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Ronald C. Link

Kimberly A. Licata

PERPETUITIES REFORM IN NORTH CAROLINA: THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES, NONDONATIVE TRANSFERS, AND HONORARY TRUSTS

RONALD C. LINK*
KIMBERLY A. LICATA**

For centuries, an archaic property law doctrine, a relic from early English common law, has set fear into the hearts of lawyers everywhere: the Rule Against Perpetuities. From novice law students to experienced practitioners, there are very few members of the legal profession who have not failed at some point in their careers to navigate successfully through both the labyrinthine workings of the Rule itself and the numerous legal fictions, such as the "fertile octogenarian" and the "precocious toddler," that the Rule has spawned. Recently, the North Carolina General Assembly enacted sweeping legislation designed to simplify North Carolina perpetuities practice. In this Article, Professor Link (the chair of the Trusts Drafting Committee appointed by the General Statutes Commission) and Ms. Licata take a first look at the new perpetuities legislation. The Article first explains the provisions of the new legislation, drawing the reader's attention to the areas in which the impact of the legislation will be the greatest. Next, the authors examine recent North Carolina perpetuities cases, and explain how the new legislation will greatly simplify the somewhat convoluted perpetuities doctrine that has come out of the North Carolina courts in recent years. Finally, the Article ends with a helpful "Primer for the Practitioner," highlighting the aspects of the new legislation that will be of greatest interest to North Carolina property lawyers.

* Professor of Law, The University of North Carolina at Chapel Hill School of Law. B.A. 1961, University of Illinois; M.A. 1962, University of California (Berkeley); J.D. 1965, University of Illinois.

** Associate, Dickstein, Shapiro & Morin, L.L.P., Washington, D.C. B.A. 1993, University of Virginia; J.D. 1996, University of North Carolina at Chapel Hill School of Law.

The Rule Against Perpetuities is a deceptively simple statement, difficult in its application: "No interest is good, unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[1] The complexities of the Rule have resulted in its reputation as "a technicality-ridden legal nightmare" and a "dangerous instrumentality in the hands of most members of the bar."[2] John Chipman Gray once wrote:

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

1. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201, at 191 (Roland Gray ed., 4th ed. 1942).

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

> eminent men, blunders which they themselves have been sometimes the first to acknowledge; and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it.[3]

The history of the application of the Rule in North Carolina cases has demonstrated the truth of this observation. The ideas encapsulated in almost every word of Gray's classic statement of the Rule have been the subject of extensive litigation in North Carolina, leading to a variety of confusing applications and uncertain results.[4] For example, the most prominent recent North Carolina Supreme Court perpetuities decision, *Joyner v. Duncan*,[5] sustained an interest that clearly violated the Rule. Other recent cases have struggled with the Rule, especially as it applies to class gifts and as it relates to rules of construction.[6]

Joining a national movement toward enactment of the Uniform Statutory Rule Against Perpetuities ("USRAP"),[7] and no doubt spurred by continuing litigation over perpetuities-related issues, the North Carolina General Assembly in its 1995 session enacted three bills to address the pitfalls of the common law: Senate Bill 83 (a Bill to enact the Uniform Statutory Rule Against Perpetuities);[8] Senate Bill 84 (a Bill to Enact Time Limits on Options in Gross and Other Interests in Land);[9] and Senate Bill 85 (a Bill to Provide for Honorary Trusts, Trusts for Pets, and Trusts for Cemetery Lots).[10] These were three of the eight trusts and estates bills recommended by the General Statutes Commission for the 1995 legislative year. All eight trusts and estates bills recommended by the Commission were enacted by the General Assembly.[11]

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3. GRAY, *supra* note 1, at xi.

4. For a discussion of North Carolina cases up to 1979, see Ronald C. Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C. L. REV. 727 (1979). Cases decided after 1979 are discussed *infra* at notes 144-88, 194-232.

5. 299 N.C. 565, 264 S.E.2d 76 (1980); *see also infra* notes 144-55 and accompanying text.

6. *See infra* notes 156-232 and accompanying text.

7. *See infra* notes 29-32 and accompanying text for discussion.

8. Senate Bill 83, Act of June 7, 1995, ch. 190, 1995 N.C. Adv. Legis. Serv., Pamphlet 3 at 152 (codified at N.C. GEN. STAT. §§ 41-15 to -22 (Supp. 1995)).

9. Senate Bill 84, Act of July 29, 1995, ch. 525, 1995 N.C. Adv. Legis. Serv., Pamphlet 5 at 686 (codified at N.C. GEN. STAT. §§ 41-28 to -33 (Supp. 1995)).

10. Senate Bill 85, Act of June 13, 1995, ch. 225, 1995 N.C. Adv. Legis. Serv., Pamphlet 3 at 245 (codified at N.C. GEN. STAT. §§ 36A-145 to -148, 65-9 (1995)).

11. The other bills were: Senate Bill 82, Act of Oct. 1, 1995, ch. 262, 1995 N.C. Adv. Legis. Serv., Pamphlet 3 at 378 (amending scattered sections of N.C. GEN. STAT. chs. 28A,

Senate Bills 83, 84, and 85 significantly improve the laws of North Carolina. They retain the basic policy behind the Rule Against Perpetuities, but will have four particularly beneficial additional effects: First, they will simplify a complex area of the law by applying clear rules and time periods where previous law required too much guesswork.[12] Second, they will reduce malpractice litigation while helping a less-than-perfect attorney to effectuate his client's intention with greater certainty.[13] Third, they will serve to clarify land titles, since valid and invalid interests will be more identifiable.[14] Fourth, they will reduce litigation in the areas of estate planning and real property law.[15]

This Article begins by reviewing some of the problems associated with the common-law Rule Against Perpetuities. It then analyzes the 1995 legislation, explains how it would apply to recent North Carolina cases on perpetuities,[16] and concludes with some advice for the practitioner. Trusts and estates lawyers will be particularly interested in the bills on perpetuities (Senate Bill 83) and honorary trusts (Senate Bill 85). Real property practitioners should note the new time limits on nondonative transfers in Senate Bill 84.

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30); Senate Bill 244, Act of June 20, 1995, ch. 294, 1995 N.C. Adv. Legis. Serv., Pamphlet 3 at 455 (codified at N.C. GEN. STAT. §§ 28A-28-1 to -7 (1995)); Senate Bill 320, Act of July 26, 1995, ch. 486, 1995 N.C. Adv. Legis. Serv., Pamphlet 5 at 203 (codified at N.C. GEN. STAT. §§ 33B-1 to -22, 32A-1 (1995)); Senate Bill 707, Act of June 5, 1995, ch. 161, 1995 N.C. Adv. Legis. Serv., Pamphlet 3 at 83 (amending N.C. GEN. STAT. § 31-5.5(a) (Supp. 1995)); Senate Bill 724, Act of June 27, 1995, ch. 724, 1995 N.C. Adv. Legis. Serv., Pamphlet 4 at 118 (codified at N.C. GEN. STAT. §§ 32A-1 to -2, 32A-14.1 to -14.12 (Supp. 1995)).

The bills were introduced in the Senate by Commission member Fletcher M. Hartsell, who did an exceptionally able job in shepherding the bills through the General Assembly.

All of the bills were first proposed to the Commission by its Trusts Drafting Committee, composed of James M. Gregg of Winston-Salem, JoAnn T. Harllee of Greensboro, James B. McLaughlin, Jr., of Buies Creek, Charles J. Murray of Raleigh, and Ronald C. Link of Chapel Hill, Chair. The views expressed in this article are those of the authors and do not necessarily represent the views of the Trusts Drafting Committee.

12. *See infra* notes 28-43 and accompanying text for discussion.

13. *See infra* note 41 and accompanying text for discussion.

14. Memorandum from the Trusts Drafting Committee to the General Statutes Commission 7 [hereinafter Memorandum] (on file with the authors).

15. *Id.*

16. This article surveys the cases from 1979 to the present. For a discussion of cases up to 1979, see Link, *supra* note 4, at 738-817.

I. THE COMMON-LAW RULE AGAINST PERPETUITIES

The Rule Against Perpetuities is a rule against remoteness of vesting, distinguishing between types of future interests,[17] between vested and contingent interests, and between vesting in interest and vesting in enjoyment. The Rule may apply to class gifts, charitable gifts, powers of appointment, and interests created by the exercise of a power of appointment. The measuring period is lives in being[18] at the creation of the interest, plus twenty-one years.[19] The validity of future interests governed by the Rule Against Perpetuities is judged at the time of their creation.[20] Traditional perpetuities analysis turns on

17. For perpetuities purposes, the principal distinction is between future interests left in the transferor (reversions, possibilities of reverter, and rights of entry), which are regarded as presently vested and therefore not subject to the Rule, and future interests in transferees (remainders and executory interests), which are potentially subject to the Rule. *See* Link, *supra* note 4, at 753-54. Further, among interests in transferees there is an important distinction between remainders, which must vest in *interest* within the period of the Rule, and executory interests, which must vest in *possession* within the period of the Rule. *Id.* at 761-62.

18. There is no simple formula for determining lives in being; they are those persons who can affect vesting in possession (such as a life tenant) and those persons who can affect vesting in interest (such as beneficiaries, persons who can affect the identity of the beneficiaries [such as parents], and persons who can affect a condition precedent to vesting). *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 300-01 (3d ed. 1993). For a case illustrating the identification of measuring lives, see Pittman v. Thomas, 58 N.C. App. 336, 339-40, 293 S.E.2d 695, 698-99, *rev'd*, 307 N.C. 485, 299 S.E.2d 207 (1982) (involving a holographic will provision for the payment of educational expenses for the testator's grandchildren, which was acceptable under the Rule since their parents, children of the testator, must be born within the testator's life and serve as measuring lives). *See also* RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.2 (1983) [hereinafter RESTATEMENT] (discussing the determination of measuring lives); Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1872 (1986) [hereinafter Dukeminier, *Modern Guide*] (identifying issues with measuring lives); Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1654-59 (1985) [hereinafter Dukeminier, *Measuring Lives*] (identifying measuring lives as those lives in a causal relation to vesting).

19. The evolution of the twenty-one year time period of the Rule Against Perpetuities began with Lord Nottingham's opinion in the Duke of Norfolk's Case, 22 Eng. Rep. 931 (Ch. 1682). Lord Nottingham's opinion stated that the Rule was not restricted to lives in being, but it failed to indicate the outer limits of the Rule. *Id.* at 955, 960. In Stephens v. Stephens, 25 Eng. Rep. 751 (Ch. 1736), the period of actual minority of a beneficiary was held to be an acceptable addition to the duration of lives in being. By the time Cadell v. Palmer, 6 Eng. Rep. 956 (H.L. 1833), was decided, the twenty-one year period was available to be added to lives in being as a period in gross regardless of the minority of a beneficiary. For a description of the evolution of the twenty-one year period, see Lord Chancellor's opinion in Cole v. Sewell, 9 Eng. Rep 1062 (H.L. 1848). Early on, the courts recognized that additional periods of gestation were necessary to preserve the testator's intentions where conceived, yet unborn children were involved. In *Cadell*, the court limited this rule to the period of gestation of an actual person, thus preventing the addition of nine or ten months in gross to every twenty-one year period.

20. In the case of interests created by a deed, the period of perpetuities begins to run on the date the deed is delivered. *See* LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF

what *might* happen—even on the most fanciful of assumptions.[21] One does not wait-and-see whether the interest vests in time. Further, if the interest is bad, it fails; there is no reformation to achieve validity.

The Rule Against Perpetuities initially served as a limit on future interests in family wealth transfers, such as wills and trusts,[22] but it has sometimes been applied to nondonative transfers, such as options to purchase, preemptive rights, and leases to commence in the future.[23] The Rule is distinct from but related to the rule against restraints on alienation, since remote future interests indirectly restrain alienation, but our courts have had difficulty keeping the two doctrines separate. In *Smith v. Mitchell*,[24] the North Carolina Supreme Court appeared to say that the time limit for the validity of a preemption challenged as an unreasonable restraint on alienation was the period of the related Rule Against Perpetuities.[25] Nevertheless, a decade later in *Village of Pinehurst v. Regional Investments*,[26] the court seemed to invalidate a preemption purely on perpetuities grounds, not as a restraint on alienation. At the same time, the North Carolina Court of Appeals has sometimes saved land contracts from invalidation under either perpe-

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FUTURE INTERESTS § 1226 (2d ed. 1956) (setting out the rules for determining the time period of the Rule Against Perpetuities). A will takes effect upon the testator's death. *See* Joyner v. Duncan, 299 N.C. 565, 569, 264 S.E.2d 76, 81 (1980). Irrevocable trusts are measured from the date of creation, W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 642 (1938), but revocable trusts are measured from the settlor's death since control of the property is not given up prior to that date. *See* Cook v. Horn, 104 S.E.2d 461, 464 (Ga. 1958); SIMES & SMITH, *supra*, § 1226.

21. This has led to the creation of such notable doctrines as the "fertile octogenarian" doctrine, which presumes a couple is fertile until death despite any medical evidence to the contrary; the "unborn widow" doctrine, which presumes that a 45-year-old life beneficiary's spouse might die and the life beneficiary might remarry a person who was unborn at the testator's death and then produce offspring; the "precocious toddler" doctrine, which presumes that a child of less than five years is capable of producing children; and the "administration contingency" doctrine, which presumes that administration of an estate or probate of a will or other event will not occur in due course but may take more than 21 years. For a discussion of these anomalous rules, see Dukeminier, *Modern Guide*, *supra* note 18, at 1876-80; Link, *supra* note 4, at 762-65; Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1728-50 (1983).

22. In 1620, the English case of Pells v. Brown, 79 Eng. Rep. 504 (K.B. 1620), held that executory interests were not subject to the doctrine of destructibility of contingent remainders. This holding probably made the evolution of something like the Rule Against Perpetuities inevitable, as a control on executory interests. *See* Link, *supra* note 4, at 733-34. The Rule now extends to remainders, equitable interests, interests in personalty, and perhaps to nondonative transfers.

23. *See* Link, *supra* note 4, at 804-17 (discussing the applicability of the Rule to commercial transactions).

24. 301 N.C. 58, 269 S.E.2d 608 (1980).

25. *Id.* at 66, 269 S.E.2d at 613.

26. 330 N.C. 725, 728-29, 412 S.E.2d 645, 646, *reh'g denied*, 331 N.C. 292, 417 S.E.2d 71 (1992).

tuities or restraints on alienation doctrines (with the supreme court subsequently denying review) by reasoning that the parties must have contemplated a reasonable time for performance, which would be less than twenty-one years.[27] In all, eighteen recent cases have struggled with the applicability of the Rule Against Perpetuities to nondonative transfers. The 1995 legislation addresses these issues.

A final related topic addressed by the 1995 legislation is that of honorary trusts, such as those to provide care of a grave, care of a pet, or the saying of masses for the repose of a soul. These are sometimes challenged on perpetuities grounds, but North Carolina case law provides no guidance in this regard.

II. THE NEW PERPETUITIES STATUTES

A. *Sections 41-15 to 41-22: The Uniform Statutory Rule Against Perpetuities ("USRAP")*[28]

This section discusses new North Carolina General Statutes sections 41-15 through 41-22, which codify the Uniform Statutory Rule Against Perpetuities ("USRAP").[29] The USRAP was approved by the National Conference of Commissioners on Uniform State Laws in 1986 and by the American Bar Association, on the unanimous recommendation of the Council of the ABA Section on Real Property, Probate and Trust Law, in 1987.[30] It has been unanimously endorsed by the Board of Regents of the American College of Probate Counsel (now the American College of Trust and Estate Counsel), the Board of Governors of the American College of Real Estate Lawyers, and the Joint Editorial Board for the Uniform Probate Code (UPC).[31] The USRAP has been adopted in twenty-four states, including Cali-

27. *See infra* text accompanying notes 195-215.

28. Despite the predictability which the USRAP brings to the law, one aspect remains puzzling—its pronunciation. Both "use-rap" and "us-rap" seem acceptable to its drafter and advocates.

29. The USRAP drafters prepared an extensive and valuable set of official comments to accompany the USRAP. Typically, the official comments to Uniform Acts are not reprinted in the Michie Company's codification of the North Carolina General Statutes. Nevertheless, the Trusts Drafting Committee thought it was especially important to include the official comments to the USRAP in the General Statutes and therefore included in Senate Bill 83 a section authorizing the Revisor of Statutes to cause to be printed with the USRAP all portions of the comments as the Reporter deemed appropriate. The official comments have been printed with the Act. *See* N.C. GEN. STAT. § 41-15 cmt. (Supp. 1995). The authors recommend these comments to the reader. This article places the USRAP in North Carolina perspective and highlights major issues that might not be immediately apparent to the reader.

30. *See* Memorandum, *supra* note 14, at 3.

31. *See id.*

fornia, Massachusetts, and nearby states Florida, Georgia, South Carolina, Tennessee, and West Virginia.[32]

The USRAP embodies three principles. First, interests that are valid under the common-law Rule remain valid. In other words, the validating side of the common-law Rule is preserved, and in this regard the USRAP works no change in North Carolina law. Thus, knowledgeable attorneys can continue to follow standard drafting practices.

Second, if an interest is not valid under the common-law Rule, it is allowed up to ninety years in which to vest. This principle of the USRAP is known as the wait-and-see doctrine, first proposed by Professor W. Barton Leach as a means of judging perpetuities from actual, not possible, events.[33] It is highly likely that most interests which would violate the Rule in theory will in fact vest or fail within the

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32. *See* Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the Generation-Skipping Transfer Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP., PROB. & TR. J. 185, 187 n.8 (1995) [hereinafter Dukeminier, *New Perils*].

The USRAP was drafted by Professor Lawrence W. Waggoner of the University of Michigan Law School, whose work continues to have a profound impact in reforming the law of donative transfers. Professor Waggoner was also Reporter for the 1990 revised Article II of the Uniform Probate Code and is Reporter for the new project to prepare the Third Restatement of the Law of Property (Donative Transfers). Law professors, who rarely agree on anything, are in near-unanimous support of the USRAP. There are, however, respected property scholars who criticize it. *See, e.g.*, Ira Mark Bloom, *Perpetuities Refinement: There Is an Alternative*, 62 WASH. L. REV. 23 (1987); Dukeminier, *New Perils*, *supra*; Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023 (1987) [hereinafter Dukeminier, *Ninety Years*]. For a trenchant review of the criticisms of the USRAP, see JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 886-99 (5th ed. 1995).

In 1988, Professor Paul G. Haskell of the University of North Carolina proposed a more limited approach than the USRAP, but one which addressed many of the unnecessary complexities of the Rule: adoption of vesting in possession within a specific number of years. Professor Haskell suggested that this period should be 125 years, although he was amenable to 110 or even 100 years, and also favored provisions for a power of sale by operation of law when the power does not otherwise exist. Paul G. Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C. L. REV. 545 (1988).

Other references on the USRAP include: Mary Louise Fellows, *Testing Perpetuity Reforms: A Study of Perpetuity Cases 1984-89*, 25 REAL PROP., PROB. & TR. J. 597 (1991); Amy Morris Hess, *Freeing Property Owners from the RAP Trap: Tennessee Adopts the Uniform Statutory Rule Against Perpetuities*, 62 TENN. L. REV. 267 (1995); Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157 (1988); Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP., PROB. & TR. J. 569 (1986); Raymond H. Young, *USRAP to the Rescue: Taming the Rule Against Perpetuities*, 73 MASS. L. REV. 126 (1988); John D. Moore, Note, *The Uniform Statutory Rule Against Perpetuities: Taming the "Technicality-Ridden Legal Nightmare,"* 95 W. VA. L. REV. 193 (1992).

33. *See* W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 730 (1952).

perpetuities period if allowed to do so.[34] The period of ninety years was selected for two reasons. First, it is a reasonable approximation of the period of lives in being plus twenty-one years and is much easier to apply.[35] Second, it avoids the random variations that result from case-by-case determinations of measuring lives.[36] The use of a period of ninety years in essence ensures that no lawyer will be held liable for a perpetuities violation within the lawyer's lifetime, since few people will live a hundred years.[37] While the desirability of the wait-and-see doctrine has been debated among scholars, wait-and-see is preferable to traditional reliance on potential events and obscure theories denying otherwise acceptable dispositions of property.[38] Although North Carolina has not previously embraced the wait-and-see doctrine,[39] it represents the majority view in the United States.[40]

Third, if an interest does not vest in time, the court is directed to reform it in the manner that most closely approximates the transferor's intention and is within the ninety-year period.[41] Not only will this provision substantially fulfill the transferor's intention, it will also reduce the risks of malpractice litigation in a very difficult area of the law. The concept of reformation for perpetuities violations has ex-

34. *Cf.* N.C. GEN. STAT. § 41-15 cmt. A (Supp. 1995) ("It is generally recognized that the *invalidating* side of the [c]ommon-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.").

