

Perpetuities Literacy for the 21st Century

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I. INTRODUCTION

The Rule Against Perpetuities (“Rule”) in common law or orthodox form is a rule of property that under specified circumstances invalidates provisions in trusts and wills regardless of the intention of the settlor or testator. About four decades have elapsed since Pennsylvania abandoned the Rule in orthodox form and adopted a wait-and-see version of the Rule.¹ Thereafter, a scholarly debate ensued on the wisdom of rejecting the Rule in orthodox form in favor of either a wait-and-see version or a *cy pres* version of the Rule (or a combination of the two reform versions). While the debate continued, some states joined Pennsylvania in abandoning the Rule in orthodox form, and others modified the Rule in orthodox form to make it more palatable.² The Section of Real Property, Probate and Trust Law of the American Bar Association memorialized these changes in the law by preparing and issuing three editions of its *Perpetuity Legislation Handbook*.³ In 1979 the American Law Institute adopted a draft of the Rule that included both wait-and-see and *cy pres* features.⁴ Finally, in 1986 the National Conference of Commissioners on Uniform State Laws approved a Uniform Statutory Rule Against Perpetuities (Uniform Statute) that not only set out the Rule in orthodox form,⁵ but also provided that “[a] nonvested property interest is invalid unless . . . the interest either vests or terminates within 90 years after its creation.”⁶ That is, the Conference complemented the Rule in orthodox form with a wait-and-see Rule limited by a definite period of time. Further, the Uniform Statute provided for *cy pres* reformation of an interest that violates the Rule in its less rigorous wait-and-see form.⁷

Just as the enactment of a wait-and-see statute in Pennsylvania sparked a scholarly discussion of the relative merits of the orthodox Rule and the reform versions, so too the acceptance of a combination of wait-and-see and *cy pres* versions of the Rule by both the American Law Institute and the National Conference of Commissioners on Uniform State Laws has stimulated the publication of articles that, on the one hand, question the desirability of sweeping reform⁸ and, on the other hand, suggest the course decisions should take under sweeping reforms already adopted.⁹ Scholarly writing on the Rule Against Perpetuities is almost invariably exceptionally well prepared, but many readers find it intimidating.

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1. 20 PA. CONS. STAT. ANN. § 6104 (Purdon 1975), amended by § 6104(d) (Supp. 1988), § 6105 (Purdon 1975).

2. See, e.g., CONN. GEN. STAT. ANN. §§ 45-95 to 45-99 (West 1981).

3. ABA COMM. ON RULES AGAINST PERPETUITIES, PERPETUITY LEGISLATION HANDBOOK (3d ed. 1967).

4. 56 A.L.I. PROC. at v (1979).

5. UNIFORM STATUTORY RULE AGAINST PERPETUITIES § 1(a)(1), 8A U.L.A. 103 (Supp. 1988).

6. *Id.* § 1(a)(2).

7. *Id.* § 3.

8. Bloom, *Perpetuities Refinement: There Is an Alternative*, 62 WASH. L. REV. 23, 33–58 (1987).

9. Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1654–1701 (1985).

What can be said about the Rule in its various forms that is not quite so intimidating and will promote literacy regarding the Rule well into the next century? Will endorsement of reform by the American Law Institute (through the *Restatement (Second) of Property*) and the National Conference of Commissioners on Uniform State Laws (through the Uniform Statute) accelerate the reform movement? If sweeping reform versions of the Rule become the norm, will knowledge of the Rule in orthodox form become irrelevant? Does perpetuities reform signal a significant departure from traditional American attitudes on control of property by the dead? Responses to these questions are among the matters considered below.

II. THE RULE IN ORTHODOX FORM

It is not a coincidence that the statement of the Rule in wait-and-see form in the Uniform Statute is preceded by a statement of the Rule in orthodox form. If a questioned future interest conforms to the requirements of the Rule in orthodox form, the future interest does not violate the Rule in those jurisdictions retaining the Rule in orthodox form, and if a questioned interest does not violate the Rule in its most rigorous form, there is no need to resort to either wait-and-see or *cy pres* reformation in those jurisdictions that have adopted a reform version of the Rule. *Working with the Rule in any of the reform versions assumes familiarity with the Rule in orthodox form.* Law school teaching materials reflect this assumption by setting out cases, problems, and text on the orthodox Rule at some length.¹⁰ Furthermore, irrespective of the version of the Rule in force, the careful drafter of a trust instrument or a will makes certain that he or she conforms to the requirements of the Rule in orthodox form. By doing so the drafter reduces the likelihood of diminishing the donor's gifts through the payment of costs and fees incident to dispute and litigation and avoids altogether liability for malpractice attributable to creating a limitation that violates the Rule. Therefore, mastery of the fundamentals of the Rule in orthodox form is a prerequisite to mastery of the fundamentals of the Rule in its reform versions. What are those fundamentals?

A. *Gray's Rule*

The best known statement of the Rule in orthodox form is that of John Chipman Gray: "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."¹¹ Both law students and lawyers find Gray's statement to be elliptical. Therefore, simplifying the elements of Gray's statement is a starting point for understanding the Rule in any of its contemporary forms. Four matters respecting the Rule in orthodox form deserve emphasis at the outset.

First, Gray made the Rule Against Perpetuities a rule against *remoteness of*

10. See, e.g., J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 769-842 (3d ed. 1984); T. WATERBURY, *MATERIALS ON TRUSTS AND ESTATES* 862-903 (1986).

11. J. GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942).

vesting. Gray's Rule requires that, to be valid, a future interest be so created that the contingency attached to it will be resolved within the perpetuities period. Gray's Rule is not a rule against *suspension of the power of alienation*.¹² And the Rule does not directly limit the length of time that a trust might last.¹³ Consider a simple example.

If A devises property in trust "to pay the income to B for life, then to B's children for their lives and the life of the survivor of them, and then to pay the principal to the grandchildren of B," and B survives A and "B's children" is given its usual construction of "B's children whenever born," the gift of principal to grandchildren is void *ab initio* under the Rule irrespective of whether the gift is initially classified as a vested remainder subject to open (because a grandchild of B is alive at A's death) or a contingent remainder (because no grandchild of B has been born at A's death). Although the gift to grandchildren is void under the Rule, the trust nonetheless might last beyond the perpetuities period of a life in being at A's death and twenty-one years because a child of B born after A's death might be the survivor of B's children, and such afterborn child might receive trust income beyond the perpetuities period. There are, of course, rules of property limiting the duration of certain kinds of trusts, and such rules do use the perpetuities period as a yardstick for measuring the length of time that a particular characteristic of a trust is permissible. Nonetheless, the matter of remoteness of vesting should be differentiated from *duration* of trusts and *termination* of trusts. Remoteness of vesting, duration of trusts, and termination of trusts are matters that are related, but they are not the same.

Second, the Rule in orthodox form invalidates contingent future interests in transferees that might vest, if at all, at a time beyond the perpetuities period. With minor exceptions, it is what *might* occur—possibilities—rather than what *does* occur—actualities—that proves to be fatal to an interest questioned under the Rule. Possibilities include the conclusive presumption that a person might conceive a child irrespective of physical condition, the eventuality that a will might be offered for probate at a time beyond the perpetuities period, and the construction of "widow" to include a person unborn at the effective date of the instrument.¹⁴ Because future

12. 6 AMERICAN LAW OF PROPERTY § 24.3 (A. Casner ed. 1952) [hereinafter A.L.P.].

13. *Id.* § 24.67.

14. These are, respectively, the "fertile octogenarian" case, the "administrative contingency" case, and the "unborn widow" case.

