1986

The Uniform Statutory Rule Against Perpetuities

Lawrence W. Waggoner
University of Michigan Law School, waggoner@umich.edu

THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES*

Lawrence W. Waggoner†

EDITOR'S SYNOPSIS: *This article discusses the new Uniform Statutory Rule Against Perpetuities, the reasons for the wait-and-see provision, and the operation of each section of the Act.*

When the National Conference of Commissioners on Uniform State Laws recently approved the Uniform Statutory Rule Against Perpetuities, it may at long last have made perpetuity reform achievable in this country. Coming, as it does, on the heels of the 1981 promulgation of the Restatement (Second) of Property (Donative Transfers), which adopts the same general type of perpetuity reform, and having been unanimously endorsed by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers, the Uniform Act deserves serious consideration for adoption by the various state legislatures.

I. GENERAL THEORY OF THE UNIFORM ACT

The Uniform Statutory Rule Against Perpetuities (Statutory Rule)[1] alters the Common-law Rule Against Perpetuities (Common-law Rule) by installing a

†James V. Campbell Professor of Law, University of Michigan Law School. The author was the Reporter for the Uniform Statutory Rule Against Perpetuities. Portions of this article have been adapted from the Prefatory Note and Comments to the Uniform Act.

The members of the Drafting Committee for the Uniform Act were: Henry M. Kittleson of the Florida bar, Chairman; Frank W. Daykin of the Nevada bar, Drafting Liaison; Robert H. Henry of the Oklahoma bar; Justice Marian P. Opala of the Supreme Court of Oklahoma; Francis J. Pavetti of the Connecticut bar; Phillip Carroll of the Arkansas bar, President of the Conference and Ex Officio member of the Committee; Michael P. Sullivan of the Minnesota bar, Chairman of the Executive Committee of the Conference and Ex Officio member of the Committee; Professor William J. Pierce of the University of Michigan Law School, Executive Director of the Conference; and John W. Wagster of the Tennessee bar, Chairman of Division B of the Conference and Ex Officio member of the Committee.

The members of the Review Committee were: Chief Justice Norman Krivosha of the Supreme Court of Nebraska, Chairman; Stephen G. Johnakin of the Virginia bar; and Dean Robert A. Stein of the University of Minnesota Law School.

The Advisors to the Drafting Committee were: Charles A. Collier, Jr., Esq., of the American Bar Association; James M. Pedowitz, Esq., of the American Bar Association Section of Real Property, Probate and Trust Law; Ray E. Sweat, Esq., of the American College of Real Estate Lawyers; and Raymond H. Young, Esq., of the American College of Probate Counsel.

[1]Also referred to herein either as the Uniform Act or as USRAP.

workable wait-and-see element. Under the Common-law Rule, the validity or invalidity of a nonvested property interest is determined, once and for always, on the basis of the facts existing *when the interest was created.* Like most rules of property law, the Common-law Rule has two sides—a validating side and an invalidating side. Both sides are evident from, but not explicit in, John Chipman Gray's formulation of the Common-law Rule:

> No [nonvested[2] property] interest[3] is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.[4]

With its validating and invalidating sides explicitly separated, the Common-law Rule is as follows:

> *Validating Side of the Common-law Rule:* A nonvested property interest is valid when it is created (initially valid) if it is then *certain* to vest or terminate[5] no later than 21 years after the death of an individual then alive.
>
> *Invalidating Side of the Common-law Rule:* A nonvested property interest is invalid when it is created (initially invalid) if there is no individual then alive with respect to whom there is no such certainty.

The invalidating side of the Common-law Rule has long been noted for its harshness. By focusing on a lack of *certainty,* invalidity is made dependent on *possible* post-creation events, *not* on *actual* post-creation events. In the peculiar world of the Common-law Rule, every chain of possible post-creation events that can be imagined, no matter how fanciful, is taken seriously—even those that have become impossible by the time of the lawsuit. A *single* chain of imagined events that could postpone vesting (or termination) beyond the permissible period spoils the transferor's disposition.

Consequently, validity is withheld from interests that are likely to, and in fact would (if given the chance), vest well within the period of a life in being plus 21 years. This is what makes the *invalidating* side of the Common-law Rule so harsh: It can invalidate interests on the ground of post-creation events that, though possible, are extremely unlikely to happen and, in actuality, almost never do happen. Reasonable dispositions can be rendered invalid because of such remote possibilities as a woman who has passed the menopause giving

---

[2]The Uniform Act uses the term "nonvested" property interest rather than "contingent" property interest because the Restatement (Second) of Property switched over to the term "nonvested." Although "contingent" is still the more traditional term, this Article uses the term "nonvested" for the sake of consistency with the Uniform Act and the Restatement (Second).

[3]All the authorities agree that a vested interest is not subject to the Rule Against Perpetuities. E.g., J. GRAY, THE RULE AGAINST PERPETUITIES § 205 (4th ed. 1942) [hereinafter referred to as J. GRAY].

[4]J. GRAY, *supra* note 3, at § 201.

[5]A property interest terminates when vesting becomes impossible. In the following example, B's interest terminates if and when he predeceases A: "to A for life, remainder to B if B survives A."

birth to (or adopting) additional children,[6] the probate of an estate taking more than 21 years to complete,[7] or a married individual in his or her middle or late years later becoming remarried to a person born after the transfer.[8] None of these dispositions offends the public policy of preventing transferors from tying up property in long-term or even perpetual family trusts. In fact, each disposition seems quite reasonable and violates the Common-law Rule on technical grounds only.

A. *The Wait-and-See Reform Movement*

The prospect of invalidating such interests led some decades ago to thoughts about reforming the Common-law Rule. Because the chains of events that make such interests invalid are so unlikely to happen, it was rather natural to propose that the criterion be shifted from *possible* post-creation events to *actual* post-creation events. Instead of invalidating an interest because of what *might* hap-

---

[6]This is the so-called fertile-octogenarian type of case, illustrated by the following example:

Fertile-Octogenarian Case. G devised property in trust, directing the trustee to pay the net income therefrom "to A for life, then to A's children for the life of the survivor, and upon the death of A's last surviving child to pay the corpus of the trust to A's grandchildren." G was survived by his daughter A (who had passed the menopause) and by A's two adult children (X and Y).

The remainder interest in favor of A's grandchildren is invalid at common law. Under the common-law's conclusive presumption of lifetime fertility, A *might* have or adopt a third child (Z), who was conceived and born after G's death and who will in turn have a child conceived and born more than 21 years after the death of the survivor of A, X, Y, and anyone else who was living at G's death.

[7]This is the so-called administrative-contingency type of case, illustrated by the following example:

Administrative-Contingency Case. G devised property "to such of my grandchildren, born before or after my death, as may be living upon final distribution of my estate." G was survived by children and grandchildren.

The remainder interest in favor of G's grandchildren is invalid at common law. The final distribution of G's estate *might* not occur within 21 years after G's death, and after G's death grandchildren might be conceived and born who might survive or fail to survive the final distribution of G's estate more than 21 years after the death of the survivor of G's children, grandchildren, and anyone else who was living at G's death.

[8]This is the so-called unborn-widow type of case, illustrated by the following example:

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

Unless the interest in favor of A's "spouse" is construed to refer only to W, rather than to whoever, if anyone, is A's spouse when he dies, the remainder interest in favor of A's descendants is invalid at common law. A's spouse *might* not be W; A's spouse might be someone who was conceived and born after G's death; she might outlive by more than 21 years the death of the survivor of A, W, X, Y, and anyone else who was living at G's death; and descendants of A might be born or die before the death of A's spouse but after the 21-year period following the death of the survivor of A, W, X, Y, and anyone else who was living at G's death.

pen, waiting to see what *does* happen seemed then and still seems now to be more sensible.[9]

The Uniform Statutory Rule Against Perpetuities follows the lead of the American Law Institute's Restatement (Second) of Property (Donative Transfers) Section 1.3 (1983) in adopting the approach of waiting to see what does happen. This approach is known as the wait-and-see method of perpetuity reform.

In line with the Restatement (Second), the Uniform Act does not alter the *validating* side of the Common-law Rule. Consequently, dispositions that would have been valid under the Common-law Rule, *including those that are rendered valid because of a perpetuity saving clause,* remain valid as of their creation. *The practice of lawyers who competently draft trusts and other property arrangements for their clients is undisturbed.* In the absence of a documented case for changing the validating side of the Rule, the last thing the bar needs, wants, or would tolerate is perpetuity reform that requires new learning to be incorporated into the planning aspect of the practice.

Under the Uniform Act, as well as under the Restatement (Second), the wait-and-see element is applied only to interests that fall prey to the *invalidating* side of the Common-law Rule. Interests that would be invalid at common law are saved from being rendered *initially invalid.* They are, as it were, given a second chance: Such interests are valid if they actually vest within the allowable waiting period, and become invalid only if they remain in existence but still nonvested at the expiration of the allowable waiting period.

In consequence, the Uniform Act recasts the validating and invalidating sides of the Rule Against Perpetuities as follows:

> *Validating Side of the Statutory Rule:* A nonvested property interest is initially valid if, when it is created, it is then *certain* to vest or terminate no later than 21 years after the death of an individual then alive. A nonvested property interest that is not *initially* valid is not necessarily invalid. Such an interest is valid if it vests within the allowable waiting period after its creation.
>
> *Invalidating Side of the Statutory Rule:* A nonvested property interest that is not *initially* valid becomes invalid (but is subject to reformation to make it valid) if it neither vests nor terminates within the allowable waiting period after its creation.

Shifting the focus from possible to actual post-creation events has great attraction. It eliminates the harsh consequences of the Common-law Rule's approach of invalidating interests because of what *might* happen, without sacrificing the basic policy goal of preventing property from being tied up for too long a time in very long-term or even perpetual family trusts or other arrangements.

