Vanderbilt Law Review

Volume 27
Issue 6 *Issue 6 - November 1974*

Article 3

11-1974

The Tennessee Rule Against Perpetuities: A Proposal for Statutory Reform

C. Dent Bostick

The Tennessee Rule Against Perpetuities: A Proposal for Statutory Reform

*C. Dent Bostick**

For several decades, there has been agitation for reform of the common-law Rule Against Perpetuities. For the most part, the reformers have urged that improvements in the Rule and the manner of its application be accomplished through legislative enactment.[1] Only a few jurisdictions have opted for reform by the judiciary.[2] Thus far, there has been no legislative reform of the Rule in Tennessee; the appellate courts of the state continue to apply the Rule in its common-law form with all the confusing rubrics attached to it by centuries of development. The condition of Tennessee's law on the subject contrasts sharply with that of neighboring Kentucky where significant reform has been achieved.[3] Considering the potential for serious mischief and even catastrophic consequences in property and estate transactions when the common-law rule is applied, it seems appropriate to take a fresh look at the Rule and its application in Tennessee.

It is the purpose of this article to review the development of the Rule Against Perpetuities, the policies it undertakes to advance, the peculiar problems which have evolved in the centuries of its development, the Tennessee experience in applying the concept, and the possible legislative or judicial avenues to a more efficient application of the Rule and its underlying policies.

---

* Professor of Law, Vanderbilt University School of Law; B.A. 1952, J.D., 1958 Mercer University.

1. Several states have made statutory changes. *See* CAL. CIV. CODE § 715.3-715.7 (West Supp. 1974); CONN. GEN. STAT. ANN. § 45-95 (1958); IDAHO CODE ANN. § 55-111 (1957); ILL. ANN. STAT. ch. 30, §§ 191-96 (Smith-Hurd Supp. 1974); KY. REV. STAT. ANN. §§ 381.215-23 (1973); ME. REV. STAT. ANN. tit. 33, §§ 101-06 (1964); MD. ANN. CODE art. 93, §§ 11-102 to -103 (1969); MASS. ANN. LAWS ch. 184A, §§ 1-2 (1955); MO. ANN. STAT. § 442.555 (Supp. 1974); N.Y. EST., POWERS & TRUSTS §§ 9-1.1 to 9-1.8 (McKinney 1967); OHIO REV. CODE ANN. §§ 2131.08-09 (Page 1968); PA. STAT. ANN. tit. 20, §§ 6104-6105 (Spec. Pamph. 1974); TEX. REV. CIV. STAT. art. 1291b (Supp. 1974); VT. STAT. ANN. tit. 27, §§ 501-03 (1967); WASH. REV. CODE ANN. §§ 11.98.010-.050 (1967); WISC. STAT. ANN. § 700.16 (Spec. Pamph. 1974); REV. STAT. OF ONTARIO ch. 343 (1970); Perpetuities and Accumulations Act 1964; Western Australian Law Reform (Property, Perpetuities and Succession) Act, 1962; Perpetuities Act, No. 47 (New Zealand 1964).

2. *See*, Smith *Perpetuities in New Jersey: A Plea for Judicial Supremacy*, 24 RUT. L. REV. 80 (1969).

3. KY. REV. STAT. ANN. §§ 381.215-.223 (1973). *See also* Dukeminier, *Kentucky Perpetuities Law Restatement and Reformed*, 49 KY. L.J. 3 (1960).

DEVELOPMENT OF THE COMMON-LAW RULE

The origin of the Rule Against Perpetuities lies deep in the history of English land law. As a result, there can be no real understanding of the Rule and its policy without some reference to this history. This requirement in itself presents difficulty to the nonhistorian because of the enormous intricacy of twelfth through nineteenth century English property arrangements. An enduring theme permeates the evolution of English property law, however, and continual reference to that theme makes the law's development more plausible, orderly, and understandable. The overriding theme is that from the earliest Norman times English land law always embodied a conflict between those who, for varying reasons, wanted land freely alienable and available for commerce, and those landowning gentry who wanted it preserved in family lines for support of future generations.[4] In the course of this long conflict, the common-law courts allied themselves with the proponents of free alienability and through their decisions evolved a highly pragmatic property law that provided for the free availability of property for conveyance. On the other side of the struggle, the landowners were assisted by legislation from a Parliament they long dominated, and by the magnificent talents of a conveyancing bar, who with great imagination and improvisation, successfully countered each move of the courts to undo the shackles that the bar had placed on free alienability of land. The similarity of the work and goals of these ancient conveyancers when compared with modern estate planners is striking and obvious. It is interesting to note that the tools with which today's planners work, the "estates" in land, are the direct descendants of the conveyancers' tools in medieval and renaissance England.

The concept of "estates" in land was becoming established in English law by the early fourteenth century. It is a concept of ownership measured in terms of time, and while probably an inheritance from the continent, it reached its peculiar fullness in Anglo-American law. Basically, the concept recognizes the possibility of successive ownership of the same piece of land by dividing the ownership into "estates," each of which can have a present existence, although only one can have a present right to possession.[5] Those estates having a present existence but no present right of possession are termed "future interests;" it is these interests which, from an-

4. L. SIMES, PUBLIC POLICY AND THE DEAD HAND 56-58 (1955).

5. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 10 (2d ed. 1898).

cient times, have attracted the attention of those who have wanted to direct the disposition of property beyond their lifetimes. From the manipulation of the future interest has come the enduring policy debate of the proper balance between the right of the "dead hand" to control property past its lifetime and the right of each generation in turn to enjoy it as it wishes.[6]

It was this concept of future estates that gave rise to the problem governed by the Rule Against Perpetuities. Prior to the Statute of Uses,[7] there was only one serious source of potential trouble among the future interests allowed by the law. That troublemaker was the remainder, and more specifically, the contingent remainder. A remainder is defined as a future interest created in a transferee, which can become a present possessory estate only on expiration of a prior estate created by the same instrument in favor of another transferee.[8] Its creation was a highly technical affair and to be effective, every element in its description was essential. A remainder that was not subject to a condition precedent, and was limited to a person in existence and ascertained was said to be a "vested" remainder. This variety of remainder was recognized as early as the thirteenth century and was the first future interest creatable in someone other than the grantor of the estate or his heirs. The vested remainder is, by definition, not an undue restraint on free alienability of property because it can be limited only to persons now in existence or ascertainable, thus precluding its use as an instrument to convey property to unborn, unknown future generations.

