survivor of X and Y, therefore, becomes the validating life for the remainder interest in favor of G's grandchildren, and G's appointment is valid. The common law's second-look doctrine would not, however, save G's appointment if he actually had one or more children after M's death and if at least one of these after-born children survived G.

Under this chapter, if no additional children are born to G after M's death, the common law second-look doctrine can be invoked as of G's death to declare G's appointment then to be valid under Section 21205(a); no further waiting is necessary. However, if additional children are born to G and one or more of them survives G, Section 21205(b) applies and the validity of G's appointment depends on G's last surviving child dying within 90 years after M's death.

3. Additional References

Restatement (Second) of Property (Donative Transfers) § 1.2 comments d, f, g, & h; § 1.3 comment g; § 1.4 comment l (1983).

BACKGROUND TO SECTION 21208

*[Adapted from Comment B to Section 1 of the
Uniform Statutory Rule Against Perpetuities (1986)]*

The rule established in Section 21208 plays a significant role in the search for a validating life. Section 21208 declares that the possibility that a child will be born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purposes of determining the validity of an interest (or power of appointment) under Section 21205(a), 21206(a) or 21207(a). The rule of Section 21208 does not apply, for example, to questions such as whether or not a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest — as a member of a class or otherwise. Neither Section 21208, nor any other provision of this chapter, supersedes the widely accepted common law principle, sometimes codified, that a child in gestation (a child sometimes described as a child *en ventre sa mere*) who is later born alive is regarded as alive at the commencement of gestation.

The limited purpose of Section 21208 is to solve a perpetuity problem caused by advances in medical science. The problem is illustrated by a case such as Example (1) in the Background to Section 21205 — “to A for life, remainder to A's children who reach 21.” When the common

law rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of deceased pregnant women long enough to develop the fetus to viability — advances in medical science unanticipated when the common law rule was in its developmental stages — having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 21205(a) on the interest of A's children in the above example. The rule of Section 21208, however, does ensure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that Section 21208 subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With Section 21208 in place, the third component of the common law perpetuity period is unnecessary and has been jettisoned. The perpetuity period recognized in Section 21205(a), 21206(a), or 21207(a) has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in Example (1) in the Background to Section 21205 it in fact turns out that A does leave sperm on deposit at a sperm bank and if in fact A's wife does become pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift. *Cf.* Restatement (Second) of Property (Donative Transfers) Introductory Note to Ch. 26, at 2-3 (Tent. Draft No. 9, 1986). Without trying to predict how that matter will be settled in the future, the best way to handle the problem from the perpetuity perspective is Section 21208's rule requiring the possibility of post-death children to be disregarded.

BACKGROUND TO SECTION 21209

[Adapted from the Explanation of Section 1(e) of the Uniform Statutory Rule Against Perpetuities (1990)]

1. Effect of Certain "Later-of" Type Language

The provision set out in Section 21209 was added to the Uniform Statutory Rule Against Perpetuities in 1990 (USRAP § 1(e)). It primarily applies to a non-traditional type of "later of" clause (described below). Use of that type of clause might have produced unintended consequences, which are now rectified by the addition of Section 21209.

In general, perpetuity saving or termination clauses can be used in either of two ways. The predominant use of such clauses is as an override clause. That is, the clause is not an integral part of the dispositive terms of the trust, but operates independently of the dispositive terms; the clause provides that all interests must vest no later than at a specified time in the future, and sometimes also provides that the trust must then terminate, but only if any interest has not previously vested or if the trust has not previously terminated. The other use of such a clause is as an integral part of the dispositive terms of the trust; that is, the clause is the provision that directly regulates the duration of the trust. Traditional perpetuity saving or termination clauses do not use a "later of" approach; they mark off the maximum time of vesting or termination only by reference to a 21-year period following the death of the survivor of specified lives in being at the creation of the trust.

Section 21209 applies to a non-traditional clause called a "later of" (or "longer of") clause. Such a clause might provide that the maximum time of vesting or termination of any interest or trust must occur no later than the *later of* (A) 21 years after the death of the survivor of specified lives in being at the creation of the trust or (B) 90 years after the creation of the trust.

Under Section 21205, this type of "later of" clause would not achieve a "later of" result. Section 21205 provides:

21205. A nonvested property interest is invalid unless one of the following conditions is satisfied:

(a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive.

(b) The interest either vests or terminates within 90 years after its creation.

If used as an override clause in conjunction with a trust whose terms were, by themselves, valid under the common law rule against

perpetuities (common law rule), the “later of” clause would do no harm. The trust would be valid under the common law rule as codified in Section 21205(a) because the clause itself would neither postpone the vesting of any interest nor extend the duration of the trust. But, if used either (1) as an override clause in conjunction with a trust whose terms were not valid under the common law rule or (2) as the provision that directly regulated the duration of the trust, the “later of” clause would not cure the perpetuity violation in case (1) and would create a perpetuity violation in case (2). In neither case would the clause qualify the trust for validity at common law under Section 21205(a) because the clause would not guarantee that all interests will be certain to vest or terminate no later than 21 years after the death of an individual then alive. In any given case, 90 years can turn out to be longer than the period produced by the language relating to specified lives in being plus 21 years.

Because the clause would fail to qualify the trust for validity under the common law rule of Section 21205(a), the nonvested interests in the trust would be subject to the wait-and-see element of Section 21205(b) and vulnerable to a reformation suit under Section 21220. Under Section 21205(b), an interest that is not valid at common law is invalid unless it actually vests or terminates within 90 years after its creation. Section 21205(b) does not grant such nonvested interests a permissible vesting period of either 90 years or a period of 21 years after the death of the survivor of specified lives in being. Section 21205(b) only grants such interests a period of 90 years in which to vest.