---

[9]See, e.g., Hansen v. Stoecker, 699 P.2d 871, 874–75 (Alaska 1985) ("We are persuaded [by the RESTATEMENT (SECOND) OF PROPERTY and other authorities] that the wait-and-see approach should be adopted as the common law rule against perpetuities in Alaska.").

One of the early objections to wait-and-see should be mentioned at this point, because it has long since been put to rest. It was once argued that wait-and-see could cause harm because it puts the validity of property interests in abeyance—no one could determine whether an interest was valid or not. This argument has been shown to be false. Keep in mind that the wait-and-see element is applied only to interests that would be invalid were it not for wait-and-see. Such interests, otherwise invalid, are always nonvested future interests. It is now understood that wait-and-see does nothing more than affect that type of future interest with an *additional* contingency. To vest, the other contingencies must not only be satisfied—they must be satisfied within a certain period of time. *If* that period of time—the allowable waiting period—is easily determined, as it is under the Uniform Act, then the additional contingency causes no more uncertainty in the state of the title than would have been the case had the additional contingency been originally expressed in the governing instrument. It should also be noted that only the status of the affected future interest in the trust or other property arrangement is deferred. In the interim, the other interests, such as the interests of current income beneficiaries, are carried out in the normal course without obstruction.

B. *The Allowable Waiting Period: The Conventional Approach*

Despite its attraction, wait-and-see has not been widely adopted. The greatest controversy over wait-and-see concerns how to determine the allowable waiting period—the time allotted for the contingencies to be validly worked out to a final resolution.

The conventional assumption has always been that the allowable waiting period should be determined by reference to so-called measuring lives who are in being at the creation of the interest; the allowable waiting period under this assumption expires 21 years after the death of the last surviving measuring life. The controversy has raged over who the measuring lives should be and how the law should identify them. Competing methods have been advanced,[10] rather stridently on occasion.

The Drafting Committee of the Uniform Act began its work in 1984 operating on the conventional assumption, and in fact presented a draft to the Conference for first reading in the summer of 1985 that utilized the measuring-lives method.

---

[10]*E.g.*, Allan, *Perpetuities: Who Are the Lives In Being?*, 81 LAW Q. REV. 106 1965 (favoring a statutory-list-of-measuring-lives approach similar to that adopted in the English Perpetuities and Accumulations Act, 1964); Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985) [hereinafter referred to as Dukeminier] (favoring a "causal-relationship" formula approach similar to that adopted in Ky. Rev. Stat. § 381.216 and a few other American states); Maudsley, *Perpetuities: Reforming the Common-Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355 (1975) (favoring a statutory-list-of-measuring-lives approach similar to that adopted in the English Act and subsequently in the RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.3(2) (1983)).

C. *The Saving-Clause Principle of Wait-and-See*

The measuring lives selected in that earlier draft were patterned after the measuring lives listed in the Restatement (Second), which adopts the saving-clause principle of wait-and-see. Under the saving-clause principle, the measuring lives are those individuals who might appropriately have been selected in a well-drafted perpetuity saving clause.

A perpetuity saving clause typically contains two components, the *perpetuity-period component* and the *gift-over component*. The perpetuity-period component expressly requires interests in the trust or other arrangement to vest (or terminate) no later than 21 years after the death of the last survivor of a group of individuals designated in the governing instrument by name or class. The gift-over component expressly creates a gift over that is guaranteed to vest at the expiration of the period established in the perpetuity-period component, but only if the interests in the trust or other arrangement have neither vested nor terminated earlier in accordance with their other terms.

In most cases, the saving clause not only avoids a violation of the Common-law Rule; it also, in a sense, over-insures the client's disposition against the gift over from ever taking effect, because the period of time determined by the perpetuity-period component provides a margin of safety. Its length is sufficient to exceed—usually by a substantial margin—the time when the interests in the trust or other arrangement actually vest (or terminate) by their own terms. The clause, therefore, is usually a formality that validates the disposition without affecting the substance of the disposition at all.

In effect, the perpetuity-period component of the saving clause constitutes a privately established wait-and-see rule. Conversely, the principle supporting the adoption and operation of wait-and-see is that it provides, in effect, a saving clause for dispositions that violate the Common-law Rule, dispositions that, had they been competently drafted, would have included a saving clause to begin with. This is the principle embraced by the Uniform Act and the principle reflected in the Restatement (Second).[11] The allowable waiting period under wait-and-see is the equivalent of the perpetuity-period component of a well-conceived saving clause.

The Uniform Act and the Restatement (Second) round out the saving clause by providing the near-equivalent of a gift-over component via a provision for judicial reformation of a disposition in case the interest is still in existence and nonvested when the allowable waiting period expires.[12]

---

[11]*See* RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) Introductory Note to Ch. 1 at 13 (1983) ("The adoption of the wait-and-see approach in this Restatement is largely motivated by the equality of treatment that is produced by placing the validity of all non-vested interests on the same plane, whether the interest is created by a skilled draftsman or one not so skilled.").

[12]*See* text accompanying notes 42–49 *infra*.

D. *The Allowable Waiting Period: Why the Uniform Act Foregoes the Use of Actual Measuring Lives and Uses a Proxy Instead*

The Uniform Act departs from and, in the judgement of the Drafting Committee, improves on the Restatement (Second)—and other existing wait-and-see statutes and proposals—in one very important particular. The Uniform Act foregoes the use of *actual* measuring lives and instead determines the allowable waiting period by reference to a reasonable approximation of—a proxy for—the period of time that would, *on average*, be produced through the use of a set of actual measuring lives plus 21 years. The proxy utilized in the Uniform Act is a flat period of 90 years. The rationale for this period is discussed below.

The use of a proxy, such as the flat 90-year period utilized in the Uniform Act, is greatly to be preferred over the conventional approach of using actual measuring lives plus 21 years. The conventional approach has serious disadvantages: wait-and-see measuring lives are difficult to describe in statutory language and they are difficult to identify and trace so as to determine which one is the survivor and when he or she died.

Drafting Problems. Drafting statutory language that unambiguously identifies actual measuring lives under a wait-and-see statute is immensely more difficult than drafting an actual perpetuity saving clause. An actual perpetuity saving clause can be tailored on a case-by-case basis to the terms and beneficiaries of each trust or other property arrangement. A statutory saving clause, however, cannot be redrafted for each new disposition. It must be drafted so that one size fits all. As a result of the difficulty of drafting such a one-size-fits-all clause, the list of measuring lives established in the Restatement (Second) contains ambiguities, at least at the fringe.[13]

Although the Restatement (Second)'s list could be improved to reduce if not eliminate these ambiguities, the resulting statutory language would be complex and difficult to understand.[14] The language would need to specify

---

[13]See Dukeminier, *supra* note 10, at 1681–1701.

[14]There is no more vivid way of demonstrating this point than to urge the reader to look at the statutory language that would have been necessary to eliminate the ambiguities contained in the Restatement (Second)'s list. This statutory language is set forth in Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 U. MIAMI INST. ON EST. PLAN. 7–26 n.18 (1986) [hereinafter referred to as Progress Report].

The USRAP Drafting Committee also considered, but did not adopt, another approach—identifying wait-and-see measuring lives by the proposed statutory language of "persons in being when the interest is created who can affect the vesting of the interest." This "causal-relationship" formula approach is advocated in Dukeminier, *supra* note 10. The "causal-relationship" approach was not adopted because, among other reasons, it would shift to the courts the unwelcome task of divining who the measuring lives are on a case-by-case basis, in an environment in which the exact meaning of "persons . . . who can affect the vesting of the interest" is disputable: Not even perpetuity scholars, to say nothing of nonexperts in the field, can agree on its precise meaning.

whether and in what circumstances individuals who were not measuring lives at first might later become measuring lives by, for example, becoming beneficiaries, or becoming ancestors or descendants of beneficiaries, through adoption, marriage, or assignment of or succession to a beneficial interest. Conversely, the statutory language would need to specify whether and in what circumstances individuals who were once measuring lives might later lose that status, by being adopted out of the family, by divorce, or by assigning or devising their beneficial interests to another.

Tracing Problems. Quite apart from the difficulty of drafting unambiguous and uncomplicated statutory language, another serious problem connected to the actual-measuring-lives approach is that it imposes a costly administrative burden. The Common-law Rule uses the life-in-being-plus-21-years period in a way that does not require the actual tracing of individuals' lives, deaths, marriages, adoptions, and so on. Wait-and-see imposes this burden, however, if measuring lives are used to determine the allowable waiting period. It is one thing to write a statute specifying the measuring lives. It is another to apply the actual-measuring-lives approach in practice. No matter what method is used in the statute for selecting the measuring lives and no matter how unambiguous the statutory language is, actual individuals must be identified as the measuring lives and their lives must be traced to determine who the survivor is and when the survivor dies. The administrative burden is increased if the measuring lives are not a static group, determined only once at the beginning, but instead are a rotating group. Adding to the administrative burden is the fact that the perpetuity question will often be raised for the first time long after the interest or power was created. The task of going back in time to reconstruct not only the facts existing when the interest or power was created, but facts occurring thereafter as well may not be worth the effort. In short, not only would births and deaths need to be monitored, but adoptions, divorces, and possibly assignments and devises over a long period of time. Monitoring and reconstructing such events to determine the survivor and the time of the survivor's death imposes an administrative burden wise to avoid. The proxy approach makes it feasible to do just that.

Possibility of Dead-Hand Control Continuing, By Default, Beyond the Permissible Period. The administrative burden of tracing actual measuring lives and the possible uncertainty of their exact make-up, especially at the fringe, combine to make the expiration date of the allowable waiting period less than certain in many cases. By making perpetuity challenges more costly to mount and more problematic in result, this might have the effect of allowing dead-hand control to continue, by default, well beyond the allowable period. Determining the allowable period by using a proxy eliminates this possibility.