The close kin of the vested remainder is the contingent remainder; here a different and more serious problem is confronted by those wishing to curtail perpetuities. The contingent remainder, recognized somewhat later than the vested remainder,[9] is defined as a remainder subject to a condition precedent or limited to a person not ascertained, or not in existence. Obviously, if one owning an estate could pass it by contingent remainders to persons yet unborn or unascertained at critical times, one could hold property in a family line indefinitely without fear that the property could be al-

6. Ironically, modern English law permits only the fee simple absolute and the term of years absolute as legal estates; all other estates in property are equitable in England. Such is not the case in this country where, for the most part, the possibility of creating all the old estates in law or equity still survives. Three acts passed in 1925 played a major role in bringing this result about; Law of Property Act, 15 Geo. 5, c. 20 (1925); Settled Land Act, 15 Geo. 5, c. 18 (1925); Trustee Act, 15 Geo. 5, c. 19 (1925).

7. Statute of Uses, 27 Hen. VIII, c. 10 (1536).

8. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 110 (1962).

9. For a discussion of the historical development of remainders, see T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 560-64 (5th ed. 1956).

ienated in fee simple by the life tenant by simply conveying a remainder to the oldest son in each successive generation in his family forever. The great landowners had something along this line in mind when in 1285 they pushed through Parliament the Statute De Donis, which created the famous, and now nearly extinct, "fee tail" estate.[10] The fee tail was a new estate in land of limited inheritance and imposed a restraint on alienation outside the line of lineal descent. Simply by conveying land to the grantee "and the heirs of his body" the grantor could insure that the land would remain in the lineal chain as long as there were bodily heirs in each successive generation. It took the common-law judges almost two hundred years to bring this device under control, but the free alienability advocates finally countered the fee tail estate with a collusive and fictitious lawsuit called the common recovery.[11] The landowners eventually regrouped and recovered some ground in the development of the "strict settlement"[12] arrangement in the seventeenth century, but the usefulness of fee tail as a totally reliable tool was at an end with the appearance of the common recovery lawsuit. Similarly, the courts acted to control the contingent remainder danger. By the sixteenth century, the courts had developed the "destructibility of contingent remainders" rule,[13] which provided that a contingent remainder that did not vest on or before the expiration of the supporting freehold estate was destroyed. By this relatively uncomplicated but effective response, the courts had rendered impotent, as an instrument of long term control of property, the only contingent interest then creatable in a third party transferee.

The struggle continued with Parliament's enactment of the famous Statute of Uses[14] in 1536 which, among its other dramatic

10. De Donis Conditionalibus, 13 Edw. I, c. 1 (1285).

11. By sanctioning this highly legalistic device in Taltarum's Case, Y.B. 12 Edw. 4, 19 pl. 25 (1472), the courts provided a method whereby the tenant in tail in possession could bar the entail by bringing a fictitious and collusive lawsuit, the result of which was to convert the fee tail into a fee simple. *See* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 14 (2d ed. 1956).

12. The "strict settlement" was a complex series of legal transactions whereby the English gentry were generally able to maintain land in the family through successive generations by pushing forward a basic resettlement centering on fee tail and primogeniture one generation at a time. The arrangement was no longer possible after the English reforms of 1925. *See* G. RADCLIFFE & G. CROSS, THE ENGLISH LEGAL SYSTEM 136 (4th ed. 1964).

13. This destructibility rule was established by a series of cases which included Anon., 2 Leo. 224, 74 Eng. Rep. 497 (K.B. 1577); Brent's Case, 2 Leo. 14, 74 Eng. Rep. 319 (K.B. 1583); Chudleigh's Case, 1 Co. Rep. 120a, 76 Eng. Rep. 270 (K.B. 1589); Archer's Case, 1 Co. Rep. 66b, 76 Eng. Rep. 146 (1597); Biggot v. Smyth, Cro. Car. 103, 79 Eng. Rep. 691 (K.B. 1628). As to the status of the rule in the U.S. today see 2 R. POWELL, REAL PROPERTY 673-77 (1967).

14. *See* note 7 *supra*.

impacts on the history of land law, made possible the creation by conveyance of two new estates in land, the springing executory interest and the shifting executory interest. The Statute of Wills in 1540 made possible the same two estates through testamentary devise.[15] The springing interest always cut short an estate in the grantor and caused the title to "spring" forward to a new taker. For example, if grantor conveyed to grantee "from and after twenty-five years from the date of this conveyance," the state of the title immediately after the conveyance would be: fee simple absolute in grantor subject to a springing executory interest in grantee, grantee's estate becoming possessory twenty-five years from the date of the conveyance by cutting short grantor's fee simple; or if the conveyance was from grantor to A for life, one day thereafter to B in fee simple, the state of the title immediately after the conveyance would be: life estate in A, reversion in fee simple in the grantor for one day, springing executory interest in B, which would cut short the grantor's fee reversion after one day and cause the fee to spring forward to B.

The shifting executory interest, on the other hand, always cut short an estate in another transferee, rather than the estate of the grantor, and shifted that estate to a second transferee. For example, if the grantor conveyed to B in fee simple, but if B married X, then to Y in fee simple, the state of the title immediately after the transfer would be fee simple in B subject to shifting executory interest in Y. If in fact, B married X, the fee would be cut short and transferred to Y.