The operation of Section 21205, as outlined above, is also supported by perpetuity policy. If Section 21205 allowed a “later of” clause to achieve a “later of” result, it would authorize an improper use of the 90-year permissible vesting period of Section 21205(b). The 90-year period of Section 21205(b) is designed to approximate the period that, *on average*, would be produced by using actual lives in being plus 21 years. Because in any given case the period actually produced by lives in being plus 21 years can be shorter or longer than 90 years, an attempt to utilize a 90-year period in a “later of” clause improperly seeks to turn the 90-year average into a minimum.

Set against this background, the addition of Section 21209 is quite beneficial. Section 21209 limits the effect of this type of “later of” language to 21 years after the death of the survivor of the specified lives, in effect transforming the clause into a traditional perpetuity saving or termination clause. By doing so, Section 21209 grants initial validity to the trust under the common law rule as codified in Section 21205(a) and precludes a reformation suit under Section 21220.

Note that Section 21209 covers variations of the "later of" clause described above, such as a clause that postpones vesting until the later of (A) 20 years after the death of the survivor of specified lives in being or (B) 89 years. Section 21209 does not, however, apply to all dispositions that incorporate a "later of" approach. To come under Section 21209, the specified-lives prong must include a tack-on period of up to 21 years. Without a tack-on period, a "later of" disposition, unless valid at common law, comes under Section 21205(b) and is given 90 years in which to vest. An example would be a disposition that creates an interest that is to vest upon "the later of the death of my widow or 30 years after my death."

2. Coordination of the Federal Generation-Skipping Transfer Tax with the Uniform Statutory Rule.

Section 1433(b)(2) of the Tax Reform Act of 1986 generally exempts (or "grandfathers") trusts from the federal generation-skipping transfer tax that were irrevocable on September 25, 1985. This section adds, however, that the exemption applies "only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985." The provisions of Section 1433(b)(2) were first implemented by Temp. Treas. Reg. § 26.2601-1, promulgated by T.D. 8187 on March 14, 1988. Insofar as the statutory rule is concerned, a key feature of that temporary regulation is the concept that the statutory reference to "corpus added to the trust after September 25, 1985" not only covers actual post-September 25, 1985, transfers of new property or corpus to a grandfathered trust, but "constructive" additions as well. Under the temporary regulation as first promulgated, a "constructive" addition occurs if, after September 25, 1985, the donee of a nongeneral power of appointment exercises that power

in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years. If a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised.

Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988). The literal wording of this regulation, as first promulgated, could have jeopardized the grandfathered status of an exempt trust if (1) the trust created a nongeneral power of appointment, (2) the donee exercised that nongeneral power, and (3) the statutory rule is the perpetuity law applicable to the donee's exercise. This possibility arose not only

because the donee's exercise itself might come under the 90-year permissible vesting period of Section 21205(b) if it otherwise violated the common law rule and hence was not validated under Section 21205(a). The possibility also arose in a less obvious way if the donee's exercise created another nongeneral power. The last sentence of the temporary regulation states that "if a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power *may* be exercised." [Emphasis added.]

In late March 1990, the National Conference of Commissioners on Uniform State Laws (NCCUSL) filed a formal request with the Treasury Department asking that measures be taken to coordinate the regulation with USRAP. In November 1990, the Treasury Department responded by stating that it "will amend the temporary regulations to accommodate the 90-year period under USRAP as originally promulgated [in 1986] or as amended [in 1990 by the addition of USRAP § 1(e)]." Letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990) (hereinafter cited as "Treasury Letter"). This should effectively remove the possibility of loss of grandfathered status under the statutory rule merely because the donee of a nongeneral power created in a grandfathered trust inadvertently exercises that power in violation of the common law rule or merely because the donee exercises that power by creating a second nongeneral power that might, in the future, be inadvertently exercised in violation of the common law rule.

The Treasury Letter states, however, that any effort by the donee of a nongeneral power in a grandfathered trust to obtain a "later of" specified-lives-in-being-plus-21-years or 90-years result will be treated as a constructive addition, unless that effort is nullified by state law. As explained above, the statutory rule, as originally promulgated in 1986 or as amended in 1990 by the addition of Section 1(e) (Section 21209 in California), nullifies any direct effort to obtain a "later of" result by the use of a "later of" clause.

The Treasury Letter states that an indirect effort to obtain a "later of" result would also be treated as a constructive addition that would bring grandfathered status to an end, unless the attempt to obtain the "later-of" result is nullified by state law. The Treasury Letter indicates that an indirect effort to obtain a "later of" result could arise if the donee of a nongeneral power successfully attempts to prolong the duration of a grandfathered trust by switching from a specified-lives-in-being-plus-21-years perpetuity period to a 90-year perpetuity period, or vice versa. This is a highly unlikely chain of events, and donees and their attorneys

should be warned of the consequences of engaging in such manipulation. Nevertheless, should a donee attempt to make a switch from a specified-lives-in-being-plus-21-years perpetuity period to a 90-year perpetuity period, Section 21209 can play an important role in preserving grandfathered status by nullifying the attempt. For example, suppose that the original grandfathered trust contained a standard perpetuity saving clause declaring that all interests in the trust must vest no later than 21 years after the death of the survivor of specified lives in being. In exercising a nongeneral power created in that trust, any indirect effort by the donee to obtain a "later of" result by adopting a 90-year perpetuity saving clause will likely be nullified by Section 21209. If that exercise occurs at a time when it has become clear or reasonably predictable that the 90-year period will prove longer, the donee's exercise would constitute language in a governing instrument that seeks to operate in effect to postpone the vesting of any interest until the later of the specified-lives-in-being-plus-21-years period or 90 years. Section 21209 makes that language inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

Although Section 21209 would not nullify a switch from a 90-year period to a specified-lives-in-being-plus-21-years period, the relation-back doctrine generally recognized in the exercise of nongeneral powers stands as a state-law doctrine that could potentially be invoked to nullify such an attempted switch (and one going in the other direction as well). Under that doctrine, interests created by the exercise of a nongeneral power are considered created by the donor of that power. See, e.g., Restatement (Second) of Property, Donative Transfers § 11.1 comment b (1986). As such, the maximum vesting period applicable to interests created by the exercise of a nongeneral power would apparently be covered by the perpetuity saving clause in the document that created the power, notwithstanding any different period the donee seeks to adopt.