This and other arguments against this formula approach are given in more detail in Waggoner, *Perpetuities: A Perspective on Wait-and-See,* 85 COLUM. L. REV. 1714 (1985), and Waggoner, *A Rejoinder,* 85 COLUM. L. REV. 1739 (1985). *See also* notes 17 and 39 *infra.*

Expiration of the allowable waiting period under the proxy adopted by the Uniform Act—a flat 90 years—is easy to determine and unmistakable.

Allowable Waiting Period Performs a Margin-of-Safety Function, Not a Precisely Self-adjusting Function. If the use of actual measuring lives plus 21 years generated an allowable waiting period that precisely self-adjusted to each situation, there might be objection to replacing the actual-measuring-lives approach with a flat period of 90 years, which obviously cannot replicate such a function. That is not the function performed by the actual-measuring-lives approach, however. That is, the actual-measuring-lives approach is not scientifically designed to generate an allowable waiting period that expires at a natural or logical stopping point along the continuum of each disposition, thereby mysteriously pinpointing the precise time before which actual vesting ought to be allowed and beyond which it ought not to be permitted. Instead, the actual-measuring-lives approach functions in a rather different way: It generates a period of time that almost always *exceeds* the time of actual vesting in cases in which actual vesting ought to be permitted. The actual-measuring-lives approach, therefore, performs a margin-of-safety function, which is a function that *can* be replicated by the use of a proxy such as the flat 90-year period under the Uniform Act.

To illustrate these points, consider the following two examples:

Example 1—Corpus to Grandchildren Contingent on Reaching an Age in Excess of 21. G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren, remainder in corpus to G's grandchildren who reach age 30; if none reaches 30, to a specified charity.

Example 2—Corpus to Descendants Contingent on Surviving Last Living Grandchild. G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren for the life of the survivor, and on the death of G's last living grandchild, corpus to G's descendants then living, per stirpes; if none, to a specified charity.

In both examples, assume that G's family is typical, with two children, four grandchildren, eight great-grandchildren, and so on.[15] Assume further that one or more of the grandchildren are living at G's death, but that one or more are conceived and born thereafter. All of the grandchildren living at G's death were then under the age of 30.

As is typical of cases that violate the Common-law Rule and to which wait-and-see applies, these examples contain two revealing features: (i) they include beneficiaries born *after* the trust or other arrangement was created, and (ii) in the normal course of events, the final vesting of the interests will coincide with

[15]The latest Census Bureau statistics on fertility rates indicate an average number of children per woman of 1.8, down from 2.5 in 1970 and considerably down from the high of 3.8 in 1957. *See* U.S. Bureau of the Census, Estimates of the Population of the United States and Components of Change: 1970 to 1985, Table B, at 3 (1986).

the death of the youngest of these after-born beneficiaries (as in Example 2) or with some event occurring during the lifetime of that youngest after-born beneficiary (such as reaching a certain age in excess of 21, as in Example 1).

Because the allowable waiting period is measured by reference to the lives of individuals who must be in being at the creation of the interests, the key players in these dispositions—the after-born beneficiaries—cannot be counted among the measuring lives. Accept, for the moment, a proposition that will be developed later:[16] conferring validity on these examples fits well within the policy of the Rule, for the reason that the after-born beneficiaries in both of these examples are members of the same generation as (or an older generation than) that of the youngest of the measuring lives. On this assumption, it is clear that an allowable waiting period measured by the lifetime of individuals in being at the creation of the interest plus 21 years is not scientifically designed to, and does not in practice, expire at the latest point when actual vesting should be allowed—on the death of the last survivor of the after-born beneficiaries. Because of its tack-on 21-year part, the period usually expires at some time *after* that beneficiary's death. In Example 2, the period of 21 years following the death of the last survivor of the descendants who were in being at G's death is normally more than sufficient to cover the death of the last survivor of the grandchildren born after G's death.

Thus the actual-measuring-lives approach performs a margin-of-safety function.[17] A proxy for this period performs this function just as well. In fact, in one respect it performs it more reliably because, unlike the actual-measuring-lives approach, the flat 90-year period cannot be cut short by irrelevant events. A key element in the supposition that the tack-on 21-year part of the period is usually ample to cover the births, lives, and deaths of the after-born beneficiaries when it is appropriate to do so is that the measuring lives will live out their statistical life expectancies. This will not necessarily happen, however. They may all die prematurely, thus cutting the allowable waiting period short—possibly too short to cover these post-creation events. Plainly, no rational connection exists between the premature deaths of the measuring lives and the time properly allowable, in Example 1, for the youngest *after-born* grandchild to reach 30 or, in Example 2, for the death of that youngest *after-born* grandchild to occur. A proxy eliminates the possibility of a waiting period cut short by irrelevant events.[18]

---

[16]See text accompanying notes 31–38 *infra*.

[17]This is the function performed by the actual-measuring-lives approach whether the measuring lives are determined by the "statutory list" method or by the "causal-relationship-formula" method. *See* note 10 *supra* and note 39 *infra*.

[18]Even if the measuring lives do not die prematurely, it is still possible that the margin of safety will be exceeded. But it would require unlikely events. The after-born members of the appropriate generation must be born an abnormally long time after G's death (as can happen in the case of second families) or one or more of the after-born members of that generation must outlive his or her life expectancy by an abnormally long period of time—or some combination of the two events

Consequently, on this count, too, a flat 90-year period is to be preferred: it performs the same margin-of-safety function as the actual-measuring-lives approach, performs it more reliably, and performs it with a remarkable ease in administration, certainty in result, and absence of complexity as compared with the uncertainty and clumsiness of identifying and tracing actual measuring lives.

E. *Rationale of the Allowable 90-year Waiting Period*

The myriad problems associated with the actual-measuring-lives approach are swept aside by shifting away from actual measuring lives and adopting instead a 90-year waiting period as representing a reasonable approximation of—a proxy for—the period of time that would, on average, be produced by identifying and tracing an actual set of measuring lives and then tacking on a 21-year period following the death of the survivor. The selection of 90 years as the period of time reasonably approximating the period that would be produced, on average, by using the set of actual measuring lives identified in the Restatement (Second) or the earlier draft of the Uniform Act is based on a statistical study suggesting that the youngest measuring life, on average, is about 6 years old.[19] The remaining life expectancy of a 6-year-old is reported as between 69 and 70 years.[20] In the interest of arriving at an end number that is a multiple of five, the Uniform Act utilizes 69 years as an appropriate measure of the remaining life expectancy of a 6-year-old, which—with the 21-year tack-on period added—yields an allowable waiting period of 90 years.

The adoption of a flat period of 90 years rather than the use of actual measuring lives is an evolutionary step in the development and refinement of the wait-and-see doctrine. Far from revolutionary, it is well within the tradition of that doctrine. The 90-year period makes wait-and-see simple, fair, and workable.

F. *Policy of the Rule*

One question remains. Does the Uniform Act authorize excessive dead-hand control? Any concern that it does must be put in a proper perspective: *First,* the fact that the allowable waiting period under the wait-and-see element of the Uniform Act is 90 years does not mean that *all* trusts or other property arrangements will last for the full 90 years, or even come close to doing so.[21]

---

must occur. Even the flat 90-year period can prove too short in these circumstances. However, were the margin of safety to be exceeded in a given case, the Uniform Act provides for reformation of the nonvested interest to make it valid. *See* text accompanying notes 42–49 *infra*.

[19]*See* the table published in Progress Report, *supra* note 14, at 7–17.

[20]69.6 years is reported in U.S. Bureau of the Census, Statistical Abstract of the United States: 1986, Table 108, at 69 (106th ed. 1985), up slightly from the 69.3 years reported in the Statistical Abstract for 1985.

[21]Even in a state that enacts the Uniform Act, lawyers might be reluctant to establish trusts geared to the 90-year period or to use a saving clause geared to the 90-year period, for fear that the law of a state that had not enacted the Uniform Act might apply.

Nor does it seem thinkable that USRAP will prompt responsible lawyers, professional fiduciaries, or financial planners to counsel the creation of trusts that last even longer—80 or 90 years *beyond* the

As with a perpetuity saving clause, most trusts or other property arrangements will terminate by their own terms far earlier, leaving the perpetuity period established by the Uniform Act to extend unused into the future long after the interests have vested and the trust or other arrangement has been distributed.[22] *Second,* the Uniform Act does not authorize an increase in aggregate dead-hand control beyond that which is already possible by competent drafting—through the use of perpetuity saving clauses—under the full rigor of the Common-law Rule. Because only a fraction of trusts and other property arrangements are incompetently drafted,[23] the modest increase in aggregate dead-hand

---

expiration of the allowable perpetuity period, or around 170 or 180 years in total. To be sure, USRAP does not change the focus of the Common-law Rule, which is on vesting in interest within the allowable perpetuity period, not vesting in possession. Any suggestion that this preserves a "loophole" should not be taken seriously, however. To take maximum advantage of such a "loophole" requires a trust to be structured so that income interests in favor of very young descendants vest in interest at the expiration of the allowable perpetuity period but continue on for another 80 or 90 years thereafter. Although in skilled hands, it is possible to establish such a trust, even under the full rigor of the Common-law Rule, as well as under USRAP, the problem is: Who is to be designated to take the remainder interest in the corpus when the extended income interests finally terminate? If the remainder interest in the corpus is also to be valid, it too must vest in interest at or before the allowable perpetuity period expires. This precludes the use of any gift that remains subject to a contingency or subject to open beyond the perpetuity period, including the most attractive candidate for the remainder interest—the transferor's descendants living at the termination of the extended income interests. Vesting the remainder interest in the "estates" of the income beneficiaries is no solution, either: Such a designation is ambiguous and thus would invite litigation over its meaning. *See* Browder, *Trusts and the Doctrine of Estates,* 72 MICH. L. REV. 1507, 1524–28 (1974); Fox, *Estates: A Word To Be Used Cautiously, If At All,* 81 HARV. L. REV. 992 (1968); Annot., 10 A.L.R.3d 483 (1966). If the ambiguity is resolved by interpreting the word "estate" as conferring a testamentary or a nongeneral power of appointment on each income beneficiary, the power of appointment cannot be valid beyond the allowable perpetuity period. *See* USRAP § 1(c) and Comment thereto. If the ambiguity is resolved by interpreting the word "estate" as granting to each income beneficiary either the remainder interest outright or a presently exercisable general power to appoint the remainder interest, then the remainder interest or general power is valid, but includible in each income beneficiary's gross estate under I.R.C. § 2033 or § 2041. More importantly, perhaps, each income beneficiary—at any time after the expiration of the allowable perpetuity period—can immediately terminate the trust and obtain possession of his or her proportionate share of the corpus. *See* Part G of the Comment to Section 1 of USRAP. Any notion, therefore, that USRAP will encourage the deliberate and widespread establishment of 170 or 180-year trusts is fanciful and can safely be disregarded.