35. Ninety years was selected as a reasonable approximation of the period of time produced using a set of actual measuring lives plus twenty-one years. According to a statistical study reported in Lawrence W. Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 INST. ON EST. PLAN. ¶ 700 (1986), the youngest measuring life tends to be age six. *Id.* ¶ 704. According to the U.S. Census Bureau, the remaining life expectancy of a six-year-old is 69.6 years. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986 at 69 tbl. 108 (1986). The drafters of the USRAP chose to use sixty-nine years, which when added to twenty-one years makes a total of ninety years. *See* UNIFORM STATUTORY RULE AGAINST PERPETUITIES, Prefatory Note (1986).

36. *See generally* Dukeminier, *Measuring Lives*, *supra* note 18 (discussing the uncertainty created by using measuring lives in the context of wait-and-see reforms).

37. *See* Dukeminier, *Modern Guide*, *supra* note 18, at 1885.

38. For a summary of the criticisms of the wait-and-see doctrine, see *id.* at 1880-87; Waggoner, *supra* note 21, at 1759-82.

39. *See* Peele v. Wilson County Bd. of Educ., 56 N.C. App. 555, 560, 289 S.E.2d 890, 893, *disc. review denied*, 306 N.C. 386, 294 S.E.2d 210 (1982); Joyner v. Duncan, 299 N.C. 565, 581-82, 264 S.E.2d 76, 88-89 (1980).

40. In addition to the 24 USRAP states, four states have judicial authorization and four others have non-USRAP statutes incorporating the wait-and-see doctrine. *See* N.C. GEN. STAT. § 41-19(b) cmt.; *see also* RESTATEMENT, *supra* note 18, §§ 1.1-1.6 (approving of the use of the wait-and-see doctrine).

41. The power to reform is sometimes called *cy pres*, after the *cy pres* doctrine available for gifts to charity. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 218 (2d ed. 1984).

isted in some form, legislative or judicial, in a handful of states to preserve the purposes of the Rule by altering the gift in violation.[42] An easy method of reformation would be for a court to ensure that all interests vest within ninety years, in effect adding a savings clause to any questionable disposition.[43]

One criticism of the USRAP has been that reformation at the end of ninety years (in contrast to reformation at the beginning when a violation of the common-law Rule appears) will be the occasion of a grand lawsuit, from which the attorneys involved will profit more than any of the parties. For example, O transfers Blackacre to A and his heirs so long as Blackacre is used for a farm, then to B and her heirs.[44] Under the common-law Rule, the executory interest in B would be remote, and any reformation would probably be made near the time of O's transfer. Under the USRAP, one would wait up to ninety years to see whether the property ceased to be used for a farm. If at the end of ninety years the property were still being used as a farm, the transfer would be reformed. The alternatives would include the following: (1) give A (or A's successors) a fee simple absolute; (2) give B (or B's successors) a fee simple absolute; (3) give O (or O's successors) a fee simple absolute; or (4) give A a fee simple determinable with a possibility of reverter in O (or O's successors).

For many of these cases, the perpetuities reforms have eliminated the constructional problem by providing a statutory answer.[45] Another answer to the criticism is that judicial reformation is preferable to no reformation at all, and that ninety years wait-and-see is preferable to common-law invalidity *ab initio*. Finally, a practical answer to the lawsuit criticism is suggested by a question raised in the Trusts Drafting Committee: Who will challenge a gift at the end of ninety years? In contrast to the common-law Rule, which gives an immediate incentive to challenge possible violations, it is likely that after ninety years no one will realize the possibility of *cy pres*. Further, the outcome of *cy pres* is less predictable than the typical common-law result of striking an invalid gift, thus creating another comparative disincentive to suit.

Other illustrations of the operation of the USRAP may be helpful. For example, grantors often use age contingencies in their disposi-

42. *See* Waggoner, *supra* note 21, at 1755 (listing the states empowering their courts to reform perpetuities violations).

43. *Id.* at 1756-59.

44. *See* DUKEMINIER & KRIER, *supra* note 18, at 322, especially problem (b).

45. Under new section 41-32, B's executory interest would be given sixty years in which to vest, and if it did not vest within sixty years the bill provides that A's interest would ripen into a fee simple absolute. *See* N.C. GEN. STAT. § 41-32(a) (Supp. 1995).

tions, believing that some people will make better or more productive use of property if the gift is postponed until the donee is older, as in the case where O bequeaths a fund of $100,000 in trust for A for life, then in trust for A's children who shall reach the age of thirty. Under common-law the gift to A's children would violate the Rule Against Perpetuities. First, A may have a child immediately preceding his death who consequently cannot reach the age of thirty within twenty-one years of A's death. The gift to this possible child is remote. Second, the gift is a class gift, which must stand or fall as a unit. The interests of A's children living at O's death, considered alone, are good—they will take, if at all, within their own lives. But they will lose their interests because of the potential birth of another sibling. Under the USRAP, such a gift would be given ninety years to vest, giving the children of O adequate time either to reach age thirty and receive a share of the gift or die before reaching age thirty and lose any property interest in the gift.

Similarly, gifts over to grandchildren and great-grandchildren will be spared immediate invalidation under the USRAP. Grantors often want to make gifts to grandchildren or great-grandchildren of their own or of collateral family members. Since the groups of grandchildren and of great-grandchildren are likely to increase either before or after the grantor's death, the grantor is likely to use class designations for any gifts involving the grandchildren or the great-grandchildren. For example, if O bequeaths a fund in trust for A for life, then in trust for A's children for life, then to pay the principal to A's grandchildren, the gift to A's grandchildren would violate the common-law Rule, since A might have a child who was not a life in being at O's death. Under the USRAP, the gift to A's grandchildren would be given ninety years to vest and would likely do so. Similarly, gifts to the testator's great-grandchildren have often fallen to the perpetuities axe because no one person alive at the testator's death serves as a validating life for every possible member of the class. It is possible for a grandchild to be born after the testator's death and produce a child, the testator's great-grandchild, well beyond the period of perpetuities. Under the USRAP, such a disposition would be given ninety years in which to vest. Most, if not all, great-grandchildren will be born within this time frame. However, if the beneficiaries are not all born within this period of time, a court could reform the will to provide a benefit to each of the testator's great-grandchildren born within that ninety-year period, thus effectuating the testator's intent to benefit these people without allowing interests to vest too remotely.

Powers Of Appointment

With the three general principles of the USRAP in mind, the authors now will examine some of the statutory details. The USRAP treatment of powers of appointment is consistent with its general principles.[46] If the power or the interest created by the exercise of the power is valid under the common-law Rule, it is valid under the USRAP, leaving the validating side of the common-law Rule unchanged. Thus, one first examines the validity of the power itself. General, presently exercisable powers are valid.[47] General powers subject to a condition precedent are valid if the condition is certain to be satisfied or not within the period of the common-law Rule.[48] That is, if the general power is certain to be *acquired* or not within the period of the Rule, it is valid. Once the power is acquired, the property subject to the power is no longer tied up, since the donee may appoint it freely.[49] Nongeneral powers (formerly known as special powers) are valid if they are certain to be exercised or not within the period of the common-law Rule.[50] The clock starts when the donor creates the power, since he has tied up the property by confining it to a limited group.[51] General testamentary powers are treated like special powers,[52] since the donee cannot benefit herself during her lifetime and will probably appoint to her family, a limited group.[53] This delineation of powers resolves a point that was not clear under former North Carolina law.[54]

If the general or special power itself is not valid under the common-law Rule, it is held in abeyance and allowed up to ninety years in which to become valid, either by satisfaction or failure of the condition precedent in the case of a general power,[55] or by exercise or termination of the nongeneral power or testamentary power.[56] If the power does not become valid within ninety years, the court may reform it.[57]

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46. *Id.* § 41-15 cmt. D (Supp. 1995). A general power is one that 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. *Id.* Powers that do not fall in this category are "nongeneral." *Id.*

47. *Id.*

48. *See id.* § 41-15(b)(1).

49. *See* Link, *supra* note 4, at 785.

50. *See* N.C. GEN. STAT. § 41-15(c)(1) (Supp. 1995).

51. *See* Link, *supra* note 4, at 784.

52. *See* N.C. GEN. STAT. § 41-15(c)(1) (Supp. 1995).

53. *See* Link, *supra* note 4, at 785-86.

54. *See id.* at 786-93.

55. N.C. GEN. STAT. § 41-15(b)(2) (Supp. 1995).

56. *Id.* § 41-15(c)(2) & cmt. E.

57. *Id.* § 41-17(1).

Next, one examines the validity of any interests created by the exercise of the powers. For interests created by the exercise of general presently exercisable powers, the validity of the interests is measured from the time of the *exercise* of the power,[58] since the donee was in substance the owner of the property subject to the power.[59] For interests created by the exercise of nongeneral powers and testamentary powers, the validity of the interests is measured from the time of *creation* of the power,[60] since the donor has controlled the disposition and the donee resembles his agent.[61] Utilizing these principles, if the interests are valid under the common-law Rule, they are valid under the USRAP.[62] If the interests violate the common-law Rule, they are allowed up to ninety years from creation to actually vest or terminate.[63] If they do not actually vest or terminate in time, they may be judicially reformed,[64] although the reformation section does not expressly refer to interests created by the exercise of powers.[65]

In determining the validity of interests created by the exercise of nongeneral or testamentary powers, some common-law jurisdictions followed the "second-look doctrine," which allowed one to take into account facts existing on the date of exercise. This is a limited kind of wait-and-see doctrine, and the broader USRAP principle subsumes but does not totally supersede it.[66] Prior North Carolina law did not clearly recognize the second-look doctrine,[67] so it is useful to have the broader USRAP reformation principle as a fail-safe.

Further to the issue of time of creation, the USRAP includes a subsection providing that nonvested property interests and powers arising out of a transfer to a previously funded trust are considered to have been created when the original contribution was made.[68] In other words, when subsequent transfers are made to an existing irrevocable trust, the clock runs on all the transfers from the date of creation of the trust. This rule is justified on the ground of administrative

58. *Id.* §§ 41-15 cmt. F, 41-16(a), (b) & cmt.

59. *See* Link, *supra* note 4, at 788.

60. N.C. GEN. STAT. §§ 41-15 cmt. F, 41-16(a), (b) & cmt. (Supp. 1995).

61. *See* Link, *supra* note 4, at 788.

62. *See* N.C. GEN. STAT. § 41-15(a)(1) (Supp. 1995).

63. *Id.* § 41-15(b).

64. *Id.* § 41-15 cmt. F.

65. It does refer to "power[s] of appointment" and to "nonvested property interest[s]," which presumably includes nonvested interests created by the exercise of powers. *Id.* §§ 41-17(1), (3).

66. *Id.* § 41-15 cmt. F.

67. *See* Link, *supra* note 4, at 789.

68. N.C. GEN. STAT. § 41-16(c) (Supp. 1995).

simplicity.[69] At first blush it seems harsh, but USRAP wait-and-see and judicial reformation will moderate its effects.[70]

Construction to Avoid Invalidity

It is generally accepted in other states that where an interest is susceptible to alternate constructions, one of which would violate the common-law Rule and the other of which would not violate the Rule, there is a constructional preference for validity, on the theory that the transferor must have intended a valid disposition.[71] The status of this constructional preference in North Carolina is not clear, with some cases clearly accepting it,[72] some ignoring it,[73] and some expressly rejecting it.[74] Even if the doctrine is rejected, the USRAP will moderate its harshness since even if the construction which violates the common-law Rule is chosen, ninety-year wait-and-see plus judicial reformation will be available for the invalid interest.[75]

Judicial Retrospective Reformation

The USRAP supersedes the common-law Rule Against Perpetuities,[76] and applies to all nonvested property interests and powers of appointment created after its effective date.[77] In addition, an important subsection extends the judicial reformation power to nonvested property interests and powers of appointment created before the effective date of the Act.[78] This is a significant feature of the USRAP, particularly for fiduciary litigators. Note, too, that retroactive reformation is now available for remote powers of appointment or interests created by their exercise. The guiding limit for retroactive reformation is the common-law lives in being plus twenty-one years, not the USRAP ninety years.[79] The Comment urges courts to apply the power by judicially inserting a saving clause, since a saving clause

69. *Id.* § 41-16(c) cmt.
70. *Id.*
71. *Id.* § 41-15 cmt. H.
72. *See* Link, *supra* note 4, at 765-67.
73. *See id.*
74. *See id.*
75. N.C. GEN. STAT. § 41-15 cmt. H (Supp. 1995).
76. *Id.* § 41-22.
77. *Id.* § 41-19(a).
78. *Id.* § 41-19(b). In a separate statement, the Joint Editorial Board of the Uniform Probate Code has addressed the validity of retroactive application of default rules. *See* Joint Editorial Board for the Uniform Probate Code, *Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents*, 17 ACTEC NOTES 184, 184-85 (1991).
79. *See* N.C. GEN. STAT. § 41-19(b) (Supp. 1995).

probably would have been used if the instrument had been drafted competently.[80]

Duration of Trusts

Traditionally, the common-law Rule has been interpreted as a rule against remoteness of vesting, not against interests that last too long.[81] In other words, if interests vest in time, there is no limit on trust duration under the common-law Rule.[82] North Carolina law on this point has wavered, but apparently the view is that trusts may last beyond the period of the Rule, provided their interests have vested in time.[83] Careful drafters, however, should limit trust duration to the period of the Rule. It is generally accepted elsewhere that a trust cannot remain indestructible beyond the period of the Rule.[84] In these jurisdictions, the USRAP Comment opines that USRAP courts can be expected to allow the trust beneficiaries to terminate trusts containing remote interests after ninety years.[85] Even if North Carolina takes the view that neither the common-law Rule nor the USRAP limits trust duration, the USRAP will be important. If the trust lasts too long, the trustee's powers to distribute income or principal may be attacked as remotely exercisable powers of appointment.[86] Even the trustee's administrative powers may be in jeopardy.[87] Careful drafters will continue to limit trust duration to the period of the Rule (and are allowed to continue to use the common-law period under the first principle of the USRAP). Careless drafters will be helped by the exclusions from the USRAP of administrative powers in a fiduciary[88] and of discretionary powers of a trustee to distribute principal to a beneficiary having a vested interest in income and principal.[89] However, the USRAP does not exclude discretionary powers over income or discretionary powers over principal for the benefit of beneficiaries who lack a vested interest in the income and principal. These powers therefore will be subject to successful attack as remotely exercisable special powers, leading then to judicial reformation.[90]

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80. *Id.* § 41-19(b) cmt.
81. *See* Link, *supra* note 4, at 793.
82. *See id.* at 793-804.
83. *See id.*
84. *See* N.C. GEN. STAT. § 41-15 cmt. H (Supp. 1995).
85. *Id.*
86. *See* Link, *supra* note 4, at 804.
87. *Id.*
88. *See* N.C. GEN. STAT. § 41-18(2) (Supp. 1995).
89. *See id.* § 41-18(4).
90. *See id.* § 41-15 cmt. E.

Saving Clauses

A common question asked by estate planners is whether they should use saving clauses designed for the common-law Rule, the USRAP ninety-year period, or a new saving clause terminating interests at the later of (a) the common-law period or (b) ninety years. This question is discussed in the USRAP Comments. The commentators argue that it is preferable to continue to use a common-law clause, since the lives in being are tailored to the precise family situation.[91] A saving clause using a ninety-year period is acceptable, and has the virtue of simplicity.[92] However, drafters should be wary of using a "later-of" clause,[93] because that clause may not cure a perpetuities violation and could actually create a violation.[94] A ninety-year period may be longer than the period of time produced by perpetuities analysis under the common-law Rule, thus such interests would not be valid under the common-law prong of the USRAP. Under the wait-and-see prong of the USRAP, such clauses improperly use the ninety-year period as a minimum time for vesting.[95] These problems are not eliminated under subsection (e) of the USRAP, which in effect converts a "later-of" clause into a traditional saving clause under which all interests must vest within twenty-one years after the death of the survivor of specified lives in being.[96]

Dynasty Trusts

Alert estate planners may have noted the "dynasty trust" possibilities available under the USRAP. For example, a grantor or testator may create a trust "to pay the income to my descendants per stirpes from time to time living for ninety years, and then to pay the principal to my descendants then living per stirpes."[97] Professor Jesse Dukeminier of the University of California at Los Angeles opines that it is likely to become popular with millionaires, because up to $1 million per transferor, or $2 million per married couple, can be trans-

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91. *Id.* § 41-15 cmt. G.

92. *See id.*

93. An example of a "later-of" clause is: "Any interest under this instrument must vest not later than the later of (1) twenty-one years after the death of the survivor of my heirs alive at my death or (2) ninety years after the creation of this trust." Part (1) sets termination at the perpetuities period under the common law Rule, while part (2) sets it at a fixed period of ninety years. *See id.* (giving other examples of "later-of" clauses).

94. *Id.*

95. *Id.*

96. *See id.* § 41-15(e).

97. *See* DUKEMINIER & KRIER, *supra* note 18, at 322 problem (d). Other bells and whistles are possible; for example, the beneficiaries could be given nongeneral powers of appointment. *See* DUKEMINIER & JOHANSON, *supra* note 32, at 897-99.

ferred into a dynasty trust and be exempt from federal estate tax and generation-skipping transfer tax for the entire duration.[98] Apparently, financial planners already have begun to market these ninety-year trusts in USRAP jurisdictions.[99] The same dynasty trust would be available under the common-law Rule, except that the duration would need to be the traditional lives in being plus twenty-one years. By astute selection of measuring lives, for example the classic "twelve healthy babies,"[100] a common-law testator easily could ensure at least a ninety-year term for the trust. Nevertheless, the possible psychological appeal of the certainty of ninety years may lead to increased use of dynasty trusts.[101]

Nondonative Transfers

Finally, nondonative transfers are exempted from the USRAP.[102] The period of the Rule is designed to provide a fair limit in family

98. *See* Dukeminier, *New Perils*, *supra* note 32, at 205-10. Actually, gift or estate taxes would not be payable until the principal left the hands of the those who received it at the end of ninety years, so taxes could be postponed for as long as 130 to 200 years after the creation of the trust. DUKEMINIER & JOHANSON, *supra* note 32, at 898. By creating the dynasty trust during life and directing the trustee to buy insurance on the settlor's life, the $1 million generation-skipping transfer (GST) tax exemption could be leveraged into $7 million on a fifty-year-old or $5 million on a sixty-year-old. *Id.* Of course, to avoid a gift tax the settlor would need to make judicious use of the $600,000 exemption equivalent and the $10,000 annual exclusion.

99. *See* Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148, 160 (1995) (discussing the interplay between dynasty trusts and the USRAP).

100. See Leach, *supra* note 20, at 642 for a description of this tactic.

101. For detailed exploration of dynasty trusts and other tax issues under the USRAP, see Dukeminier, *New Perils*, *supra* note 32, at 205-10.

102. *See* N.C. GEN. STAT. § 41-18(1) (Supp. 1995). The statute contains an instructive list of exceptions, and the comment includes a useful discussion of the line between donative and nondonative transfers. Three particular issues deserve mention here:

First, interests arising out of premarital or divorce agreements and the like are not excluded from the USRAP. Even though given in exchange for consideration, the USRAP regards these agreements as essentially domestic and therefore subject to the USRAP. *Id.* § 41-18(1)(a) & cmt. A. Second, nonvested interests in a charity or governmental unit are excluded from the USRAP, "if the nonvested property interest is preceded by an interest" in another charity or governmental unit. *Id.* § 41-18(5). This is the well-known exception for back-to-back charitable gifts.

Professor Paul G. Haskell of the University of North Carolina at Chapel Hill School of Law has inquired as to the meaning of the USRAP charity-to-charity exception. Interview with Paul J. Haskell, Professor of Law, University of North Carolina at Chapel Hill School of Law, in Chapel Hill, N.C. (April 15, 1996). Suppose that the back-to-back charitable gifts are preceded by a life estate in an individual, for example:

O conveys to A for life, then to Charity X, but if Charity X ceases to exist, to Charity Y.

Is the otherwise remote gift to Charity Y valid under § 41-18(5), since there is no reference in § 41-18(5) to cases with preceding life estates? In the authors' opinion, § 41-

dispositions such as wills and trusts, not arm's length commercial deals.[103] The concept of remote vesting designed for future interests does not easily or predictably apply to contract rights created by business organizations.[104] The USRAP exemption for nondonative transfers leads to the next part of this Article.