BACKGROUND TO SECTION 21210

*[Adapted from the Comment to Section 2(a) of the
Uniform Statutory Rule Against Perpetuities (1986)]*

General Principles of Property Law; When Nonvested Property Interests and Powers of Appointment Are Created

Under Sections 21205-21207, the period of time allowed by the statutory rule against perpetuities is marked off from the time of creation of the nonvested property interest or power of appointment in question. Except as provided in Sections 21211 and 21212, the time of creation of

nonvested property interests and powers of appointment is determined under general principles of property law.

Since a will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the will, general principles of property law determine that the time when a nonvested property interest or a power of appointment created by will is created is at the decedent's death.

With respect to a nonvested property interest or a power of appointment created by inter vivos transfer, the time when the interest or power is created is the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed.

With respect to a nonvested property interest or a power of appointment created by the testamentary or inter vivos exercise of a power of appointment, general principles of property law adopt the "relation back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was created not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power. If the exercised power was a general power presently exercisable, the relation back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably exercised, not when the power was created.

BACKGROUND TO SECTION 21211

*[Adapted from the Comment to Section 2(b) of the
Uniform Statutory Rule Against Perpetuities (1986)]*

1. Postponement, for Purposes of This Chapter, of the Time When a Nonvested Property Interest or a Power of Appointment Is Created in Certain Cases

The reason that the significant date for purposes of this chapter is the date of creation is that the unilateral control of the interest (or the interest subject to the power) by one person is then relinquished. In certain cases, all beneficial rights in a property interest (including an interest subject to a power of appointment) remain under the unilateral control of one person even after the delivery of the deed or even after the decedent's death. In such cases, under Section 21211, the interest or power is created, for purposes of this chapter, when no person, acting alone, has a power presently exercisable to become the unqualified beneficial owner of the property interest (or the property interest subject to the power of appointment).

Example (1) — Revocable inter vivos trust case. G conveyed property to a trustee, directing the trustee to pay the net income therefrom to himself (G) for life, then to G's son A for his life, then to A's children for the life of the survivor of A's children who are living at G's death, and upon the death of such last surviving child, the corpus of the trust is to be distributed among A's then-living descendants, per stirpes. G retained the power to revoke the trust.

Because of G's reservation of the power to revoke the trust, the creation for purposes of this chapter of the nonvested property interests in this case occurs at G's death, not when the trust was established. This is in accordance with common law, for purposes of the common law rule against perpetuities. *Cook v. Horn*, 214 Ga. 289, 104 S.E.2d 461 (1958).

The rationale that justifies the postponement of the time of creation in such cases is as follows. A person, such as G in the above example, who alone can exercise a power to become the unqualified beneficial owner of a nonvested property interest is in effect the owner of that property interest. Thus, any nonvested property interest subject to such a power is not created for purposes of this chapter until the power terminates (by release, expiration at the death of the donee, or otherwise). Similarly, as noted above, any property interest or power of appointment created in an appointee by the irrevocable exercise of such a power is created at the time of the donee's irrevocable exercise.

For the date of creation to be postponed under Section 21211, the power need not be a power to revoke, and it need not be held by the settlor or transferor. A presently exercisable power held by any person acting alone to make himself the unqualified beneficial owner of the nonvested property interest or the property interest subject to a power of appointment is sufficient. If such a power exists, the time when the interest or power is created, for purposes of this chapter, is postponed until the termination of the power (by irrevocable exercise, release, contract to exercise or not to exercise, expiration at the death of the donee, or otherwise). An example of such a power that might not be held by the settlor or transferor is a power, held by any person who can act alone, fully to invade the corpus of a trust.

An important consequence of the idea that a power need not be held by the settlor for the time of creation to be postponed under this section is that it makes postponement possible even in cases of testamentary transfers.

Example (2) — Testamentary trust case. G devised property in trust, directing the trustee to pay the income “to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall appoint; in default of appointment, the property to remain in trust to pay the income to A’s children for the life of the survivor, and upon the death of A’s last surviving child, to pay the corpus to A’s grandchildren.” A survived G.

If A exercises his presently exercisable general power, any nonvested property interest or power of appointment created by A’s appointment is created for purposes of this chapter when the power is exercised. If A does not exercise the power, the nonvested property interests in G’s gift-in-default clause are created when A’s power terminates (at A’s death). In either case, the postponement is justified because the transaction is the equivalent of G’s having devised the full remainder interest (following A’s income interest) to A and of A’s having in turn transferred that interest in accordance with his exercise of the power or, in the event the power is not exercised, devised that interest at his death in accordance with G’s gift-in-default clause. Note, however, that if G had conferred on A a nongeneral power or a general testamentary power, A’s power of appointment, any nonvested property interest or power of appointment created by A’s appointment, if any, and the nonvested property interests in G’s gift-in-default clause would be created at G’s death.