[22] *See* text at 574 *supra* and the discussion of Example (1), text at 586 *infra. See also* note 39 *infra.*

[23] The number of reported appellate cases raising perpetuity claims is not large, though drawing conclusions about the frequency of violations of the Common-law Rule from the number of reported appellate decisions is misleading. Many perpetuity violations go undetected or unlitigated, making it largely a matter of luck as to which ones are cut down and which ones escape. See, e.g. Fruehwald, *Rule Against Perpetuities Savings Clauses,* 30 Ind. B.A. Res Gestae 378 (1987) ("After reviewing the [Indiana] Supreme Court's decision in *Merrill [v. Wimmer,* 481 N.E.2d 1294 (Ind. 1983)], this author had an opportunity to review some wills and trusts prepared by various Indiana practitioners. . . . While it was not surprising that several of the documents this author reviewed violated the [R]ule, it was surprising that so few of the documents contained 'savings clauses' designed to save the bequest if the [R]ule was violated."). Furthermore, the number of perpetuities violations that are detected and litigated may not be accurately reflected by the number of reported appellate decisions. Charles A.

control that would be effected under USRAP is hardly significant in terms of national policy.

If excessive dead-hand control is a problem, it is not USRAP that is or would be the root cause, but the Common-law Rule itself, especially the feature of the Common-law Rule that allows the use of perpetuity saving clauses to validate otherwise invalid interests such as those in Examples 1 and 2, above.[24] Do either or both of those examples, whether they are rendered valid through a perpetuity saving clause or through the wait-and-see element of USRAP, violate the *policy* of the Rule?

It may help to visualize what is at stake if these examples are reintroduced and fitted into a wider array of hypothetical family situations than considered earlier. I return to Example 1 first because: (i) I believe readers will recognize it as more typical of the desires of donors than Example 2; and (ii) it is difficult to argue that this example represents excessive dead-hand control, no matter what standard is used to judge excessiveness.

> *Example 1—Corpus to Grandchildren Contingent on Reaching an Age in Excess of 21.* G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren, remainder in corpus to G's grandchildren who reach age 30; if none reaches 30, to a specified charity.

Consider how G's disposition plays out in the context of four hypothetical families charted on the following pages. Each family is the same and typical,[25] in that there are two children (A and B), four grandchildren (V, X, Y, and Z), eight great-grandchildren (K, L, M, N, P, Q, R, and S), and so on. The difference among the families comes in the spread between generations. The first family (Family I) has the smallest spread; in that family, the children are born when the parents are 20 and 25 respectively. The fourth family (Family IV) is the most spread out; there, child-bearing has been deferred until the parents are 35 and 40. The second and third families (Families II and III) fall between the other two: The parents are 25 and 30 when their children are born in Family II and 30 and 35 in Family III. Few if any actual families will duplicate any of these four hypothetical families, of course. But in various combinations, and taking due account of the fact that the number of offspring and the timing of the child-bearing will vary widely from one family to another and within the same family at each generation and from one descending line to another, they do in the aggregate sufficiently resemble actual families to make the charts

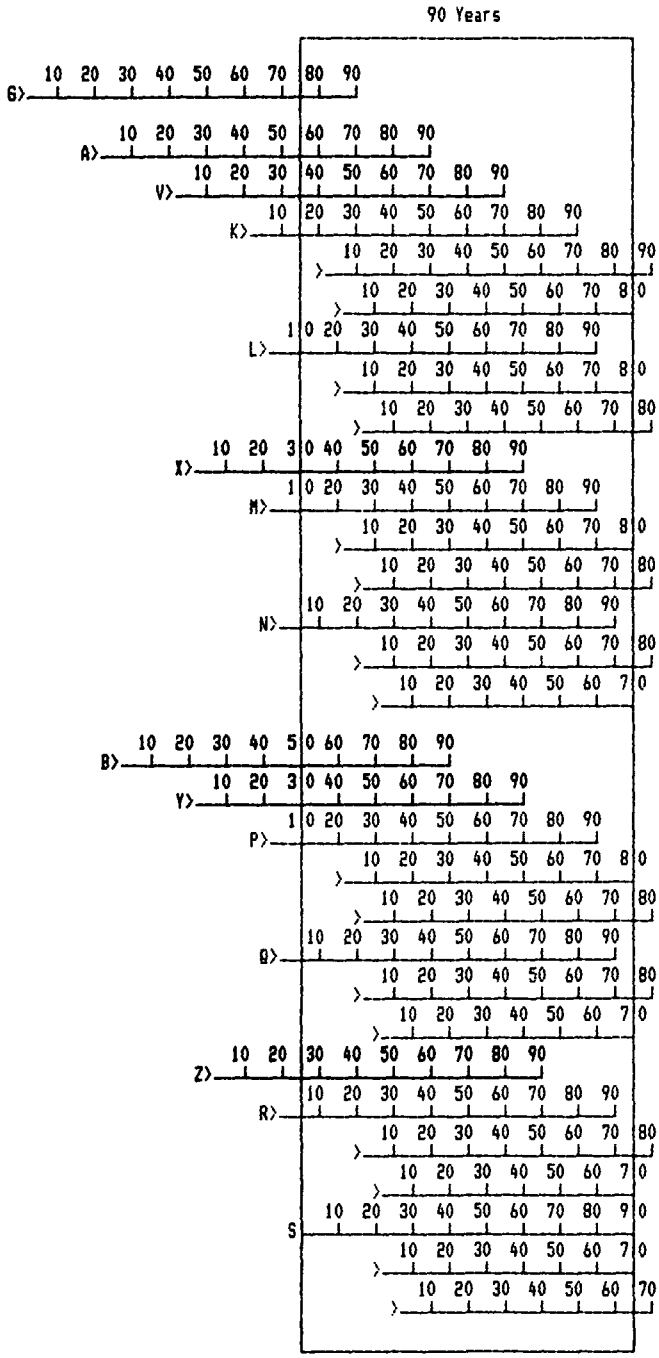
---

Collier, Jr., Esq., the American Bar Association Advisor to the USRAP Drafting Committee, represented to the Committee that in Los Angeles County a number of perpetuity violations have been reformed, without appeal, by the lower courts under the California reformation statute, Cal. Civ. Code § 715.5. Notice, too, that perpetuity violations can occur even if a saving clause is inserted, as in the not uncommon case of *irrevocable* inter vivos trusts that improperly gear the perpetuity-period component of the clause to lives in being at the settlor's *death*.

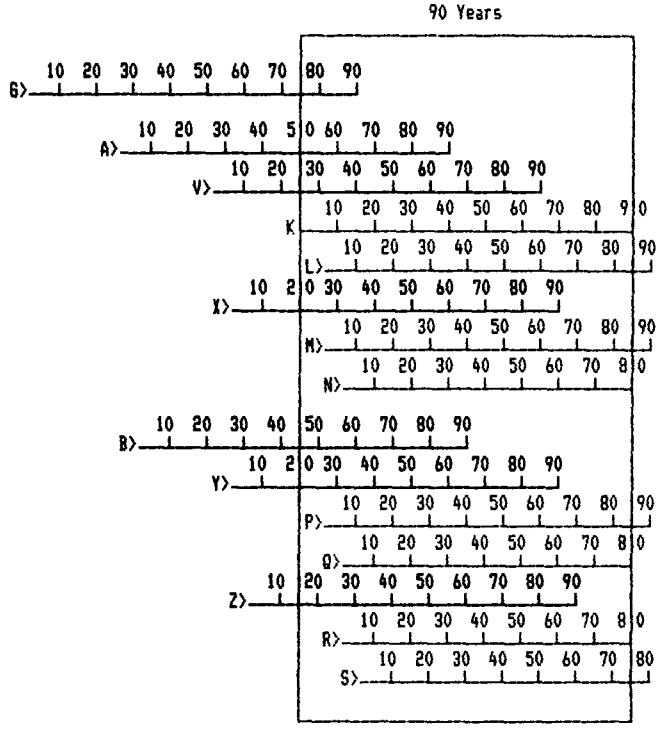
[24]Text at 577 *supra*.

[25]*See* note 15 *supra*.