B. *Sections 41-28 to 41-33: Time Limits on Options in Gross and Other Interests in Land*

As noted above,[105] the USRAP generally excludes from its coverage property interests or arrangements created in nondonative transfers.[106] Nondonative interests are exempted from the USRAP for two

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18(5) applies; it is not expressly limited to present estates to the first charity and the language is broad enough to fit the first hypothetical.

On the other hand, Professor Haskell suggests the following case:

O conveys to A and her heirs, but if the property ceases to be used for a farm, then to Charity X, but if Charity X ceases to exist to Charity Y.

Putting aside the effects of new North Carolina General Statutes §§ 41-28 through 41-33, *see infra* notes 105-30 and accompanying text, are the gifts to Charities X and Y protected by section 41-18(5)? In the authors' opinion, they are not, because the gift to the first charity is remote. The purpose of the back-to-back charity exemption is to save a second gift to charity where the first gift to charity is valid, on the theory that if property may be devoted forever to one charity, it ought to be allowed to be devoted forever to two charities. We concede, however, that the statutory language does not resolve the issue. The Restatement (Second) of Property indicates that the charitable gifts in the first hypothetical would be good, but the charitable gifts in the second would be remote. RESTATEMENT, *supra* note 18, § 1.6 cmts. b & d.

Third, nonvested interests in employee benefit plans are excluded from the USRAP. N.C. GEN. STAT. § 41-18(6) (Supp. 1995). This is consistent with existing statutory provision on employee trusts, *see id.* § 36A-6, as well the USRAP exclusion for arrangements "not subject to the common-law rule against perpetuities or . . . excluded by another statute of this State." *Id.* § 41-18(7).

103. *See* Link, *supra* note 4, at 727-51 (discussing policies underlying the Rule Against Perpetuities).

104. *See id.* at 753-54 (identifying the interests subject to the common-law Rule Against Perpetuities in North Carolina).

105. *See supra* notes 102-04 and accompanying text.

106. *See* N.C. GEN. STAT. § 41-18(1) & cmt. A. (Supp. 1995). The new law also excludes any commercial agreement relating to interest in oil, gas, or minerals, so as to avoid interfering with bona fide commercial arrangements in the mineral industries. *See id.* § 41-29.

The usage "nondonative" transfers may appear novel to some readers. It translates more or less to "commercial," and is employed here because it is coming into standard usage. For example, the Restatement (Second) of the Law of Property, dealing with such matters as perpetuities, restraints on alienation, powers of appointment and class gifts, was subtitled "Donative Transfers." A new restatement project to restate the rules of construction for wills and trusts as well as to survey the entire law of wills, class gifts, and powers of appointment is similarly subtitled "Donative Transfers." As noted in the Official Comment to the new statute, the line between donative and nondonative transfers defies easy demarcation, but the essence of "donative" is a family wealth transfer, while "nondonative" connotes a commercial transaction. *See id.* § 41-18 cmt. A.

reasons: The first reason is that the measuring period, which is a fair compromise in wills and trusts between the desires of a testator or settlor to tie up his or her property forever and the desires of his or her family to be able to enjoy and consume the property immediately,[107] is wholly inappropriate for commercial transactions, where completely different policies are at work. The second reason is that the concept of remoteness of vesting is unpredictable and difficult to apply to commercial interests. For example, if a corporation holds a presently exercisable option, is the option presently "vested" or does it "vest" only upon exercise?

Since the USRAP exempts nondonative interests from the Rule Against Perpetuities, the drafters of the North Carolina perpetuities reform legislation deemed it best to answer the question of what standards apply to the duration of these interests. A statutory answer to this question is particularly desirable in North Carolina, where the possible applicability of the common-law Rule has been frequently litigated, with unpredictable results.[108] The new nondonative transfer provisions are based on a uniform act provided by the Joint Editorial Board for the Uniform Probate Code (UPC), the sponsors of the USRAP.[109] They incorporate features of "reverter acts" enacted in some states,[110] and can fairly be described as the best and most comprehensive solution for nondonative transfers yet enacted by any state.[111]

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107. The common-law period of lives in being plus twenty-one years is often regarded as a narrow limit, but in fact it is fairly generous. It allows the transferor to provide for those whom he or she knows (lives in being) and allows twenty-one additional years to cover the minority of their children.

108. *See generally* Link, *supra* note 4, at 804-17 (describing the trials and tribulations experienced by the North Carolina courts as they sought to apply the Rule Against Perpetuities to new and old situations, winding up with a variety of anomalous results).

109. *See* N.C. GEN. STAT. ch. 41, art. 3, cmt. (Supp. 1995). The nondonative transfers act has not yet been approved by the National Conference of Commissioners on Uniform State Laws. It may or may not be presented for approval in the future. The nondonative transfers draft may have been omitted from the USRAP because of some concern that inclusion might jeopardize enactment of the basic USRAP. *Cf.* N.C. GEN. STAT. § 41-18 cmt. A (Supp. 1995).

110. *See, e.g.*, ILL. ANN. STAT. ch. 765, para. 305/4 (Smith-Hurd 1993).

111. As with the USRAP, the drafters of the uniform act upon which new §§ 41-28 to 41-33 were based also prepared a draft set of official comments to accompany the act. Those comments are not widely available, but they are very helpful and almost essential to an understanding of the act. The Trusts Drafting Committee therefore included in the legislation a section authorizing the Revisor of Statutes to print comments in the General Statutes, and the draft official comments have been printed with the Act. *See* N.C. GEN. STAT. ch. 41, art. 3, cmt. (Supp. 1995).

In general, the new legislation substitutes a simple thirty-year period[112] as the governing period for the validity of options in gross,[113] leases to commence in the future,[114] and nonvested easements.[115] If an option is exercised or a lease commences or the nonvested easement vests within thirty years, it is valid. If the relevant event does not occur within thirty years, the commercial interest simply becomes invalid at that time.

The blanket thirty-year period under the USRAP replaces any reasonableness inquiry, as well as any perpetuities analysis. Thus, the compromise of implying a reasonable time for the exercise of an option when the instrument is silent as to duration[116] is replaced by the thirty-year period. Like the virtues of the USRAP in the traditional wills and trusts setting, this provision saves options and preemptive rights from early invalidity because of the possibility of exercise beyond the perpetuities period and grants parties thirty years in which to exercise their property rights. This allows parties to wait-and-see if the option or preemptive right will be used rather than immediately holding such an interest invalid on the possibility it might not be used.

For possibilities of reverter, rights of entry, and executory interests, the drafters followed a similar approach, except that they chose a period of sixty years.[117] "Reverter acts" in other states have chosen periods of thirty, forty, and sixty years as limits on the duration of ancient reversionary interests.[118] The UPC draft period was a period

112. The UPC draft bracketed the period of thirty years. (The use of brackets around a time period is a Uniform Law Commissions convention indicating that the Commissioners recommend the period but do not feel strongly that state-to-state uniformity is essential.) The North Carolina drafters retained that period, by analogy to the period of the North Carolina Marketable Title Act. *See* N.C. GEN. STAT. §§ 47B-1 to -9 (1984). However, the Marketable Title Act does not automatically terminate the real property interests to which it applies at the end of thirty years; instead, the Act requires the owner of the interest to re-record it within thirty years to preserve its validity for another thirty years, and so on. *Id.* § 47B-4(a).

113. N.C. GEN. STAT. § 41-29 (Supp. 1995).

114. *Id.* § 41-30.

115. *Id.* § 41-31.

116. *See* Rodin v. Merritt, 48 N.C. App. 64, 71, 268 S.E.2d 539, 543-44, *disc. review denied*, 301 N.C. 402, 274 S.E.2d 226 (1980), *and motion to reconsider denied*, 274 S.E.2d 231 (N.C. 1981); *infra* notes 218-24 and accompanying text.

117. It should be noted that reversions—the third type of future interest left in a transferor—continue to be regarded as vested and are therefore not subject to the USRAP or the nondonative transfers bill. *See supra* note 17.

Section 41-28 of the North Carolina General Statutes, a helpful section not included in the UPC draft, defines the terms of art referred to in the nondonative transfer provisions. N.C. GEN. STAT. § 41-28 (Supp. 1995). Additional guidance as to the meaning of these terms may be found in the comments to the UPC draft. *See id.*, ch. 41, art. 3 cmt.

118. *See, e.g.*, William F. Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517, 527-31.

of thirty years enclosed in brackets, which is the convention used to indicate that the Uniform Laws Commissioners suggested thirty years but did not feel strongly that uniformity on the period from state-to-state was essential. The greater period of sixty years was chosen for North Carolina because of the traditional significance of reversionary interests, particularly for charitable gifts.[119] Charitable gifts of land often retain reversionary interests for the donor, and the drafters wanted to preserve a fairly long lifetime for these interests, so as not to discourage charitable gifts.[120]

The sixty-year provision will further the free alienability of land. For example, if A transfers Blackacre to B and his heirs so long as Blackacre is used as a farm, A retains a possibility of reverter. Without the new statute, A's interest would continue forever unaffected by the Rule Against Perpetuities because of the traditional view that possibilities of reverter in the grantor are presently vested and therefore not subject to the Rule.[121] Such a restriction on land limits the pool of willing buyers, decreases the value of the land if a market is found, and makes it extremely difficult to obtain financing with the land as security, meaning that no improvements will be made to the land. However, under the new law, A's interest continues sixty years and no longer. If the property is still being used as a farm at the end of sixty

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119. *See* SIMES & SMITH, *supra* note 20, §§ 1279-80.

120. *See generally* LEWIS M. SIMES, *The Dead Hand Achieves Immortality: Gifts to Charities*, *in* PUBLIC POLICY AND THE DEAD HAND 110 (1955) (discussing the disparate perpetuities treatment given to charitable trusts).

121. *See* Link, *supra* note 4, at 754. In contrast, the English view is that possibilities of reverter and rights of entry (but not reversions) are subject to the Rule Against Perpetuities, since they are essentially contingent and tie up the use of land. *See* DUKEMINIER & KRIER, *supra* note 18, at 307. The traditional American exemption of possibilities of reverter and rights of entry from the Rule, while executory interests in third parties are potentially subject to the Rule, gave an advantage to the drafter who was clever enough to use two instruments. For example, if a grantor attempted the following conveyance, the executory interest in C was remote:

> A transfers to B and his heirs so long as Blackacre is used for a farm, then to C and her heirs.
>
> But if the grantor was clever, the desired result could be achieved as follows:
>
> First: A transfers to B and his heirs so long as Blackacre is used for a farm. This leaves a (valid) possibility of reverter in A.
>
> Second: A transfers his possibility of reverter to C and her heirs. C is regarded as owning A's (valid) possibility of reverter.
>
> The desired result could also be achieved as follows:
>
> First: A transfers to C and her heirs in fee simple absolute. This gives C a fee simple absolute.
>
> Second: C transfers to B and his heirs so long as the property is used for a farm. This leaves a (valid) possibility of reverter in C.

Cf. DUKEMINIER & KRIER, *supra* note 18, at 302 (setting forth as examples failed devises attempting to accomplish the above transfer).

years, B owns a fee simple absolute as if there had never been any restriction on the use of his land.

Rights of entry are treated the same as possibilities of reverter. For example, if A transfers Blackacre to B and his heirs, but if Blackacre ceases to be used as a farm, A and his heirs may reenter and repossess as of A's former estate, A retains a right of entry. The difference from a possibility of reverter is that the reversion is not automatic; A must reenter for title to revert. At common law, the right of entry was not subject to the Rule.[122] Under new section 41-32, A's interest is good for sixty years and if at the end of that period no reentry has been made, B owns in fee simple absolute.[123]

In sum, the new law places a sixty-year limit on possibilities of reverter and rights of entry that previously were of potentially unlimited duration. There is another aspect of the new legislation that in effect expands the validity of a different type of future interest in order to give it consistent treatment with possibilities of reverter and rights of entry. For executory interests, a type of future interest in transferees, not the transferor, the sixty-year provision may have a validating effect. For example, if A transfers Blackacre to B and his heirs so long as Blackacre is used for a farm, then to C and her heirs, under the common-law Rule Against Perpetuities the executory interest in C is remote and void *ab initio*.[124] Senate Bill 84, however, validates the gift to C for sixty years.[125] If at the end of that period the property is still being used for a farm, B's interest ripens into a fee simple absolute.[126]

These provisions answer a criticism that has been made of the USRAP: in a state that has enacted the USRAP and, for example, a thirty-year reverter act, the limits of the reverter act could be avoided by creating a remote executory interest, which would be subject to the USRAP ninety-year wait-and-see, then having the holder of the executory interest transfer it to the original grantor. In the grantor's hands, the executory interest would still be good for the USRAP ninety years, not the reverter act's thirty years. The perpetuities re-

122. *See* SIMES, *supra* note 120, at 70.

123. N.C. GEN. STAT. § 41-32 (Supp. 1995).

124. See *supra* pp. 1792-93.

125. N.C. GEN. STAT. § 41-32 (Supp. 1995).

126. Senate Bill 84 operates to restrict the duration of some executory interests. Formerly, executory interests could be created to last longer than sixty years, provided the drafter was prescient enough to limit the interest to lives in being plus twenty-one years. Under new section 41-32, such an executory interest would be good only for sixty years, not for the potentially longer period of lives in being plus twenty-one years. N.C. GEN. STAT. § 41-32(a) (Supp. 1995).

forms eliminate this ploy; reverter interests and executory interests alike are subject to a statutory sixty-year limit.[127]

Section 41-32 does not apply to interests in charities and governmental entities that are exempt from the USRAP.[128] This codifies the charity-to-charity exception of the common law, giving a clear answer to a question which had been discussed in North Carolina cases, but never squarely adopted.[129] Thus, if A devises Blackacre to First Baptist Church so long as it remains a church, and if First Baptist Church dissolves, then to the United Way, the new statute would not limit the executory interest in the United Way to sixty years. Since both gifts involve charities, the USRAP exempts them from its provisions in an effort to encourage charitable contributions and to ensure that the testator's charitable wishes are met.[130] If at any time in the future First Baptist Church were to cease being a church, the United Way would have the right to Blackacre.

Certainty and simplicity are the greatest successes of the statute regulating options in gross and other similar interests. Any interest falling within the statutory definition is subject to an identifiable period of time in which the interest is valid. Gone is the guesswork of finding a measuring life in a commercial setting, as is the dead hand of perpetual reversionary interests in long-dead parties.

C. *Sections 36A-145 to 36A-148: Honorary Trusts, Trusts for Pets, and Trusts for Cemetery Lots*

The Trusts Drafting Committee also turned its attention to the area of so-called honorary trusts, typically those to provide care of a cemetery lot, care of a pet, or the saying of masses for the soul of the testator or another person.[131] Under the common law these are not valid as charitable trusts because they do not fit traditional charitable purposes or benefit the public as a whole, nor are they valid as private

127. N.C. GEN. STAT. § 41-32(a) (Supp. 1995).

128. *Id.* § 41-32(b). The nondonative transfers provisions also exempt agreements relating solely to interests in oil, gas, or minerals. N.C. GEN. STAT. §§ 41-29, -30, -32 (Supp. 1995). Surprisingly, this exemption was not the result of lobbying by the oil and gas industry. Rather, it was part of the draft provided by the UPC Reporter, and reflected his desire not to upset bona fide commercial transactions in oil and gas. Telephone Interview with Professor Lawrence W. Waggoner, Reporter for the Uniform Probate Code (June 4, 1991).

129. *See infra* text accompanying notes 253-58.

130. The usual rationale for validity is that since property may be given to one charity forever, there is no significant difference in giving property to two successive charities forever.

131. *See* N.C. GEN. STAT. §§ 36A-145 to -148 (1995).

express trusts, because they lack definite human beneficiaries.[132] Nevertheless, the trustee often is allowed to perform the trust, hence the term "honorary," but cannot be compelled to do so. There is very little North Carolina case law on honorary trusts,[133] but sometimes they are challenged on perpetuities or similar theories.

New North Carolina General Statutes section 36A-145, enacted by Senate Bill 85, generally allows the trustee to perform honorary trusts for twenty-one years. This section is similar but not identical to current UPC section 2-907(a).[134] Section 36A-146 validates trusts for cemetery lots.[135] The section attempts to provide a comprehensive listing of potential arrangements and to anticipate and reject potential theoretical challenges to these arrangements,[136] while requiring compliance with existing North Carolina law[137] on cemetery lots. Section 36A-147 is based on a 1990 UPC section and validates trusts to provide care for pets.[138] It is somewhat similar to current UPC sections 2-907(b) and (c).[139] The new section does not allow the trust to continue for the animal's offspring, but it does allow the trust to continue for the animal's life, even if it should exceed twenty-one years.[140] Sec-

132. *See* PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 268-69 (2d ed. 1994).

133. *See generally* Gold v. Price, 24 N.C. App. 660, 211 S.E.2d 803, *cert. denied*, 287 N.C. 259, 214 S.E.2d 430 (1975) (invalidating a provision of a holographic will attempting to create a trust to care for testatrix's grave, where she did not provide any funds to maintain the grave).

134. *See* N.C. GEN. STAT. § 36A-145 cmt. (1995).

135. *Id.* § 36A-146. The section has no counterpart in the UPC. *See* N.C. GEN. STAT. ch. 36A-145 cmt. The Trusts Drafting Committee thought it advisable to deal specifically with trusts for cemetery lots and to validate them. *See* Memorandum, *supra* note 14, at 6.

136. N.C. GEN. STAT. § 36A-146 (1995).

137. *See* N.C. GEN. STAT. § 28A-19-10 (1984); N.C. GEN. STAT. §§ 65-7 to -12 (1994); *id.* §§ 65-46 to -73.

138. *Cf.* U.P.C. § 2-907 (1990).

139. *Cf. id.* § 2-907(b), (c).

140. N.C. GEN. STAT. § 36A-147(b), (c) (1995). The section provides for distribution of any unexpended trust property at the animal's death as directed in the trust or will, but if no taker is provided by the trust or will, to the transferor or "the transferor's heirs, determined as of the date of the transferor's death under Chapter 29 of the General Statutes." *Id.*

The phrase "determined as of the date of the transferor's death" was added to the draft UPC language "the transferor's heirs" at the suggestion of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association in order to avoid any question as to whether the transferor's heirs were to be determined as of the transferor's death or as of the date of termination of the trust. The time of the transferor's death is the usual meaning of the word "heirs," and is the meaning intended by the Trusts Drafting Committee and the meaning a court would likely ascribe to the word. Nevertheless, the time of termination of the trust would not be an impossible reading of the term, given that the time of distribution might be a time after the transferor's death. The Fiduciary Law Section thought, and the Trusts Drafting Committee agreed, that for purposes of consistency and

tion 36A-148; providing for termination of small trusts with corpora less than $100, was included at the suggestion of the Clerks of Court, who generally have jurisdiction over trusts for pets under new section 36A-147.[141] North Carolina General Statutes section 65-9 was amended to be consistent with the trust termination provision.[142]

III. Application of the New Statutes to Recent North Carolina Case Law

A. *Traditional Rule Against Perpetuities Cases*

The history of Rule Against Perpetuities litigation in North Carolina is both lengthy and convoluted. A 1979 article collected the many (and often complex) North Carolina cases on perpetuities.[143] In the decade and a half since 1979, the flow of perpetuities cases has continued: about twenty-six reported cases have dealt with the Rule Against Perpetuities in one fashion or another. Of those cases, eight have dealt with the Rule in its intended context of donative transfers (e.g., wills and trusts).

The difficulties in applying the Rule in its intended contexts—wills and trusts—are illustrated by the North Carolina Supreme Court's prominent decision in *Joyner v. Duncan*,[144] which involved interests under a testamentary trust.[145] The trust gave a right to the income from the trust for life first to Edwin Duncan (the testator's son) and then to Edwin's widow.[146] Following these interests, the income was payable to the testator's two existing grandchildren, Edwin Jr. and Jane Cannon, for their lives, or to be paid to their children per stirpes when either died.[147] These income interests are valid under the Rule because they are gifts to people in existence at the testator's death or to their children for whom they are lives in being. The principal was to be paid out to the class of Edwin's children in $5000 incre-

simplicity it would be best to make it absolutely clear that status as an heir would be determined as of the transferor's death, rather than leaving open the possibility that there would have to be the trouble and expense of a new determination of heirship at some time after the transferor's actual death, especially since most of these trusts for pets will not last very long and changes in the heirship would not be likely. Letter from Ronald C. Link, Chair, Trusts Drafting Committee, to Floyd M. Lewis, Revisor of Statutes (Oct. 7, 1994) (on file with the authors).

141. N.C. Gen. Stat. § 36A-148 (1995).

142. *Id.* § 65-9 (1994) (allowing funds to be held perpetually for such purpose).