2. Unqualified Beneficial Owner of the Nonvested Property Interest or the Property Interest Subject to a Power of Appointment

For the date of creation to be postponed under Section 21211, the presently exercisable power must be one that entitles the donee of the power to become the unqualified beneficial owner of the nonvested property interest (or the property interest subject to a nongeneral power of appointment, a general testamentary power of appointment, or a general power of appointment not presently exercisable because of a condition precedent). This requirement was met in Example (2), above, because A could by appointing the remainder interest to himself become the unqualified beneficial owner of all the nonvested property interests in G’s gift-in-default clause. In Example (2) it is not revealed whether A, if he exercised the power in his own favor, also had the right as sole beneficiary of the trust to compel the termination of the trust and possess himself as unqualified beneficial owner of the property that was the subject of the trust. Having the power to compel termination of the trust

is not necessary. If, for example, the trust in Example (2) was a spendthrift trust or contained any other feature that under Section 15403 would prevent A as sole beneficiary from compelling termination of the trust, A's presently exercisable general power over the remainder interest would still postpone the time of creation of the nonvested property interests in G's gift-in-default clause because the power enables A to become the unqualified beneficial owner of such interests.

Furthermore, it is not necessary that the donee of the power have the power to become the unqualified beneficial owner of all beneficial rights in the trust. In Example (2), the property interests in G's gift-in-default clause are not created for purposes of this chapter until A's power expires (or on A's appointment, until the power's exercise) even if someone other than A was the income beneficiary of the trust.

3. Presently Exercisable Power

For the date of creation to be postponed under Section 21211, the power must be presently exercisable. A testamentary power does not qualify. A power not presently exercisable because of a condition precedent does not qualify. If the condition precedent later becomes satisfied, however, so that the power becomes presently exercisable, the interests or powers subject thereto are not created, for purposes of this chapter, until the termination of the power. The common law decision of *Fitzpatrick v. Mercantile Safe Deposit Co.*, 220 Md. 534, 155 A.2d 702 (1959), appears to be in accord with this proposition.

Example (3) — General power in unborn child case. G devised property "to A for life, then to A's first-born child for life, then to such persons, including A's first-born child or such child's estate or creditors, as A's first-born child shall appoint." There was a further provision that in default of appointment, the trust would continue for the benefit of G's descendants. G was survived by his daughter (A), who was then childless. After G's death, A had a child, X. A then died, survived by X.

As of G's death, the power of appointment in favor of A's first-born child and the property interests in G's gift-in-default clause would be regarded as having been created at G's death because the power in A's first-born child was then a general power not presently exercisable because of a condition precedent.

At X's birth, X's general power became presently exercisable and excluded from the statutory rule. X's power also qualifies as a power exercisable by one person alone to become the unqualified beneficial owner of the property interests in G's gift-in-default clause. Consequently, the nonvested property interests

in G's gift-in-default clause are not created, for purposes of this chapter, until the termination of X's power. If X exercises his presently exercisable general power, before or after A's death, the appointed interests or powers are created, for purposes of this chapter, as of X's exercise of the power.

4. Partial Powers

For the date of creation to be postponed under Section 21211, the person must have a presently exercisable power to become the unqualified beneficial owner of the full nonvested property interest or the property interest subject to a power of appointment described in Section 21206 or 21207. If, for example, the subject of the transfer was an undivided interest such as a one-third tenancy in common, the power qualifies even though it relates only to the undivided one-third interest in the tenancy in common; it need not relate to the whole property. A power to become the unqualified beneficial owner of only part of the nonvested property interest or the property interest subject to a power of appointment, however, does not postpone the time of creation of the interests or powers subject thereto, unless the power is actually exercised.

Example (4) — "5 and 5" power case. G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall by will appoint;" in default of appointment, the governing instrument provided for the property to continue in trust. A was given a noncumulative power to withdraw the greater of \$5,000 or 5% of the corpus of the trust annually. A survived G. A never exercised his noncumulative power of withdrawal.

G's death marks the time of creation of: A's testamentary power of appointment; any nonvested property interest or power of appointment created in G's gift-in-default clause; and any appointed interest or power created by a testamentary exercise of A's power of appointment over the remainder interest. A's general power of appointment over the remainder interest does not postpone the time of creation because it is not a presently exercisable power. A's noncumulative power to withdraw a portion of the trust each year does not postpone the time of creation as to all or the portion of the trust with respect to which A allowed his power to lapse each year because A's power is a power over only part of any nonvested property interest or property interest subject to a power of appointment in G's gift-in-default clause and over only part of any appointed interest or

power created by a testamentary exercise of A's general power of appointment over the remainder interest. The same conclusion has been reached at common law. See *Ryan v. Ward*, 192 Md. 342, 64 A.2d 258 (1949).

If, however, in any year A exercised his noncumulative power of withdrawal in a way that created a nonvested property interest (or power of appointment) in the withdrawn amount (for example, if A directed the trustee to transfer the amount withdrawn directly into a trust created by A), the appointed interests (or powers) would be created when the power was exercised, not when G died.

5. Incapacity of the Donee of the Power

The fact that the donee of a power lacks the capacity to exercise it, by reason of minority, mental incompetency, or any other reason, does not prevent the power held by such person from postponing the time of creation under Section 21211, unless the governing instrument extinguishes the power (or prevents it from coming into existence) for that reason.

6. Joint Powers — Community Property; Marital Property

For the date of creation to be postponed under Section 21211, the power must be exercisable by one person alone. A joint power does not qualify, except that, under Section 21211(b), a joint power over community property (or over marital property under a Uniform Marital Property Act held by individuals married to each other, pursuant to the definition of community property in Section 28) is, for purposes of this chapter, treated as a power exercisable by one person acting alone. See Restatement (Second) of Property (Donative Transfers) § 1.2 comment b & illustrations 5, 6, & 7 (1983) for the rationale supporting the enactment of the bracketed sentence and examples illustrating its principle.