The classic fertile octogenarian case is *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787). In substance the testator bequeathed money to Mary Hall, but if direct descendants of Mary Hall ceased to exist, then to the daughters then living of John and Elizabeth Jee. Mary Hall, daughters of the Jees, and John and Elizabeth Jee survived the testator. The contingent executory interest was held invalid under the Rule. Although the Jees were aged persons, "daughters" was construed to include daughters born after the testator's death, and if invalid with respect to an unborn daughter, the gift was invalid with respect to all—the "all-or-nothing" or unit rule on class gifts was applied. Because the testator used the word "daughters" to describe the beneficiaries of the contingent executory interest, as a matter of construction of the will the gift *could* have been limited to daughters of the Jees *known to the testator*; that is to say, lives in being at the execution of the will, some or all of whom were alive at the testator's death when the will took effect. If confined to such daughters, the gift would have been valid under the Rule because the contingencies would have been resolved, favorably or unfavorably, within the lifetime of each daughter.

The conventional example of the administrative contingency case is a devise or bequest "to B on the probate of my will." Although B survives the testator, the gift (a contingent executory interest) is invalid under the Rule on the assumption that probate of the will might occur beyond the perpetuities period. "On the probate of my will" should be regarded as redundant. If so, there is no contingency attached to the gift.

The unborn widow case is illustrated by a testamentary gift "to B for life, then to B's widow for life, remainder to

interests held invalid under the Rule in orthodox form have, in actuality, sometimes vested or failed, as the case may be, within the perpetuities period, the move from a possibilities test for validity to an actualities, or wait-and-see test, has had an understandable appeal.

Third, the Rule in orthodox form requires that, to be valid, an interest subject to the Rule be so created that *all* contingencies with respect to the interest be resolved within the perpetuities period. It bears emphasis that *one or more* contingencies might be attached to an interest. If *A* devises land “to *B* for life, remainder to such of *B*’s children as survive *B* and attain age 21,” and *B* survives *A*, but no child has been born to *B* before *A*’s death, the future interest is a contingent remainder subject to three contingencies: (1) the birth of a child to *B*, (2) such child’s surviving *B*, and (3) such child’s attaining age twenty-one. Viewed as of the time of *A*’s death, *all* of these contingencies must be resolved within the perpetuities period in order for the requirements of the Rule to be satisfied.

Fourth, although the Rule *invalidates* an interest subject to the Rule that might vest, if it vests at all, at a remote time, we determine that a questioned interest is invalid by trying to demonstrate that it complies with the Rule, and finding ourselves unable to do so. If our attempt to demonstrate compliance has been performed correctly, but we are unsuccessful in proving compliance, the questioned interest is void *ab initio*. If our task is performed incorrectly, we assert invalidity erroneously. If *A* devises land “to *B* if alive at the probate of my will,” and *B* survives *A*, the devise (a contingent executory interest) is valid under the Rule in orthodox form even though we assume that probate of *A*’s will might occur, if it occurs at all, at a remote time. *B*’s interest is subject to *two* contingencies: (1) probate of *A*’s will, and (2) *B*’s being alive at the probate of *A*’s will. To qualify for the devise *B* must be alive when probate occurs, “if at all.” Therefore, we will know *within B’s lifetime* whether *B* takes or whether the devise fails, and *B* is a life in being at *A*’s death. Had we directed our attention solely to the “administrative contingency”—probate of the will—we would erroneously have concluded that we could not demonstrate validity.

1. “interest”

Because any version of the Rule is simply a part of the law of future interests, working with the Rule assumes familiarity with the law of future interests, particularly that part of future interest law dealing with the categories of future interests and the classification of powers of appointment. When Gray used the word “interest,”¹⁵ he referred to an abstraction that *might* violate the Rule. The familiar

the children of *B* then surviving.” If *B* survives the testator, the gift to the widow (a contingent remainder) is valid under the Rule even though “widow” potentially includes a person unborn at the testator’s death. The identity of *B*’s widow, if any, will be established at *B*’s death, and *B* is a life in being at the testator’s death. However, the gift to the children of *B* (a contingent remainder) is invalid under the Rule. The gift is not confined to children of *B* alive at the testator’s death; the gift includes afterborn children. And the gift is not confined to children of *B* who survive *B*—they might also be required to survive a person who might be unborn at the testator’s death: *B*’s “widow.” Because the identification of the children who share, if any, *might* be established at a time beyond relevant lives in being at the testator’s death and twenty-one years, the gift to children is invalid.

15. See text accompanying note 11.

interests, legal or equitable, that might be invalid under the Rule are the *contingent remainder*, the *vested remainder subject to open*, and the *contingent executory interest*, interests intended for transferees, rather than future interests retained by a transferor, such as the reversion, the possibility of reverter, and the right of entry for condition broken. The Rule also encompasses *powers of appointment*, despite the fact that we do not ordinarily think of a special (or “non-general”) power as a property interest, but rather as an ability to shift property from one person or persons to another person or persons. The Rule also encompasses *appointments* made through the exercise of powers. Although the Rule developed primarily as a means of policing the indiscriminate creation of contingent future interests in family transactions, it has been used to invalidate an option in gross that might be exercisable at some time in the indefinite future.¹⁶ In sum, Gray’s word “interest” is simply a convenient way of directing our attention to a particular part of a property transaction, and applying the Rule in orthodox form presupposes skill in identifying that part of a property transaction that might pose a perpetuities problem.

Identifying that part of a property transaction that might pose a problem requires knowledge of all the relevant facts, because the facts affect the existence of gifts, the characterization of future interests, and the operation of the Rule. Consider just one deceptively simple example, with variations in the facts. If *A* devises land “to *B* for life, remainder to that child of *B* who first attains age 25,” we should first determine whether there is an intended future interest in a transferee that is subject to the Rule. If *B* predeceases *A*, and no child of *B* survived *A*, we must know whether a child of *B* had attained age twenty-five, but predeceased *A*. If there were such a child, an anti-lapse statute *might* create a gift by substitution, thus precluding complete failure of the gift. If there were no such child, or if circumstances were such that no gift by substitution exists, the intended devise simply fails. *But failure is not attributable to the Rule Against Perpetuities*. The gift fails for lack of actual or potential beneficiaries, just as it would fail if there were no subject matter of the gift. The Rule is irrelevant because there is no future interest, even a tentative future interest, that is subject to the Rule.

To continue with this example, if a child or children of *B* have survived *A*, we must know whether a child of *B* alive at *A*’s death has attained age twenty-five at *A*’s death. If a child of *B* has attained age twenty-five at *A*’s death, then, *irrespective* of whether *B* survived *A*, that child has a vested interest to which the Rule does not apply. If *B* survived *A*, the future interest is an *indefeasibly vested remainder*. If *B* predeceased *A*, the child who has attained age twenty-five has an *immediate* or *possessory* interest.

If a child or children of *B* have survived *A*, but none has attained age twenty-five at *A*’s death, the validity of the devise to the child under the Rule Against Perpetuities turns on whether *B* survived *A*. If *B* predeceased *A*, the devise is a contingent

16. An option in gross is one that is not incident to a lease for years and exercisable during the term. In *Kentucky-West Virginia Gas Co. v. Martin*, 744 S.W.2d 745 (Ky. Ct. App. 1988), and *Ferrero Constr. Co. v. Dennis Rourke Corp.*, 311 Md. 560, 536 A.2d 1137 (1988), preemptive rights of first refusal were found to violate the Rule.

executory interest that is valid under the Rule because *any* child of *B* alive at *A*'s death will be the first child to attain age twenty-five, or will fail to do so, within such child's own lifetime, and such child is a "life in being" at *A*'s death. In short, the contingency attached to the executory interest will be resolved, one way or the other, within the lifetime of each child of *B* alive at *A*'s death.