143. *See* Link, *supra* note 4.

144. 299 N.C. 565, 264 S.E.2d 76 (1980).

145. In testamentary trusts, the period under the Rule Against Perpetuities begins to run when the testator dies. *See* Simes & Smith, *supra* note 20, § 1226.

146. *Joyner*, 299 N.C. at 570-71, 264 S.E.2d at 82.

147. *Id.* at 571, 264 S.E.2d at 83.

ments when each grandchild reached age twenty-five and every five years thereafter until death.[148] The court erroneously upheld the interests in the principal, claiming that Edwin's children were given vested interests subject to open with enjoyment postponed.[149] However, the accurate construction of such interests would be that they are bequests contingent on the beneficiaries reaching age twenty-five, which could occur beyond the period of the Rule.[150] The final interest created under the trust was an educational allowance of $1000 to be paid to each great-grandchild for college for as long as the great-grandchild remained in good academic standing.[151] The court held that this was a class gift vested at birth and that the testator did not intend to include hypothetical after-born grandchildren and their children, in essence ignoring traditional perpetuities analysis based on what might happen.[152] Although the court was incorrect in sustaining

148. *Id.* at 572-73, 264 S.E.2d at 83-84.

149. *Id.* at 575, 264 S.E.2d at 85.

150. Perpetuities law has always distinguished gifts contingent *on reaching* a given age from those gifts that are *payable* at a given age which vest immediately. The Rule invalidates the following devise: "To testator's son, A, for life, at A's death to A's children if they reach 25," while validating the following: "To testator's son, A, for life, at A's death to A's children to be paid when they reach 25." *See* W. Barton Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 HARV. L. REV. 1329, 1332-38 (1938).

151. *Joyner*, 299 N.C. at 575-76, 264 S.E.2d at 85. In the event that the great-grandchild did not remain in good academic standing, the allocated income was to be added to the corpus. *Id.*

152. *Id.* at 576-78, 264 S.E.2d at 86-87. The court reasoned that all the children of Edwin Jr. and Jane (grandchildren of the testator and lives in being at the testator's death) would be born within their parents' lives. *Id.* at 578, 264 S.E.2d at 87. These children would be the great-grandchildren of the testator. The problem with this interest stems from a possible event: Bessie Lee and Edwin Sr. might give birth to a child after the testator's death, who might give birth to a child or children (a great-grandchild of the testator) after the period of the Rule. This event did not occur and thus this interest would be valid under wait-and-see principles although invalid under traditional principles, which rely on possible, not actual, events; any hypothetical violation of the Rule, regardless of how unlikely it is, invalidates an interest. *See* Jee v. Audley, 29 Eng. Rep. 1186, 1187-88 (Ch. 1787) (holding that because after-born children were a possibility for a couple over 70 years old vesting of their present children's interests was impossible within the period of the Rule Against Perpetuities); Leach, *supra* note 20, at 642-43 ("[A] future interest is invalid unless it is absolutely certain that it must vest within the period of perpetuities. . . . It is immaterial that the contingencies actually do occur within the permissible period or actually have occurred when the validity of the instrument is first litigated."); Leach, *supra* note 150, at 1338-46 (discussing anomalous results in perpetuities law, including *Jee*). It was at this point that the court relied on the presumption that a testator intended a valid disposition of his or her property, which the courts should seek to effectuate. The court also attempted to question the testator's meaning behind his use of the term "great-grandchildren" in this gift as if it would mean something different to him than the average reader. For example, the court excluded adoptees from the potential class of "great-grandchildren." Likewise, the court excluded an indefinite line of descendants from the class. *Joyner*, 299 N.C. at 576-78, 264 S.E.2d at 85-87.

an interest clearly violative of the Rule, the case is nevertheless valuable for its thorough discussion of numerous aspects of North Carolina perpetuities law.[153]

Applying the USRAP to some of the interests in *Joyner v. Duncan*, the income interests in the testator's son, his son's widow, and the testator's grandchildren would remain valid. The interests in the principal, although validated by the court erroneously,[154] likely would be validated because the testator's son was forty-eight years old when the testator died; any grandchild of the testator would almost certainly reach age twenty-five within ninety years of the testator's death. Similarly, a provision to distribute trust property to a testator's children or grandchildren if " 'any . . . come to suffering, in any other way, save by idleness, drunkenness, or anything of the kind, so as to become an object of charity, I want the said executor to give a part of this to such child or grandchild' " was held invalid under traditional perpetuities doctrine since distribution for a grandchild might occur more than twenty-one years after the testator's death.[155] These gifts would be allowed ninety years to vest under the USRAP.

In *Wing v. Wachovia Bank & Trust Co., N.A.*,[156] the North Carolina Court of Appeals examined the interests created by a testamentary trust divided among the testator's sister, two brothers, eleven named nieces and nephews, twelve named great-nieces and great-nephews, and any great-niece or great-nephew born within twenty-one years of the testator's death.[157] The testator included a saving

153. The real reason for the decision may have been that validation of the generation-skipping trust saved the family substantial estate taxes. One suspects that the family members who claimed that the trust violated the common-law Rule were only nominal objectors and were not truly prejudiced by validation of the trust. In the end, a third child was not born to Edwin Sr. and Bessie Lee Duncan, so all great-grandchildren were able to point to a life in being to validate their interests, which would validate the interests under the USRAP's wait-and-see ninety-year period.

154. For a critique of *Joyner*, see *supra* notes 149-53 and accompanying text.

155. Moore v. Moore, 59 N.C. (6 Jones Eq.) 141, 141-42 (1860) (quoting the will of Jesse Moore). For a discussion of this case under traditional perpetuities analysis, see Link, *supra* note 4, at 760.

156. 44 N.C. App. 402, 261 S.E.2d 279, *aff'd in part*, 301 N.C. 456, 272 S.E.2d 90 (1980). For additional treatment of this case, see Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 646-52 (1988).

157. For a discussion of the validity of similar provisions relating to the period of perpetuities, see Leach, *supra* note 20, at 640-42. Professor Leach, like the *Wing* court, agrees that a testamentary gift "to all descendants of mine who shall be born within twenty-one years after my death" is valid, as is a gift "to my grandchildren who shall reach the age of twenty-one," since all grandchildren must be born within the lifetime of the testator's children, who are necessarily all lives in being at the death of the testator. *Id.* at 641. However, an inter vivos trust payable to "my grandchildren who shall reach age twenty-one," is violative of the Rule since the testator may have other children, not lives in being at the

clause to avoid perpetuities violations, under which the trust ceased to exist beyond the lives of any niece or nephew, or any great-niece or great-nephew, alive at the time of the testator's death.[158] With regard to the trust income, the court held that upon the death of a great-niece or great-nephew, his or her share of the income was to be distributed to his or her beneficiaries or heirs since the testator had not expressed a condition of survivorship.[159] With respect to distribution of the corpus, the court reversed the trial court, holding that the corpus was to be distributed to the testator's intestate takers—his brothers and sister living at his death and the three children of his predeceased brother—with their interests postponed until the trust terminated.[160]

The North Carolina Supreme Court granted discretionary review to settle conclusively the disposition of the trust corpus.[161] After identifying two possible constructions of the testator's silence on the distribution of the corpus, the court chose a reading of the testator's entire

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creation of the trust, who themselves may have children causing a remote vesting of their interests. *Id.*

158. *Wing*, 44 N.C. App. at 405, 261 S.E.2d at 281. Saving clauses are commonly used by experienced lawyers in drafting wills and trusts involving future interests. *See* DUKEMINIER & KRIER, *supra* note 18, at 318 n.4. These insure that the Rule Against Perpetuities will not be violated by remote vesting or by a trust that lasts beyond the period of perpetuities. Although a trust may last beyond the period of perpetuities in some cases, there are too many potential difficulties under property law for the typical lawyer to fully protect against a violation of the Rule. *See* Leach, *supra* note 20, at 671 (suggesting the limitation of trusts to the period of perpetuities to avoid complications).

The *Wing* trust had been before the North Carolina courts twice before. In the first case, the court held that the testator had not intended to include adopted children in Trust Co. v. Andrews, 264 N.C. 531, 537, 142 S.E.2d 182, 187 (1965). The second case held that this trust did not violate the Rule Against Perpetuities. Wing v. Trust Co., 35 N.C. App. 346, 350, 241 S.E.2d 397, 400, *cert. denied*, 295 N.C. 95, 244 S.E.2d 263 (1978). The second case was appealed, and the court of appeals reversed the trial court's opinion in part and affirmed in part.

The suit involved all the necessary parties and trustees to determine distribution upon the death of any great-niece or great-nephew. The trial court concluded that upon the death of a great-niece or great-nephew, the share of income payable to him or her would go to either the legatees of the decedent or the intestate heirs, and the corpus would be split in seventeen equal shares to the great-niece or great-nephew if living or to the legatees or heirs, with final distribution occurring upon the death of the last niece, nephew, great-niece, and great-nephew living at the testator's death. *Wing*, 44 N.C. App. at 406, 261 S.E.2d at 282. The trial court's analysis of distribution of the corpus was reversed by the court of appeals which held that interests in the corpus passed to the intestate takers of the testator, namely one-fourth to his sister, one-fourth to each brother living at his death, and one-fourth to the three children of the brother who had predeceased the testator. *Id.* at 412, 261 S.E.2d at 285.

159. *Wing*, 44 N.C. App. at 413, 261 S.E.2d at 286. The court relied on the testator's handling of the brothers', sister's, nieces' and nephews' interests under the trust which contained provisions in the event that one of them predeceased the others. *Id.*

160. *Id.* at 412, 261 S.E.2d at 285.

161. 301 N.C. 456, 272 S.E.2d 90 (1980).

dispositive plan to imply[162] a distribution of the trust corpus through the will to the seventeen natural-born nieces and nephews of the testator.[163] In conclusion, the court addressed the acceptable duration of the trust in explaining the testator's use of a saving clause written at a time when North Carolina law required that a trust for a private purpose terminate within the perpetuities period.[164] The court used the saving clause as evidence to support the testator's desire to protect the interests of his great-nieces and great-nephews rather than limit them.[165] These interests continue to be valid under the USRAP because the saving clause terminates the trust within the perpetuities period.

Class gifts—as in *Joyner* and *Wing*—have significant potential for perpetuities violations, leading some scholars to caution lawyers to identify beneficiaries by name rather than rely on a class designation.[166] For a class gift to be valid, future interests in all members of the class must vest within the period of the Rule Against Perpetuities; otherwise, the entire gift fails even though some members fulfilled the conditions within the period.[167] The "rule of convenience" artificially closes class membership when a gift is qualified to be distributed.[168] Under the USRAP class gifts are more likely to be validated, since in most cases all the class members become eligible to take their interests within the perpetuities period and what-might-have-been is not considered. In the event that all members of a class do not become eligible for distribution within the USRAP's ninety-year period, the court can reform the interest to include only those eligible for distribution at the end of ninety years.

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162. It is commonly said that gifts by implication are neither common nor favored. In the absence of a clear dispositive intention or plan, it is unlikely that courts will imply such a gift. *See, e.g.*, Burney v. Holloway, 225 N.C. 633, 637, 36 S.E.2d 5, 8 (1945) (stating that a gift by implication cannot rest on mere conjecture).

163. *Wing*, 301 N.C. at 462, 272 S.E.2d at 95. This gave each of the natural born nieces and nephews an equal share in the trust corpus. The construction chosen by the court of appeals was that the testator's silence might indicate his intention that the corpus not be disposed of by the will. *Id.*

164. *Id.* at 465-66, 272 S.E.2d at 97. For the development of North Carolina law in this area, see Link, *supra* note 4, at 793-804.

165. *Wing*, 301 N.C. at 466, 272 S.E.2d at 97.

166. *See, e.g.*, Leach, *supra* note 20, at 670.

167. This is known as the all-or-nothing rule in class gifts; a class gift must vest or fail as a unit. For a discussion of this rule, see SIMES & SMITH, *supra* note 20, § 1265; Leach, *supra* note 20, at 648-51.

168. The class may close at the testator's death if distribution is to take place at that time. Otherwise, class closure occurs when any member is entitled to distribution. *See* Cole v. Cole, 229 N.C. 757, 760, 51 S.E.2d 491, 493 (1949).

In *Sherrod v. Any Child or Children*,[169] the court of appeals held that a gift of a farm in trust to two granddaughters and any unborn children of the testator's son until they reached age thirty did not violate the Rule Against Perpetuities as all interests would vest within twenty-one years of a life in being, namely the son.[170] The court relied on *Wise v. Leonhardt*[171] to limit the class of takers to those alive at the testator's death.[172] *Wise* held that when real property was involved and its distribution was postponed to a later date, the class closed at the testator's death, not at the date of distribution, unless there was an intervening life estate.[173] Thus, in *Sherrod*, the members of the class held vested interests in the trust property with enjoyment postponed at the testator's death, and the Rule Against Perpetuities was not violated.[174] These trust interests would continue to be valid under the USRAP since all interests would vest within the period of perpetuities, although the enjoyment of the gifts was possibly postponed beyond the perpetuities period.

Likewise, the court of appeals had difficulty construing class gifts under a will in *Thornhill v. Riegg*.[175] A guiding beacon to courts in perpetuities cases is the construction of the interests to avoid invalidity.[176] However, in its opinion, the court of appeals seemingly mis-

169. 65 N.C. App. 252, 308 S.E.2d 904 (1983), *aff'd as modified*, 312 N.C. 74, 320 S.E.2d 669 (1984).

170. *Id.* at 259, 308 S.E.2d at 909.

171. 128 N.C. 289, 38 S.E. 892 (1901).

172. *Sherrod*, 65 N.C. App. at 258, 308 S.E.2d at 908.

173. 128 N.C. at 290-91, 38 S.E. at 892. In *Wise*, class closure operated to the disadvantage of the testator's son, who might have had children by the date of distribution, but did not have any at the testator's death. The *Wise* rule was grounded in the belief that title had to be vested in a presently ascertainable group of people to prevent the inalienability and unmarketability of land if the class remained open for the lives of the testator's children. *See Sherrod*, 65 N.C. App. at 257, 308 S.E.2d at 907. However, this decision has been criticized by courts on three grounds. First, as this case involved a trust, legal title was at all times held by the trustee and equitable title by the members of the class born prior to the testator's death. The legal title would be alienable by the trustee. Second, because distribution was postponed to a later date, keeping the class open would cause no hardship. Third, keeping the class open satisfies the policy of including as many takers as possible. *Id.* at 257, 308 S.E.2d at 908.

174. *Id.* at 259, 308 S.E.2d at 909. The Rule Against Perpetuities is concerned with remote vesting, not remote enjoyment of property. Even if the court had allowed the class to remain open until distribution, the Rule Against Perpetuities would not have been violated since any child of the testator's son would take a vested interest subject to partial divestment at birth with apparently no condition of survivorship until age thirty. *See id.* at 261, 308 S.E.2d at 910 (Phillips, J., dissenting) (stating that the devise was intended to benefit children of the testator's son regardless of the date of their birth and should have been upheld). For a discussion of vesting and vesting with postponed enjoyment, see SIMES & SMITH, *supra* note 20, §§ 1232-33.

175. 95 N.C. App. 532, 383 S.E.2d 447 (1989).

176. *See* Leach, *supra* note 20, at 657-59; Link, *supra* note 4, at 765-67.

spoke when it said the court should construe a document according to the testator's intention prior to considering the Rule Against Perpetuities.[177] In *Thornhill*, the testator sought to have the trust property divided into two equal shares for his children or the descendants of any deceased child after giving his wife income for life and any support payments as necessary.[178] The testator provided that if a child predeceased him or his wife, that child's interest passed to his or her descendants "when and as they attain the age of twenty-five years."[179] Unfortunately, the court erred in its analysis of this interest, which clearly violates the Rule, when the court categorized the interest as a vested gift with enjoyment postponed.[180] Instead, like the principal interests in *Joyner*, such interests are typically construed as bequests contingent on the legatee attaining twenty-five, not vested until that time.[181] Along with the children's bequests, the testator empowered the trustee to distribute the principal as needed for the "support and

177. *Thornhill*, 95 N.C. App. at 536, 383 S.E.2d at 449. However, in its analysis the court favored a valid construction as under traditional analysis, presuming that the testator intended to comply with the law. *Id.* at 538, 383 S.E.2d at 451.

178. *Id.* at 537-38, 383 S.E.2d at 450. This interest is valid since any interest is vested upon the death of the testator's wife, a life in being. The court construed the term "descendants" to mean children of the testator's children to avoid any possible perpetuities violation; such devises to grandchildren are validated by the lives of their parents, who are necessarily lives in being at the death of the testator. *See also* Wachovia Bank of N.C. v. Willis, 118 N.C. App. 144, 148-49, 454 S.E.2d 293, 296 (1995) (interpreting the term "issue" to mean "perpetual succession of [his] lineal descendants").

179. *Thornhill*, 95 N.C. App. at 539, 383 S.E.2d at 451. Technically, this gift would violate the Rule Against Perpetuities; while a child of the testator is a life in being, that child might have a child immediately prior to his or her death whose interest in the trust property could not vest within twenty-one years of a life in being at the testator's death. Since this grandchild of the testator could be born after the testator's death, there would be no life in being to validate the interest.

180. *Id.* To achieve such an interpretation of this interest, the testator should have said "to be paid at age twenty-five," rather than the provision at issue: "descendants of a child deceased at my death shall receive their share of the trust when and as they attain the age of twenty-five years." *Id.* A gift "when" a person reaches twenty-five is not vested with postponed enjoyment—it is conditioned on reaching twenty-five, as stated in Clobberie's Case, 86 Eng. Rep. 476 (Ch. 1677):

> In one Clobberie's Case it was held, that where one bequeathed a sum of money to a woman, at her age of twenty-one years, or day of marriage, to be paid unto her with interest, and she died before either, that the money should go to her executor; and was so decreed by my Lord Chancellor Fynch [later Lord Nottingham, *see supra* note 19].
>
> But he said, if money were bequeathed to one at his age of twenty-one years; if he dies before that age the money is lost.
>
> On the other side, if money be given to one, to be paid at the age of twenty-one years; though, if the party dies before, it shall go to the executors.

Id. at 476; *see also* W. BARTON LEACH & JAMES K. LOGAN, FUTURE INTERESTS AND ESTATE PLANNING 287 (1961) (discussing the case).

181. *See supra* notes 149-50 and accompanying text.

education" of a descendant of a deceased child. Although the court upheld this interest, it violates the Rule Against Perpetuities.[182] Finally, in the event that any interest in the trust was not distributed to a child of the testator before he or she died, the testator provided that the remaining interest would pass to any descendant per stirpes or in equal shares to the testator's other children or their descendants.[183] The court properly voided this interest because the great-grandchildren definitely were not certain to reach age twenty-five within the perpetuities period, given that they might be born just before the death of all lives in being and have only twenty-one years to reach age twenty-five, an impossibility.[184] Under the USRAP, this gift of discretionary trust property to children or grandchildren would be subject to judicial reformation if the provisions of the trust did not vest within the ninety-year wait-and-see period.

Similarly, in *Coble v. Patterson*,[185] the court correctly held that a holographic will with gifts of trust income to the testator's sisters and their children did not violate the Rule Against Perpetuities since the gifts to the sisters and their children vested immediately upon the death of the testator's wife.[186] Following the decision in *Wing*,[187] the court held that the gift of trust income not limited in time was equivalent to a gift of the principal.[188] These interests, valid under the common-law Rule, would continue to be valid under the new legislation.

B. Nondonative Transfers (Options in Gross, etc.)

Property owners may seek to limit a grantee's ability to alienate the property by placing restrictive provisions in the instrument of conveyance. To prevent property owners from unduly restricting the free alienation of land and other property interests, the courts developed several mechanisms to invalidate conditions and interests against public policy. While clarity and conciseness are desirable in property law,

182. 95 N.C. App. at 539, 383 S.E.2d at 451. The bequest violates the Rule because distribution of principal may occur beyond the perpetuities period, i.e. more than twenty-one years after the death of the testator's child. Interestingly, this provision when related to the next, presumes no interest in the trust property until age twenty-five, not the interpretation espoused by the court.

183. *Id.* at 540, 383 S.E.2d at 451-52.

184. *Id.* at 540, 383 S.E.2d at 452.

185. 114 N.C. App. 447, 442 S.E.2d 119 (1994).

186. *Id.* at 453, 442 S.E.2d at 122.

187. 44 N.C. App. 402, 261 S.E.2d 279, *aff'd in part*, 301 N.C. 456, 272 S.E.2d 90 (1980).