BACKGROUND TO SECTION 21212

*[Adapted from the Comment to Section 2(c) of the
Uniform Statutory Rule Against Perpetuities (1986)]*

No Staggered Periods

For purposes of this chapter, Section 21212 in effect treats a transfer of property to a previously funded trust or other existing property arrangement as having been made when the nonvested property interest or power of appointment in the original contribution was created. The purpose of Section 21212 is to avoid the administrative difficulties that

would otherwise result where subsequent transfers are made to an existing irrevocable trust. Without Section 21212, the allowable period under the statutory rule would be marked off in such cases from different times with respect to different portions of the same trust.

Example (5) — Series of transfers case. In Year One, G created an irrevocable inter vivos trust, funding it with \$20,000 cash. In Year Five, when the value of the investments in which the original \$20,000 contribution was placed had risen to a value of \$30,000, G added \$10,000 cash to the trust. G died in Year Ten. G's will poured the residuary of his estate into the trust. G's residuary estate consisted of Blackacre (worth \$20,000) and securities (worth \$80,000). At G's death, the value of the investments in which the original \$20,000 contribution and the subsequent \$10,000 contribution were placed had risen to a value of \$50,000.

Were it not for Section 21212, the allowable period under the statutory rule would be marked off from three different times: Year One, Year Five, and Year Ten. The effect of Section 21212 is that the allowable period under the statutory rule starts running only once — in Year One — with respect to the entire trust. This result is defensible not only to prevent the administrative difficulties inherent in recognizing staggered periods. It also is defensible because if G's inter vivos trust had contained a perpetuity saving clause, the perpetuity-period component of the clause would be geared to the time when the original contribution to the trust was made; this clause would cover the subsequent contributions as well. Since the major justification for the adoption by this chapter of the wait-and-see method of perpetuity reform is that it amounts to a statutory insertion of a saving clause, Section 21212 is consistent with the theory of this chapter.

BACKGROUND TO SECTION 21220

*[Adapted from the Comment to Section 3 of the
Uniform Statutory Rule Against Perpetuities (1986)]*

1. Reformation

This section requires a court, on petition of an interested person, to reform a disposition whose validity is governed by the wait-and-see element of Section 21205(b), 21206(b), or 21207(b) so that the reformed disposition is within the limits of the 90-year period allowed by those

sections, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: First, when (after the application of the statutory rule) a nonvested property interest or a power of appointment becomes invalid under the statutory rule; second, when a class gift has not but still might become invalid under the statutory rule and the time has arrived when the share of one or more class members is to take effect in possession or enjoyment; and third, when a nonvested property interest can vest, but cannot do so within the allowable 90-year period under the statutory rule.

It is anticipated that the circumstances requisite to reformation will seldom arise, and consequently that this section will be applied infrequently. If, however, one of the three circumstances arises, the court in reforming is authorized to alter existing interests or powers and to create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole. In reforming, the court is urged not to invalidate any vested interest retroactively (the doctrine of infectious invalidity having been superseded by this chapter, as indicated in the Background to Section 21201). The court is also urged not to reduce an age contingency in excess of 21 unless it is absolutely necessary, and if it is deemed necessary to reduce such an age contingency, not to reduce it automatically to 21 but rather to reduce it no lower than absolutely necessary. See Example (3) below; Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718, 1755-59 (1983); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 546-49 (1982).

2. Judicial Sale of Land Affected by Future Interests

Although this section — except for cases that fall under subdivisions (b) or (c) — defers the time when a court is directed to reform a disposition until the expiration of the allowable 90-year waiting period, this section is not to be understood as preventing an earlier application of other remedies. In particular, in the case of interests in land not in trust, the principle, codified in many states, is widely recognized that there is judicial authority, under specified circumstances, to order a sale of land in which there are future interests. See 1 American Law of Property §§ 4.98-4.99 (A. Casner ed. 1952); L. Simes & A. Smith, *The Law of Future Interests* §§ 1941-46 (2d ed. 1956); see also Restatement of Property § 179, at 485-95 (1936); L. Simes & C. Taylor, *Improvement of Conveyancing by Legislation* 235-38 (1960). Nothing in Section 21220 should be taken as precluding this type of remedy, if appropriate, before the expiration of the allowable 90-year waiting period.

3. *Duration of the Indestructibility of Trusts — Termination of Trusts by Beneficiaries*

As noted in the Background to Section 21201, it is generally accepted that a trust cannot remain indestructible beyond the period of the rule against perpetuities. Under this chapter, the period of the rule against perpetuities applicable to a trust whose validity is governed by the wait-and-see element of Section 21205(b), 21206(b), or 21207(b) is 90 years. The result of any reformation under Section 21220 is that all nonvested property interests in the trust will vest in interest (or terminate) no later than the 90th anniversary of their creation. In the case of trusts containing a nonvested property interest or a power of appointment whose validity is governed by Section 21205(b), 21206(b), or 21207(b), courts can therefore be expected to adopt the rule that no purpose of the settlor, expressed in or implied from the governing instrument, can prevent the beneficiaries of a trust other than a charitable trust from compelling its termination after 90 years after every nonvested property interest and power of appointment in the trust was created. See Section 15414 (termination of trust after perpetuity period).

4. *Subdivision (a): Invalid Property Interest or Power of Appointment* Subdivision (a) is illustrated by the following examples.

Example (1) — Multiple generation trust. G devised property in trust, directing the trustee to pay the income “to A for life, then to A’s children for the life of the survivor, then to A’s grandchildren for the life of the survivor, and on the death of A’s last surviving grandchild, the corpus of the trust is to be divided among A’s then living descendants per stirpes; if none, to” a specified charity. G was survived by his child (A) and by A’s two minor children (X and Y). After G’s death, another child (Z) was born to A. Subsequently, A died, survived by his children (X, Y, and Z) and by three grandchildren (M, N, and O).