However, if a child or children of *B* have survived *A*, and none has attained age twenty-five at *A*'s death, the devise to the child is a contingent remainder that is invalid under the Rule if *B* survived *A*. It is true that with respect to any child of *B* alive at *A*'s death the contingency will be resolved within such child's own lifetime. But the devise is not confined to a child or children of *B* alive at *A*'s death. The devise encompasses possible afterborn children of *B*, and with respect to an afterborn child of *B*, it is not *certain*, viewed as of the time of *A*'s death, that the contingency will be resolved within the perpetuities period. A possible afterborn child of *B* might be the only child of *B* who attains age twenty-five, and such afterborn child might do so more than twenty-one years after the death of the survivor of *B* and children of *B* alive at *A*'s death. (If the destructibility rule¹⁷ were in force, the contingent remainder would be valid under the Rule because it would vest, if at all, during *B*'s lifetime, or be destroyed under the destructibility rule at *B*'s death. Hereinafter in this article we will assume that the destructibility rule has been abolished.)

Notice that examining this simple gift (a devise "to *B* for life, remainder to that child of *B* who first attains age 25") requires considering the law on lapse, the classification of interests, and the operation of the Rule. If we are asked whether such a gift is valid under the Rule, our response should be, "What are the relevant facts?" Facts let us determine whether a gift of any kind is precluded, whether a gift by substitution might exist under an anti-lapse statute, and whether an intended gift is an interest unaffected by the Rule or the kind of future interest that is subject to the Rule. Here, as elsewhere in the law, facts make a critical difference.

2. "good"

The Rule in orthodox form is a rule of property or a rule of law that *invalidates* an interest that does not conform to the requirements of the Rule. Nonetheless, by using the word "good,"¹⁸ Gray stressed that we determine whether an interest violates the Rule by trying to show that it was so created that it conforms to the requirements of the Rule and is therefore *not invalid* at its creation, but "good." If an interest subject to the Rule is unaffected by it, we conventionally say that the interest is "good." If an interest subject to the Rule is invalid under the Rule, we conventionally say that the interest is "bad."

17. The destructibility rule has been abolished in about three-fourths of the states, and its existence in the remaining one-fourth of the states is questionable. J. DUKEMINIER & J. KRIER, PROPERTY 249 (2d ed. 1988).

18. See text accompanying note 11.

3. "unless it must vest"

Under the Rule in orthodox form the validity of a questioned interest is determined *as of the time of its creation*. But a contingent remainder, or a contingent executory interest, or a vested remainder subject to open has the capacity to change over time—to *vest*, that is, to become possessory or be transformed into a vested estate, or a vested remainder, or a vested remainder in a class no longer subject to possible partial divestment. "Vest" is one of the most intractable abstractions in the law of property, but it is worth noting that reform versions of the Rule have not cast it aside. The Rule in orthodox form requires that a questioned interest be so created that it *must* (not *might*) vest,¹⁹ that is, become possessory or be transformed, if at all, within the perpetuities period. Suppose that *A* devises land "to *B* for life, remainder to such of the children of *B* as attain age 21." If *B* survives *A*, and "children" is construed to mean "children of *B* whenever born," the gift in remainder is valid under the Rule irrespective of whether at *A*'s death it is classified as a vested remainder subject to open (because a child of *B* has attained age twenty-one at *A*'s death) or a contingent remainder (because no child of *B* has attained age twenty-one at *A*'s death, or *B* has no children at *A*'s death). Regardless of classification, the transformation of the future interest will occur, or the gift will fail in its entirety, within the lifetime of *B* and twenty-one years.

Let us consider this example in greater detail. If the future interest at *A*'s death is a vested remainder subject to open, we know at *A*'s death that the gift will not fail, and we will know within *B*'s lifetime and twenty-one years, *at the latest*, the precise number of *B*'s children who will share in the fee simple. All children born to *B* might attain age twenty-one before *B*'s death. If so, the vested remainder subject to open will become an indefeasibly vested possessory estate in fee simple at *B*'s death. If a child or children of *B* who survive *B* have not attained age twenty-one at *B*'s death, the class will close at *B*'s death, and the vested remainder subject to open will become a vested possessory estate in fee simple, subject to possible partial divestment (through a child's attaining age twenty-one after *B*'s death, but within the perpetuities period).

On the other hand, if the future interest at *A*'s death is a contingent remainder, we will know within *B*'s lifetime and twenty-one years, *at the latest*, either (1) the precise number of *B*'s children who share in the fee simple, or (2) that the gift has failed in its entirety because no child of *B* attained age twenty-one. Again, all children born to *B* might attain age twenty-one before *B*'s death. If so, the contingent remainder will first be transformed into a vested remainder subject to open during *B*'s lifetime, and at *B*'s death, the vested remainder subject to open will become an indefeasibly vested possessory estate in fee simple. If one or more of *B*'s children attain age twenty-one during *B*'s lifetime, but one or more who survive *B* have not attained age twenty-one at *B*'s death, the class will close at *B*'s death, and the vested remainder subject to open will become a vested possessory estate in fee simple,

19. See text accompanying note 11.

subject to possible partial divestment. If no child of *B* has attained age twenty-one during *B*'s lifetime, but a child or children of *B* survive *B*, the class will close at *B*'s death, and the reversioner will be entitled to possession. The contingent future interest (irrespective of whether it is still classified as a contingent remainder or is reclassified as an executory interest) will become a vested possessory estate in fee simple, subject to possible partial divestment, if a child of *B* attains age twenty-one and there is, at that time, a sibling or siblings who have not yet attained age twenty-one.

Finally, in this example, if the future interest at *A*'s death is a contingent remainder, it is possible, of course, that *no* child of *B* will attain age twenty-one. Viewed as of the time of *A*'s death, (1) *B* might never have a child, or (2) all children born to *B* might die during *B*'s lifetime without attaining age twenty-one, or (3) all children born to *B* might fail to attain age twenty-one, some dying during *B*'s lifetime and others dying after *B*'s death. Under any of these circumstances, the contingent remainder will never vest, *but will fail by its own terms within the perpetuities period*. Conformity to the Rule does not assure vesting. Conformity merely assures that any and all contingencies will be resolved within the perpetuities period.

4. "if at all"²⁰

From the fact, then, that a questioned interest is "good" or valid under the Rule, it does not follow that the intended beneficiary of the interest invariably will enjoy it in the usual sense. In order that an interest be deemed valid under the Rule, it is essential that the interest be so created that it will either vest, *or fail by its own terms*, within the perpetuities period. Let us consider another example. If *A* devises land "to *B* for life, remainder to *C* if *C* attains age 21," and both *B* and *C* survive *A*, but *C* is ten years of age at *A*'s death, *C* has a contingent remainder that is valid under the Rule. *C* will attain age twenty-one, *or die before attaining age twenty-one*, within his own lifetime—the contingent remainder will vest, *or fail*, within the lifetime of *C*, a person in being at *A*'s death. (It will also vest, or fail, within the lifetime of *B* and twenty-one years, or simply within the "period in gross" of twenty-one years.) What the Rule requires is that an interest be so created that a contingency with respect to it will be resolved, favorably with respect to the beneficiary, or unfavorably, as the case may be, within the perpetuities period of a life in being at the creation of the interest and twenty-one years.

5. "some life in being"²¹

Under the Rule in orthodox form, a future interest subject to the Rule is void *ab initio* unless it is so created that the contingency affecting it will be resolved within the "perpetuities period"—a length of time measured by a life in being at the creation of the interest and twenty-one years.

20. See text accompanying note 11.

21. See text accompanying note 11.

Defining a life in being has proved to be elusive. Therefore, descriptions of the operation of the Rule customarily include hypothetical cases illustrating identification of an appropriate life in being for purposes of demonstrating the validity of an interest that is being questioned under the Rule. It is true that in some instances more than one life in being can be used to demonstrate validity. For example, if *A* devises land "to *B* for life, remainder to *C* if *C* attains age 21," and both *B* and *C* survive *A*, but *C* is ten years of age at *A*'s death, the condition attached to *C*'s contingent remainder will be resolved within *B*'s lifetime and twenty-one years or within *C*'s lifetime. Both *B* and *C* are lives in being at *A*'s death. The contingency will also be resolved within the "period in gross" of twenty-one years.²² It bears emphasis that if the validity of a questioned interest can be demonstrated in just one way, that is sufficient. That validity might be demonstrated in other ways is of interest, but it is unnecessary.