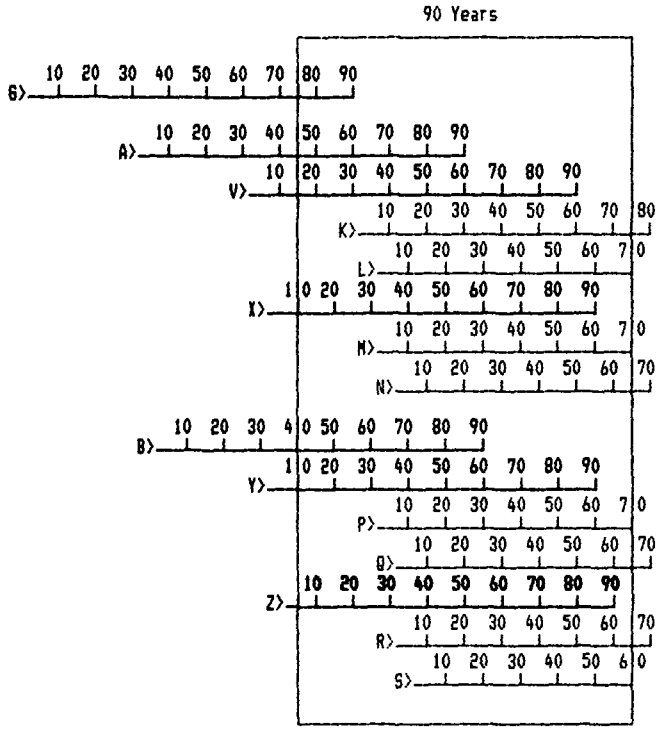
FAMILY I: Parents Are 20 and 25 When Children Are Born



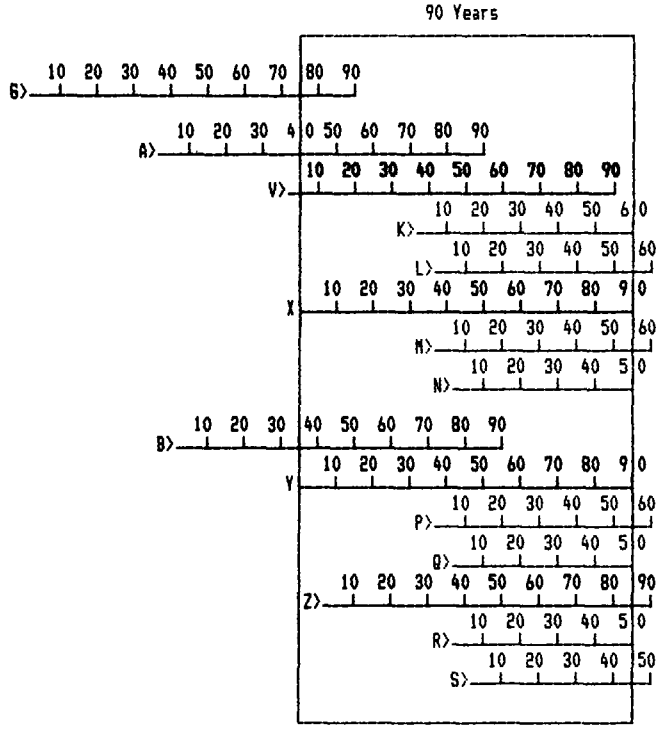
FAMILY II: Parents Are 25 and 30 When Children Are Born



FAMILY III: Parents Are 30 and 35 When Children Are Born



FAMILY IV: Parents Are 35 and 40 When Children Are Born



highly illuminating. To help visualize how the Uniform Act will apply, superimposed on each chart is the 90-year allowable waiting period, measured from G's hypothesized death at age 75—the assumption being, for purposes of this exercise, that G lives out a statistical life expectancy, but no longer.

Hypothesizing that G's death will occur at age 75, the preceding charts show that G's youngest grandchild, Z, will reach 30 within: (i) 5 years after G's death in Family I, (ii) 15 years after G's death in Family II, (iii) 25 years after G's death in Family III, and (iv) 35 years after G's death in Family IV.[26] No matter what standard is applied to gauge excessive dead-hand control, it would be hard to make out a case that this trust violates the policy of the Rule. Yet the grandchildren's remainder interest would violate the Common-law Rule and be invalid without a saving clause or, in its absence, without a wait-and-see element such as would be effected under the Uniform Act. This example also provides a good illustration of how the period determined by the perpetuity-period component of a saving clause or the 90-year waiting period under the Uniform Act extends unused into the future long after the nonvested interests have vested (or terminated) and the trust has been distributed.

Example 2, to which I now return, is less frequently created, but does pose a more serious question concerning excessive dead-hand control.

> *Example 2—Corpus to Descendants Contingent on Surviving Last Living Grandchild.* G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren for the life of the survivor, and on the death of G's last living grandchild, corpus to G's descendants then living, per stirpes; if none, to a specified charity.

Hypothesizing that G dies at age 75 and that each of G's grandchildren lives out a normal life expectancy of 75 years, Z will be the last living grandchild. The trust will terminate and the remainder interests in the corpus will vest (or terminate): (i) 50 years after G's death in Family I, (ii) 60 years after G's death in Family II, (iii) 70 years after G's death in Family III, and (iv) 80 years after G's death in Family IV. A perpetuity saving clause or, in its absence, the Uniform Act's 90-year allowable waiting period, would grant validity to this trust. Does the validity of this trust offend the policy of the Rule by representing excessive dead-hand control?

With the exception of a small number of individuals, I have detected no enthusiasm among either the academic community or the community of practicing lawyers for tightening up the Common-law Rule to preclude the trust's

---

[26]Because the corpus of the trust is not distributable until the death of G's last living child, the trust itself will last a little longer. If we assume that G's children live out their life expectancies of 75 years, B will be G's last living child, and will die: (i) 25 years after G's death in Family I, (ii) 30 years after G's death in Family II, (iii) 35 years after G's death in Family III, and (iv) 40 years after G's death in Family IV. Note the import of this: Even in Family IV, the most spread out of the four families, the interest of each grandchild, in the ordinary course of events, vests (or terminates) within the lifetimes of G's children, who were lives in being at G's death.

validation. In fact, scholars have trouble identifying the policy of the Rule Against Perpetuities, now that the major impact of the Rule—at least as far as nondonative transfers are concerned—falls on trusts in which the trustee has the power to buy and sell the assets in the trust. It can no longer be thought that the main function of the Rule is to protect alienability of land or other property from the indirect restraint effected by nonvested future interests.

Lewis M. Simes captured what is often cited as the modern policy served by the Rule in his now well-known formulation: The Rule, he wrote, "strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy."[27] In putting Simes' fair balance into somewhat more concrete terms, the "clear, obvious, natural line"observed by Sir Arthur Hobhouse, writing about dead-hand control over a century ago, "between those persons and events which the Settlor knows and sees, and those which he cannot know and see"[28] has a certain appeal.

How do perpetuity saving clauses and, in their absence, the Uniform Act's 90-year allowable waiting period, fare in the light of this standard? If the standard can be taken to mean that donors should be allowed to exert control through the youngest generation of descendants they knew and saw, or at least one or more but not necessarily all of whom they knew and saw,[29] both effectuate this standard well. Certainly, by this standard, the Example 2 trust fits well within the policy of the Rule. Before he died, G had the opportunity to know and see all four of his grandchildren in Families I, II, and III, and to know and see three of his four grandchildren in Family IV (or at least to know and see one of them and to anticipate the imminent birth of two of the others).

To be sure, this standard is imprecisely effectuated by perpetuity saving clauses and by the allowable waiting period under wait-and-see, whether

---

[27]Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 723 (1955). The Restatement (Second) of Property (Donative Transfers) Introductory Note to Part I at 8 (1983), picks up on his theme by stating that "the rule against perpetuities provides an adjustment or balance between the desire of the current owner of property to prolong indefinitely into the future his control over the devolution and use thereof and the desire of the person who will in the future become the owner of the affected land or other thing to be free of the dead hand."

[28]A. HOBHOUSE, THE DEAD HAND 188 (1880). Quoting Hobhouse is not to suggest that his book indicates support for the conclusions I draw from his quotation. It is true that Hobhouse went on to say: "I submit, then, that the proper limit of Perpetuity is that of lives in being at the time when the settlement takes effect." *Id.* But Hobhouse apparently had something quite different in mind, a rule much more restrictive than was apparently acceptable then and one that would hardly be acceptable today: "[t]hat land should not be settled on anybody not in existence when the Settlement takes effect." That is, future interests wholly or partly in favor of unborn persons—class gifts subject to open—should be prohibited. "[E]ach generation in turn," he urged, "should be absolute Owner of its possessions, and not share the ownership with the Dead or with the Unborn." *Id.* at 190–91.

[29]The plausible function of the tack-on 21-year part of the period is to allow the inclusion of after-born members of a generation occupied by lives *in being at the creation of the interest*. See text at 578 *supra*.

measured by actual measuring lives or by the 90-year proxy of the Uniform Act.[30] The expiration of the period is not scientifically designed to self-adjust so that it coincides in each case with the death of the last living member of the youngest generation of descendants known and seen by the donor. To point this out, however, does not mean that the period or its proxy works poorly. In fact, it works well because its length is sufficient to provide a margin of safety: With respect to almost all if not all dispositions that seek to go through the lives of that youngest known-and-seen generation, actual vesting will occur prior to the expiration of the period.[31] The period, in other words, is almost never underpermissive.

Obviously, there is a cost of having an imprecise period that performs a margin-of-safety rather than a precisely self-adjusting function: It will sometimes be overpermissive. That is, an imprecise period that in almost all if not all cases extends beyond the death of the last living member of the youngest known-and-seen generation[32] will of necessity be generous enough to allow some donors in some cases to extend control through or into generations completely unknown and unseen by them.[33] Perpetuity saving clauses and, in

[30]See text at 577–8 *supra* concerning how the allowable waiting period under wait-and-see performs a margin-of-safety rather than a precisely self-adjusting function. This discussion, of course, also applies to the period of time determined by the perpetuity-period component of a saving clause.