There are four interests subject to the statutory rule in this example: (1) the income interest in favor of A’s children, (2) the income interest in favor of A’s grandchildren, (3) the remainder interest in the corpus in favor of A’s descendants who survive the death of A’s last surviving grandchild, and (4) the alternative remainder interest in the corpus in favor of the specified charity. The first interest is initially valid under Section 21205(a); A is the validating life for that interest. There is no validating life for the other three interests, and so their validity is governed by Section 21205(b).

If, as is likely, A and A's children all die before the 90th anniversary of G's death, the income interest in favor of A's grandchildren is valid under Section 21205(b).

If, as is also likely, some of A's grandchildren are alive on the 90th anniversary of G's death, the alternative remainder interests in the corpus of the trust then become invalid under Section 21205(b), giving rise to the prerequisite to reformation under Section 21220(a). A court would be justified in reforming G's disposition by closing the class in favor of A's descendants as of the 90th anniversary of G's death (precluding new entrants thereafter), by moving back the condition of survivorship on the class so that the remainder interest is in favor of G's descendants who survive the 90th anniversary of G's death (rather than in favor of those who survive the death of A's last surviving grandchild), and by redefining the class so that its makeup is formed as if A's last surviving grandchild died on the 90th anniversary of G's death.

Example (2) — Sub-class case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child the proportionate share of corpus of the one so dying shall go to the descendants of such child surviving at such child's death, per stirpes." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the descendants of a child of A is treated separately from the others. Consequently, the remainder interest in favor of X's descendants and the remainder interest in favor of Y's descendants are valid under Section 21205(a): X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the descendants of Z is not validated by Section 21205(a) because Z, who was not alive when the interest was created, could have descendants more than 21 years after the death of the survivor of A, X, and Y. Instead, the validity of the remainder interest in favor of Z's descendants is governed by Section 21205(b), under which its validity depends on Z's dying within 90 years after G's death.

Although unlikely, suppose that Z is still living 90 years after G's death. The remainder interest in favor of Z's

descendants will then become invalid under the statutory rule, giving rise to the prerequisite to reformation under Section 21220(a). In such circumstances, a court would be justified in reforming the remainder interest in favor of Z's descendants by making it indefeasibly vested as of the 90th anniversary of G's death. To do this, the court would reform the disposition by eliminating the condition of survivorship of Z and closing the class to new entrants after the 90th anniversary of G's death.

5. Subdivision (b): Class Gifts Not Yet Invalid

Subdivision (b), which, upon the petition of an interested person, requires reformation in certain cases where a class gift has not but still might become invalid under the statutory rule, is illustrated by the following examples.

Example (3) — Age contingency in excess of 21. G 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." G 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 G 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 chapter (see the Background to Section 21201) 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 G'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 by Section 21205(a).

Under Section 21205(b), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G'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 G's death, the class gift is valid. (Note that at Z's birth it would have been known whether or not Z could be alive and under the age of 30 on the 90th anniversary of G's death; nevertheless, even if it was then certain that Z could not be alive and under the age of 30 on the 90th anniversary of G's death, 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 G'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 remaining part of the 90-year period following G's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after G's death. Consequently, the prerequisites to reformation set forth in subdivision (b) are satisfied, and a court would be justified in reforming G'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 G'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.

Example (4) — Case where subdivision (b) applies, not involving an age contingency in excess of 21. G 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 graduate from an accredited medical school or law school." G was survived by A, by A's spouse (H), and by A's two minor children (X and Y).

As in Example (3), the remainder interest in favor of A's children is a class gift, and the common law principle is not superseded by this chapter by which the interests of all potential class members must be valid or the class gift is totally invalid. Although X and Y will either graduate from an accredited medical or law school, or fail to do so, within their own lifetimes, there is at G's death the possibility that A will have an after-born child (Z), who will graduate from an accredited medical or law school (or die without having done either) more than 21 years after the death of the survivor of A, H, X, and Y.

The class gift would not be valid under the common law rule and is, therefore, not validated by Section 21205(a).

Under Section 21205(b), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death.

Suppose in fact that there is an afterborn child (Z), and that at A's death Z was a freshman in college. Suppose further that at A's death X had graduated from an accredited law school and that Y had graduated from an accredited medical school. Z's interest and hence the class gift as a whole is not yet invalid under Section 21205(b) because the 90-year period following G's death has not yet expired; but the class gift might become invalid because Z might be alive but not a graduate of an accredited medical or law school 90 years after G's death. Consequently, the prerequisites to reformation set forth in Section 21220(b) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on graduating from an accredited medical or law school within 90 years after G's death. This would render Z's interest valid so far as the Section 21205(b) 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 graduate from an accredited medical or law school within the allowed time under the disposition as so reformed, the remaining one-third share would be divided equally between X and Y or their successors in interest.

6. *Subdivision (c): Interests That Can Vest But Not Within the Allowable 90-Year Period*

In exceedingly rare cases, an interest might be created that can vest, but not within the allowable 90-year period of the statutory rule. This may be the situation when the interest was created (see Example (5)), or it may become the situation at some time thereafter (see Example (6)). Whenever the situation occurs, the court, upon the petition of an interested person, is required by subdivision (c) to reform the disposition within the limits of the allowable 90-year period.

Example (5) — Case of an interest, as of its creation, being impossible to vest within the allowable 90-year period. G devised property in trust, directing the trustee to divide the income, per stirpes, among G's descendants from time to time living, for 100 years. At the end of the 100-year period

following G's death, the trustee is to distribute the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's descendants who are living 100 years after G's death can vest, but not within the allowable 90-year period of Section 21205(b). The interest would violate the common law rule, and hence is not validated by Section 21205(a), because there is no validating life. In these circumstances, a court is required by Section 21220(c) to reform G's disposition within the limits of the allowable 90-year period. An appropriate result would be for the court to lower the period following G's death from a 100-year period to a 90-year period.