Although a life that is appropriate for demonstrating validity need not be a beneficiary under the dispositive instrument, and need not be mentioned in the dispositive instrument, an appropriate life has some relevant connection with the disposition.²³ If *A* devises land "to such of my grandchildren as attain age 21," and *A* is survived by children but no grandchild of *A* has attained age twenty-one at *A*'s death, the contingent future interest (in this case, an executory interest) is valid under the Rule because any grandchild of *A* who shares in the gift will necessarily be identifiable within the lifetime of a child of *A* alive at *A*'s death and twenty-one years. That *A*'s children are not themselves beneficiaries and are not specifically mentioned in *A*'s will does not preclude using their lives to demonstrate validity.

An actual period of gestation is included in the perpetuities period. Suppose that *A* devises land "to the firstborn child of *B* for life, remainder to the children of such child," and *B* survives *A*, having had no children during *A*'s lifetime, but having conceived a child before *A*'s death who is born alive after *A*'s death. Because the firstborn child was conceived before *A*'s death, such child is treated for property purposes as alive at *A*'s death. The gift for life to such child is an immediate interest to which the Rule does not apply. The gift of the remainder (a contingent remainder) is valid under the Rule because it is certain to vest or fail, as the case may be, within the lifetime of the firstborn child, a life in being at *A*'s death.

A drafter may lawfully *provide* a reasonable number of lives in being for the purpose of measuring the perpetuities period, but drafters do not usually do so. Instruments with a carefully crafted perpetuities savings clause assure compliance

22. See *infra* subpart 6.

23. Professor Dukeminier has consistently and persuasively maintained that the person whose life is used to demonstrate validity of a questioned interest must have a *causal relationship* to vesting. His definitive article is *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985). Although Professor Dukeminier's view has been challenged in Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714 (1985), Dukeminier's rejoinder, *A Response by Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985), and his later articles, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867 (1986), and *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023 (1987), assure that Professor Dukeminier's analysis will prevail. Just as Professor Leach's *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938), and *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965), have been the perpetuities bible for several generations of law students and lawyers, so too will Professor Dukeminier's *A Modern Guide to Perpetuities* be the perpetuities bible for the legal profession for the foreseeable future.

with the Rule by requiring that all property interests become absolute and possessory *at the latest* at the end of the perpetuities period.

6. “*twenty-one years*”²⁴

If a questioned future interest is so created that the contingency will be resolved within twenty-one years, the interest is valid, and it is unnecessary to identify a life in being at the creation of the interest for the purpose of demonstrating validity. If *A* devises “to *B* if *B* is alive twenty years after my death,” and *B* survives *A*, the contingent future interest (an executory interest) is valid because the contingency will be resolved within the *period in gross* of twenty-one years, and that in itself is sufficient to satisfy the requirements of the Rule. The contingency will also be resolved within *B*’s lifetime, and *B* is a life in being at *A*’s death. However, if *A* devises “to such of my lineal descendants as are alive twenty years after my death,” the contingent future interest (an executory interest) is valid *only* because the persons, if any, who share in the gift will be identified within the period in gross. In this case it is not possible to identify a life in being at *A*’s death for the purpose of demonstrating validity.

7. “*at the creation of the interest*”²⁵

For perpetuities purposes, an interest created by will is created at the death of the testator. If created by deed, an interest is created on delivery. If created by irrevocable trust, an interest is created on establishing the trust. If created by revocable trust, an interest is created when the trust becomes irrevocable, commonly on the death of the settlor. (The revocable trust is assimilated to the will for perpetuities purposes, because outstanding interests are subject to destruction through the right to revoke.)

8. *Gray’s Rule amplified*

If we amplify Gray’s Rule in the way suggested above, it reads as follows: “No interest [that is, contingent remainder, contingent executory interest, or vested remainder subject to open] is good [that is, valid at its creation] unless it must vest [that is, be so created as to become possessory or be transformed into a vested estate, or a vested remainder, or a vested remainder in a class no longer subject to possible partial divestment], if at all [for the interest, though valid, may “fail by its own terms”], not later than twenty-one years after some life in being at the creation of the [questioned] interest.”

Again, it bears emphasis that this expanded statement of Gray’s Rule is still general in nature, and that it does not clearly encompass powers of appointment and appointments made through the exercise of powers. In sum, amplifying Gray’s Rule gives us a better appreciation of Gray’s skill at distillation and makes us aware of its

24. See text accompanying note 11.

25. See text accompanying note 11.

dependence on mastery of the fundamentals of the law of wills, trusts, and future interests.

B. Powers and Appointments

The Rule in orthodox form might invalidate a power of appointment at its creation, or the Rule might invalidate an appointment made through the exercise of a power that is itself valid. A power is a *general* power if the holder of the power may appoint to anyone, including the holder of the power or the holder's estate. A general power to appoint by deed or will that is acquired contemporaneously with its creation is exempt from the Rule. If *A* devises land "to *B* for life, remainder to such person or persons as *B* by deed or will appoints," and *B* survives *A*, the power in *B* is the perpetuities equivalent of an indefeasibly vested remainder and is exempt from the Rule. However, if the acquisition of a general power to appoint by deed or will is deferred beyond the effective date of the instrument creating the power, the power is valid only if it is so created that it must be acquired, if acquired at all, within the perpetuities period.²⁶ If *A* devises "to *B* for life, remainder to such person or persons as the first child born to *B* by deed or will appoints," and *B* survives *A* but has no child at *A*'s death, the power is valid under the Rule because a child of *B* will acquire the power, if at all, within *B*'s lifetime.

A power is a *special* power if the holder of the power may appoint to anyone other than the holder of the power or the holder's estate. A special power is usually a power to appoint to a class—for example, children of the holder of the power. For perpetuities purposes, a general testamentary power (a general power exercisable only by will) and a special power are equivalent. A general testamentary power or a special power that is so created that it might be exercised beyond the perpetuities period is invalid under the Rule in orthodox form.²⁷ If *A* devises land "to *B* for life, then to *B*'s children for their lives, remainder to such of *B*'s grandchildren as the first child born to *B* by deed or will appoints," and *B* survives *A* but has no children at *A*'s death, the power is invalid under the Rule because it might be exercised at a time beyond *B*'s lifetime and twenty-one years.

Because holding a general power to appoint by deed or will is so close to ownership of the subject matter of the power, the validity of an appointment made by the exercise of such a power is determined by computing the perpetuities period from the time the power is *exercised*.²⁸ We view the appointment as if it were a grant or a devise by the owner of property. If *A* devises land "to *B* for life, then to *B*'s children for their lives, remainder to such person or persons as *C* by deed or will appoints," and both *B* and *C* survive *A*, and *C* by deed appoints the remainder "to *D* for life, remainder to *D*'s children, share and share alike," the appointment is valid under the Rule. It is as if *C*, owning in fee simple absolute, had granted "to *D* for life, remainder to *D*'s children share and share alike." The remainder created for *D*'s

26. See A.L.P., *supra* note 12, § 24.31.

27. *Id.* § 24.32.

28. *Id.* § 24.33.

children is either vested subject to open (if *D* has a child at the time *C* makes the appointment) or a contingent remainder. But irrespective of classification, the future interest is valid under the Rule because the contingency attached to the appointment (the birth of a child to *D*) will be resolved within *D*'s lifetime, and *D* is a person in being when *C* exercises the power.