Each of the new interests was relatively simple to create and each could be used to closely approximate the same estate as had previously been possible only through contingent remainders.[16] For a time, it was believed that the new interests were subject to the same destructibility rule as were contingent remainders. In the case of *Pells v. Brown*,[17] however, the English courts ruled that the destructibility rule did not apply to executory interests, at least to the extent that the executory interest was not destructible by any action of the owner of the preceding estate. The effect of the *Pells* ruling

15. Statute of Wills, 32 Hen. VIII, c. 1 (1540).

16. For example, before the statute, if A wanted to create a life estate in B followed by a contingent interest in C, he could create such an interest in C only by the use of a contingent remainder, which was of course subject to all the hazards surrounding a contingent remainder. After the statute, A could convey to B for life, and one day thereafter a contingent interest in C. C's interest now is a springing executory interest not subject to the dangers of destructibility, etc.

17. Cro. Jac. 590, 79 Eng. Rep. 504 (K.B. 1620).

was somewhat dampened half a century later by the holding that any interest which at the time it was created could take effect either as a contingent remainder or as an executory interest must take effect as a contingent remainder and, therefore, be subject to the destructibility rule.[18] Nevertheless, there now existed a viable vehicle for creating new contingent future interests with no effective method of limiting the time in which they must vest or fail. The lawyers of the landowning gentry began to utilize the new advantage by creating long term leases with executory interests, an arrangement not subject to defeat by the common recovery. This development required counter measures from the free alienation side of the dispute. Thus came the Rule.

The Rule Against Perpetuities is, of course, a court-made rule. It did not develop into the proposition we know today until the nineteenth century.[19] Its origins derive from the famous Duke of Norfolk's case decided in 1682.[20] In the middle of the seventeenth century, the Earl of Arundel's family situation presented a problem to his solicitor, Sir Orlando Bridgman, an ingenious master of the intricacies of common-law conveyancing. The Earl wished to leave a certain estate, the Barony of Grostock, to his second son, Henry. But if Henry's older brother Thomas died (which was expected since he was an invalid) leaving the title of Earl and the bulk of Arundel's estates to Henry, then the Earl wanted Grostock to go to his younger son Charles. Bridgman set to work and produced an arrangement whereby, among many other complicated provisions, Grostock was given to Henry for a long term of years upon the executory limitation that if Thomas died while Henry was still alive (as happened), then Grostock would go to Charles. Earl Arundel died, Thomas became Earl and died, and Henry became Earl and later Duke of Norfolk. He refused to give up Grostock to Charles on the ground that Charles' interest was void as a perpetuity. The case was a fascinating one much caught up in the politics of the times. The arrangement, however, was ultimately sustained by the House of Lords in Lord Nottingham's ruling that if a future interest must vest, if at all, during or at the end of a life in being, it is not void as a perpetuity. From this beginning, the English courts struggled for two centuries with both the permissible period of the Rule and its nature. In

18. Purefoy v. Rogers, 2 Lev. 39, 83 Eng. Rep. 443 (K.B. 1669).

19. Cadell v. Palmer, 1 Cl. & Fin. 372, 6 Eng. Rep. 956 (H.L. 1832-33). A strong argument against reform of the rule by the courts alone is found in the observation that it took from 1682 (the *Duke of Norfolk's* case) to 1832 (the *Cadell* case) for the courts to state the rule in its common law form.

20. Howard v. Duke of Norfolk, 2 Chan. Rep. 230, 21 Eng. Rep. 665 (1682).

1832, the period of the Rule was finally established as lives in being and twenty-one years following and any needed period of gestation.[21] By 1886, John Chipman Gray depicted the nature of the Rule as one against remoteness of vesting and not one of suspension of alienation. As finally set out by Gray, the Rule accepted in England and America is:

"No interest is good unless it must vest, if at all, not later than twenty one years after some life in being at the creation of the interest."[22]

THE OPERATION OF THE COMMON-LAW RULE

On its face, Gray's statement of the Rule seems direct, to the point, and well adapted to its role as the principal judicial weapon in controlling the operation of the dead hand on the transmission of wealth. In fact, as applied by the courts, it has become a "technicality ridden nightmare" to the draftsmen undertaking to meet its requirements.[23] To fully understand the policies underlying contemporary efforts at reform of the common-law rule, one must grasp the limitations and troubles of the common-law rule and especially the peculiar set of presumptions and constructions that through the years attached to it.

1. *Interest to which the Rule Applies*

The common-law rule applies to both real estate and personal property, as well as to both legal and equitable interests. Because it is not a rule about interests that last too long (in theory a fee simple absolute can last forever) but a rule about vesting, it generally applies only to nonvested interests.[24]

Possibilities of reverter and rights of re-entry are not regarded as subject to the Rule despite the fact that they are in theory contingent interests.[25] The possibility of reverter is that future interest retained in the grantor and his heirs which follows either a fee simple determinable, or the now virtually defunct fee simple conditional.[26] The right of re-entry is the future interest retained in the

21. Cadell v. Palmer, 1 Cl. & Fin. 372, 6 Eng. Rep. 956 (H.L. 1832-33).

22. J. GRAY, RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

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

24. A good discussion of all interests subject to the Rule may be found in J. GRAY, *supra* note 22, §§ 279-330.3.

25. 3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1238-39 (2d ed. 1956).

26. Three states still retain the fee simple conditional, Iowa, Oregon and South Carolina, but it is only of importance in South Carolina. 2 R. POWELL, THE LAW OF REAL PROPERTY § 195 (1966).

grantor and his heirs following a fee simple on condition subsequent. Although the historical reason is unclear, both interests enjoy exemption from the Rule, probably because they evolved long before the Rule itself and because their availability was believed to encourage gifts to charity, a policy consideration as important as avoiding perpetuities. These interests have in some cases received special statutory attention,[27] but for the most part, they endure unchecked to clutter land titles.