Note that the circumstance that triggers the direction to reform the disposition under this subdivision is that the nonvested property interest still can vest, but cannot vest within the allowable 90-year period of Section 21205(b). It is not necessary that the interest be certain to become invalid under that subdivision. For the interest to be certain to become invalid under Section 21205(b), it would have to be certain that it can neither vest nor terminate within the allowable 90-year period. In this example, the interest of G's descendants might terminate within the allowable period (by all of G's descendants dying within 90 years of G's death). If this were to happen, the interest of XYZ Charity would be valid because it would have vested within the allowable period. However, it was thought desirable to require reformation without waiting to see if this would happen: The only way that G's descendants, who are G's primary set of beneficiaries, would have a chance to take the property is to reform the disposition within the limits of the allowable 90-year period on the ground that their interest cannot vest within the allowable period and subdivision (c) so provides.

Example (6) — Case of an interest after its creation becoming impossible to vest within the allowable 90-year period. G devised property in trust, with the income to be paid to A. The corpus of the trust was to be divided among A's children who reach 30, each child's share to be paid on the child's 30th birthday; if none reaches 30, to the XYZ Charity. G was survived by A and by A's two children (X and Y). Neither X nor Y had reached 30 at G's death.

The class gift in favor of A's children who reach 30 would violate the common law rule against perpetuities and, thus, is not

validated by Section 21205(a). Its validity is therefore governed by Section 21205(b).

Suppose that after G's death, and during A's lifetime, X and Y die and a third child (Z) is born to or adopted by A. At A's death, Z is living but her age is such that she cannot reach 30 within the remaining part of the 90-year period following G's death. As of A's death, it has become the situation that Z's interest cannot vest within the allowable period. The circumstances requisite to reformation under subdivision (c) have arisen. An appropriate result would be for the court to lower the age contingency to the age Z can reach 90 years after G's death.

7. Additional References

For additional discussion and illustrations of the application of some of the principles of this section, see the comments to Restatement (Second) of Property (Donative Transfers) § 1.5 (1983).

BACKGROUND TO SECTION 21225

*[Adapted from the Comment to Section 4 of the
Uniform Statutory Rule Against Perpetuities (1986)]*

Section 21225 lists several exclusions from the statutory rule against perpetuities (statutory rule). Some are declaratory of existing law; others are contrary to existing law. Since the common law rule against perpetuities and the Civil Code perpetuities provisions are superseded by this chapter, a nonvested property interest, power of appointment, or other arrangement excluded from the statutory rule by this section is not subject to the rule against perpetuities, statutory or otherwise.

A. Subdivision (a): Nondonative Transfers Excluded

1. Rationale

In line with long-standing scholarly commentary, subdivision (a) excludes (with certain enumerated exceptions) nonvested property interests and powers of appointment arising out of a nondonative transfer. The rationale for this exclusion is that the rule against perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule — a life in being plus 21 years — is not suitable for nondonative transfers, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Sections 21205-21207 because that period represents an approximation of the period of time that would be produced, on average,

by using a statutory list identifying actual measuring lives and adding a 21-year period following the death of the survivor.

No general exclusion from the common law rule against perpetuities is recognized for nondonative transfers, and so subdivision (a) is contrary to existing common law. (But see *Metropolitan Transportation Authority v. Bruken Realty Corp.*, 67 N.Y.2d 156, 165-66, 492 N.E.2d 379, 501 N.Y.S.2d 306 (1986), pointing out the inappropriateness of the period of a life in being plus 21 years to cases of commercial and governmental transactions and noting that the rule against perpetuities can invalidate legitimate transactions in such cases.)

Subdivision (a) is therefore inconsistent with decisions holding the common law rule to be applicable to the following types of property interests or arrangements when created in a nondonative, commercial-type transaction, as they almost always are: options (e.g., *Milner v. Bivens*, 255 Ga. 49, 335 S.E.2d 288 (1985)); preemptive rights in the nature of a right of first refusal (e.g., *Atchison v. City of Englewood*, 170 Colo. 295, 463 P.2d 297 (1969); *Robroy Land Co., Inc. v. Prather*, 24 Wash. App. 511, 601 P.2d 297 (1969)); leases to commence in the future, at a time certain or on the happening of a future event such as the completion of a building (e.g., *Southern Airways Co. v. DeKalb County*, 101 Ga. App. 689, 115 S.E.2d 207 (1960)); nonvested easements; top leases and top deeds with respect to interests in minerals (e.g., *Peveto v. Starkey*, 645 S.W.2d 770 (Tex. 1982)); and so on.

2. Consideration Does Not Necessarily Make the Transfer Nondonative

A transfer can be supported by consideration and still be donative in character and hence not excluded from the statutory rule. A transaction that is essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration. Thus, for example, the exclusion would not apply if a parent purchases a parcel of land for full and adequate consideration, and directs the seller to make out the deed in favor of the purchaser's daughter for life, remainder to such of the daughter's children as reach 25. The nonvested property interest of the daughter's children is subject to the statutory rule.

3. Some Transactions Not Excluded Even If Considered Nondonative

Some types of transactions — although in some sense supported by consideration and hence arguably nondonative — arise out of a domestic situation, and should not be excluded from the statutory rule. To avoid uncertainty with respect to such transactions, subdivision (a) specifies

that nonvested property interests or powers of appointment arising out of any of the following transactions are not excluded by the nondonative-transfers exclusion in subdivision (a): a premarital or postmarital agreement; a separation or divorce settlement; a spouse's election, such as the "widow's election" in community property states; an arrangement similar to any of the foregoing arising out of a prospective, existing, or previous marital relationship between the parties; a contract to make or not to revoke a will or trust; a contract to exercise or not to exercise a power of appointment; a transfer in full or partial satisfaction of a duty of support; or a reciprocal transfer. The term "reciprocal transfer" is to be interpreted in accordance with the reciprocal transfer doctrine in the tax law (see *United States v. Estate of Grace*, 395 U.S. 316 (1969)).