Because the creator of a general testamentary or a special power has restricted exercise of the power by excluding the holder of the power from the group of permissible appointees, the holder of such a power is viewed as an extension of the creator of the power when the holder exercises the power. Therefore, when determining the validity of an appointment made by the exercise of a general testamentary or a special power, the perpetuities period begins to run when the power is *created*, and the appointment is "read back" into the instrument creating the power.²⁹ If *A* devises land "to *B* for life, remainder to such of the children of *B* as *B* by deed or will appoints, and in default of appointment, remainder to *C*," and both *B* and *C* survive *A*, and *B* by will appoints the remainder "to such of my children as survive me, share and share alike," the appointment is valid under the Rule. "Read back" into *A*'s will, it is as if *A* had devised "to *B* for life, remainder to such of the children of *B* as survive *B*, and if no child of *B* survives *B*, remainder to *C*." The identity of the children of *B* who survive *B*, if any, is fixed at *B*'s death, and *B* is a person in being at *A*'s death, when the special power was created.

Although the holder of a general testamentary or a special power is viewed as an extension of the creator of the power, and the validity of an appointment made by the exercise of such a power is determined by computing the perpetuities period from the time the general testamentary or the special power is created, facts existing *when the appointment is made* are taken into account.³⁰ (This aspect of the Rule in orthodox form is a precursor of the wait-and-see approach.) If *A* devises land "to *B* for life, remainder to such of the children of *B* as *B* by deed or will appoints, and in default of appointment, remainder to *C*," and both *B* and *C* survive *A*, and *B* by will appoints the remainder "to such of my children as attain age 25," the appointment is valid under the Rule *provided the youngest child of B is four or more years of age at B's death*. When *B*'s appointment is "read back" into *A*'s will, and the facts existing at *B*'s death are taken into account, it is as if *A* had devised "to *B* for life, remainder to such of *B*'s children as survive *B* and attain age 25 no later than twenty-one years after *B*'s death, and if no child of *B* survives *B* and attains age 25 no later than twenty-one years after *B*'s death, remainder to *C*." The number of children of *B* who share, including those born after the creation of the power, will be fixed at the latest within twenty-one years after the death of *B*, a person in being at the creation of the power.

29. *Id.* § 24.34.

30. *Id.* § 24.35.

C. Class Gifts

A gift to a class is typically to “children” or “grandchildren” or “nephews and nieces.” If a gift to a class includes a future interest to which a contingency is attached, the gift *in its entirety* might violate the Rule in orthodox form. A class gift is totally invalid under the Rule unless the ultimate number of persons sharing in the gift is determinable within the perpetuities period.³¹ That is, if invalid as to one member of the class, the gift is invalid as to all. This “all-or-nothing” aspect of the Rule competes with the “conclusive presumption of fertility” aspect for the questionable distinction of being the principal feature of the Rule in orthodox form that has brought the Rule into disrepute and has resulted in modifications of the orthodox Rule in some states and abandonment of the orthodox Rule in others.

The application of the Rule to class gifts is most easily understood by considering some examples of class gifts. If *A* devises land “to such of *B*’s children as attain age 25,” we should first determine whether there is an intended future interest in a transferee that is subject to the Rule. If *B* predeceased *A*, and no child of *B* survived *A*, we need to know whether a child of *B* had attained age twenty-five, but predeceased *A*. If there were such a child, an anti-lapse statute *might* create a gift by substitution, thus precluding complete failure of the gift. But if there were no such child, or if circumstances were such that no gift by substitution exists, the intended devise simply fails. But, again, failure is not attributable to the Rule Against Perpetuities. The gift fails for lack of actual or potential beneficiaries. Hereinafter in this Article we will assume that no gift by substitution exists under an anti-lapse statute. Nonetheless, it bears emphasis that the possible impact of an anti-lapse statute should not be ignored.

To continue with this example, if a child or children of *B* have survived *A*, we must know whether a child of *B* alive at *A*’s death has attained age twenty-five at *A*’s death. If a child of *B* has attained age twenty-five at *A*’s death, then, *irrespective* of whether *B* survived *A*, only children of *B* alive at *A*’s death are permitted under the class-closing rules³² to share in the gift. (The child of *B* who has attained age twenty-five meets the description of the beneficiaries of the gift in every respect, and there is no outstanding life estate preceding the gift to the children of *B* that precludes a beneficiary who meets the description from seeking immediate possession.) If *all* children of *B* alive at *A*’s death have attained age twenty-five at *A*’s death, the gift in its entirety is a *present* or *immediate* interest, and the Rule does not apply to present or immediate interests. However, if there is a child of *B* alive at *A*’s death who has attained age twenty-five at *A*’s death, and there is another child or children of *B* alive at *A*’s death under twenty-five, the child of *B* who has attained age twenty-five has a vested possessory estate in the land, subject to *possible partial divestment* because there is another child or children of *B* alive at *A*’s death who might attain age twenty-five. (The child of *B* who has attained age twenty-five at *A*’s death is certain

31. *Id.* § 24.26.

32. The closing of the class means that an afterborn child of *B* does not share. Our knowing that a class has closed does not in itself tell us precisely who shares—it tells us who does *not* share.

to share, but at *A*'s death we do not know the exact number of children who will share.) Such other child or children take by way of contingent executory interests. But such executory interests are valid under the Rule because any child of *B* alive at *A*'s death will attain age twenty-five, or fail to do so, within such child's own lifetime. In short, the contingency attached to the executory interest will be resolved, one way or the other, within the lifetime of each child of *B* alive at *A*'s death who has not attained age twenty-five at *A*'s death.

Let us assume two other variations on the facts at *A*'s death. If there is a child or children of *B* alive at *A*'s death, but none has attained age twenty-five at *A*'s death, we must know whether *B* survived *A*. If *B* did not, only a child or children of *B* alive at *A*'s death will attain age twenty-five and thus qualify as beneficiaries. Again, a child of *B* alive at *A*'s death will attain age twenty-five, or not, within such child's own lifetime. All children who share in the devise take by way of valid contingent executory interests; the first to attain age twenty-five acquires a vested possessory estate in the land, subject to possible partial divestment if such child, on attaining age twenty-five, has a sibling or siblings who might attain age twenty-five thereafter.

If there is a child or children of *B* alive at *A*'s death, but none has attained age twenty-five at *A*'s death, the fact that *B* survives *A* precludes demonstrating that the gift to the children of *B* is valid. Under the Rule in orthodox form, a gift to a class is treated as a unit. If the gift is invalid as to one member of the class, it is invalid as to all. Although a child of *B* alive at *A*'s death will attain age twenty-five, or fail to do so, within such child's own lifetime, the class is open at *A*'s death, in this case, to admit a child or children born to *B* after *A*'s death. Because a *possible* afterborn child of *B* might attain age twenty-five beyond the period of a life in being at *A*'s death and twenty-one years, the gift to the children of *B* who attain age twenty-five is invalid in its entirety under the unit rule on class gifts.

In sum, if a testator devises land "to such of *B*'s children as attain age 25," we need to know whether a child of *B* has attained age twenty-five at *A*'s death (thus closing the class at *A*'s death and confining the gift to children of *B* alive at *A*'s death). If no child of *B* has attained age twenty-five at *A*'s death, we need to know whether *B* survived *A*. If *B* did not, the class closes at *A*'s death irrespective of the ages of *B*'s children alive at *A*'s death. If *B* did survive *A*, the class is open at *A*'s death, and the gift fails in its entirety under the unit rule on class gifts.

Notice that examining this simple gift (a devise "to such of *B*'s children as attain age 25") requires considering the law on lapse, the classification of interests, the mechanics of class gifts, and the operation of the Rule in the context of class gifts. If we are asked whether such a gift is valid under the Rule, again our response should be, "What are the relevant facts?" Facts let us determine whether a gift of any kind is precluded, whether a gift by substitution might exist under an anti-lapse statute, and whether an intended gift is a possessory interest, unaffected by the Rule, or the kind of future interest that is subject to the Rule.