The two categories of future interests left as subject to the Rule are contingent remainders and executory interests. Even as to these estates one must consider technical exceptions. For example, although executory interests are always contingent in theory and thus subject to the Rule, an interest limited on an executory interest that is *certain* to occur should be regarded as vested and therefore not subject to the Rule in every instance.[28] It is not certain, however, that this construction would prevail. Further, there is the "all or nothing" concept, later discussed, which renders contingent—for purposes of application of the Rule—those class interests vested subject to partial divestment.[29] Options to purchase land not incident to a lease are regarded as contingent interests and subject to the Rule.[30] Certain charitable distributions are not subject to the Rule.[31]

The requirement of the Rule is that the subject interest must "vest" within the period of the Rule. This does not necessarily mean a vesting in possession—though as to executory interests there can be no vesting until they become possessory—rather, it means a vesting "in interest." There is a requirement that the interest be absolutely certain to vest, if it is ever going to vest, within the period of the Rule.[32]

27. *See, e.g.*, CONN. GEN. STAT. ANN. § 45-97 (1958); FLA. STAT. ANN. § 689.18 (1969); ILL. ANN. STAT. ch. 30, § 37e (Smith-Hurd 1969); KY. REV. STAT. ANN. §§ 381.218-19, 222-23 (1973); LA. REV. STAT. §§ 9.2321-22 (1965); ME. REV. STAT. ANN. tit. 33, § 103 (1964); MASS. ANN. LAWS ch. 184A, § 3 (1969); MINN. STAT. ANN. § 500.20 (1945); NEB. REV. STAT. §§ 76-299 to 76-2.105 (1971); N.Y. REAL PROPERTY LAW § 345 (McKinney 1968); N.Y. REAL PROP. ACTIONS §§ 1951-55 (McKinney 1963); R.I. GEN. LAWS ANN. § 34.4-19 (1969).

28. Mercantile Trust Co. v. Hammerstein, 380 S.W.2d 287 (Mo. 1964); 4 RESTATEMENT OF PROPERTY § 370, comments *g* and *h* (1944).

29. The leading English case is Leake v. Robinson, 2 Mer. 363 (1817). The important Tennessee case dealing with the issue is Crockett v. Scott, 199 Tenn. 90, 284 S.W.2d 289 (1955); *see* 5 R. POWELL, *supra* note 13, §§ 780-87; 3 L. SIMES & A. SMITH, *supra* note 25, § 1265, at 197; 4 RESTATEMENT OF PROPERTY §§ 371, 383 (1944).

30. J. GRAY, *supra* note 22, §§ 230.1, 330.1; 3 L. SIMES & A. SMITH, *supra* note 25, §§ 1243-44.

31. *See* 3 L. SIMES & A. SMITH, *supra* note 25, §§ 1278-87.

32. L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS, § 127, at 265 (2d ed. 1966).

2. *The Permissible Period*

The permissible period includes lives in being plus the period of gestation—if there is an actual gestation involved—and a gross period of twenty-one years following. The twenty-one year period must follow the lives, it cannot precede them.[33] The "lives" involved must be human lives, not the lives of an artificial person or the lives of animals,[34] but they need not be lives associated in any way with the beneficiary nor need they, themselves, receive any beneficial interest under the disposition.[35] The measuring lives may be explicitly designated in the instrument,[36] or they may be implied from the terms of the gift.[37] There is no limit to the number of lives chosen as measuring lives so long as it is reasonably possible to ascertain their identity.[38]

3. *The Requirement of Certainty of Vesting*

Professor Gray advanced the notion that one should ascertain what interests were created by an instrument and then remorselessly apply the Rule to these interests as created.[39] Thus, one views the problem from the effective date of the interest's creation, that is, the delivery date in case of a deed and the date of testator's death in case of a will.[40] If measured from that time, an interest subject to the Rule might not vest within the period of the Rule, that interest is void. Probabilities that an interest will or will not in fact vest within the permissible period are irrelevant. If there is *any* possibility that the interest will not vest, it is void.[41] It is from this proposition—the required *absolute certainty of vesting* as viewed from the time of creation—that most of the problems in application of the common-law rule have flowed.

---

33. 4 RESTATEMENT OF PROPERTY § 374, comment *o* (1964); L. SIMES & A. SMITH, *supra* note 25, at § 1225; Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 640-42 (1938).

34. *In re* Howells' Estate, 145 Misc. 557, 260 N.Y.S. 598 (Sur. Ct. 1932). As to the lives of animals see *In re* Kelly, [1932] Ir. R. 255. As to corporations see Fitchie v. Brown, 211 U.S. 321 (1908). As to both see 4 RESTATEMENT OF PROPERTY § 374, comment *h* (1944).

35. Chicago Title & Trust Co. v. Shellaberger, 399 Ill. 320, 77 N.E.2d 675 (1948); *In re* Friday's Estate, 313 Pa. 328, 170 A. 123, 125 (1933).

36. As for example, the royal lives clause, see *In re* Villar, [1929] 1 ch. 243.

37. Harris v. France, 33 Tenn. App. 333, 355-58, 232 S.W.2d 64, 73-74 (1950); 4 RESTATEMENT OF PROPERTY § 374, comment *j* (1944).

38. Thellusson v. Woodford, 32 Eng. Rep. 1030 (1805); J. GRAY, *supra* note 22, at §§ 216-18; 4 RESTATEMENT OF PROPERTY § 374, comment *a* (1944).

39. J. GRAY, *supra* note 22, at § 629.

40. 5 R. POWELL, *supra* note 13, at § 764(2); 4 RESTATEMENT OF PROPERTY § 374, comment *b* (1944); L. SIMES & A. SMITH, *supra* note 31, at § 1226.

41. *In re* Freeman's Estate, 195 Kan. 190, 404 P.2d 222 (1965).