4. Other Means of Controlling Some Nondonative Transfers

Some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded by subdivision (a) from the statutory rule because, as noted above, the period of a life in being plus 21 years — actual or by the 90-year proxy — is inappropriate for them; that period is appropriate for family-oriented, donative transfers. Other provisions limit these types of interests. See, e.g., Civil Code §§ 715 (lease to commence in future), 883.110-883.270 (mineral rights), 884.010-884.030 (unexercised options), 887.010-887.090 (abandoned easements).

B. Subdivisions (b)-(g): Other Exclusions

1. Subdivision (b) — Administrative Fiduciary Powers

Fiduciary powers are subject to the statutory rule against perpetuities, unless specifically excluded. Purely administrative fiduciary powers are excluded by subdivisions (b) and (c), but distributive fiduciary powers are generally speaking not excluded. The only distributive fiduciary power excluded is the one described in subdivision (d).

The application of subdivision (b) to fiduciary powers can be illustrated by the following example.

Example (1). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children for the life of the survivor, and on the death of A's last surviving child to pay the corpus to B. The trustee is granted the discretionary power to sell and to reinvest the trust assets and to invade the corpus on behalf of the income beneficiary or beneficiaries.

The trustee's fiduciary power to sell and reinvest the trust assets is a purely administrative power, and under subdivision (b) of this section is not subject to the statutory rule.

The trustee's fiduciary power to invade corpus, however, is a nongeneral power of appointment that is not excluded from the statutory rule. Its validity, and hence its exercisability, is governed by Section 21207. Since the power is not initially valid under Section 21207(a), Section 21207(b) applies and the power ceases to be exercisable 90 years after G's death.

2. Subdivision (c) — Powers to Appoint a Fiduciary

Subdivision (c) excludes from the statutory rule against perpetuities powers to appoint a fiduciary (a trustee, successor trustee, or co-trustee, a personal representative, successor personal representative, or co-personal representative, an executor, successor executor, or co-executor, etc.). Sometimes such a power is held by a fiduciary and sometimes not. In either case, the power is excluded from the statutory rule.

3. Subdivision (d) — Certain Distributive Fiduciary Power

The only distributive fiduciary power excluded from the statutory rule against perpetuities is the one described in subdivision (d); the excluded power is a discretionary power of a trustee to distribute principal before the termination of a trust to a beneficiary who has an indefeasibly vested interest in the income and principal.

Example (2). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children; each child's share of principal is to be paid to the child when he or she reaches 40; if any child dies under 40, the child's share is to be paid to the child's estate as a property interest owned by such child. The trustee is given the discretionary power to advance all or a portion of a child's share before the child reaches 40. G was survived by A, who was then childless.

The trustee's discretionary power to distribute principal to a child before the child's 40th birthday is excluded from the statutory rule against perpetuities. (The trustee's duty to pay the income to A and after A's death to A's children is not subject to the statutory rule because it is a duty, not a power.)

4. Subdivision (e) — Charitable or Governmental Gifts

Subdivision (e) codifies the common law principle that a nonvested property interest held by a charity, a government, or a governmental agency or subdivision is excluded from the rule against perpetuities if the interest was preceded by an interest that is held by another charity,

government, or governmental agency or subdivision. See L. Simes & A. Smith, *The Law of Future Interests* §§ 1278-87 (2d ed. 1956); Restatement (Second) of Property (Donative Transfers) § 1.6 (1983); Restatement of Property § 397 (1944).

Example (3). G devised real property “to the X School District so long as the premises are used for school purposes, and upon the cessation of such use, to Y City.”

The nonvested property interest held by Y City (an executory interest) is excluded from the statutory rule under subdivision (e) because it was preceded by a property interest (a fee simple determinable) held by a governmental subdivision, X School District.

The exclusion of charitable and governmental gifts applies only in the circumstances described. If a nonvested property interest held by a charity is preceded by a property interest that is held by a noncharity, the exclusion does not apply; rather, the validity of the nonvested property interest held by the charity is governed by the other sections of this chapter.

Example (4). G devised real property “to A for life, then to such of A’s children as reach 25, but if none of A’s children reaches 25, to X Charity.”

The nonvested property interest held by X Charity is not excluded from the statutory rule.

If a nonvested property interest held by a noncharity is preceded by a property interest that is held by a charity, the exclusion does not apply; rather, the validity of the nonvested property interest in favor of the noncharity is governed by the other sections of this chapter.

Example (5). G devised real property “to the City of Sidney so long as the premises are used for a public park, and upon the cessation of such use, to my brother, B.”

The nonvested property interest held by B is not excluded from the statutory rule by subdivision (e).

5. Subdivision (f) — Trusts for Employees and Others; Trusts for Self-Employed Individuals

Subdivision (f) excludes from the statutory rule against perpetuities nonvested property interests and powers of appointment with respect to a trust or other property arrangement, whether part of a “qualified” or “unqualified” plan under the federal income tax law, forming part of a bona fide benefit plan for employees (including owner-employees), independent contractors, or their beneficiaries or spouses. The exclusion

granted by this subdivision does not, however, extend to a nonvested property interest or a power of appointment created by an election of a participant or beneficiary or spouse.

6. *Subdivision (g) — Pre-existing Exclusions from the Common Law Rule Against Perpetuities*

Subdivision (g) ensures that all property interests, powers of appointment, or arrangements that were excluded from the common law rule against perpetuities or are excluded by another statute of this state are also excluded from the statutory rule against perpetuities. Possibilities of reverter and rights of entry (also known as rights of re-entry, rights of entry for condition broken, and powers of termination) are not subject to the common law rule against perpetuities, and so are excluded from the statutory rule.