The fact that a gift to a class is preceded by a life estate affects the closing of the class, and therefore affects the application of the Rule to a class gift. If *A* devises land "to *B* for life, remainder to such of *B*'s children as attain age 25," and *B* predeceases

A, the class gift cannot violate the Rule in orthodox form even though a child of *B* who survives *A* has not attained age twenty-five at *A*'s death. Because *B* has predeceased *A*, any child of *B* alive at *A*'s death who has not already attained age twenty-five at *A*'s death will attain age twenty-five, or fail to do so, within such child's own lifetime, and such child is a life in being at *A*'s death. But if *B* survives *A*, the class gift is invalid in its entirety under the Rule, irrespective of whether a child of *B* alive at *A*'s death has already attained age twenty-five at *A*'s death. A child of *B* alive at *A*'s death who has attained age twenty-five at *A*'s death meets the description of the remaindermen in every respect, but the existence of the life estate precludes such a child of *B* from calling for possession of the land. The class is therefore open at *A*'s death to admit possible afterborn children of *B*. A child *might* be born to *B* after *A*'s death, and such afterborn child *might* attain age twenty-five at a time beyond *B*'s lifetime, or the lifetime of a child of *B* alive at *A*'s death, and twenty-one years. The possibility that an afterborn child of *B* might attain age twenty-five beyond the perpetuities period invalidates the class gift altogether.

If *A* devises land "to *B* for life, then to *B*'s children for their lives, remainder to *B*'s grandchildren," and *B* survives *A*, the gift to *B*'s children is open at *A*'s death to admit afterborn children of *B*. Irrespective of whether that gift is classified as a vested remainder subject to open (because *B* has a child alive at *A*'s death) or is classified as a contingent remainder (because *B* has no child alive at *A*'s death), the gift complies with the requirements of the Rule. Any child of *B* sharing in the gift is identifiable at *B*'s death, and *B* is a person in being at *A*'s death. However, the gift to *B*'s grandchildren is invalid in its entirety under the Rule in orthodox form. The gift to grandchildren is open at *A*'s death to admit afterborn grandchildren of *B*. Irrespective of whether that gift is classified as a vested remainder subject to open (because *B* has a grandchild alive at *A*'s death) or is classified as a contingent remainder (because *B* has no grandchild alive at *A*'s death), it is possible that *B* might have a child after *A*'s death, and that afterborn child of *B* might be the survivor of *B*'s children. As long as a child of *B* is alive, grandchildren of *B* are not entitled to possession of the land, and the class remains open to admit further grandchildren. Because the afterborn child of *B* might have an afterborn child at a time beyond the lifetime of any relevant life in being and twenty-one years, the gift to *B*'s grandchildren is invalid.

If the gift to *B*'s grandchildren set out in the preceding paragraph were created by *A* as a gift to subclasses, some or all of the gift might be valid. Suppose that *A* creates a testamentary trust "to pay the income to *B* for life, then to pay the income to the children of *B* for their lives, and upon the death of a child of *B* survived by issue, to pay that share of principal upon which such child was receiving the income to such child's then surviving issue, per stirpes." *B* survives *A* and dies thereafter survived by children *C*, *D*, and *E*. *C* and *D* were alive at *A*'s death; *E* was born thereafter. Because any gift of income will become possessory at *B*'s death, and *B* is a person in being at *A*'s death, no gift of income to an afterborn child of *B* can violate the Rule. The gifts of principal to the issue of *B*'s children (all contingent remainders) are valid with respect to the shares of principal represented by *C* and *D*, persons in

being at *A*'s death, but invalid with respect to the share represented by *E*, an afterborn child of *B*. Valid gifts of principal are separated from the invalid and are permitted to stand.³³

If the amount that a member of a group takes is not dependent upon the number in the group, the "all-or-nothing" rule does not apply. *A* bequeaths "\$10,000 to each child of *B* who attains age 25." *B* survives *A* and has four children at *A*'s death, one of whom, *C*, has attained age twenty-five at *A*'s death. *C* meets the description of a legatee in every respect and is entitled to \$10,000. Each of the other three children of *B* is a person in being at *A*'s death and will attain age twenty-five, or fail to do so, within such child's own lifetime. Each of these three executory interests is valid under the Rule,³⁴ and the personal representative of *A*'s estate sets aside a sum sufficient to pay these gifts. With respect to gifts intended for unborn children of *B* the result is different. As a matter of convenience in administering *A*'s estate, afterborn children of *B* are precluded from taking because the number of such children is speculative. Even if a state were willing as a matter of estate administration to delay closing *A*'s estate until *B*'s unborn children, if any, attain age twenty-five, or fail to do so, the executory interests intended for *B*'s afterborn children are invalid under the Rule because the contingency attached to the gifts is not certain to be resolved within the perpetuities period. Note that excluding unborn children of *B* as a matter of estate administration precludes gifts to afterborn children that would not violate the Rule, for example, "\$10,000 to each child of *B* who attains age 21."

D. *Separability of Gifts on Express Alternative Contingencies*

Suppose that *A* bequeaths \$10,000 "to that child of *B* who first becomes a lawyer, but if *B* dies never having had a child, or if no child of *B* becomes a lawyer, then to *C*." *B* and *C* survive *A*, but no child of *B* is a lawyer at *A*'s death. The gifts to *B*'s child and to *C* are contingent executory interests. The gift to the child is invalid under the Rule in orthodox form because the contingency is not certain to be resolved within the perpetuities period. The gift to *C* that is conditioned on no child of *B* becoming a lawyer is also invalid for the same reason. But the gift to *C* that is conditioned on *B* dying never having had a child is valid because the contingency will be resolved at *B*'s death. The valid gift to *C* is separated from the invalid gifts and is permitted to stand. Had the drafter failed to *express* the alternative contingencies attached to the gifts to *C*, all of the gifts would be invalid under the Rule. For example, suppose that *A* bequeaths \$10,000 "to that child of *B* who first becomes a lawyer, but if no child of *B* becomes a lawyer, then to *C*." Although the gift to *C* is also implicitly conditioned on *B* dying never having had a child, the gift to *C* is nevertheless invalid.³⁵

33. See *Cattlin v. Brown*, 11 Hare 372, 68 Eng. Rep. 1319 (Ch. 1853).

34. See *Storrs v. Benbow*, 2 My. & K. 46, 39 Eng. Rep. 862 (Ch. 1833). See also J. GRAY, *supra* note 11, § 389.

35. See A.L.P., *supra* note 12, § 24.54.

E. *Commercial Transactions*

Although the Rule Against Perpetuities was fashioned by judges to police the indiscriminate creation of contingent future interests that are a part of gratuitous intrafamily transfers, the Rule has been applied to commercial transactions. An option to purchase land that is not incident to a lease and exercisable during the term (an "option in gross") is void *ab initio* if it is so created that it might be exercised beyond the perpetuities period.³⁶

F. *Infectious Invalidity*

In a separate property state, if a surviving spouse successfully seeks a forced share of the decedent's estate by electing to "take against the will," we allocate an appropriate share of the estate to the spouse, "sequester" any gifts to the spouse made by the rejected will, and then we apply the surviving terms of the will to the balance of the net probate estate as best we can. If rejection of the will by the electing spouse results in such distortion of the testamentary plan that the intention of the testator cannot be realized, we allow the balance of the net probate estate to pass by intestacy. Similarly, if a limitation violates the Rule, we excise it from the dispositive instrument and give effect to the instrument as if the invalid limitation had not been written. However, if the invalid limitation was such an integral part of the donor's dispositive plan that it cannot be excised without altogether distorting the plan, limitations that do not violate the Rule might fall with the invalid limitation on the basis of "infectious invalidity."³⁷

G. *Summary of the Rule in Orthodox Form*

How might we summarize the way we examine a deed, a will, or a trust in a state that has the Rule in orthodox form?