In determining whether an interest is certain to vest within the period of the Rule as viewed from the time of its creation, the common-law courts developed a set of four corollary rules which have come to be characterized as:

1. The "fertile octogenarian" rule.[42]
2. The "all or nothing" rule.[43]
3. The "slothful executor" or "administrative contingency" rule.[44]
4. The "unborn widow" rule.[45]

On applicable factors, each of these rules may be used to void a gift on an extremely remote, and sometimes even physically impossible, sequence of events. For example, the fertile octogenarian rule involves the conclusive presumption that a female can bear children at any age despite any physical handicap, even a total hysterectomy.[46] By this rule, a gift by testator to all of his sister's grandchildren is void under the rule even if the evidence is that at the effective date of the gift, testator's death, the sister is eighty years of age and has had a total hysterectomy. The classic theory is that the sister might yet bear another child who in turn might produce another grandchild after the sister's death. Since the measuring life, the sister's new child, would not be a life in being at the critical time, the gift is void. In addition, under the all or nothing rule, the gift to *all* of the sister's grandchildren is void, not merely the gift to the later born grandchild. This result is required by the accepted construction that while a gift to a class may be vested subject to partial divestment, nevertheless, such a gift is considered "contingent" as to all until "vested" as to all for purposes of applying the Rule Against Perpetuities.[47]

The unborn widow rule may become operative when contingent interests are created that vest on the death of a person described only by status such as "widow" or "husband." The danger is that such person's life is the measuring life, and if the "widow" was not a life in being, or *might not have been* a life in being at the creation

42. 4 RESTATEMENT OF PROPERTY § 377 (1944).

43. *Id.* § 371, comments *a* and *d*.

44. 5 R. POWELL, *supra* note 13, at § 764(5).

45. 4 RESTATEMENT OF PROPERTY § 370, comment *k* (1944).

46. The existence of this ancient presumption is recognized in *In re* Lattouf's Will, 87 N.J. Super. 137, 208 A.2d 411 (1965). That court, however, refused to apply the presumption when the evidence indicated that the female in question had undergone a total hysterectomy rendering her permanently sterile. The court suggested that to so apply the presumption would "blind us to present realities and conceal demonstrable truth." *Id.* at 415. *See also* 4 RESTATEMENT OF PROPERTY § 377 (1944).

47. *See* note 28 *supra*.

of the interest, the interest is void. Hence, in a devise to A for life, then to A's widow for life, then to such of their children who survive A's widow, the gift to the children is void since it is contingent on the termination of a life not necessarily in being at T's death. A could have married a woman not yet born at T's death. The fact that A dies married to the woman to whom he was married for forty years before T's death does not change the result. It is the *potential*, not the actual, violation that is decisive. Finally, the administrative contingency or slothful executor rule voids interests that are contingent on some event not tied to lives in being.[48] While one may properly have a contingency on a twenty-one year gross period not tied to lives, the event must be certain to occur within the gross period. Hence a gift to one to be vested "immediately after the probate of my will" is void since there is no absolute certainty that the testament will be probated within twenty-one years of the testator's death.

THE TENNESSEE EXPERIENCE

The Tennessee appellate courts have consistently claimed strict adherence to the traditional common-law rule.[49] Yet the frustration of its application appears early in the state's history as exemplified by the Supreme Court's appraisal of the matter in 1853:

> This rule [against perpetuities] was adopted upon sound considerations of policy, to unfetter estates for the promotion of commerce, and has been firmly maintained for centuries . . . . *These rules are too familiar to require a reference to authorities to sustain them. But the books are crowded with controversies arising out of their application, and much apparent, if not real conflict, exists in the reported cases and elementary writers on the subject.* [Emphasis added][50]

Until the decade of the 1950's, the Tennessee appellate courts consistently applied the common-law rule with the accepted classic common-law constructions.[51] The Tennessee Courts state the Rule thusly: "that executory limitations, whether of real or personal estate in order to be valid, must vest in interest, if at all, within a life or lives in being and twenty-one years and a fraction thereafter, or the terms of gestation in cases of posthumous birth."[52] It is recognized in Tennessee that the Rule is not a rule of construction but a mandate of law whose object is to defeat intent, not to test it.[53] It is

48. 5 R. POWELL, *supra* note 13, § 764(5).
49. Lewis v. Claiborne, 13 Tenn. 369 (1821).
50. Bramlet v. Bates, 33 Tenn. 373, 385 (1853).
51. *See generally* Warner, *The Rule Against Perpetuities*, 21 TENN. L. REV. 641 (1951).
52. Hassell v. Sims, 176 Tenn. 318, 324, 141 S.W.2d 472, 475 (1940).
53. Marks v. Southern Trust Co., 203 Tenn. 200, 310 S.W.2d 435 (1958).

recognized that the Rule is not one dealing with the length of legal or equitable estates.[54]

In the 1888 case of *Brown v. Brown*,[55] the court recognized the necessity for viewing matters as they might conceivably transpire at the effective date of the will and without regard to what subsequently did occur.[56] In the later case of *Frank v. Frank*,[57] the court recognized the Rule's conclusive presumption of lifelong fertility in perpetuities cases by holding that, for purposes of the Rule, sixty-four and fifty-eight year old women were capable of bearing children.[58] In *Crockett v. Scott*,[59] the court recognized the fertility presumption and applied the "all or nothing" rule to a class gift where it appeared that some of the class were in life when the gift was made but that others might come into life at a later time not within the period of the Rule.[60] In *Standard Knitting Mills, Inc. v. Allen*,[61] the court voided an executory interest which was to become possessory on an event unrelated to any life and which might not occur within the twenty-one year gross period, thereby again correctly applying the Rule in its common-law form.[62] All of these cases indicate Tennessee's adherence to its stated policy of following the common-law rule.