[31]See notes 18 and 29 *supra*.

[32]As the following chart shows, life expectancies increased dramatically during the first half of this century, and have been inching slowly upwards since then. In sheer numbers of years, it therefore takes longer for a whole generation of descendants to die out than ever was thought possible at an earlier time.

Year of Birth	*Life Expectancy at Birth*
1982	75
1980	74
1970	71
1960	70
1950	68
1940	63
1930	60
1920	54
1910	50
1900	47

Sources: U.S. Bureau of the Census, Statistical Abstract of the United States: 1986, Tables 106 and 108 at 68–69 (106th ed. 1985); U.S. Bureau of the Census, Historical Statistics of the United States, Table B 107–115 at 55 (Part 1, 1975).

A word of caution about the years of life expectancy depicted above: They represent the average number of years that members of a hypothetical cohort would live if they were subject throughout their lives to the age-specific mortality rates observed at the time of their births. This is the most usual measure of the comparative longevities of different populations, but it does shorten the reported years of life expectancy if there are relatively large numbers of deaths occurring in the first year of life. This factor declines in importance as infant mortality decreases.

[33]For example, suppose G in any of the four charted families dies prematurely enough so that his

their absence, their proxy, the 90-year allowable waiting period under the Uniform Act, allow excessive dead-hand control only if one asserts the view that the line delimited by the youngest known-and-seen generation must never, ever, be allowed to be crossed[34]—and can justify such a view by substantiating the precise harm caused by those few individual cases in which it is crossed.

The study cited earlier[35] suggests that, on average, the youngest descendant that donors know and see before they die is a 6-year old. The preceding charts show that that youngest descendant seldom is a child.[36] Seldom also will that youngest descendant be at the other extreme, a great-great-grandchild.[37] More likely, he or she is a grandchild, perhaps a great-grandchild.[38]

---

death occurs before *any* of his grandchildren are born. (This would mean that G died before age 40 in Family I, before age 50 in Family II, before age 60 in Family III, and before age 70 in Family IV.) A perpetuity saving clause could nevertheless confer validity on G's trust in Examples 1 and 2. The lives used to determine the perpetuity-period component of the clause need not be limited to G's descendants living at G's death but can be tailored to include the descendants of G's parents or grandparents living at G's death. This would normally sweep in some very young descendants. Similarly, because the Uniform Act is based on averages, G's premature death would not reduce the 90-year allowable waiting period. The prospect of the line being exceeded in such cases should cause no undue concern, however, because the younger and more prematurely G dies, the likelihood of his actually creating either disposition diminishes. The actual creation of such dispositions is much more likely when G's will was executed after or shortly before and in anticipation of when the birth or conception of his first grandchild, V, is anticipated to be imminent, not far off in the distant future.

[34]A perpetuity period that is neither overpermissive nor underpermissive could easily be invented for cases in which the trust or other property arrangement fits conveniently within generational lines, as in cases like Examples 1 and 2 above. Doing so, however, would require replacing the traditional period of lives in being plus 21 years with a generational scheme. That is, the Rule Against Perpetuities could be wholly revised to allow nonvested property interests to remain nonvested through a specified generation (including its after-born members), but no longer. The specified generation could be identified as the youngest generation containing at least one living member at the time of the transfer. Such a generational scheme would be complex and would require revising even the validating side of the Common-law Rule, which in turn would require new learning on the part of lawyers, even lawyers expert in estate planning. The major source of the complexity would come about from trying to devise a generational scheme that would adapt to situations in which the trust does not fit conveniently into generational lines.

[35]Progress Report, *supra* note 14.

[36]In all four families, G must die prematurely for this to happen—5 or more years prematurely in Family IV, 15 or more years prematurely in Family III, 25 or more years prematurely in Family II, and 35 or more years prematurely in Family I.

[37]G must outlive his life expectancy in all four families for this to happen—5 or more years beyond his life expectancy even in Family I. (Great-great-grandchildren are not even depicted in the charts for Families II, III, and IV, but for the record G must live 25 or more years beyond his life expectancy in Family II, 45 or more years beyond his life expectancy in Family III, and 65 or more years beyond his life expectancy in Family IV.)

[38]To take the two outer families first, the youngest descendant in Family I if G dies at age 75 would be a new-born great-grandchild (S); G must die 15 or more years prematurely for that youngest descendant to be a grandchild. In Family IV, at the other extreme, G's youngest descendant will be a pair of new-born grandchildren (X and Y) if G dies at age 75; G must outlive his life expectancy by 30 or more years for that youngest descendant to be a great-grandchild. As for the in-between families, Families II and III, G's dying at age 75 would mean that the youngest des-

Whatever the generation, even with respect to the small fraction of donors who, like G in Example 2, seek to exert maximum or near-maximum control, both the Uniform Act and perpetuity saving clauses preserve in an acceptable way the line between descendants donors knew and saw and those they never knew and saw, by providing a period of time long enough to cover the former in nearly all if not all cases while, on average, excluding the latter.[39]

---

cendant is a new-born great-grandchild (K) in Family II and a 5-year old grandchild (Z) in Family III.

[39]It is doubtful that it can be demonstrated that, on average, a "causal-relationship" formula for determining actual measuring lives (see notes 10 and 14 *supra* and text accompanying note 17 *supra*) curtails the dead hand more appropriately than a statutory list or the 90-year proxy therefor. About one point, there is no doubt: *When donors seek to exert maximum or near-maximum control, such as G did in Example 2 above, a "causal-relationship" regime accommodates them.* The allowable waiting period using a "causal-relationship" formula can expand to a period of 90 years *or more* in such cases. In Example 2, for instance, the youngest "causal-relationship" measuring life would presumably be G's youngest descendant living at G's death. If that youngest measuring life and the after-born grandchildren, if there are any, live out their statistical life expectancies (as determined in Table 108 in U.S. Bureau of the Census, Statistical Abstract of the United States: 1986 at 69), the allowable waiting period for each of the four families is more than ample to validate the disposition in each case—and is longer in each case than the flat 90-year waiting period under the Uniform Act:

Example 2 Under A "Causal-Relationship" Regime

Family	Youngest "C-R" Measuring Life	Projected Allowable Waiting Period	Projected Time of Actual Vesting	Unused End-Portion
I	S (age 0)	96 (75+21)	50	46
II	K (age 0)	96 (75+21)	60	36
III	Z (age 5)	92 (71+21)	70	22
IV	X&Y (age 0)	96 (75+21)	80	16

If the "causal-relationship" formula produces a projected allowable waiting period shorter than the other methods, it occurs sporadically and only when the greater margin of safety provided by a longer period is unlikely to be needed to accommodate the disposition—i.e., if *actual* vesting is projected to occur within a shorter period of time. The difference in such cases is merely in the length of the *unused* end-portion of the allowable waiting period, *which is a matter of no importance at all so far as curtailment of dead-hand control is concerned.* In Example 1 above, for instance, the youngest "causal-relationship" measuring life is presumably G's youngest grandchild living at G's death. In Families III and IV, therefore, the projected "causal-relationship" waiting period for Example 1 would be the *same* as that for Example 2, even though *actual* vesting in Example 1 is projected to occur *decades* earlier. Only in Families I and II is the projected "causal-relationship" waiting period shorter for Example 1 than it is for Example 2, and in both of these families the unused end-portion is equal to Family III's and greater than Family IV's:

II. Section-By-Section Analysis of The Uniform Act, With Statutory Text

This part of the article turns to a section-by-section analysis of the Uniform Act. It is presented in the following format: The text of each section is first set forth, followed by a commentary explaining the section's import and the rationale of certain of its features. The commentary presented here is considerably briefer than the actual set of Comments appended to the Act. The Comments appended to the Act are quite detailed and contain numerous examples designed to assist lawyers and judges in applying the Act to actual cases.

SECTION 1. 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 subsection (a)(1), (b)(1), or (c)(1), the possibility that a child will be born to an individual after the individual's death is disregarded.

Commentary. Section 1 establishes the Statutory Rule Against Perpetuities (Statutory Rule). As provided in Section 9, the Uniform Act supersedes the Common-law Rule Against Perpetuities (Common-law Rule) in jurisdictions

Example 1 Under A "Causal-Relationship" Regime

Family	Youngest "C-R" Measuring Life	Projected Allowable Waiting Period	Projected Time of Actual Vesting	Unused End-Portion
I	Z (age 25)	72 (51+21)	5	67
II	Z (age 15)	82 (61+21)	15	67
III	Z (age 5)	92 (71+21)	25	67
IV	X&Y (age 0)	96 (75+21)	35	61

previously adhering to it (or repeals any statutory version or variation thereof previously in effect in the jurisdiction). The Common-law Rule (or the statutory version or variation thereof) is replaced by the Statutory Rule in Section 1 and by the other provisions of the Uniform Act.

Section 1(a) covers nonvested property interests, and will be the subsection most often applicable. Subsections (b) and (c) cover powers of appointment.

Paragraph (1) of subsections (a), (b), and (c) is a codified version of the validating side of the Common-law Rule. In effect, paragraph (1) of these subsections provides that nonvested property interests and powers of appointment that are valid under the Common-law Rule Against Perpetuities, *including those that are rendered valid because of a perpetuity saving clause,* continue to be valid under the Statutory Rule and can be declared so at their inceptions. This is an extremely important feature of the Uniform Act because it means that no new learning is required of competent estate planners: *The practice of lawyers who competently draft trusts and other property arrangements for their clients is undisturbed.*

Paragraph (2) of subsections (a), (b), and (c) establishes the wait-and-see rule. Paragraph (2) provides that an interest or a power of appointment that is not validated by paragraph (1), and hence would have been invalid under the Common-law Rule, is given a second chance: Such an interest is valid if it does not actually remain in existence and nonvested when the allowable 90-year waiting period expires; such a power of appointment is valid if it ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires.