First, we place ourselves at the time the instrument takes effect for perpetuities purposes, and we assemble facts as of that time that permit us to classify interests in accordance with the generally accepted rules of construction.

Second, if our classification of interests turns up a future interest in a transferee that is subject to a contingency, we try to show that the questioned interest will either vest or fail, as the case may be, within a period that does not exceed that measured by the lifetime of a relevant life in being at the creation of the interest and twenty-one years. When demonstrating that the questioned interest satisfies the requirements of the Rule, we assume what might occur (possibilities), viewed as of the time the instrument takes effect, rather than what has in fact occurred (actualities) since the instrument took effect. Possibilities include assumptions that are contrary to experience ("fantastic possibilities").

Finally, if we cannot demonstrate that the questioned interest is valid under the

36. *Id.* § 24.56.

37. *Id.* §§ 24.47–.52.

Rule, it is void *ab initio*, and we read the dispositive document as if the invalid interest had been omitted from the instrument.

III. REFORM VERSIONS OF THE RULE

Although numerous jurisdictions have moved away from the Rule Against Perpetuities in its common law or orthodox form, there has been no uniformity in either the source or the nature of reform. Most of the reform versions of the Rule have originated in legislatures, but occasionally reform has been judge-made. A reform version of the Rule may simply abandon aspects of the Rule in orthodox form that are deemed particularly offensive, such as the conclusive presumption of fertility.³⁸ This kind of reform leaves the Rule in orthodox form substantially intact. Other reform statutes abandon the Rule in orthodox form altogether and embrace a wait-and-see Rule, or a *cy pres* Rule, or a wait-and-see Rule complemented by *cy pres*. Statutes reforming the Rule vary from brief statements assuming familiarity with the rule in orthodox form to elaborate enactments intimidating in their detail.³⁹ Variations on the period in gross of twenty-one years exist. This state of affairs is unlikely to be quickly affected by the recent approval of a Uniform Statutory Rule by the National Conference of Commissioners on Uniform State Laws.⁴⁰ Interest in the Rule is confined to a small group of lawyers. Lawyers who have succeeded in securing a reform version of the Rule that they find satisfactory are unlikely to undertake displacing an existing reform statute.

In short, variation in approach has characterized the reform movement. When we encounter a perpetuities question, we are advantaged by our knowledge of the Rule in orthodox form, but we must put ourselves in a particular jurisdiction and determine what version of the Rule governs our case.

A. *Wait-and-See*

Wait-and-see means just that. If an instrument of transfer includes a future interest that violates the Rule in orthodox form, but the jurisdiction whose laws govern the instrument has a wait-and-see version of the Rule, we usually wait to see whether the interest vests or fails, as the case may be, within the perpetuities period.⁴¹ A straightforward version of wait-and-see is a variation on Gray's statement of the Rule in orthodox form: "No interest is good *unless it vests, or fails by its own terms, not later than twenty-one years after some life in being at the creation of the interest.*" The test for validity under the Rule in wait-and-see form is an *actualities* test. For example, if *A* devises land "to *B* for life, remainder to that child of *B* who first attains age 25," and *B* survives *A*, but no child of *B* has attained age twenty-five at *A*'s

38. See *supra* note 14 and accompanying text.

39. An example of an American reform statute is that of Pennsylvania, 20 PA. CONS. STAT. ANN. § 6104 (Purdon 1975), amended by § 6104(d) (Supp. 1988), § 6105 (Purdon 1975). An example of a more complex reform statute is that of England, Perpetuities and Accumulations Act, 1964, 13 Eliz. 2, ch. 55; see generally 33 HALSBURY'S STAT. OF ENGLAND AND WALES 511 (4th ed. 1987).

40. See *supra* notes 5-7 and accompanying text.

41. R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 34 (1966).

death, we wait to see what the turn of events is. If *B* dies thereafter never having had a child, the contingent remainder fails. If all children of *B* predecease *B*, none having attained age twenty-five, the contingent remainder fails. If no child of *B* attains age twenty-five during *B*'s lifetime, and *B* dies survived by children *C* and *D*, ages two and one, respectively, both born after *A*'s death, the remainder fails because neither *C* nor *D* can attain age twenty-five within *B*'s lifetime and twenty-one years. And a declaration of invalidity under the Rule at *B*'s death is appropriate because there is nothing further to wait for. If *C* and *D* are ages five and four, respectively, at *B*'s death, we wait to see whether the contingent remainder vests or fails, as the case may be, within twenty-one years after *B*'s death. If the remainder does vest within the perpetuities period, it is valid under the Rule in wait-and-see form. But the remainder might fail. A wait-and-see version of the Rule is less rigorous than the Rule in orthodox form, but wait-and-see does not guarantee vesting.

As noted in the preceding paragraph, if there is nothing to wait for, a declaration of failure to comply with the requirements of the Rule in wait-and-see form is appropriate. Consider one more example. If *A* devises "to *B* for life, remainder to that child born to (not adopted by) *B* who first attains age 25," and *B* is a female who survives *A* but is childless and incapable of both conceiving and bearing a child, a declaration of failure of the contingent remainder is permissible on *A*'s death.⁴² A legislature adopting a wait-and-see version of the Rule intends to permit withholding judgment on the validity of a questioned future interest when withholding judgment serves a useful purpose. If no useful purpose is served, judgment can be immediate.

B. *Cy Pres*

A contingent future interest that violates the Rule in orthodox form might be recast to conform to the requirements of the Rule if reformation is permissible in the jurisdiction.⁴³ For example, if *A* devises land "to *B* for life, remainder to that child of *B* who first attains age 25," and *B* survives *A*, but no child of *B* has attained age twenty-five at *A*'s death, the contingent remainder can be reformed under a *cy pres* version of the Rule to read "remainder to that child of *B* who first attains age 21."

Under a wait-and-see version of the Rule we do not wait if there is nothing to wait for. Similarly, under a *cy pres* version of the Rule we do not reform if reformation is futile. If *A* devises "to *B* for life, remainder to that child born to (not adopted by) *B* who first attains age 25," and *B* is a female who survives *A* but is childless and incapable of both conceiving and bearing a child, a declaration of the failure of the contingent remainder is permissible on *A*'s death. Reformation would be pointless, and judgment of invalidity can be immediate. A *cy pres* version of the

42. Adoption, freezing sperm, *in vitro* fertilization, and surrogate motherhood have complicated the already untidy aspects of family law and gratuitous transfers. Just as a rational law on perpetuities excludes a conclusive presumption of fertility, so too it excludes possibilities of adoption, conception, and birth that run counter to the probable intention of the donor and preclude the reasonably prompt final settlement of disputes over property. A general discussion of how to interpret the Rule in the light of changing conditions is found in Lynn, *Raising the Perpetuities Question: Conception, Adoption, "Wait and See," and Cy Pres*, 17 VAND. L. REV. 1391 (1964).

43. See Lynn, *supra* note 42.

Rule is less rigorous than the Rule in orthodox form, but *cy pres* does not guarantee vesting.

When wait-and-see and *cy pres* are combined in a reform version of the Rule, they work in tandem. If *A* devises "to *B* for life, remainder to that child of *B* who first attains age 25," and *B* survives *A* but no child of *B* has attained age twenty-five at *A*'s death, we wait to see whether a child of *B* does or might attain age twenty-five within the perpetuities period. If no child of *B* attains age twenty-five during *B*'s lifetime, and *B* dies survived by children *C* and *D*, ages five and four, respectively, both born after *A*'s death, we wait to see whether the contingent remainder vests or fails, as the case may be, within twenty-one years after *B*'s death. Under these facts we do not reform the remainder at *B*'s death. However, if *C* and *D* are ages two and one, respectively, we reform the remainder at *B*'s death to read "remainder to that child of *B* who first attains age 21." We reform the remainder at *B*'s death because neither *C* nor *D* can attain age twenty-five within *B*'s lifetime and twenty-one years.