During the late 1950's and early 1960's, however, the Tennessee Supreme Court premised several decisions on unfortunate reasoning resulting in considerable confusion concerning the law of perpetuities. Apparently the court was not consciously seeking to modify principles concerning previous application of the Rule; yet, it misapplied the Rule according to its own previously announced standards. A particularly confusing decision is the 1956 decision of *Sands v. Fly*[63] in which the court struggled with the question whether certain remainders over after the expiration of successive life estates violated the Rule and hence were void. The troublesome remainders, given to certain named nieces and nephews of the testator, were to take possession at the death of the last surviving child of the testator's son. The son was in life at the testator's death. In a confusing analysis, the court appeared properly to hold that the

54. Tramell v. Tramell, 162 Tenn. 1, 35 S.W.2d 574 (1930).
55. 86 Tenn. 277, 6 S.W. 869 (1888).
56. *Id.* at 291, 6 S.W. at 873.
57. 153 Tenn. 215, 280 S.W. 1012 (1926).
58. *Id.* at 218, 280 S.W. at 1013.
59. 199 Tenn. 90, 284 S.W.2d 289 (1955).
60. *Id.* at 103, 284 S.W.2d at 295.
61. 221 Tenn. 90, 424 S.W.2d 796 (1967).
62. *Id.* at 97-98, 424 S.W.2d 799-800.
63. 200 Tenn. 414, 292 S.W.2d 706 (1956).

Rule was not violated if the remainders to the nieces and nephews were gifts to persons living at testator's death and were vested in interest at the time of testator's death even though possession was delayed until the death of testator's last son.[64] This is, of course, a correct analysis since if the interests are vested from inception, there is nothing on which the Rule can operate. The court concluded that the remainders were so vested. Without apparent necessity, however, the court suggested that the Rule was not violated because the interests must vest within the lives of testator's son's children *and that all these persons were in life at testator's death.* This finding, of course, ignores the common-law presumption that testator's son could have children at any time until his death. If the interests created here had been found contingent, and if in fact they could not vest until the termination of a potential measuring life not in being at testator's death (namely his unborn grandchild), then the Rule was violated by common-law standards. The court did not appear to recognize the presumption of continuing fertility and thereby confused the nature of the common-law rule and its application. In actuality, all the remaindermen were named and were in being at testator's death so that their interests, if contingent, had to vest within their own lives if at all and thus could not violate the Rule. This factor should have decided the case because the court had already determined that the interests were not vested from the time of their creation and hence not subject to the Rule. The gratuitous and erroneous analysis following that finding was unnecessary.

In the 1958 case of *Marks v. Southern Trust Co.*,[65] the Supreme Court again departed from the basic concepts of the Rule. The case involved construction of an irrevocable inter vivos trust naming as successive life beneficiaries the settlor, the settlor's named son and his named wife and the survivor of them, and then the children of the named son and his named wife surviving their mother and father. The court correctly decided that the class of children included a child born to the son and his wife after the execution of the instrument since the gift to children was intended as a class gift, but then, perplexingly, it went on to suggest that if *a clause limiting the duration of the trust itself* to named lives in being and twenty-one years had not been included, the gift to the after born child would have rendered the class gift violative of the Rule.[66] This conclusion is erroneous as the class in question consisted of the children of a

64. *Id.* at 425-26, 292 S.W.2d at 712.
65. 203 Tenn. 200, 310 S.W.2d 435 (1958).
66. *Id.* at 211-12, 310 S.W.2d at 440.

person who was himself a life in being at the time of the creation of the trust and, hence, any child of his—whenever born—would have to be born within the life of a life in being at the creation of the trust. Further, the court confused the existence of the trust itself with the existence of the interests created within the trust. There is no requirement that a trust duration be limited to the Rule period; the requirement is that interests within the trust *vest* within the rule period. Thus, in *Marks* the court again evidenced a lack of understanding of the basic principles of the Rule.

In the 1960 case of *Ross v. Stiff*,[67] the Supreme Court again considered a perpetuities problem and rendered a dubious decision. In that case, the court construed a holographic will in which the testator placed his estate in trust with the direction that the income was to be divided into certain percentages and paid variously to his widow, children and as an educational fund for his grandchildren. At the death of testator's grandchildren there were gifts over to their issue, if any, and other contingent gifts if they had no issue. Correctly, the court concluded that the gifts of the remainder interests to great-grandchildren and contingent takers were void. Unfortunately, however, the court also concluded that the gifts of income to the grandchildren of testator as an educational fund were also void since the possible delay till the education of the grandchildren might result in the gift not vesting within the period of the Rule.[68] The court could easily have held that the interests of the grandchildren vested in interest within the Rule, because all the grandchildren would of necessity have been in life at the end of a life in being at testator's death, namely, his own children's lives. The fact that the trust for the grandchildren might then have continued on past the time of the Rule is unimportant since the critical interests would have vested in the grandchildren during the period of the Rule. Once again the court seems to have confused the vesting of an interest within a trust with the duration of the trust itself.

In sum, the general Tennessee experience has been one of correct application of orthodox thinking on the Rule. None of the cases cited seem to have intentionally departed from the basic policy of a common-law application and when an application deviates from that policy, it resulted from a basic misunderstanding of the common-law rule and not an attempt to intentionally depart from the precepts of the Rule.

67. 47 Tenn. App. 355, 338 S.W.2d 244 (1960).
68. *Id.* at 374, 338 S.W.2d at 252-53.

THE NEED TO REFORM

There is need for reform of the Rule in Tennessee and those other jurisdictions following the common law. Perhaps some of the hesitance in reform efforts comes from the notion that the earliest attempt at statutory enactment—that of New York in 1830[69]—was a disaster and that New York's subsequent efforts have been designed to overcome the defects of the original tampering with the common-law rule.[70] Yet, effective methods seem available and the need is clear for the following reasons.