188. *Coble*, 114 N.C. App. at 453, 442 S.E.2d at 122. This principle was also articulated in Wing v. Trust Co., 301 N.C. 456, 465, 272 S.E.2d 90, 97 (1980). For a discussion, see *supra* notes 161-65 and accompanying text.

they are unlikely to be found in this area, for courts often confuse dissimilar concepts such as the doctrine against unreasonable restraints on alienation[189] with traditional perpetuities analysis.

Although the rule against direct restraints on alienation and the Rule Against Perpetuities have similar goals of preserving the marketability and the alienability of property interests,[190] they are distinct in their substance and their operation.[191] The older of the two, the rule against direct restraints on alienation, deals with direct restraints,[192]

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189. *See infra* notes 190-93 and accompanying text.

190. *See* RESTATEMENT, *supra* note 18, div. 1, pt. 1, at 5-11; Leach, *supra* note 20, at 640. There are four principal objections to restraints on alienation. *See* DUKEMINIER & KRIER, *supra* note 18, at 223. First, such restraints make land less marketable, sometimes even unmarketable. Second, such restraints serve to concentrate wealth in the hands of a few. Third, improvements on land are discouraged since the owner cannot sell the property to recoup any investment and banks are unlikely to provide money for improvements without gaining a mortgage as security. Finally, restraints prevent creditors from reaching property when creditors have relied on such security in extending credit. *Id.*

191. Rules governing indirect restraints on alienation, like the Rule Against Perpetuities, provide a definite time frame in which the interest must vest to be valid. Indirect restraints that are too remote will be voided under such a rule, whereas reasonable indirect restraints will not be. *See* SIMES & SMITH, *supra* note 20, § 1116 (discussing the essential differences between these rules and the policy reasons supporting them). The authors note that if the rule were different and all future interests were disallowed, the freedom of disposition of property would be unduly limited. The incidental infringement of alienation is permitted because of the benefits that stem from either the creation of the future interest or a trust. On the other hand, direct restraints limit presently vested property interests, not necessarily future interests. *Id.* A direct restraint on alienation may be invalid without respect to the length of time it lasts if it is unreasonable in other respects. For example, the following restraint would be invalid as a total disabling restraint on alienation regardless of any time limit: O grants Blackacre to A and his heirs and any attempt to transfer any interest in Blackacre by any means is hereby null and void. This restraint would not violate the Rule Against Perpetuities, because A would have a presently vested interest.

192. Disabling restraints are those that "seek to invalidate a later transfer of that interest, in whole or in part . . . ." RESTATEMENT, *supra* note 18, § 3.1; *see* SIMES & SMITH, *supra* note 20, §§ 1131, 1136-46. These restraints are the most restrictive and therefore most objectionable restraints that a grantor can place on the transfer of a property interest. Such restraints are likely to be struck by a court; however, they are commonly accepted in situations where completely free alienation is likely to adversely impact another party's property interests, such as transfer of an equitable interest in a trust, transfer of property involving landlords and tenants, sale of residential property in cooperatives or condominiums, and sale of stock in a close corporation. *See* RESTATEMENT, *supra* note 18, § 3.1 cmt. a. Disabling restraints are treated more restrictively than forfeiture and promissory restraints since they have the greatest adverse affect on free alienation and marketability of land. *See* SIMES & SMITH, *supra* note 20, § 1137.

A forfeiture restraint is a condition placed on a property transfer which either voids or subjects a property interest to termination if a transfer is attempted. RESTATEMENT, *supra* note 18, § 3.2; SIMES & SMITH, *supra* note 20, §§ 1131, 1147-60. Forfeiture restraints are less restrictive than disabling restraints, as alienation is possible, but at a cost. They are more likely to be validated by a court than a disabling restraint. An example of a forfeiture restraint is: "O grants Blackacre to A and his heirs, but if A transfers the property, to

whereas the Rule Against Perpetuities addresses indirect restraints on alienation.[193]

B." Such restraints are often used where disabling restraints are unavailable. *See* RESTATEMENT, *supra* note 18, §3.2 cmt. a.

Promissory restraints, the least restrictive restraint on alienation, are those that condition a property interest with contractual liability in the event that a transfer is made or attempted. *Id.*, § 3.3; SIMES & SMITH, *supra* note 20, §§ 1131, 1161-67. If a person holding an interest subject to a promissory restraint violates the restraint placed on the land, he or she is liable either in damages or equitable relief listed in the instrument transferring the interest. An example is: "O grants Blackacre to A and his heirs, and A promises not to transfer Blackacre during his lifetime." Of the three types of restraints, promissory ones are the most likely to be validated, because they do not take the property from the holder but merely subject him or her to damages for breach of the promise.

The rule against direct restraints provides that if a conveyance of property contains a condition prohibiting the grantee from alienating the property, the condition is void as unreasonable and the property is held in fee simple absolute. RESTATEMENT, *supra* note 18, div. 1, pt. 2, at 142-44 (citing THOMAS LITTLETON, TENURES §§ 360-62 (Eugene Wambaugh ed., 1903)). The Restatement provides for two different rules regulating direct restraints, one for disabling restraints and the other for forfeiture and promissory restraints. According to § 4.1, a disabling restraint is automatically invalid if the restraint makes it impossible to transfer a property interest ever; and in all other cases, validity is possible only after a determination of reasonableness in light of the circumstances. Several rules govern the validity of forfeiture interests. A forfeiture restraint attached to a life estate or an interest for a term of years that terminates upon the end of a person's life is valid. *Id.* § 4.2(1). On the other hand, a forfeiture restraint that makes it impossible to transfer a property interest without the penalty of forfeiture at any time is invalid. *Id.* § 4.2(2). Finally, a forfeiture interest may be validated if it is reasonable in light of the circumstances relating to the granting of the interest. *Id.* § 4.2(3). A promissory restraint is valid if it would be valid under the tests of forfeiture restraints. *Id.* § 4.3. In all cases, the reasonableness of a restraint on alienation is examined from the totality of the circumstances, including the purpose, duration, scope, nature of the restraint, and marketability of the property restrained. *Id.* § 4.2(3); SIMES & SMITH, *supra* note 20, § 1168 (discussing the dominant factors in determining whether a direct restraint on alienation is unacceptable).

The rule operates most restrictively on those interests that totally restrain alienation, and partial restraints on alienation may be upheld. For example, a grantor can limit the group of acceptable transferees or the time frame for alienation, and such restrictions may be upheld. *See* RESTATEMENT, *supra* note 18, §§ 4.1 cmts. a-g, 4.2 cmts. a-y (discussing a variety of issues related to disabling and forfeiture restraints).

193. If a direct restraint unreasonably restricts a grantee's ability to alienate property, the condition is void and the property is conveyed as if the burden never existed. *See* RESTATEMENT, *supra* note 18, § 4.1 cmt. a. Indirect restraints are those that in effect restrain a grantee's ability to alienate his or her property, but were created with some other purpose in mind. SIMES & SMITH, *supra* note 20, § 1112. The most common forms of indirect restraints on alienation are future interests and some forms of trusts.

Indirect restraints are governed primarily by the Rule Against Perpetuities and related rules. *See* RESTATEMENT, *supra* note 18, div. 1, pt. 2, at 143; SIMES & SMITH, *supra* note 20, § 1114 (describing the historical development of the doctrine of illegal restraints). The Rule Against Perpetuities is still a vital part of modern property law despite its complexity and history, because it serves a valid social purpose in preventing perpetual interests in land that make land unmarketable. When the Rule was created, it was believed that if land were taken off the market a reduction in productivity, dead-hand control of property, and concentration of wealth would ensue, all of which were undesirable in England

The application of the Rule Against Perpetuities to nondonative (*i.e.*, commercial) transactions has been particularly nettlesome in North Carolina. Of the twenty-six perpetuities cases in the last decade and a half, seventeen have dealt with nondonative transfers, such as preemptions and options.[194]

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where land was scarce. *See* SIMES & SMITH, *supra* note 20, § 1117 (addressing the policy reasons supporting the various rules favoring the alienability of land and the Rule Against Perpetuities). The inability to alienate land decreases productivity in that an owner unwilling or unable to use the land productively would typically seek to sell the land to a person willing and able to make the land productive. When an owner cannot sell because a future interest causes uncertainty about the title to land, the land will remain unproductive until the condition is satisfied or the future interest vests. *Id.* While some amount of control in the disposition of one's property through creative future interests is acceptable, interests and conditions that are too remote prevent the present owner of land from freely consuming and fully enjoying the property.

During a series of lectures given in 1955, Professor Lewis Simes examined the policies behind the common-law Rule Against Perpetuities. *See* SIMES, *supra* note 120. Professor Simes first suggested protection of alienability to secure productivity as the justification for the Rule. *Id.* at 36. However, he rejected alienability as a satisfactory rationale for the Rule in modern times because: (1) future interests subject to the Rule were nearly always in trusts, where the trustee had the power to alienate the property; (2) shares of corporate stock were often involved in such interests and the corporation always retained the right to alienate its property; (3) in emergencies, judicial sales of property could be compelled to eliminate future interests in the property; (4) legislation, such as a 1925 English statute, provided for a power of sale in many situations involving future interests; and (5) administrative procedures for increased productivity of land were more effective in modern social states. *Id.* at 40-47. Professor Simes found two justifications for the continued vitality of the Rule. First, the Rule balanced the interests of the living and the dead in controlling the disposition of property. *Id.* at 58-59. Second, he felt that property should be controlled by the living rather than the dead. *Id.* at 59-60. He criticized the operation of the Rule for its arbitrary and inequitable results. *Id.* at 63-71. To achieve a more user-friendly, less harsh Rule Against Perpetuities, Professor Simes proposed several reforms: (1) broadly construing interests, consistently with the intent of the testator, to avoid perpetuities violations; (2) using *cy pres* to offset the harshness of the Rule; (3) regulating possibilities of reverter and rights of entry through separate legislation; and (4) eliminating the Rule's distinction between vested and contingent remainders. *Id.* at 74-82. Most of these recommendations are implemented in the new legislation.

194. A preemptive right "requires that, before the property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person." 6 AMERICAN LAW OF PROPERTY § 26.64 (A. James Casner ed., 1952); *see* 6 RICHARD POWELL, THE LAW OF REAL PROPERTY 12-13; SIMES & SMITH, *supra* note 20, § 1154; Thomas W. Christopher, *Options to Purchase Real Property in North Carolina*, 44 N.C. L. REV. 63, 66 (1965). Preemptive rights are also known as rights of first refusal. Until a third party attempts to purchase some property, a preemptive right will not be triggered.

An option, on the other hand, is a right to purchase or otherwise acquire an interest in property at a specified price for a limited period of time. Scholars have considered options to be indirect restraints rather than direct restraints since the primary purpose of an option is to allow a party to purchase land, rather than prevent the alienation of land. *See* SIMES & SMITH, *supra* note 20, § 1154. Thus, if options are subject to any rule, it may be the Rule Against Perpetuities, invalidating any option exercisable beyond the period of the Rule. *Id.* At any time before its expiration, an option may be exercised without any action by a

Perhaps the case most illustrative of the need for reform of North Carolina's law regulating preemptions and options in gross is *Smith v. Mitchell*.[195] In *Smith*, the North Carolina Supreme Court broadened the reach of the common-law Rule Against Perpetuities by holding that the test for the validity of a preemptive right to repurchase land is not whether the preemption is exercisable within a reasonable time, but whether its exercise is limited to a period within the Rule Against Perpetuities.[196] The validity of the preemptive right[197] had been challenged as an unreasonable restraint on alienation, but the court devoted much of its opinion to the Rule Against Perpetuities. The court recognized commercial options as "useful and necessary devices," and stated that the reasonableness of any option or preemptive right was dependent on two considerations: its price determination provisions

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third party. Preemptive rights may be restraints on alienation if they are not reasonable with respect to duration of the right and the price to be paid. RESTATEMENT, *supra* note 18, § 4.4. Preemptive rights are traditionally exempted from coverage under the common-law Rule Against Perpetuities because they often take the form of a vested right in the grantor, like a right of reentry, possibility of reverter, or other reversionary interest. SIMES & SMITH, *supra* note 20, § 1154.

Compared to preemptive rights, options may be even more problematic. Under one view, options are presently vested interests in the grantor, exempt from the Rule Against Perpetuities, but subject to regulation by the rule against restraints on alienation. *See* DUKEMINIER & KRIER, *supra* note 18, at 312. Under another view, options are subject to the Rule Against Perpetuities on the theory that exercise of the option is like the happening of a specified event causing an executory interest to vest in the grantor or the grantor's successors in interest. *See id.*

195. 301 N.C. 58, 269 S.E.2d 608 (1980).

196. *Id.* at 66, 269 S.E.2d at 613. For a variety of views on this issue, see Mazzeo v. Kartman, 560 A.2d 733, 737 (N.J. Super. Ct. App. Div. 1989) (holding that a preemptive option to repurchase land is subject to the Rule Against Perpetuities, but is valid if exercisable within a reasonable time); Izzo v. Brooks, 435 N.Y.S.2d 485, 490-92 (N.Y. App. Div. 1980) (holding that a perpetual fixed-price preemptive option did not violate the rule against direct restraints on alienation, nor the Rule Against Perpetuities, because it was vested subject to defeasance); Gearhart v. West Lumber Co., 90 S.E.2d 10, 11 (Ga. 1955) (holding that a conveyance conditioned on use of the land only for school purposes with a reservation of a right to repurchase violated the Rule Against Perpetuities); *see also* SIMES & SMITH, *supra* note 20, § 1154 n.46 (citing cases with similar holdings).

197. The restrictive covenants at issue were as follows:

> If any future owner of lands herein described shall desire to sell the lands owned by him, he shall offer the parties of the first part the option to repurchase said property at a price no higher than the lowest price he is willing to accept from any other purchaser. Parties of the first part agree to exercise said option or to reject same in writing within 14 days of said offer. This covenant shall be binding on the parties of the first part and their heirs, successors, administrators, and executors or assigns for as long as W. Osmond Smith, Jr. shall live and for 20 years from the date of his death unless sooner rescinded.

Smith, 301 N.C. at 59-60, 269 S.E.2d at 610 (citation omitted). Apparently, the drafter of the preemption was aware of a possible perpetuities challenge, since he limited the duration of the preemption to a life in being (W. Osmond Smith, Jr.) plus twenty years.

and its duration.[198] The *Smith* court decided to adopt what it considered to be a clear rule for determining a reasonable duration of a restraint on alienation—a right exercisable only within the period of the Rule Against Perpetuities.[199] The court noted that such a rule would "avoid lengthy litigation,"[200] despite the reality that few practicing attorneys understand the Rule Against Perpetuities or can identify a period of time within the rule or the relevant measuring lives for any given set of facts. Thus, after *Smith*, a valid preemptive right must be limited to lives in being plus twenty-one years and reflect a price related either to the market value of the property or a price set by the seller.[201]

In the aftermath of the *Smith* decision, a variety of decisions confused the Rule Against Perpetuities and the rule against restraints on alienation. In 1992, in *Village of Pinehurst v. Regional Investments*,[202] the North Carolina Supreme Court ruled that a right of first refusal to purchase sewage and water systems on behalf of Village of Pinehurst

198. *Id.* at 63, 269 S.E.2d at 611 (citing 6 AMERICAN LAW OF PROPERTY, *supra* note 194, § 26.66, at 509). The absence of a reasonable price mechanism may cause a preemption to fail. In Levan v. Eidson, 86 N.C. App. 100, 101, 356 S.E.2d 396, 397 (1987), which involved a right of first refusal over a parcel of land from the defendants if the plaintiffs ever decided to sell it, the court invalidated a contract provision that specified:

> That for and in consideration of the parties of the second part [plaintiffs] having purchased property from the parties of the first part [defendant and her deceased husband], the said parties of the first part do hereby agree and grant unto the parties of the second part the following:
>
> That if at any time the parties of the first part decided to sell their property located on the Southeast corner of U.S. Highway No. 21 and N.C. Road No. 2171, that they will first offer the same for sale to the parties of the second part.

Id. at 101, 356 S.E.2d at 397. Notice that this language in no way includes a reference to a price term, which ultimately invalidates the right of first refusal. The preemptive right does not violate the Rule Against Perpetuities since it appears to apply only to the grantors and grantees, who are lives in being. *Id.* at 102, 356 S.E.2d at 398. In *Levan*, the court held that if a preemptive right does not link the price either to the fair market value of the property or to the seller's price for third parties, the right fails. *Id.*

199. *Smith*, 301 N.C. at 66, 269 S.E.2d at 613.

200. *Id.* For a discussion of the difficulties inherent in determining measuring lives, see *supra* note 18 and accompanying text. In the nondonative transfers context, the determination of measuring lives would seem to be particularly uncertain. In wills and trusts at least there are some obvious candidates (e.g., beneficiaries), but in options, preemptions, and the like there often would be no natural connections to human lives if the parties to the agreement were business entities. Even if the original grantors and grantees were individuals, there would be no other obvious candidates for measuring lives.

201. *Smith*, 301 N.C. at 65, 269 S.E.2d at 613.

202. 330 N.C. 725, 412 S.E.2d 645, *reh'g denied*, 331 N.C. 292, 417 S.E.2d 71 (1992). For additional discussion of the impact of *Village of Pinehurst*, see Alan D. McInnes, Note, Village of Pinehurst v. Regional Invs. of Moore: *Perpetuating the Rule Against Perpetuities in the Realm of Preemptive Rights—North Carolina Refuses to Accept and Exception to the Rule*, 71 N.C. L. REV. 2115 (1993).

residents, which had unlimited duration, violated the Rule Against Perpetuities.[203] Although the preemptive right was part of a commercial, rather than a personal or residential, transaction, the court refused to validate it.[204] To be consistent with *Smith*, the court should have ruled that the right of refusal was an unreasonable restraint on alienation because it was not limited in duration to a reasonable time, namely the perpetuities period of lives in being plus twenty-one years.

In dissent, Justice Meyer challenged the applicability and utility of the Rule Against Perpetuities in the commercial world. Relying on the commonly recognized purpose behind the Rule Against Perpetuities—"to prevent . . . property from being fettered with future interests so remote that the alienability of the land and its marketability would be impaired, preventing its full utilization for the benefit of society at large as well as of its current owners"[205]—Justice Meyer reasoned that this option did not restrain free alienation by the lessor since he could still sell the property at any time as long as the lessee was given the opportunity to purchase the property first.[206] Although he was unable to persuade the rest of the court, Justice Meyer had the better argument in *Village of Pinehurst.*

In the past decade, the North Carolina Court of Appeals has decided a variety of cases involving the Rule Against Perpetuities in the context of preemptive rights. In *Snipes v. Snipes*,[207] the court applied the perpetuities time limit to a right of first refusal in a lease, holding that a right of first refusal not to exceed fifteen years was not an unreasonable restraint on alienation since it fell within the period of the Rule.[208] In *Coxe v. Wyatt*,[209] the court rejected the validity of a pre-

203. *Id.* at 728, 412 S.E.2d at 646.

204. *Id.* at 729, 412 S.E.2d at 646-47.

205. *Id.* at 732, 412 S.E.2d at 648 (Meyer, J., dissenting) (quoting Anderson v. 50 E. 72nd St. Condominium, 505 N.Y.S.2d 101, 103 (N.Y. App. Div. 1986), *appeal dismissed*, 504 N.E.2d 700 (N.Y. 1987)).

206. *Id.* at 735, 412 S.E.2d at 650 (Meyer, J., dissenting). Prior to the supreme court's decision in *Pinehurst*, the court of appeals had ruled that the right of first refusal violated the Rule Against Perpetuities and was void. Village of Pinehurst v. Regional Invs. of Moore, Inc., 97 N.C. App. 114, 117, 387 S.E.2d 222, 224 (1990), *aff'd*, 330 N.C. 725, 412 S.E.2d 645, *reh'g denied*, 331 N.C. 292, 417 S.E.2d 71 (1992). Like the supreme court, the court of appeals' majority seemed to confuse the Rule Against Perpetuities with the rule against restraints on alienation, *see id.* at 117, 387 S.E.2d at 224, and the dissent argued that the Rule Against Perpetuities was inapplicable. *Id.* at 118, 387 S.E.2d at 224-25 (Phillips, J., dissenting). A few months later, the court of appeals addressed other issues in the *Pinehurst* case, including the applicability of the public convenience and necessity test to the transfer of water and sewer franchises and the means of obtaining approval of such a transfer. State *ex rel.* Util. Comm'n v. Pinehurst, 99 N.C. App. 224, 227-30, 393 S.E.2d 111, 113-15 (1990), *aff'd*, 331 N.C. 278, 415 S.E.2d 199 (1992).