Although neither a wait-and-see nor a *cy pres* version of the Rule guarantees vesting, *cy pres* often permits us to go beyond actualities and allows us to restructure a limitation so that it conforms to the Rule. In this respect *cy pres* is more liberal than the wait-and-see approach, and this liberality is the basis for the argument that if we wish to reform the Rule in orthodox form, *cy pres* "does it all."

C. *The Measuring Lives Under Wait-and-See*

The first wait-and-see statute provided that "[u]pon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void."⁴⁴ Implicit in this statement of the wait-and-see approach is the assumption that under a wait-and-see version of the Rule the perpetuities period is measured by relevant lives in being at the creation of the interest and twenty-one years, just as it is under the Rule in orthodox form. The Uniform Statutory Rule Against Perpetuities abandons this assumption in favor of a *ninety-year* wait-and-see perpetuities period.⁴⁵ The formulation of wait-and-see in the Uniform Statute is succinct, and in this respect is a marked departure from the earlier wait-and-see statutes.

The *Restatement (Second) of Property* lists the measuring lives used to demonstrate validity of a questioned interest under wait-and-see.⁴⁶ To the extent that the lives listed include those that all would agree are relevant to vesting, the *Restatement (Second)* breaks no new ground. But to the extent that listing adds measuring lives not relevant to vesting, the *Restatement (Second)* will complicate the task of lawyers representing clients in controversies arising under older, well established wait-and-see versions of the Rule. The ninety-year wait-and-see period of the Uniform Statutory Rule affects the law only insofar as the uniform act is adopted.

44. 20 PA. CONS. STAT. ANN. § 6104 (Purdon 1975), amended by § 6104(d) (Supp. 1988).

45. See *supra* note 6 and accompanying text.

46. RESTATEMENT (SECOND) OF PROPERTY § 1.3(2) (1983) (Donative Transfers).

The effect that the listing of irrelevant lives as measuring lives has on the law turns on the extent to which the *Restatement (Second)* is regarded as authoritative by a generation of judges more aware than their predecessors of the political process that is an undeniable part of the proceedings of the American Law Institute.

IV. LIVING WITH THE RULE TODAY

What and how should we think about the Rule as we leave the twentieth century and move into the twenty-first?

First, as drafters of deeds, wills, and trusts, we should advise clients not to create future interests unless both the nature of the subject matter and the objectives sought to be achieved justify doing so. Persons with little property usually should make outright gifts, uncomplicated by future interests, and lawyers are obligated to point that out.

Second, although reform versions of the Rule facilitate saving gifts that violate the Rule in orthodox form, as drafters of legal documents, we should make certain that the documents we draft conform to the requirements of the Rule in orthodox form. If those requirements are met, there is no need to resort to either wait-and-see or *cy pres*, and if a dispute arises and litigation ensues, a declaration of validity is appropriate. The existence of a reform version of the Rule in a jurisdiction might tempt the drafter to be less cautious than he or she otherwise would be. That temptation should be resisted. Persons owning property and executing documents change domiciles with great regularity. They own property in states other than that where they are domiciled. A document drafted in one jurisdiction might be construed and applied years later in another jurisdiction. Drafting should conform to the requirements of the Rule in its most stringent form, and careful drafting should be complemented by inclusion of a perpetuities savings clause in the document.⁴⁷

Third, although the share of the population that uses the law of future interests has been small and will remain so, we cannot assume that if the Rule were abandoned altogether, donors would invariably seek to control wealth for a length of time that all thoughtful persons would agree is not excessive. If the Rule did not exist, some kind of device to curb the whims of the egotist would have to be invented.⁴⁸ The Rule has been around for a long time. We can and do modify its characteristics in its traditional form, we reform it, and we sensibly allocate less teaching time to it with every passing year. But we should not assume that the Rule has outlived its usefulness and can be forgotten. The Rule exists, and it will persist in some form.

Fourth, there are a number of versions of the Rule, and we must identify the version of the Rule that will be controlling in a particular case. Doing so requires us not only to identify the appropriate jurisdiction, but also to fix the time frame within

47. See *supra* subpart II(A)(5).

48. Sol Goldman died on October 18, 1987, survived by an estranged spouse and three children. He left an estate of one billion dollars, now the subject of dispute between the widow and the children. He reportedly hoped that his real estate empire of some 600 properties would be kept intact "for his grandchildren and his grandchildren's grandchildren." N.Y. Times, Sept. 25, 1988, § 10 (Real Estate), at 1, col. 3.

which relevant events occurred. Changes in property law are rarely retroactive. Perpetuities questions sometimes arise years after relevant events have occurred. A version of the Rule that exists in a jurisdiction today might not be the version of the Rule that is decisive in the case we are considering.

Fifth, although the Rule was created by judges to police the transmission of wealth from generation to generation among families, it has been applied to commercial transactions, and, indeed, a significant share of the relatively few recently *reported* perpetuities problems arose in a commercial rather than a family setting.⁴⁹ Therefore, we should not assume that if a law practice does not include family law, estate planning, or administration of estates, the strictures of the Rule can be ignored. It is just as embarrassing for the real estate development lawyer to learn that he or she has violated the Rule as it is for the estate planner to learn that a dispositive scheme has been skewed by a violation of the Rule.

Sixth, when we examine a document that might pose a perpetuities problem, we should remind ourselves that our ability to identify a violation of the Rule turns on our knowledge of all the relevant facts. The Rule applies to a limited number of future interests, and our ability to identify a future interest subject to the Rule requires us to classify interests in accordance with the rules of construction. When we construe limitations, we put ourselves at a particular date and ask such questions as: Who is alive? Who is dead? What contingency or contingencies have been attached to the gift? Has a contingency, such as attaining the age of twenty-five, already been fulfilled at the effective date of the document? If we know all the relevant facts, and construction is unarguable, we can identify a violation of the Rule in orthodox form. If the rule in wait-and-see form governs, in some instances we can identify a violation of the Rule, and in other instances we can see that an interest might violate the Rule, depending upon the turn of events. If construction is arguable, we can take account of the proclivity of twentieth-century judges to construe in a way that precludes a violation of the Rule, and we can set out alternative analyses under either version of the Rule. If *cy pres* exists, we can determine how to restructure an invalid limitation to conform to the requirements of the Rule.

Finally, we should not assume that modifications of the Rule recommended or made from time to time indicate any significant shift in American attitudes on control of wealth by the dead. Defenders of the Rule in its early twentieth-century form either do not exist at all or, if existing, are silent. Where the Rule exists in orthodox form, its indefensible harsh effects have been mitigated by statutory modifications and by constructional preferences that preclude invoking the Rule to invalidate a gift. Where shifts from the orthodox Rule to less rigorous forms of the Rule occurred in the thirty years after World War II, the shifts were accompanied by a vigorous exchange of views on the wisdom of change, but both the wait-and-see and *cy pres* versions of the Rule that were adopted in the United States in those years were relatively simple. Although the listing of measuring lives in the *Restatement (Second)* and the recommendation of a ninety-year period in gross by the Commissioners on Uniform

49. See *supra* note 16.

State Laws in this last decade are departures in the United States from simplicity in reform, neither of these events shows a remarkable change in contemporary views on the use of trusts and wills to provide for families over several generations.

We do not know whether lawyers and judges will accept the listing of measuring lives as persuasive, or whether legislatures in significant numbers will enact the Uniform Statute. What we do know as we move into the twenty-first century is that any version of the Rule that we encounter presupposes mastery of the Rule in orthodox form, and that no version of the Rule that we encounter frees us from our obligation to draft documents that conform to the Rule in orthodox form. Documents that clearly conform to the Rule in orthodox form reduce the likelihood of the dispute and litigation that disrupt families and reduce the donor's gifts by costs and fees. Promoting family harmony and keeping the donor's gifts intact are clearly in the public interest.