1. The principle reason for reform is that the Rule has become so complex in its application that the overwhelming body of those who must deal with it in practice simply do not understand its operation sufficiently well to meet its demands. Rather than serve a valuable social purpose in keeping the right to dispose of property largely in the present generation, the Rule has become a snare to the draftsman who unknowingly crosses its path. Perhaps the practicing bar can take some comfort in the California case exonerating an attorney of negligence for drafting a violation of the Rule on the ground that the Rule has literally become too complicated to understand.[71]

2. The Tennessee cases discussed above demonstrate that the court appeared to misunderstand and misapply the Rule[72] even under its own previously announced standards.

3. The common-law rule, as applied, leads to the unreasonable result of voiding interests that subsequently do vest within lives in being and twenty-one years. The reason is that under the orthodox view, the interests created must be viewed from the date of creation and if there is any possibility, however remote, that they will not vest within the stipulated period, they are void. This "remorseless" application of the rule thus voids many interests that are unobjectionable in light of the rule's social policy.

4. The common-law rule is not sufficiently inclusive of all objectionable contingent interests. In particular, the Rule has no application to a possibility of reverter or right of reentry. Yet, these ancient devices serve a dubious purpose today and in fact contribute

69. For statutes pertaining to real property see N.Y. REV. STAT. Pt. 2, ch. 1, tit. 2, art. 1, §§ 14-24; art. 2, § 63; art. 3, §§ 81-85, 128 (1830). For statutes pertaining to personal property see N.Y. REV. STAT. Pt. 2, ch. 4, tit. 4, §§ 1-2 (1830).

70. *See* Pasley, *The 1960 Amendments to the New York Statutes on Perpetuities and Powers of Appointment*, 45 CORNELL L.Q. 679 (1960).

71. Lucas v. Hamm, 56 Cal. 2d 583, 591-93, 364 P.2d 685, 690, 15 Cal. Rptr. 821, 826, *rev'g* 11 Cal. Rptr. 727 (Dist. Ct. App. 1961).

72. *See* cases cited notes 57-59 *supra*.

to the clogging of title chains and uncertainty about marketability. Any effort at reform should include control of these two future interests. With these concerns as a backdrop, and with subsequent explanation, the following provisions are offered as a reformation of the Rule in Tennessee:

PROPOSED STATUTES

1. In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this section an interest which must terminate not later than the death of one or more persons is a "life estate" even though it may terminate at an earlier time. Any interest which would violate said rule as thus modified shall be reformed, within limits of that rule, to approximate most closely the intention of the creator of the interest.

2(a) A fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty years from the effective date of the instrument creating such fee simple determinable or fee subject to a right of entry. If such contingency occurs within said thirty years the succeeding interest shall become possessory or the right of entry exercisable notwithstanding the rule against perpetuities. This section shall not apply to rights created prior to _____, 1974. (Effective date of the statute).

2(b) Every possibility of reverter and right of entry created prior to _____, 1974, (Effective date of the statute) shall cease to be valid or enforceable at the expiration of thirty years after the effective date of the instrument creating it unless before _____, 198__, (Seven years from the effective date of the statute), a declaration of intention to preserve it is filed for record with the Registrar of Deeds of the County in which the real property is located.

To best comprehend the precise rationale underlying this proposed statute, it is first necessary to understand the reform experience in other states.

History of Reform Possibilities

The most effective and widespread effort at legislative reform in modern times has been through the adoption of the so-called "Wait and see" doctrine.[73] This doctrine utilizes the period of the common-law rule but judges the validity of an interest by actual, not potential events. Therefore, an interest is valid under the "Wait and see" doctrine if it, in fact, vests within the period of the Rule, even though, when viewed from its creation could *conceivably* not vest within the period of the Rule. This doctrine was first advanced by statute in Pennsylvania in 1947[74] with subsequent enaction in Vermont and Kentucky.[75] All of these jurisdictions allow the complete period of the Rule to run for "wait and see" purposes. The operation of the doctrine can be simply illustrated: Assume a gift from a testator to all of the grandchildren of B. Applying the common-law rule, the gift to the grandchildren is void if B is alive at testator's death. The reason is that it is conceivable that as viewed from testator's death, B could have a child subsequent to testator's death which child could in turn produce a grandchild of B. That grandchild's interest then might not vest within lives in being plus twenty-one years of testator's death. This would be the case if at testator's death B has no child, but later produces a grandchild, then such grandchild's interest does not vest within the period of the Rule. But it is conceivable and perhaps even probable that the outlined sequence of events will not actually occur. The "Wait and see" doctrine would wait and see whether or not all of the grandchildren of B were in life within the period of the rule. If this was the case, the gift to the grandchildren of B would be valid. This solution seems eminently sensible and preferable to the orthodox common law approach.

There are, however, some serious objections to the "wait and see" approach. The very requirement that one wait and see if interests do in fact vest within the period of the Rule itself renders property effectively inalienable during the waiting period. If the policy of the Rule is to render the maximum amount of property as freely alienable as possible, that policy has been somewhat undercut by the time one must wait to see. If it were not for the waiting

73. Popularity of the reform concept received new impetus from an article by Professor Leach advocating change: Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721 (1952).

74. Pa. Stat. Ann. tit. 20, § 301.4 (1950).

75. Ky. Rev. Stat. Ann. § 381.216 (Baldwin 1973); Vt. Stat. Ann. tit. 27, § 501 (1967); *accord*, Mass. Ann. Laws ch. 184A, § 1 (1955); Ohio Rev. Code Ann. § 2131.08 (Page 1968).

period, presumably the Rule would be violated, the interests so created declared void, and the title rendered certain from the date of creation. The English reform[76] mitigates this objection considerably by requiring that the disposition shall be treated as if it were not subject to the Rule against perpetuities until such time as it becomes established that vesting will occur beyond the period of the Rule. For example, until such time, payments made by trustees under the disposition are valid.