207. 55 N.C. App. 498, 286 S.E.2d 591, *aff'd*, 306 N.C. 373, 293 S.E.2d 187 (1982).

208. *Id.* at 502-03, 286 S.E.2d at 594.

emptive right that was of no stated duration as violative of the Rule Against Perpetuities and therefore legally insignificant,[210] an approach relied upon in *Mizell v. Greensboro Jaycees*.[211] In *Nichols v. Lake Toxaway Co.*,[212] a right of first refusal limited in duration to the life of the grantee was held not to violate the Rule Against Perpetuities since it would be exercised or not within some life in being. In reaching its decision, the *Nichols* court employed two constructional rules. First, a more specific provision will control a more general one.[213] That rule tied the preemptive right to the life of the grantee even though more general language in the deed left the duration of the right open. Second, a construction that validates an instrument will be preferred whenever possible.[214] In this case, linking the preemptive right to the life of the grantee was preferred.[215]

In an attempt to save preemptive rights from the Rule Against Perpetuities, some courts have employed the wait-and-see doctrine. The North Carolina Court of Appeals rejected this doctrine in *Peele v. Wilson County Board of Education*[216] based on its interpretation that *Smith* had removed the validity of preemptive rights from the question of what was reasonable under the circumstances.[217]

In another line of cases, both the court of appeals and federal courts have resisted applying the Rule Against Perpetuities to commercial transactions and contractual performance. In *Rodin v. Merritt*,[218] a contract for the sale of land was conditioned upon rezoning

209. 83 N.C. App. 131, 349 S.E.2d 75 (1986), *disc. review denied*, 319 N.C. 103, 353 S.E.2d 107 (1987).

210. *Id.* at 133-34, 349 S.E.2d at 77. Note that the court did not consider implying that the parties intended that the right of first refusal last only a reasonable period of time, namely twenty-one years. For discussion of the implications of such a result, see *infra* notes 218-21, 225-26 and accompanying text.

211. 105 N.C. App. 284, 290, 412 S.E.2d 904, 907 (1992). In *Mizell*, Southern Life Insurance Company had conveyed a parcel of real estate to the Greensboro Jaycees-Greensboro Junior Chamber of Commerce, Inc. subject to a right of first refusal limited to 25 years, a duration violative of the Rule Against Perpetuities according to the court. Following the result of *Coxe*, the *Mizell* court disregarded the reference to the right of first refusal in the sale contract with Mizell because the right was legally void and therefore insignificant.

212. 98 N.C. App. 313, 390 S.E.2d 770, *disc. review denied*, 327 N.C. 141, 394 S.E.2d 178 (1990).

213. *Id.* at 317, 390 S.E.2d at 773.

214. *Id.* at 318, 390 S.E.2d at 773.

215. *Id.*

216. 56 N.C. App. 555, 289 S.E.2d 890, *disc. review denied*, 306 N.C. 386, 294 S.E.2d 210 (1982).

217. *Id.* at 560, 289 S.E.2d at 893. For supposed simplicity, the court preferred to limit the duration of preemptive rights to twenty-one years after some life in being at the interest's creation.

218. 48 N.C. App. 64, 268 S.E.2d 539, *disc. review denied*, 301 N.C. 402, 274 S.E.2d 226 (1980), *and motion to reconsider denied*, 274 S.E.2d 231 (N.C. 1981).

and annexation of the land.[219] The seller attempted to back out of the deal on the ground that the rezoning might not take place within a period of any lives in being plus twenty-one years, thus violating the Rule.[220] Judge Morris upheld the contract by reasoning that the parties must have contemplated a reasonable time for performance, and a reasonable time would be less than twenty-one years.[221] Noting that this interest was in gross and thus subject to a twenty-one year period of performance under the Rule Against Perpetuities,[222] Judge Morris examined the policy behind the Rule[223] and discounted the need for such a rule in commercial transactions while supporting its use in non-commercial transactions.[224]

Other cases have followed the reasoning used in *Rodin*. For example, in *Love v. United States*,[225] a federal district court applying North Carolina law recognized that performance under a contract is presumed to be within a reasonable time, which would be not more than twenty-one years.[226] In *Continental Cablevision v. United Broadcasting*,[227] the Fourth Circuit employed similar reasoning in a case decided under Massachusetts law involving Continental Cablevision's right of first refusal for the purchase of assets and stock in United Broadcasting Company, a cable company.[228] The court briefly considered the propriety of applying the Rule Against Perpetuities to a right of first refusal because "[o]f all the options, a right of first refusal is one of the least obnoxious to the policy concerns of the rule."[229] Ultimately, the court sided with the majority of states which had subjected rights of first refusal to the Rule[230] and concluded that a valid right of first refusal was restricted to a reasonable period of time, which would

219. *Id.* at 66-68, 268 S.E.2d at 541-42.

220. *Id.*

221. *Id.* at 71, 268 S.E.2d at 543-44.

222. The court followed standard usage in referring to interests where the twenty-one-year period of the Rule Against Perpetuities was not tied to any life in being as being "in gross," valid only if the contingency must happen within twenty-one years. *Id.* at 68, 268 S.E.2d at 541-42. The lack of measuring lives is common in commercial transactions.

223. For a discussion of the creation of and policy behind the Rule Against Perpetuities, see *supra* notes 17-23 and accompanying text.

224. *Rodin*, 48 N.C. App. at 68-69, 268 S.E.2d at 542.

225. 889 F. Supp. 1548 (E.D.N.C. 1994).

226. *Id.* at 1565-66. The *Love* decision involved a contract for the conveyance of a railroad right-of-way under which the court implied the condition that the railroad track had to be laid within twenty-one years. *Id.* at 1550-51.

227. 873 F.2d 717 (4th Cir. 1989).

228. *Id.* at 718-19.

229. *Id.* at 722 n.11.

230. *See id.* at 722 (citing cases).

be a maximum of twenty-one years.[231] The court justified having a fixed duration for rights of first refusal because of its certainty of result, its effectuation of parties' intention, and its simplicity.[232]

In the view of the somewhat idiosyncratic and unpredictable approach North Carolina courts have taken, the new legislation's application to preemptions, like those in *Smith* and *Village of Pinehurst*, or to options in gross, is unsure. The North Carolina courts could interpret the new law in a number of ways: (1) hold that the new legislation does not apply, (a) because *Smith* chose the period of the common-law Rule, and the period of the common-law Rule remains what it always was, or (b) because *Smith* was premised on the rule against restraints on alienation, and the new legislation is directed at the Rule Against Perpetuities; (2) hold that the USRAP (not the nondonative transfers legislation) applies, (a) because it replaces the common-law period with a new legislative equivalent of ninety years,[233] or (b) because ninety years is a much simpler and clearer rule than common-law measuring lives; (3) hold that the nondonative transfers legislation (and not the USRAP) applies, since it is directed specifically at the permissible time period for options and preemptions;[234] or (4) the courts might realize that they erred in importing perpetuities concepts into the cases, and the rule should be a simple contracts principle that the parties must have contemplated a reasonable time, which would vary according to the facts of each contract.[235]

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231. *Id.* at 728. The court found that the plaintiffs had a valid right of first refusal until 1996, twenty-one years after the creation of the right.

232. *Id.* Judge Murnaghan's opinion also considered but rejected a number of other approaches to validating the right of first refusal: (a) construing the right as a series of annual options, valid for the first twenty-one options and invalid thereafter; (b) reading in some measuring lives, since they do not have to be specified in the creating instrument; (c) construing the right as two options, the first exercisable for twenty-one years (valid) and the second exercisable for infinity thereafter (invalid); (d) applying the doctrine of *cy pres* to cut the unlimited and invalid right down to a valid period; (e) construing the right as a vested interest (the preemption) in a contingent interest (the first refusal), i.e., as similar to a vested interest in a contingent remainder; (f) restricting the right to a reasonable time, which would vary with the circumstances rather than always being twenty-one years; (g) holding that the Rule Against Perpetuities does not apply to interests unknown to the common law; and (h) holding that the Rule does not apply to commercial interests (a cable TV contract) or to personal property (stock options). *Id.* at 724-27. For another approach to validity, see Justice Meyer's dissenting opinion in Village of Pinehurst v. Regional Invs. of Moore, Inc., 330 N.C. 725, 731-38 412 S.E.2d 645, 648-52 (Meyer, J., dissenting), *reh'g denied*, 331 N.C. 292, 417 S.E.2d 71 (1992). See *supra* notes 202-206 and accompanying text for further discussion of *Village of Pinehurst.*

233. N.C. GEN STAT. § 41-15 (Supp. 1995).

234. *Id.* § 41-29.

235. *Cf.* Juliano & Sons v. Chevron, U.S.A., 593 A.2d 814 (1991) (holding that New Jersey's adoption of the USRAP had the effect of abolishing the common-law Rule Against Perpetuities as it applied to *nondonative* transfers).

The clear legislative intent is for section 41-29 to apply. The General Assembly has replaced the common-law period with ninety- and thirty-year (and in some cases sixty-year) periods tailored to donative and nondonative transfers. The USRAP excludes nondonative transfers from its ambit,[236] and the new sections 41-28 to 41-33 provide a comprehensive legislative plan regulating the duration of nondonative transfers. The time limits of the nondonative transfers legislation necessarily reflect restraints on alienation as well as perpetuities considerations. New sections 41-28 to 41-33 deal specifically with time limits on options in gross and other interests in land and is so entitled. The legislation provides statutory definitions for options in gross and preemptions.[237] The approach of sections 41-28 to 41-33 is the preferable policy, providing a reasonable, certain, easily-administered period of thirty years[238] in lieu of an ill-suited (lives in being plus twenty-one years) or an unpredictable (a reasonable time) period. To the property lawyer, certainty is essential to good planning. The intent of the drafters was that the time limits in Article 3 would supersede any common-law perpetuities or restraints on alienation inquiries; the drafting committee considered *Smith* and its progeny and intended to simplify and clarify the law.[239]

Assuming the above reasoning is persuasive to the courts, the governing time limit on a preemptive right such as the one in *Smith* and a right of first refusal such as the one in *Village of Pinehurst* would be the thirty-year period established by North Carolina General Statutes section 41-29. As to duration, the preemption would be good for thirty years, and if not exercised within that period, it would cease to be valid.[240] Of course, the preemption might be invalid for a reason other than duration if, for example, it failed to provide a mechanism for determining a reasonable price as in *Levan v. Eidson*.[241] A preemptive right limited to the life of the grantee, like the one upheld in *Nichols v. Lake Toxaway Co.*,[242] would have to be exercised within thirty years to be valid. Any option or preemptive right created under the new law must be exercised within thirty years, at which time it will

236. *See supra* notes 102-04 and accompanying text.

237. *See* N.C. Gen. Stat. §§ 41-28(2), (3) (Supp. 1995).

238. *See id.* § 41-29. The duration is extended to sixty years for possibilities of reverter, rights of entry, and executory interests, which are often found in association with charitable gifts. *See id.* § 41-32.

239. *See* Memorandum, *supra* note 14, at 1-3.

240. *See* N.C. GEN. STAT. § 41-29 (Supp. 1995). Under §§ 41-33 and 41-19, the thirty-year period applies only to interests or arrangements created on or after October 1, 1995.

241. 86 N.C. App. 100, 356 S.E.2d 396 (1987).

242. 98 N.C. App. 313, 390 S.E.2d 770, *disc. review denied*, 327 N.C. 141, 394 S.E.2d 178 (1990). *See supra* notes 212-15 for a discussion of the case.

become invalid. Thus, while the new legislation will generally operate to validate interests that are not restricted in duration, it will occasionally serve to limit the duration of interests that formerly were valid for more than thirty (or sixty) years.[243]

In view of the new legislation, what is the status of the *Rodin-Love-Continental Cablevision* line of decisions, which implied a contracts law notion of a reasonable time for cases in which no limit was specified for performance? The USRAP would not apply because of its exclusion for nondonative transfers. *Rodin* and *Love* both involved interests in land, but the precise conditions at issue—a contract conditioned on rezoning and a right-of-way conditioned on the laying of railroad tracks—are not specifically dealt with in the new legislation. There is no general catch-all thirty-year period in the bill, probably because the range of potential applications might be too broad and idiosyncratic to predict.

Further, *Continental Cablevision* involved interests in personal property rather than land, and it is reasonably clear that sections 41-28 to 41-33 do not apply to personalty.[244] An argument exists that the policies supporting these sections indicate that they should also apply to interests such as those in *Rodin, Love, and Continental Cablevision.* The solution of *Rodin*—the use of a reasonable period of time when the contract fails to specify date of performance—has been long-accepted in the area of commercial transactions involving the sale of goods and is a general principle used to supply an omitted contract

243. A practitioner has raised the following question: Given that *Village of Pinehurst*, discussed *supra* notes 202-06, seems to say that a right of first refusal unlimited in time violates the common-law Rule Against Perpetuities, and given that the USRAP supersedes the common-law Rule, N.C. GEN. STAT. § 41-22 (Supp. 1995), and given that the new judicial reformation power of the USRAP is retroactive, *see id.* § 41-19(b), does it not then follow that judicial reformation is now possible for pre-October 1, 1995 rights of first refusal that are unlimited in time?

The authors reject this argument. Under *Village of Pinehurst*, an unlimited right of first refusal is not really invalid because it violates the common-law Rule Against Perpetuities, but rather (in light of *Smith*) because it violates the rule against unreasonable restraints on alienation (since it is not limited to the time period of the Rule Against Perpetuities). Thus, the predicate (violation of the common-law Rule Against Perpetuities) for application of § 41-19(b) is missing. Although it might be useful for § 41-19(b) to apply, the authors' view is that the pre-October 1, 1995 unlimited right of first refusal is simply invalid under *Smith* and *Village of Pinehurst.*

244. The title of the new article refers to interests "in land"; the definitions section for options, preemptions and nonvested easements refers to "land," *see id.* § 41-28; the possibilities of reverter, rights of entry, and executory interest section refers to "events affecting the use of land," *see id.* § 41-32; and the introductory comment prepared by the UPC drafters refers to "some transactions respecting land." *Id.* ch. 41, art. 3 cmt. On the other hand, the section on leases to commence in the future does not refer to land. *See id.* § 41-30. However, the classic situation is a lease to commence upon completion of a building.

term.[245] If the reach of the new legislation were extended to include land contract contingencies and personalty as well as realty, the right of first refusal for the purchase of assets and stocks, which was limited to twenty-one years by the Fourth Circuit in *Continental Cablevision*,[246] would be given an additional nine years of validity. Likewise, the performance under the contract for the conveyance of a railroad right-of-way at issue in *Love*[247] would be extended to thirty years, rather than the twenty-one year time frame applied by the court as a reasonable time for performance. In the final analysis, the new legislation does not literally apply to the kinds of arrangements at issue in *Rodin*, *Love*, and *Continental Cablevision*. Nevertheless, the legislation's clear rejection of the *Smith/Village of Pinehurst* perpetuities approach could be taken as an implicit endorsement of the alternative reasonable time approach of *Rodin* for cases not falling within the letter of the statute.

In another area of the law, tenants' rights (a) to perpetual renewals under leases and (b) to options for the purchase of land have been held not to violate the Rule Against Perpetuities because such interests do not discourage property enhancement or the alienation of property.[248] For example, in *Lattimore v. Fisher's Food Shoppe, Inc.*,[249] the North Carolina Supreme Court held that perpetual lease renewals were not violative of the Rule Against Perpetuities, since these covenants were included in the tenant's present interest in the leasehold and did not prevent the alienation of the land at any time.[250] However, the court noted that since such rights are not favored in property law, they would not be enforced unless the language of the lease clearly indicated this was the parties' intention.[251] The new perpetuities legislation does not expressly deal with these interests, but they should continue to be valid under the blanket exclusion from the

245. *See* U.C.C. §§ 1-204, 2-309(1) (1972) (discussing the use of a reasonable time where the parties make an isolated contract without specifying time for performance and there is no evidence of another intention); *see also* RESTATEMENT (SECOND) OF CONTRACTS 18, § 204 cmt. d (1981) (identifying general rules for supplying an omitted contract term).

246. 873 F.2d 717, 728 (4th Cir. 1989); *see supra* notes 227-32 and accompanying text.

247. 889 F. Supp. 1548, 1550-51 (E.D.N.C. 1994); *see supra* notes 225-26 and accompanying text.

248. *See* DUKEMINIER & KRIER, *supra* note 18, at 312.

249. 313 N.C. 467, 329 S.E.2d 346 (1985).

250. *Id.* at 470-71, 329 S.E.2d at 348.

251. *Id.*

USRAP for "[any] property interest . . . that was not subject to the common-law rule against perpetuities."[252]

One final point in perpetuities law is the charity-to-charity exception, under which a second gift to a charity will not violate the Rule Against Perpetuities if the preceding interest is also in a charity, regardless of the vesting or duration of the interest.[253] The court of appeals addressed the charity exceptions in property law in a case involving a deed of land to a charity, Hornets Nest Girl Scout Council, which purported to retain a reversionary interest in the grantor, Cannon Mills Foundation, another charity.[254] The court held that the interest in the second charity was void, since it was inconsistent with the other language granting the Girl Scout Council a fee simple.[255] In

252. N.C. GEN. STAT. § 41-18(7) (Supp. 1995); *see also id.* § 41-22 (stating that the USRAP supersedes the common-law Rule Against Perpetuities).

253. *See* RESTATEMENT, *supra* note 18, § 1.6 (stating that if a charitable gift does not vest within the period of the Rule Against Perpetuities, it is void unless the preceding interest exists in another charity). Comment a of §1.6 explains that this is in consideration of the public interest inherent in validating and encouraging charitable gifts. *Id.* §1.6 cmt. a. This exception is limited to cases involving back-to-back charitable gifts and does not operate when an individual gift precedes a charitable gift or when a charitable gift precedes an individual gift. *Id.* §1.6 cmts. b-d.

The charity-to-charity exception is touched upon in the case of *In re* Perry-Griffin Foundation, 108 N.C. App. 383, 424 S.E.2d 212, *disc. review denied*, 333 N.C. 538, 429 S.E.2d 561 (1993), which involved a charitable trust conditioned with a restraint forbidding the sale of any real property, but allowing the lease of such property and the sale of any timber on such property. *Id.* at 392, 424 S.E.2d at 217. The plaintiff successfully argued that these restrictions significantly decreased the value of the property. *Id.* at 394-96, 424 S.E.2d at 219-20. In the course of its opinion, the court of appeals discussed the preferential treatment given to charitable gifts in property law as a function of the public policy supporting such gifts. *Id.* at 390-91, 424 S.E.2d at 216-17. This discussion recognizes such proactive intervention as the doctrine of *cy pres* by which courts reform charitable trusts to achieve their primary purposes, the exceptions to the Rule Against Perpetuities and rule against direct restraints on alienation involving charities, and several statutes providing support for the public policy protecting charitable gifts. *Id.*

The majority and dissenting opinions in Village of Pinehurst v. Regional Invs. of Moore, Inc., 330 N.C. 725, 731-38, 412 S.E.2d 645, 648-52 (Meyer, J., dissenting), *reh'g denied*, 331 N.C. 292, 417 S.E.2d 71 (1992) also touched on the charity-to-charity exemption. The majority held that the exception did not apply because the interest at issue did not pass to Pinehurst after being vested in another charity nor was the village itself clearly a charity. *Id.* at 729, 412 S.E.2d at 647. Justice Meyer relied on N.C. GEN. STAT. § 36A-49 (1991) for an exception to the Rule Against Perpetuities, rationalizing that the purpose of the interest in Pinehurst was the benefit of the community, an acceptable charitable purpose. *Id.* at 735, 412 S.E.2d at 649 (Meyer, J., dissenting). North Carolina General Statutes § 36A-49 provides that no grant to charity shall be invalid by reason of the Rule Against Perpetuities. N.C. GEN. STAT. § 36A-49 (1991). The majority opinion rejected section 36A-49 on the ground that the municipality's operation of a sewer system was a proprietary function, not a charitable one. *Village of Pinehurst*, 330 N.C. at 729, 412 S.E.2d at 647.

254. Hornets Nest Girl Scout Council v. Cannon Found., 79 N.C. App. 187, 339 S.E.2d 26 (1986).

255. *Id.* at 195, 339 S.E.2d at 32.

dicta, the court recited several tenets of perpetuities law, including a statement that the Rule Against Perpetuities did not apply to charitable trusts.[256] In the end, perpetuities was not an issue because the restraint was not properly included in the deed transferring the property and was invalidated by the court on constructional grounds. Although the USRAP preserves the charity-to-charity exception,[257] the result in *Hornets Nest Girl Scout Council* would not be changed by the new legislation, since the case rested on the lack of back-to-back charitable gifts.[258]

IV. A PRIMER FOR THE PRACTITIONER

The 1995 legislation brings new light and clarity to perpetuities-related law in North Carolina. The changes adopted by the legislature not only make new law in this area, but integrate many aspects of traditional Rule Against Perpetuities principles. Although the statutes themselves should be carefully consulted, this Primer outlines the current status of perpetuities-related law in North Carolina in light of the new legislation.

