

Washington Law Review

Volume 65
Number 2 *Dedicated to Professor Robert L.
Fletcher*

4-1-1990

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Robert L. Fletcher, *Perpetuities: A Father's Reply*, 65 Wash. L. Rev. 357 (1990).

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PERPETUITIES: A FATHER'S REPLY

Robert L. Fletcher

Susan has persuasively argued for adoption of a method that would look at the various chains of events—the resolving sequences—thus to separate those that fail from those that pass. We differ in only one important respect. In some instances she would use a life or portion of a life that is extraneous to the vesting reached in a particular sequence. I would not. In doing so, she in effect adopts Professor Dukeminier's "affecting lives" approach. To put this in my terms, she uses any life or portion of a life that is pertinent to vesting of any sequence within the interest, not confining herself to those lives that are pertinent to the sequence under scrutiny. Further, she will use that extraneous life even though it is not adequate to defend the other sequence. She also would use a life that is adequate to defend a sequence that resolves the remainder that is alternate to the remainder being tested.

This difference is apparent in her treatment of the *Proctor* case ("To the first son of *A* to become a clergyman," *A* having no sons at the effective date). She would validate a sequence that gives the property to an afterborn son who first becomes a clergyman, no matter at what age, as long as he takes the cloth within 21 years of *A*'s death, despite the fact that *A*'s continued life after the birth of that son is extraneous. Consider the sequence in which the only afterborn son (#1 son) becomes a clergyman at age 30. Susan would say that this is defensible if *A* lives until the #1 son is 9 years old. *A*'s life, after the birth of #1, is usable since *A* could later produce #2 son (or #3 or #4), who could become the first to become a clergyman. *A* being essential to that other sequence at least long enough to get #2 born, his life until that time is also usable to defend the sequence in which the first son gets the prize at 30, #2 being born when #1 is 9 or older.

Assuming we are willing to use extraneous lives, this approach at least has the virtue of using a definable group of people. But to my mind it come uncomfortably close to the *Restatement (Second)*'s use of many extraneous people—handy to have around, but intruders nonetheless. Further, they should be recognized for what they are—merely a convenient mechanism for extending our tolerance of dead hand control beyond the limits set by the common law rule.