The rule established in subsection (d) deserves a special comment. Subsection (d) declares that the possibility that a child will be born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purpose of determining the validity of an interest (or a power of appointment) under paragraph (1) of subsection (a), (b), or (c). The rule of subsection (d) does not apply, for example, to questions such as whether a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest—as a member of a class or otherwise. Neither subsection (d), nor any other provision of the Uniform Act, supersedes the widely accepted common-law principle, sometimes codified, that a child in gestation (a child sometimes described as a child *en ventre sa mere*) who is later born alive is regarded as alive at the commencement of gestation.

The limited purpose of subsection (d) is to solve a perpetuity problem caused by advances in medical science. The problem is illustrated by a case such as "to A for life, remainder to A's children who reach 21." When the Common-law Rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to

validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common-law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of a deceased pregnant woman long enough to develop the fetus to viability[40]—advances in medical science unanticipated when the Common-law Rule was in its developmental stages—having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 1(a)(1) on the interest of A's children in the above example. The rule of subsection (d), however, *does* insure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that subsection (d) subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With subsection (d) in place, the third component of the common-law perpetuity period is unnecessary and has been jettisoned. The perpetuity period recognized in paragraph (1) of subsections (a), (b), and (c) has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in the above example A leaves sperm on deposit at a sperm bank and after A's death a woman (A's widow or another) becomes pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift.[41] Without trying to predict how *that* question will be resolved in the future, the best way to handle the problem from the perpetuity perspective is the rule in subsection (d) requiring the possibility of post-death children to be disregarded.

SECTION 2. WHEN NONVESTED PROPERTY INTEREST OR POWER OF APPOINTMENT CREATED.

(a) Except as provided in subsections (b) and (c) and in Section 5(a), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this [Act], 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 Section 1(b) or 1(c), the nonvested property interest or power of appointment is created when the power to become the un-

[40]*See* Detroit Free Press, July 31, 1986, at 5A; Ann Arbor News, Oct. 30, 1978, at C5 (AP story); N.Y. Times, Dec. 6, 1977, at 30; N.Y. Times, Dec. 2, 1977, at B16.

[41]*Cf.* RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) Introductory Note to Ch. 26 at 2–3 (Tent. Draft No. 9, 1986).

qualified beneficial owner terminates. [For purposes of this [Act], a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.]

(c) For purposes of this [Act], 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.

Commentary. Section 2 defines the time when, for purposes of the Uniform Act, a nonvested property interest or a power of appointment is created. The period of time allowed by Section 1 is measured from the time of creation of the nonvested property interest or power of appointment in question. Section 5, with certain exceptions, provides that the Uniform Act applies only to nonvested property interests and powers of appointment created on or after the effective date of the Act.

Section 2(a) provides that, with certain exceptions, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law. Because a Will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the Will, general principles of property law determine that a nonvested property interest or a power of appointment created by Will is created at the decedent's death. With respect to an inter vivos transfer, an interest or power is created on the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed or the funding of the trust. As for a nonvested property interest or a power of appointment created by the testamentary or inter vivos exercise of a power of appointment, general principles of property law adopt the "relation back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was created, not when it was exercised, if the exercised power was a non-general power or a general testamentary power. If the exercised power was a presently exercisable general power, the relation back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably exercised, not when the power was created.

Section 2(b) provides that, if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest (or a property interest subject to a power of appointment described in Section 1(b) or 1(c)), the time of creation of the nonvested property interest (or the power of appointment) is postponed until the power to become the unqualified beneficial owner ceases to exist. This is in accord with existing common law. The standard example of the application of this subsection would be a *revocable* inter vivos trust. For perpetuity purposes, both at common law and under the Uniform Act, the nonvested property interests and powers of appointment created in the trust are created when the power to revoke expires, usually at the settlor's death.

Section 2(c) provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing *irrevocable* inter vivos trust. Arguably, at common law, each transfer starts the period of the Rule running anew as to that transfer. The prospect of staggered periods is avoided by subsection (c). Subsection (c) is in accord with the saving-clause principle of wait-and-see embraced by the Uniform Act. If the irrevocable inter vivos trust had contained a saving clause, the perpetuity-period component of the clause would be measured by reference to lives in being when the original contribution to the trust was made, and the clause would cover subsequent contributions as well.

SECTION 3. 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 Section 1(a)(2), 1(b)(2), or 1(c)(2) if:

(1) a nonvested property interest or a power of appointment becomes invalid under Section 1 (statutory rule against perpetuities);

(2) a class gift is not but might become invalid under Section 1 (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) a nonvested property interest that is not validated by Section 1(a)(1) can vest but not within 90 years after its creation.

Commentary. Section 3 directs a court, upon the petition of an interested person,[42] to reform a disposition within the limits of the allowable 90-year period, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in any one of three circumstances. Section 3 applies only to dispositions the validity of which is governed by the wait-and-see element of Section 1(a)(2), 1(b)(2), or 1(c)(2); it does not apply to dispositions that are initially valid under Section 1(a)(1), 1(b)(1), or 1(c)(1)—the codified version of the validating side of the Common-law Rule.

This section will seldom be applied. Of the fraction of trusts and other property arrangements that are incompetently drafted, and thus fail to meet the requirements for initial validity under the codified version of the validating side of the Common-law Rule, almost all of them will have terminated by their own terms long before any of the circumstances requisite to reformation under Section 3 arise.

If, against the odds, one of the circumstances requisite to reformation does arise, it will be found easier than perhaps anticipated to determine how best

[42]The "interested person" who would frequently bring the reformation suit would be the trustee.

to reform the disposition.[43] The court is given two criteria to work with: (i) the transferor's manifested plan of distribution, and (ii) the allowable 90-year period. Because governing instruments are where transferors manifest their plans of distribution, the imaginary horrible of courts being forced to probe the minds of long-dead transferors will not materialize.[44]

The theory of Section 3 is to defer the right to reformation until reformation becomes truly necessary. Thus, the basic rule of Section 3(1) is that the right to reformation does not arise until a nonvested property interest or a power of appointment becomes invalid; under Section 1, this does not occur until the expiration of the 90-year allowable waiting period.[45] As noted above, this approach substantially reduces the number of reformation suits. It also is consistent with the saving-clause principle embraced by the Uniform Act. Deferring the right to reformation until the allowable waiting period expires is the only way to grant every reasonable opportunity for the donor's disposition to work itself out without premature interference.[46]

---

[43]Note that reformation under Section 3 is mandatory, not up to the discretion of the court. Consequently, as noted in the Comment to Section 3, the common-law doctrine of infectious invalidity is superseded by the Act.

[44]Perhaps the easiest way to illustrate the operation of Section 3 is to provide one of the several examples contained in the Comment to that section. It may be noted that the trust established in this example is abnormal in that the donor, G, tried to exceed the fair balance between descendants he knew and those he did not know. Consequently, the trust is not likely to terminate by its own terms before the expiration of the allowable 90-year waiting period.

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

The validity of the remainder interest in the corpus in favor of A's descendants who survive the death of A's last surviving grandchild and the alternative remainder interest in the corpus in favor of the specified charity is governed by Section 1(a)(2).

Likely, some of A's grandchildren will be alive on the 90th anniversary of G's death. If so, the remainder interests in the corpus of the trust *then* become invalid under Section 1(a)(2), giving rise to Section 3(1)'s prerequisite to reformation.

How a court should reform G's disposition is rather apparent if time is taken to work through the example. In reforming G's disposition so that it comes as close as possible to his manifested plan of distribution without exceeding the allowable 90-year period, the Comment to Section 3 suggests that the court should order the following: (i) close the class in favor of A's descendants as of the 90th anniversary of G's death (precluding new entrants thereafter), (ii) move back the time when survivorship is required, so that the remainder interest is transformed into one that is in favor of G's descendants who survive the 90th anniversary of G's death (rather than in favor of those who survive the death of A's last surviving grandchild), and (iii) redefine the class so that its makeup is formed as if A's last surviving grandchild died on the 90th anniversary of G's death.

[45]The Restatement (Second) is in accord. Reformation is provided for in the Restatement only if the nonvested property interest becomes invalid after waiting out the allowable waiting period. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5 (1983).

[46]The Committee specifically rejected the idea of granting a right to reformation at any time

At the same time, the Uniform Act is not inflexible, for it grants the right to reformation before the expiration of the 90-year allowable waiting period when it becomes necessary to do so or when there is no point in waiting that period out. Thus subsection (2), which pertains to class gifts that are not yet but still might become invalid under the Statutory Rule, grants a right to reformation whenever the share of any class member is entitled to take effect in possession or enjoyment. Were it not for this subsection, a great inconvenience and possibly injustice could arise, for a class member whose share had vested within the allowable period might otherwise have to wait out the remaining part of the 90 years before obtaining his or her share.[47] Reformation under this subsection will seldom be needed, however, because of the common practice of structuring trusts to split into separate shares or separate trusts at the death of each income beneficiary, one such separate share or separate trust being created for each of the income beneficiary's then-living children; when this pattern is followed, the circumstances described in subsection (2) will not arise.[48]

---

on a showing of a violation of the Common-law Rule, as some states have done. The experience under these statutorily or judicially established reformation principles has not been satisfactory. The courts have lowered age contingencies to 21, an unwarranted distortion of the donor's intention because, like Example 1 (discussed at text accompanying notes 25–26 *supra*), the cases were such that the vesting of the beneficiaries' interests would almost certainly occur well within the period of time determined by the perpetuity-period component of a saving clause or, in the absence of such a clause, well within the time allowed by a wait-and-see element such as would be effected by the Uniform Act. The cases lowering age contingencies to 21 are collected and discussed in Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1757 n.103 (1983).