A. Sections 41-15 to 41-22: The USRAP

- *Interests that are good under the common-law Rule are good under the USRAP.* In other words, the USRAP preserves the validating side of the common-law Rule. This means that capable practitioners do not have to learn anything new.
- *Interests that violate the common-law Rule are allowed up to ninety years to vest or terminate.* The USRAP codifies the wait-and-see doctrine and substitutes a simple ninety-year period in place of the common-law lives in being plus twenty-one years.
- *Remote interests may be judicially reformed.* Interests that do not vest or terminate within ninety years may be reformed by the court, keeping as nearly as possible to the original plan and within the ninety-year period. This *cy pres* power probably will be exercised by the judicial insertion of a saving clause.

256. *Id.* at 192, 339 S.E.2d at 30 (citing Reynolds Found. v. Trustees of Wake Forest College, 227 N.C. 500, 42 S.E.2d 910 (1947)). Apparently, the court meant to summarize the charity-to-charity exception to the Rule Against Perpetuities here since the Rule applies to gifts to charities when they precede or follow individual gifts. Like *Reynolds Foundation*, *Hornets Nest Girl Scout Council* involved a transfer to one charity with an executory interest in another charity. *Id.* at 191, 339 S.E.2d at 29.

257. N.C. GEN. STAT. § 41-18(5) (Supp. 1995).

258. Note that the charity-to-charity exception generally is available for gifts to governments and governmental agencies or subdivisions, as well as to charities. *Id.* § 41-18(5).

- *Drafters probably should continue to use their traditional saving clauses.* They are tailored to each unique family situation and with increasing longevity of the population may in fact tie up the property for more than the USRAP ninety years—if indeed a client wants to tie up her property for as long as possible.
- *Ninety-year saving clauses are an acceptable alternative.* Ninety years may be used in lieu of the common-law lives in being plus twenty-one years. Ninety years is both simple and certain.
- *Drafters should not use a "later-of" saving clause.* A saving clause to take effect on the later of (a) the common-law period, or (b) the USRAP period of ninety years is very risky. The precise effect of such a clause is uncertain and should not be used according to section 41-15(e) and its Comment.[259]
- *Ninety-year dynasty trusts are now possible.* A testator could create a trust "to pay the income to my descendants from time to time living for ninety years, and then to pay the principal to my descendants then living per stirpes." This so-called dynasty trust would be valid under the USRAP.[260] In addition to creating new ninety-year dynasty trusts, it may be possible to convert a trust initially governed by the common-law period into a ninety-year trust.[261]

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259. The explanation is a somewhat tortuous one, having to do with whether use of a later-of clause would be accepted by the Treasury Department as a valid approximation of the common-law perpetuities period for generation-skipping transfer tax purposes. There is scholarly criticism of the position taken by the drafters of the USRAP. *See* Dukeminier, *Ninety Years*, *supra* note 32. The prudent course would be to avoid later-of saving clauses altogether; the possible gain in tying up the property for a few more years is not worth the risk of invalidity either for property law purposes or for transfer tax purposes.

260. Note that up to $1 million per transferor ($2 million per married couple) could be transferred into a dynasty trust and be exempt from federal estate tax and the generation-skipping transfer tax. *See* Dukeminier, *New Perils*, *supra* note 32, at 205-10. Of course, a similar trust is possible under the common-law Rule. A testator could create a trust "to pay the income to my descendants from time to time living until twenty-one years after the death of the last to die of all my descendants living at my death, and then to pay the principal to my descendants living at the termination of the trust per stirpes." Nevertheless, there may be something about a simple, clear, ninety-year period that is more appealing to the dynasty-minded than the common law lives plus twenty-one years. Reportedly, dynasty trusts are already being marketed in USRAP states. *See* Dukeminier, *supra* note 99, at 169. But as Jo Ann Harllee of the Trusts Drafting Committee has pointed out, with the increasing longevity of the population, a dynasty trust keyed to the common-law period (which trust remains valid under the first principle of the USRAP) would usually tie up the testator's property for more than ninety years. See *supra* note 98 and accompanying text for a discussion of dynasty trusts.

261. This possibility exists where a special power of appointment under a trust grandfathered from the GST tax (i.e., pre-September 26, 1985 irrevocable trusts and pre-October 22, 1986 wills and revocable trusts if the decedent died before 1987) is exercised to

- *The USRAP generally applies to property interests and powers of appointment created on or after October 1, 1995.* General principles of property law determine the time when an interest is deemed to have been created.[262]
- *The judicial reformation power (cy pres) is retroactive.*[263] In other words, fiduciary litigators should be aware that *cy pres* is now potentially available in perpetuities suits involving pre-October 1, 1995 instruments. This is a significant change in North Carolina law.[264]
- *The USRAP provides extensive guidance for determining the validity of powers of appointment and interests created by the exercise of powers.*[265] The traditional tests are used for determining the validity of powers and interests created by the exercise of powers. If the power or the interest violates the common-law Rule, the USRAP extends its basic ninety-year wait-and-see and judicial reformation protections to them.
- *The exercise of a power of appointment created before October 1, 1995 is governed by the USRAP.* Furthermore, Professor Dukeminier has identified two situations in which exercise of a special power of appointment in a grandfathered trust may lose the generation-skipping transfer (GST) tax exemption: where the special power is exercised (1) to extend the trust for the longer of the common-law period and the USRAP ninety-year period and

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extend the trust for ninety years. The considerations are complex, and the drafter should see Dukeminier, *New Perils*, *supra* note 32, for further analysis.

262. N.C. GEN. STAT. §§ 41-16 & cmt., 41-19(a) & cmt. (Supp. 1995). For wills, the interest is created at the testator's death. Other principles are as follows: for irrevocable trusts, the creation of the trust; for revocable trusts, the time the trust becomes irrevocable (usually the settlor's death); and for deeds, the delivery of the deed.

263. *Id.* § 41-19(b). For judicial proceedings commenced on or after October 1, 1995 but dealing with property interests and powers of appointment created before that date, a court may reform the disposition in the manner that most closely approximates the transferor's plan and is within the limits of the common-law Rule. *Id.*

264. While the result of *cy pres* may be unpredictable, the Official Comment to North Carolina General Statutes § 41-19(b) urges the court to judicially insert a saving clause into the instrument, selecting as measuring lives those appropriate to the facts and disposition. This would "achieve an after-the-fact duplication of a professionally competent product." *Id.* § 41-19(b) cmt.

The USRAP drafters anticipate that few reformation cases will actually arise under the ninety-year wait-and-see approach. UNIFORM STATUTORY RULE AGAINST PERPETUITIES, Prefatory Note (1986). For those cases that do arise, the Official Comment to § 41-17 provides a number of illustrations and examples. N.C. GEN. STAT. §41-17 cmt. (Supp. 1995). Although the Comment does not specifically mention the saving clause approach, it seems to be advocated in the Official Comments to §§ 41-15, 41-19(b). *See id.* §§ 41-15 cmt., 41-17 cmt., 41-19(b) cmt.

265. *Id.* §§ 41-15 to -17.

(2) to violate the common-law Rule.[266] In sum, drafters should be very careful in exercising special powers under GST-grandfathered trusts.

- *The ninety-year period approach of the USRAP will be accepted as a valid approximation of the common-law period for Generation-Skipping Transfer Tax purposes.*[267]
- *The USRAP will not increase malpractice exposure; in fact, it will significantly decrease malpractice exposure for perpetuities errors.* Most potentially remote interests will in fact vest or terminate within the ninety-year wait-and-see period. For those that are not resolved within the ninety-year period, judicial reformation will minimize any loss to an intended beneficiary.
- *The USRAP excludes "nondonative transfers," which roughly translates to "commercial interests."*[268] The line between donative and nondonative transfers is not always easy to draw,[269] but North Carolina General Statutes section 41-18 classifies several types of transfers, and the Official Comment to section 41-18 provides fur-

266. *See* Dukeminier, *New Perils*, *supra* note 32, at 208-15. There has been a spirited debate between Professor Dukeminier and the Joint Editorial Board for the Uniform Probate Code over whether the GST exemption for pre-1986 trusts will be lost if, in a USRAP state, the donee exercises a special power in violation of the common-law Rule. In their prominent, widely adopted trusts and estates casebook, Professors Dukeminier and Johanson stated that under these circumstances the trust will lose its GST exemption, because the exercise makes it unclear whether the interest will vest within the common-law period or the USRAP ninety-year period, and the Treasury denies the GST exemption where there is any attempt to achieve the longer of the two periods. DUKEMINIER & JOHANSON, supra note 32, at 895-97. The Joint Editorial Board then issued a statement in response, characterizing the Dukeminier and Johanson conclusion as "erroneous." Joint Editorial Board for Uniform Probate Code, *Statement in Response to the USRAP "Tax-Trap" Argument*, DONATIVE TRANSFERS, FIDUCIARIES AND ESTATE PLANNING NEWSLETTER (Assoc. of Am. L. Schs. Section on Donative Transfers, Fiduciaries and Est. Plan., Washington, D.C.), Spring 1995, at 15-16. The Board stated that the Treasury removes the GST exemption only if the governing period is measured by the longer of the two periods, and violation of the common-law Rule only triggers application of the ninety-year USRAP period. *Id.* Professors Dukeminier and Johanson responded that the Board was "wrong," because it had overlooked the alternative contingencies doctrine of the common law. Jesse Dukeminier & Stanley M. Johanson, *Response to JEB/UPC by Professors Dukeminier and Johanson*, DONATIVE TRANSFERS, FIDUCIARIES AND ESTATE PLANNING NEWSLETTER (Assoc. of Am. L. Schs. Section on Donative Transfers, Fiduciaries and Est. Plan., Washington, D.C.), Fall 1995, at 8-9; *see also* Dukeminier, *New Perils*, supra note 32, at 185, 199-202 (providing detailed explanation of the Board's "misstep").

267. *See* N.C. GEN. STAT. § 41-15 cmt. G (Supp. 1995).

268. The choice of term reflects current property usage in the national scholarly literature. *See supra* note 106.

269. For example, where does one place a will drawn pursuant to a settlement agreement? Section 41-18(1)(b) provides that such a transfer is not exempt from the statutory rule. N.C. GEN. STAT. § 41-18 (Supp. 1995).

ther clarification of the rules for several common nondonative interests in land.[270]

- *The Official Comments to the USRAP are printed in the General Statutes of North Carolina and provide further guidance.*

B. *Sections 41-28 to 41-33: Time Limits on Options in Gross and Other Interests in Land*

- *Options in gross, preemptive rights, leases to commence in the future, and nonvested easements in land are good for thirty years.*[271] If the option or preemption is exercised or the lease commences or the nonvested easement vests within thirty years, it is valid. If the relevant event does not occur within thirty years, the interest simply becomes invalid at the end of thirty years.
- *Possibilities of reverter, rights of entry, and executory interests in land are good for sixty years.*[272] If the event causing the property to revert back to the transferor or to shift over to a third party does not occur within sixty years, the future interest becomes invalid and the property that was subject to the future interest becomes a fee simple absolute.
- *Section 41-28 provides statutory definitions for options, preemptions, and easements "in gross."*[273] In brief, an option is a right to purchase someone else's land at a specified price. A preemption is a right of first refusal—i.e., before the owner may sell a parcel of land to another, the owner must first offer it to the holder of the preemption. The term "in gross" signifies that the holder of the option or preemption owns no other interest in the property subject to the option or preemption or that the holder of the easement owns no property that would be benefited by the easement.[274]
- *Drafters should limit the duration of options in gross and similar interests to thirty years.* If the drafter attempts to create an option, preemption, or nonvested easement in gross, or a lease to commence in the future, with a specified term of more than thirty

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270. *Id.* § 41-18 & cmt. .

271. *Id.* § 41-29.

272. *Id.* § 41-32.

273. *Id.* § 41-28.

274. At the suggestion of the General Statutes Commission, the definitions of these terms, eventually codified as North Carolina General Statutes § 41-28, were added to the UPC draft on which new Article 3 was based. *See* Letter from Ronald C. Link, Chair, Trusts Drafting Committee, to Floyd M. Lewis, Revisor of Statutes (March 22, 1993) (on file with the authors). These definitions were drawn from various sources, including § 454 of the original Restatement of Property for the definition of nonvested easements in gross. *Id.* The meaning of the terms is also discussed in the Comments to North Carolina General Statutes §§ 41-29 and 41-31. N.C. GEN. STAT. §§ 41-29 cmt. & 41-31 cmt. (Supp. 1995).

years, the interest will be good for only thirty years. If the interest is not actually exercised within the period, it becomes invalid.[275]

- *An option in gross or similar interest is good for thirty years even if the drafter fails to specify its duration.*[276] Under North Carolina

275. The authors are not aware of any techniques to circumvent the thirty-year limit, but undoubtedly creative lawyers will set their wits to finding a loophole. A practitioner has suggested the following evasive device: The grantor conveys a fee simple determinable upon the occurrence of an event affecting the use of land. The conveyance provides that upon the first to occur of: (a) the event or (b) the passage of 59½ years, the property will automatically revert to the grantor or his heirs. The conveyance further provides that if at the end of 59½ years the event has not occurred, the grantee may record an extension document (analogous to re-recording a declaration of restrictive covenants) that will preserve the determinable fee in the grantee for another period until the first to occur of: (a) the event or (b) the passage of a new 59½ years, and so on.

In the authors' opinion, the grantee's right to record would not be legally enforceable under the new legislation. *See* N.C. GEN. STAT. § 41-32 (Supp. 1995). Possibilities of reverter and rights of entry are valid for a maximum period of sixty years, and the grantee's right to record, if enforced, would in effect extend the enforceability of the grantor's reversionary interest beyond the sixty-year limit. One could try to validate the grantee's right on the theory it is analogous to a tenant's perpetual right to renew or a tenant's option to purchase, *see supra* notes 248-52, but in contrast to those situations, the proposed right to record would limit alienability rather than further it. By recording, the grantee would be losing what would otherwise be a fee simple absolute at the end of 59½ years.

Another evasive technique might be to place the right to record an extension document in the grantor, not the grantee. In the authors' opinion, that would also be unenforceable, because it would amount to a reversionary interest lasting more than sixty years. One is reminded of the prescient comment in the case that began the evolution of the common-law Rule:

> Now the ultimum quod sit, or the utmost limitation of a fee upon a fee, is not yet plainly determined, but it will be soon found out, if men shall set their wits on work to contrive by contingencies, to do that which the law has so long labored against, the thing will make itself evident, where it is inconvenient, and God forbid, but that mischief should be obviated and prevented.

The Duke of Norfolk's Case, 22 ENG. REP. 931, 953 (Ch. 1682).

A more appropriate instrument for the control of land use by private agreement is the restrictive covenant. *See generally* 2 JAMES A. WEBSTER, JR., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA §§ 18-3 to -10 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 4th ed. 1994). Restrictive covenants should be regarded as being excluded from the USRAP by the general exemption for nondonative transfers. There does not seem to be any North Carolina case law on whether the common-law Rule Against Perpetuities (which is superseded by the USRAP) applies to restrictive covenants (as compared with options and preemptions). *See id.* The better view is that restrictive covenants are not subject to the common-law Rule or the USRAP. *See* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 3.3 (Tentative Draft No. 2, 1991); Hess, *supra* note 32, at 275 n.40. The duration of restrictive covenants is regulated by the doctrine of changed conditions, whereby an outmoded covenant becomes unenforceable. WEBSTER, *supra*, § 18-7. The North Carolina Conservation and Historic Preservation Agreements Act provides that conservation and preservation agreements "may be effective perpetually or for shorter stipulated periods of time." N.C. GEN. STAT. § 121-38 (1995). They are also excepted from the re-recording requirements of the Marketable Title Act. N.C. GEN. STAT. § 47B-3(8)(c) (Supp. 1995).

276. N.C. GEN. STAT. § 41-29 (Supp. 1995).

case law predating the enactment of section 41-29, the interest probably would be void *ab initio* and the lawyer might be liable for malpractice.

- *An option in gross or similar interest is not automatically valid even if it is limited to thirty years.* From the standpoint of duration, it is valid. But the interest might fail for some other reason, such as the rule against unreasonable restraints on alienation or for failure to provide a mechanism to establish a reasonable price.[277]
- *Drafters should limit the duration of possibilities of reverter, rights of entry, and executory interests to sixty years.*[278] These interests are good for sixty years, and any attempt to create them to last longer than sixty years would be ineffective.
- *A possibility of reverter, right of entry, or executory interest is good for sixty years even if the drafter fails to limit its duration.* Under North Carolina case law prior to the enactment of section 41-32, possibilities of reverter and rights of entry were regarded as presently vested in the transferor and therefore were not subject to any time limit (save for re-recording under the Marketable Title Act). On the other hand, executory interests (in third parties) were subject to the Rule Against Perpetuities and were void if not limited to the period of the Rule.[279]
- *Possibilities of reverter, rights of entry, and executory interests should continue to be re-recorded every thirty years under the Marketable Title Act.* The new legislation does not explicitly address its relationship to the Marketable Title Act,[280] but the authors' recommendation is that the possibility of reverter or similar interest must be re-recorded under the Marketable Title Act every thirty years in order to retain its validity. Even if adequately re-recorded, the interest then becomes invalid at the end of sixty years under section 41-32.

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277. *See, e.g.*, Levan v. Eidson, 86 N.C. App. 100, 356 S.E.2d 396 (1987).

278. *See* N.C. GEN. STAT. § 41-32 (Supp. 1995).

279. The new legislation places the first real limit on possibilities of reverter and rights of entry. Previously viewed as presently vested and therefore not subject to perpetuities or other time restraints (as long as they were re-recorded every thirty years), they are now capped at sixty years. *Id.* Under the old law, the use of land could be tied up forever by using possibilities of reverter or rights of entry.

On balance, the statutory reforms both restrict and enlarge the validity of executory interests. Formerly, executory interests could be created to last longer than sixty years, provided that the drafter was prescient enough to limit the interest to lives in being plus twenty-one years. However, executory interests that were not limited to the perpetuities period were void *ab initio*. The new law caps express duration at sixty years, while simultaneously validating carelessly unlimited executory interests for the same period.

280. N.C. GEN. STAT. §§ 47B-1 to -9 (Supp. 1995).

- *The new legislation probably does not apply to interests in personal property.*[281]
- *Sections 41-28 to 41-33 do not apply to all nondonative transfers.* The bill deals with the most common specific types of nondonative interests in land; it does not provide a general rule for all nondonative interests. Nondonative interests in real property that are not covered by the new law and nondonative interests in personalty may be subject to the rule against unreasonable restraints on alienation.[282] The USRAP itself exempts nonvested property interests arising out of nondonative transfers,[283] as well as property interests subjected to time limits by sections 41-28 to 41-33.[284]
- *For interests within their scope, sections 41-28 to 41-33 apply to donative, as well as nondonative transfers.*[285] While the interests regulated by these sections often will arise under nondonative transfers, the statute is not restricted to nondonative interests.
- *For nondonative interests that are not governed by sections 41-28 to 41-33, but might be subject to some perpetuities challenge, the drafter should expressly limit duration to the classic period in gross of twenty-one years.* If twenty-one years is not necessary on the facts, the drafter should consider an even shorter period tailored to the situation.
- *Section 41-33 provides that these sections apply to property interests created on or after October 1, 1995.*[286]
- *The draft Official Comments to the UPC draft, on which sections 41-28 to 41-33 are based, are printed in the General Statutes of North Carolina and provide further guidance.*

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281. *See supra* notes 233-35.

282. The better view regarding North Carolina's inconsistent case law on nondonative interests is that if the drafter fails to specify a time for performance, the court will imply a reasonable time, i.e., less than twenty-one years. *See, e.g.*, Rodin v. Merritt, 48 N.C. App. 64, 71, 268 S.E.2d 539, 543-44, *disc. review denied*, 301 N.C. 402, 274 S.E.2d 226 (1980), *and motion to reconsider denied*, 274 S.E.2d 231 (N.C. 1981). Other authority holds that the interest will violate the rule against restraints on alienation if the drafter does not specify a time within the common-law Rule Against Perpetuities. *See, e.g.*, Smith v. Mitchell, 301 N.C. 58, 63, 269 S.E.2d 608, 611 (1980) (discussed *supra* notes 195-201 and accompanying text).

283. N.C. GEN. STAT. § 41-18(1) (Supp. 1995).

284. *Id.* § 41-18(9).

285. *See id.* ch. 41, art. 3, cmt.

286. *Id.* § 41-33.

C. Sections 36A-145 to 36A-148: Honorary Trusts

- *Honorary trusts—those for a lawful noncharitable purpose that lack a human beneficiary—are generally validated.*[287]
- *Trusts for cemetery lots and the like are specifically validated without regard to remoteness of vesting, provided that they meet the ordinary statutory requirements for cemetery trusts.*[288]
- *Trusts for pets are specifically validated and guidelines are spelled out in the statute.*[289]
- *The general provision for honorary trusts permits the trustee to carry out the trust, but the specific provisions for cemetery and pet trusts apparently require the trustee to carry out the trust.* The general provisions of section 36A-145 follow the traditional rule that the trustee of an honorary trust "may" carry it out, but cannot be compelled to do so. On the other hand, the cemetery trust and pet trust sections each state that the trust "is valid," suggesting that the trust is binding on the trustee.
- *If the trustee of an honorary trust under section 36A-145 refuses to carry it out, the trust corpus probably would revert to the settlor or the settlor's successors on a resulting trust theory.*[290] Of course, it is unlikely that the trustee would refuse to carry out the trust.
- *If the trustee of a cemetery trust under section 36A-146 or a pet trust under section 36A-147 refuses to carry it out, the court probably would appoint a successor trustee.* Since the trust is valid, the usual rule that equity will not allow a trust to fail for want of a trustee presumably would apply. The court would appoint a successor trustee, unless it was clear that the settlor intended the trust to be

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287. N.C. GEN. STAT. § 36A-145 (1995).

288. *Id.* § 36A-146. A practitioner has raised the following question about the new cemetery trusts statute: Must the trustee be the clerk of superior court pursuant to Article 4 of Chapter 65 (especially § 65-7) or a cemetery trustee pursuant to Article 9 of Chapter 65 (especially § 65-60.1)? The authors' interpretation is that the new § 36A-146 is a particular instance of the new general honorary trusts alternative of § 36A-145, so that the trustee need not be the clerk (Article 4) or a cemetery trustee (Article 9), provided that the honorary trust is not a subterfuge to avoid Article 9. In the authors' view, the reference in § 36A-146 to Articles 4 and 9 was meant to say only that if the cemetery trust falls under Articles 4 or 9 it must comply with those articles, not to mandate only those forms of what might be construed as honorary trusts. Thus, a bequest to an individual, say a family member, to provide for care of a grave should be valid notwithstanding that it does not meet the technical requirements of Articles 4 or 9.

289. *Id.* § 36A-147.

290. 2A AUSTIN W. SCOTT, LAW OF TRUSTS § 124 (William F. Fratcher ed., 4th ed. 1987). A resulting trust "is simply a way of recognizing the existence of an equitable reversion which has not been expressly provided for. Just as the legal reversion in land is usually implied rather than expressed, so the equitable reversion [in the trust corpus] is usually implied." HASKELL, *supra* note 132, at 352.

effective only if the named trustee agreed to serve (in which event the corpus would be returned to the settlor or her successors on a resulting trust theory).[291]

- *In general, honorary trusts may last for twenty-one years.*[292] There is no limit on the duration of cemetery trusts.[293] Trusts for pets terminate on the death of the animal even if the animal lives longer than twenty-one years.[294] Note that the pet trust is restricted to animals in being; for example, it may not extend for the lives of the animal's offspring born after the creation of the trust.
- *Drafters should be aware of alternatives to an honorary trust.* Three classic alternatives are (1) a gift to a person or institution (e.g., the Humane Society or a church) on the condition that the donee provide care of a grave or care of a pet or say masses for the soul; (2) a gift absolute to a person or institution with a clearly nonbinding expression of the donor's wish that the donee provide for the grave, pet, or masses; and (3) a contract with a person or institution to provide care of a grave.
- *Honorary trusts terminate if the corpus falls below $100 and are distributed as provided by the settlor or to the settlor's estate.*[295]
- *This legislation applies to honorary trusts created on or after October 1, 1995.* The cemetery trusts section applies to cemetery trusts created before, on, or after October 1, 1995.
- *The Official Comments to UPC section 2-907, upon which sections 36A-145 to 36A-148 were partially based, are not printed in the General Statutes, but may be found in the UPC or Uniform Laws Annotated and provide further guidance.*

V. CONCLUSION

Perpetuities reform in North Carolina was commendably implemented during the 1995 legislative session. The new legislation passed the Senate and the House to become the law of North Carolina effective generally for interests created on or after October 1, 1995, and in the case of the USRAP power of judicial reformation, also effective for pre-October 1, 1995 instruments in litigation commenced on or after the effective date. The USRAP also applies to pre-October 1, 1995 powers of appointment. The measuring period for retroactive

291. *See* HASKELL, *supra* note 132, at 268-69.
292. N.C. GEN. STAT. § 36A-145 (1995).
293. *Id.* § 36A-146.
294. *Id.* § 36A-147.
295. *Id.* § 36A-148.

application of the *cy pres* power to nonvested interests and powers is the common-law period, not the USRAP ninety years.

The general perpetuities reform in sections 41-15 to 41-22 reflects a national trend in which twenty-three other states have adopted the USRAP. Prior to the USRAP, some states had adopted, by statute or judicial decision, the *cy pres* doctrine which allows judicial reformation of a perpetuities violation. North Carolina had not adopted mechanisms to deal with the inequities created by strict application of the Rule Against Perpetuities. Under the USRAP, the passage of additional time up to ninety years, as well as the use of judicial reformation techniques, will usually allow the beneficiaries to receive all or nearly all of what the testator or settlor intended to give them. The new legislation's substitution of a ninety-year period for the common-law lives in being plus twenty-one years, its adoption of the wait-and-see doctrine, and its grant of judicial reformation power are all new to North Carolina.

While the USRAP does not adopt the subsidiary doctrine of construction to avoid invalidity, a doctrine that our courts have not consistently approved or disapproved, the USRAP principles will generally protect any invalid interests chosen by construction. If North Carolina courts adhere to their occasional view that the Rule Against Perpetuities does not limit the duration of indestructible trusts, the USRAP may apply to preserve the trustee's administrative powers, but will not preserve most distributive powers, leading to judicial reformation.

For powers of appointment, the USRAP treats general testamentary powers like nongeneral (special) powers for purposes of determining the validity of the power itself as well as the validity of the interests created by exercise of the power. These are points on which North Carolina law was not always clear. The broad USRAP judicial reformation principle is available if our courts do not apply the second-look doctrine in determining the validity of interests created by the exercise of nongeneral or testamentary powers. Our courts have not clearly recognized the second-look doctrine.

The reforms for options, preemptions, and other typically nondonative transfers in sections 41-28 to 41-33 were a response to litigation over the validity of commercial interests in which the drafters had forgotten to place time limits on the interests. While some policies behind the Rule Against Perpetuities remain valid today, the period of the Rule and its vesting concept are ill-suited measures for the validity of nondonative transfers. The application of the common-law Rule to nondonative transfers by North Carolina courts led to a

variety of inconsistent decisions and distracted our courts from more relevant considerations, such as the rule against unreasonable restraints on alienation and contracts principles of reasonableness. In cases involving options and preemptions, *Smith* erred in adopting the perpetuities period as the time limit for the rule against restraints on alienation, and *Village of Pinehurst* compounded the error by applying the Rule Against Perpetuities itself, instead of the rule against restraints on alienation. Some cases, notably *Rodin*, have seen the issue more clearly and employed the contracts law principle of implying a reasonable time for performance in the absence of a stated period of performance, but other cases have ignored the approach.

Section 41-29 provides a clear and reasonable thirty-year period for the performance of options, preemptions, and leases to commence in the future, as well as for the vesting of nonvested easements. This period should override the *Smith* and *Pinehurst* decisions, but given the past idiosyncrasies of our courts, one should not be too sanguine until the courts have spoken again. The thirty-year period is both a protection for the drafter who forgets to specify a time limit, and a limitation for the drafter who wishes to specify a time period greater than thirty years.

Section 41-32 also provides a time limit of sixty years for possibilities of reverter and rights of entry in the grantor. Previously, there was no time limit on these interests, save for re-recording every thirty years under the Marketable Title Act, and they could tie up the use of land forever. The sixty-year limit is also imposed on executory interests in third parties; previously, there was no time limit on these interests other than the common-law Rule Against Perpetuities. The sixty-year limit is both a protection for the drafter who forgets to specify a time limit on executory interests and a limitation for the drafter who wishes to specify a time period greater than sixty years for executory interests, possibilities of reverter, and rights of entry.

It should be noted that this legislation is not limited to nondonative transfers, although most of the affected interests will arise from nondonative transfers. It is limited to interests in land, not personalty. The law does not contain any over-arching general provision; it applies only to the specific interests described. Nevertheless, one hopes that in future cases not specifically covered by this legislation the courts will respond to its implicit message and avoid getting sidetracked in trying to apply the Rule Against Perpetuities to nondonative transfers; instead, they should focus their attention on considerations of reasonable restraints on alienation, the contracts law principle of implying a reasonable time for performance, and other relevant

public policies.[296] The import of the perpetuities reform is that in most of these cases, the breaching party should not go free because the drafter blundered.[297]

296. A possibly instructive set of policies for consideration is suggested by the draft Restatement (Third) of Property (Servitudes), rejecting the touch-and-concern requirement for the running of servitudes:

> Although courts still use the rhetoric of touch and concern, they increasingly determine the validity of servitudes on the basis of the rules stated in this Chapter. They look to the legitimacy and importance of the purposes to be served by the servitude in the particular context, the fairness of the arrangement, its impact on alienability and marketability of the property, its impact on competition, and the degree in which it interferes with rights to personal autonomy and freedom from discrimination.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), *supra* note 275, § 3.2, cmt. b.

297. *But See* Justice Cardozo's aphorism in People v. Defore, 150 N.E. 585, 587 (1926) ("The criminal is to go free because the constable has blundered.").

VI. APPENDICES

APPENDIX I

GENERAL ASSEMBLY OF NORTH CAROLINA
1995 SESSION
RATIFIED BILL
CHAPTER 190
SENATE BILL 83

AN ACT TO ENACT THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION .

The General Assembly of North Carolina enacts:

Section 1. Chapter 41 of the General Statutes is amended by designating the existing provisions as Article 1, "Survivorship Rights and Future Interests", and by adding a new Article to read:

ARTICLE 2.

Uniform Statutory Rule Against Perpetuities.

§ 41-15. Statutory rule against perpetuities.

(a) A nonvested property interest is invalid unless:

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

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

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(1) 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; or

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

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) 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; or

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

(d) In determining whether a nonvested property interest or a power of appointment is valid under subdivision (a)(1), (b)(1), or (c)(1) of

this section, the possibility that a child will be born to an individual after the individual's death is disregarded .

(e) 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 (i) 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 (ii) 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 of time that exceeds 21 years after the death of the survivor of the specified lives.

§ 41-16. When non-vested property interest or power of appointment created.

(a) Except as provided in subsections (b)and (c) of this section and in G.S. 41-19(a), the time for creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this Article, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in G.S. 41-15(b) or (c), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(c) For purposes of this Article, 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.

§ 41-17. Reformation.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by G.S. 41-15(a)(2),41-15(b)(2), or 41-15(c)(2) if:

(1) A nonvested property interest or a power of appointment becomes invalid under G.S. 41-15;

(2) A class gift is not invalid under G.S. 41-15, but might become invalid under G.S. 41-15, and the time has arrived when the share of any class is to take effect in possession or enjoyment; or

(3) A nonvested property interest that is not validated by G.S. 41-15(a)(1) can vest but not within 90 years after its creation.

§ 41-18. Exclusions from statutory rule against perpetuities.

G.S. 41-15 does not apply to:

(1) 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:

a. A premarital or postmarital agreement;

b. A separation or divorce settlement;

c. A spouse's election;

d. A similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties;

e. A contract to make or not to revoke a will or trust;

f. A contract to exercise or not to exercise a power of appointment;

g. A transfer in satisfaction of a duty of support; or

h. A reciprocal transfer;

(2) 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;

(3) A power to appoint a fiduciary;

(4) 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;

(5) 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;

(6) 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; or

(7) 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.

§ 41-19. Prospective application.

(a) Except as extended by subsection (b) of this section, this Article applies to a nonvested property interest or a power of appointment that is created on or after October 1, 1995. For purposes of this section, a nonvested property interest or a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created prior to October 1, 1995, and is determined in a judicial proceeding, commenced on or after October 1,1995, to violate this State's rule against perpetuities as that rule existed before October 1, 1995, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

§ 41-20. Short title.

This Article may be cited as the Uniform Statutory Rule Against Perpetuities.

§ 41-21. Uniformity of application and construction.

This Article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Article among states enacting it.

§ 41-22. Supersession.

This Article supersedes the rule of the common law known as the rule against perpetuities.

Sec. 2. In the event that the 1995 General Assembly enacts a new Article of Chapter 36A of the General Statutes, entitled "Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots", G.S. 41-18, as enacted by this act, is amended by adding a new subdivision to read:

"(8) A property interest or arrangement subjected to a time limit under Article 14 of Chapter 36A, 'Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots'."

The Revisor of Statutes shall relocate the disjunctive "or" and shall correct punctuation as appropriate in the event that G.S. 41-18 is amended as provided in this section.

Sec. 3. In the event that the 1995 General Assembly enacts a new Article of Chapter 41 of the General Statutes, entitled "Time Limits on Options in Gross and Certain Other Interests in Land", G.S. 41-18, as enacted by this act, is amended by adding a new subdivision to read:

"(9) A property interest or arrangement subjected to a time limit under Article 3 of this Chapter, 'Time Limits on Options in Gross and Certain Other Interests in Land'."

The Revisor of Statutes shall relocate the disjunctive "or" and shall correct punctuation as appropriate in the event that G.S. 41-18 is amended as provided in this section.

Sec. 4. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Statutory Rule Against Perpetuities Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

Sec. 5. This act becomes effective October 1, 1995.

In the General Assembly read three times and ratified this the 7th day of June, 1995.

APPENDIX II

GENERAL ASSEMBLY OF NORTH CAROLINA
1995 SESSION
RATIFIED BILL

CHAPTER 525
SENATE BILL 84
AN ACT TO PLACE TIME LIMITS ON OPTIONS IN GROSS AND OTHER INTERESTS IN LAND, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:
Section 1. Chapter 41 of the General Statutes is amended by designating the existing provisions as Article 1, "Survivorship Rights and Future Interests", and by adding a new Article to read:
ARTICLE 3.
Time Limits on Options in Gross and Certain Other Interests in Land.

§ 41-28. Definitions.
As used in this Article:

(1) 'Nonvested easement in gross' means a nonvested easement which is not created to benefit or which does not benefit the possessor of any tract of land in his or her use of it as the possessor.
(2) 'Option in gross with respect to an interest in land' means an option in which the holder of the option does not own any leasehold or other interest in the land which is the subject of the option.
(3) 'Preemptive right in the nature of a right of first refusal in gross with respect to an interest in land' means a preemptive right in which the holder of the preemptive right does not own any leasehold or other interest in the land which is the subject of the preemptive right.

§ 41-29. Options in gross, etc.
An option in gross with respect to an interest in land or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in land becomes invalid if it is not actually exercised within 30 years after its creation. For purposes of this section, the term 'interest in land' does not include arrangements relating solely to an interest in oil, gas, or minerals.

§ 41-30. Leases to commence in the future.
A lease to commence at a time certain or upon the occurrence or nonoccurrence of a future event becomes invalid if its term does not actu-

ally commence in possession within 30 years after its execution. For purposes of this section, the term 'lease' does not include an oil, gas, or mineral lease.

§ 41-31. Nonvested easements.

A nonvested easement in gross becomes invalid if it does not actually vest within 30 years after its creation.

§ 41-32. Possibilities of reverter, etc.

(a) Except as otherwise provided in this section:

(1) A possibility of reverter preceded by a fee simple determinable;

(2) A right of entry preceded by a fee simple subject to a condition subsequent; or

(3) An executory interest preceded by either a fee simple determinable or a fee simple subject to an executory limitation;

becomes invalid, and the preceding fee simple becomes a fee simple absolute, if the right to vest in possession of the possibility of reverter, right of entry, or executory interest depends on an event or events affecting the use of land and if the possibility of reverter, right of entry, or executory interest does not actually vest in possession within 60 years after its creation.

(b) This section does not apply to a possibility of reverter, right of entry, or executory interest held by a charity, a government or governmental agency or subdivision excluded from the Uniform Statutory Rule Against Perpetuities by G.S. 41-18(5) or to an arrangement relating solely to an interest in oil, gas, or minerals.

§ 41-33. Prospective application.

This Article applies only to a property interest or arrangement that is created on or after October 1, 1995.

Sec. 2. The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Rule Against Perpetuities Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

Sec. 3. This act becomes effective October 1, 1995.

In the General Assembly read three times and ratified this the 29th day of July, 1995.

APPENDIX III

GENERAL ASSEMBLY OF NORTH CAROLINA
1995 SESSION
RATIFIED BILL

CHAPTER 225
SENATE BILL 85
AN ACT TO AUTHORIZE HONORARY TRUSTS, TRUSTS FOR PETS, AND TRUSTS FOR CEMETERY LOTS, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:
Section 1. Chapter 36A of the General Statutes is amended by adding a new Article to read:
ARTICLE 14.
Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots.

§ 36A-145. Honorary trusts.
Except as otherwise provided in this Article, a trust (i) for a noncharitable corporation or unincorporated society or (ii) for a lawful noncharitable purpose may be performed by the trustee for 21 years but no longer, whether or not there is a beneficiary who can seek the trust's enforcement or termination and whether or not the terms of the trust contemplate a longer duration.

§ 36A-146. Trusts for cemetery lots.
A trust, contract, or other arrangement to provide for the care of a cemetery lot, grave, crypt, niche, mausoleum, columbarium, grave marker, or monument is valid without regard to remoteness of vesting, duration of the arrangement, or lack of definite beneficiaries to enforce the trust, provided that the trust, contract, or other arrangement meets the requirements of G.S. 28A-19-10, Article 4 of Chapter 65 of the General Statutes, Article 9 of Chapter 65 of the General Statutes, or other applicable law. This section does not revoke, repeal, supersede, or diminish G.S. 36A-49.

§ 36A-147. Trusts for Pets.
(a) Subject to the provisions of this section, a trust for the care of one or more designated domestic or pet animals alive at the time of creation of the trust is valid.
(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of the designated animal or animals.

(c) The trust terminates at the death of the animal or last surviving animal. Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(1) As directed in the trust instrument;

(2) If the trust was created in a preresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will;

(3) If no taker is produced by the application of subdivision (1) or (2) of this subsection, to the transferor or the transferor's heirs determined as of the date of the transferor's death under Chapter 29 of the General Statutes.

(d) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by the clerk of superior court having jurisdiction over the decedent's estate upon application to the clerk by an individual.

(e) Except as ordered by the clerk or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, bond, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(f) A governing instrument shall be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence shall be admissible in determining the transferor's intent.

(g) The clerk may reduce the amount of the property transferred, if the clerk determines that the amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c) of this section.

(h) If no trustee is designated or if no designated trustee agrees to serve or is able to serve, the clerk shall name a trustee. The clerk may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. The clerk may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.

§ 36A-148. Termination of small trusts.

Notwithstanding any other provision of this Article, a trust created under this Article shall terminate upon the balance of the trust corpus falling below the sum of one hundred dollars ($100.00), at which time

the remaining balance shall be disbursed as provided in G.S. 36A-147(c).

Sec. 2. G.S. 65-9 reads as rewritten:

§ 65-9. Funds to be kept perpetually.

All money placed in the office of the superior court clerk in accordance with this Article shall be held perpetually, or until such time as the balance of the trust corpus falls below one hundred dollars ($100.00), at which time the trust shall terminate and the clerk shall disburse the remaining balance as provided in G.S. 36A-147(c). Except as otherwise provided herein, no one shall have authority to withdraw or change the direction of the income on same.

Sec. 3. The Revisor of Statutes shall cause to be printed along with this act all explanatory comments of the drafters of this act as the Revisor may deem appropriate.

Sec. 4. This act becomes effective October 1, 1995. Section 1 of this act applies to trusts created on or after that date. Section 2 of this act applies to all cemetery trusts in existence before or created on or after that date.

In the General Assembly read three times and ratified this the 13th day of June, 1995.