[47]Subsection (2) is illustrated by the following example, taken from the Comment to that subsection.

Age Contingency in Excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children"; the corpus of the trust is to be equally divided among A's children who reach the age of 30. G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died. After G's death, another child (Z) was born to A.

The class gift is not validated by Section 1(a)(1). Under Section 1(a)(2), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death. Although unlikely, suppose that at A's death (prior to the expiration of the 90-year period), Z's age was such that he or she could be alive but under the age of 30 on the 90th anniversary of G's death. Suppose further that at A's death X and Y were over the age of 30. Z's interest and hence the class gift as a whole is not yet invalid under the Statutory Rule because Z might die under the age of 30 within the 90-year period following G's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after G's death. Consequently, the prerequisites to reformation in subsection (2) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on reaching the age Z can reach if Z lives to the 90th anniversary of G's death. This would render Z's interest valid so far as the Statutory Rule Against Perpetuities is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to reach the required age under the reformed disposition, the remaining one-third share would be divided equally between X and Y or their successors in interest.

[48]The example in note 47 *supra* was purposely structured to illustrate the application of Section

Subsection (3) also grants the right to reformation before the 90-year waiting period expires. The circumstance giving rise to the right to reformation under subsection (3) occurs if a nonvested property interest can vest but not before the 90-year period has expired. Though unlikely, such a case can theoretically arise. If it does, the interest—unless it terminates by its own terms earlier—is bound to become invalid under Section 1 eventually. There is no point in deferring the right to reformation until the inevitable happens. The Uniform Act provides for early reformation in such a case, just in case it arises.[49]

3(2). In an actual trust, however, it would be more likely that G's disposition would be structured quite differently. On A's death, the typical trust would divide into equal shares (or trusts), one share each for A's then-living children (and one share each for the then-living descendants of any of A's children who had predeceased A). The separate share or trust for each then-living child would pay the income from that share to that child until the child dies or reaches 30, whichever occurs first, with the corpus of that share going outright to that child if he or she reaches 30; there would also be an appropriate gift over if the child dies before reaching 30.

If the trust were structured this way, the so-called sub-class doctrine would apply, eliminating the need to petition for reformation on A's death in order for X and Y to receive their shares immediately. The trust would divide into three separate shares when A died, one share for X, one for Y, and one for Z. Under the sub-class doctrine, the validity of the interests of X and Y would not depend on the validity of Z's interest. Because X and Y were living at G's death, their interests were certain to vest or terminate within their own lifetimes, and were therefore initially valid under Section 1(a)(1), the codified version of the validating side of the Common-law Rule. No reformation suit would be necessary for X and Y to receive the corpus of their respective shares immediately on A's death. The validity of the interest of the after-born child, Z, in the corpus of his or her separate share or trust would be governed by the wait-and-see element of Section 1(a)(2). On the facts given (unlikely as they are to arise), it would be impossible for Z's interest to vest within the 90-year waiting period. Section 3(3) would therefore apply to allow an interested person to petition for reformation of Z's interest; such a reformation suit, which would be a less pressing matter because Z's *income* interest would be valid, would probably result in lowering the age contingency with respect to Z's nonvested interest in the corpus of his or her share or trust to the age Z can reach on the 90th anniversary of G's death. The point is, however, that even in this exceedingly unlikely factual situation, such a reformation suit would not be necessary in order for X and Y to receive their shares.

[49]In addition to the situation with respect to Z's interest in the example in note 48 *supra*, the application of Section 3(3) can be illustrated by the following example, taken from the Comment to that subsection:

Case of An Interest, As of Its Creation, Being Impossible to Vest Within the Allowable 90-Year Period. G devised property in trust, directing the trustee to divide the income, per stirpes, among G's descendants from time to time living, for 100 years. At the end of the 100-year period following G's death, the trustee is to distribute the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's descendants who are living 100 years after G's death can vest, but not within the allowable 90-year period of Section 1(a)(2). The interest would violate the Common-law Rule, and hence is not validated by Section 1(a)(1), because there is no validating life. In these circumstances, a court, on the petition of an interested person, is required by Section 3(3) to reform G's disposition within the limits of the allowable 90-year period. An appropriate result would be for the court to lower the period following G's death from a 100-year period to a 90-year period.

SECTION 4. EXCLUSIONS FROM STATUTORY RULE AGAINST PERPETUITIES.

Section 1 (statutory rule against perpetuities) 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 (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) 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.

Commentary. Section 4 lists the interests and powers that are excluded from the Statutory Rule Against Perpetuities. This section is in part declaratory of existing common law but in part not. Under subsection (7), all the exclusions from the Common-law Rule recognized at common law and by statute in the state are preserved.

The major departure from existing common law comes in subsection (1). In line with long-standing scholarly commentary,[50] subsection (1) excludes

---

[50]6 AMERICAN LAW OF PROPERTY § 24.56 at 142 (A. Casner ed. 1952); L. Simes & A. Smith, The Law of Future Interests § 1244 at 159 (2d ed. 1956); Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318, 1321–22 (1960); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 660 (1938). *See also* Metropolitan Transportation Authority v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 384 (1986); RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) Introduction at 1 (1983).

nondonative transfers from the Statutory Rule. The Rule Against Perpetuities is an inappropriate instrument of social policy to use as a control on such arrangements. The period of the Rule—a life in being plus 21 years—is suitable for donative transfers only, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Section 1. That period, as noted, represents an approximation of the period of time that would be produced, on average, by tracing a set of actual measuring lives identified by statutory list and adding a 21-year period following the death of the survivor.

Certain types of transactions—although in some sense supported by consideration, and hence arguably nondonative—arise out of a domestic situation, and should not be excluded from the Statutory Rule. To avoid uncertainty with respect to such transactions, subsection (1) lists and restores such transactions, such as premarital or postmarital agreements, contracts to make or not to revoke a will or trust, and so on, to the donative-transfers category that does not qualify for an exclusion.

The Drafting Committee recognized that some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded from the Statutory Rule by the nondonative-transfers exclusion of subsection (1). The reason, again, is that the period of a life in being plus 21 years—actual or by the 90-year proxy—is inappropriate for them; that period is appropriate for family-oriented, donative transfers.

The Committee was aware that a few states have adopted statutes on perpetuities that include special limits on certain commercial transactions,[51] and in fact the Committee itself drafted a comprehensive version of Section 4 that would have imposed a 40-year period-in-gross limitation in specified cases. In the end, however, the Committee did not present that version to the National Conference for approval because it was of the opinion that the control of commercial transactions that directly or indirectly restrain alienability is better left to other types of statutes, such as marketable title acts[52] and the Uniform Dormant Mineral Interests Act, backed up by the potential application of the common-law rules regarding unreasonable restraints on alienation.

SECTION 5. PROSPECTIVE APPLICATION.

(a) Except as extended by subsection (b), this [Act] applies to a nonvested property interest or a power of appointment that is created on or after the effective date of this [Act]. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created

[51] *E.g.*, FLA. STAT. § 689.22(3)(a); ILL. REV. STAT. ch. 30, § 194(a).

[52] *E.g.*, the Uniform Simplification of Land Transfers Act.

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 before the effective date of this [Act] and is determined in a judicial proceeding, commenced on or after the effective date of this [Act], to violate this State's rule against perpetuities as that rule existed before the effective date of this [Act], 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.

Commentary. Section 5 provides that, except for Section 5(b), the Uniform Act applies only to nonvested property interests or powers of appointment created on or after the Act's effective date. The second sentence of subsection (a) establishes a special rule for nonvested property interests (and powers of appointment) created by the exercise of a power of appointment. The import of this special rule, which applies to the exercise of all types of powers of appointment (general testamentary powers and nongeneral powers as well as presently exercisable general powers), is that all the provisions of the Uniform Act except Section 5(b) apply if the donee of a power of appointment exercises the power on or after the effective date of the Act, whether the donee's exercise is revocable or irrevocable. In addition, all the provisions of the Act except Section 5(b) apply if the donee exercised the power before the effective date of the Act if (i) that pre-effective-date exercise was revocable *and* (ii) that revocable exercise becomes irrevocable on or after the effective date of the Act. The special rule, in other words, prevents the common-law doctrine of relation back from inappropriately shrinking the reach of the Act.

Although the Statutory Rule does not apply retroactively, Section 5(b) authorizes a court to exercise its equitable power to reform instruments that contain a violation of the state's former rule against perpetuities and to which the Statutory Rule does not apply because the offending property interest or power of appointment was created before the effective date of the Act. Courts are urged in the Comment to consider reforming such dispositions by judicially inserting a saving clause, because a saving clause would probably have been used at the drafting stage of the disposition had it been drafted competently. To obviate any possibility of an inequitable exercise of the equitable power to reform, Section 5(b) limits its recognition of the authority to reform to situations in which the violation of the former rule against perpetuities is determined in a judicial proceeding that is commenced on or after the effective date of the Act. The equitable power to reform would typically be exercised in the same judicial proceeding in which the invalidity is determined.

SECTION 6. SHORT TITLE.

This [Act] may be cited as the Uniform Statutory Rule Against Perpetuities.

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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

SECTION 8. TIME OF TAKING EFFECT.

This [Act] takes effect _____.

SECTION 9. [SUPERSESSION] [REPEAL].

This [Act] [supersedes the rule of the common law known as the rule against perpetuities] [repeals (list statutes to be repealed)].

III. CONCLUSION

The Uniform Act makes wait-and-see fair, simple, and workable, and it does so without authorizing excessive dead-hand control. Coming, as it does, on the heels of the Restatement (Second)'s adoption of wait-and-see, perpetuity reform in this country may at long last be achievable. The Act deserves serious consideration for adoption by the various state legislatures.