The waiting period also creates a problem in terms of the measuring lives. Under the common-law rule, one had to determine at the time of creation whether vesting would occur within any life in being at that time. This rule required contemporary reference to either stipulated lives in the instrument, or to lives implied by reason of their casual relationship to determine whether the interest would vest or fail. Under wait and see, it is open to question whether this standard is still present, or whether the courts may pick any life that happens to be in existence at the time the interest was created and use that life to save an interest even though the life selected has no casual reference to the interest's validity, either by stipulation or implication, and is selected only for its longevity. If the latter holds true, obviously many more provisions will be held up and some on unreasonably long limitations.

The reformers have been of two views on the problem of measuring lives under the "Wait and see" doctrine. Pennsylvania and Vermont in this country and Western Australia, abroad, have retained the common-law standard.[77] At the other extreme, the English Perpetuities Act of 1964[78] developed an extremely intricate and complex method of specifying the measuring lives in a wait and see rule application. Somewhat between these two approaches, the Kentucky and Ontario[79] statutes require that a measuring life be relevant to or in some way limit the period in which the interest may vest. Thus, the argument over measuring lives under wait and see comes to this: One view contends that measuring lives under wait and see is no different than measuring lives under the common-law rule since in each instance it is necessarily implied that the measuring life must have some casual relation to the matter of vesting; the other point of view is that in adopting wait and see legislation, the

76. The Perpetuities and Accumulations Act 1964, c. 55, § 3. *See* 25 HALSBURY'S STATUTES OF ENGLAND 6 (3d ed. 1970).

77. PA. STAT. ANN. tit. 20, § 6104 (Spec. Pamph. 1974); VT. STAT. ANN. tit. 27, § 501 (1967); Western Australia Law Reform (Property, Perpetuities and Succession) Act, 1962.

78. *See* note 76 *supra*.

79. KY. REV. STAT. ANN. § 381.216 (1973); REV. STAT. OF ONTARIO ch. 343, § 6 (1970).

legislature must define measuring lives to avoid the possibility that courts, in order to save the interest, will select the most ancient life available irrespective of whether that life had any relationship at all to the vesting of the interest in question. Experience thus far suggests that an elaborate attempt at definition as in the English statute may be unclear and unwieldy.[80] Further, a modified legislative expression on the subject, as in Kentucky or Ontario, is of uncertain value since both are sufficiently imprecise to require judicial interpretation of each definition of the measuring life. Perhaps the best approach is to eliminate any reference to the determination of measuring lives in the statute and to rely simply on the courts to apply the wait and see concept in a sensible way, effecting its design of modifying the more unreasonable rigors of the common law while not creating a new problem in stretching the wait and see period beyond any reasonable standard of social benefit. The matter is unsettled and remains a source of disagreement among the perpetuities reformers.[81]. A second major technique for reform is utilized in the proposed Tennessee statute. This is the so-called "modified wait and see" legislation, originally developed in Massachusetts under the influence of Professors Leach and Casner at Harvard, and since adopted in Connecticut, Maine and Maryland.[82] Unlike the Pennsylvania "wait and see" statute that permits a waiting for the entire period of the Rule to see what actually occurs, the modified wait and see approach applies only where there are gifts over at the ends of life estates created in persons who are lives in being at the effective date of the instrument. This concept permits waiting only until the end of the life estates to ascertain the validity of the interest. There is merit to this approach; since the corpus of the estate cannot be distributed until the intervening life estates terminate, there seems no inconvenience in waiting until that time to determine the validity of the ultimate distributions of the corpus.

A third major technique of reform, used independently or in conjunction with the wait and see approach, is the cy pres or judicial reformation technique. The final sentence of Section I of the proposed statute incorporates this technique. This device is a statutory authorization allowing a court to reform a disposition, when neces-

80. O. BROWDER, L. WAGGONER & R. WELLMAN, FAMILY PROPERTY SETTLEMENTS, FUTURE INTERESTS 714 (2d ed. 1973).

81. *See* Morris & Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486 (1964) and the reply to this article, Allan, *Perpetuities: Who Are the Lives in Being*, 81 L.Q. REV. 106 (1965).

82. CONN. GEN. STAT. ANN. § 45-95 (1958); ME. REV. STAT. ANN. tit. 33, § 101 (1964); MD. ANN. CODE art. 93, § 11-103 (1969).

sary, so as to bring it within the permissible period of the Rule while carrying out the ascertained general intent of the donor. The most obvious example is a gift by a testator to those of his grandchildren who reach age twenty-five. If survivorship to age twenty-five is required of the grandchildren for the interest to vest, then the Rule is violated since this event is not certain to occur within lives in being and twenty-one years of testator's death. If the court can reduce the survival requirement to age twenty-one, however, the Rule is not violated since all of testator's children must be in life at his death and all the grandchildren must reach age twenty-one within twenty-one years after the last child's death. Presumably, the testator would prefer this result to one of a totally void gift. The problem with this solution is that, unrestricted, it confers extraordinary discretion on the court to rewrite the testator's will. The Vermont and Kentucky statutes meet this criticism, in part, by combining "wait and see" with cy pres. The court's right to reform is limited to the time when the "Wait and see" rule has run its course and it has become apparent that the interests will not vest within the period of the Rule.[83] Other jurisdictions permit cy pres solutions only in specific problem areas, such as the reduction of an age contingency. While these provisions may curtail considerably the discretion of the court in rewriting the will (often the interest will vest within "wait and see" and no reform is necessary), one of the principal benefits of the cy pres technique is lost in the combination approach. A strength of cy pres not enjoyed by wait and see is that cy pres can reform the disposition at once without the necessity of the long period of uncertainty characteristic of the "wait and see" approach. To the extent that reform can be applied only after wait and see has intervened, this advantage is lost. Some states have chosen, therefore, to provide for reform without the wait and see delay requirement.[84] As a technique for reform of the rule, cy pres seems to hinge on how much the courts are to be trusted in its application. If the necessarily broad discretion leads the courts to tortured dispositions not in accordance with the pattern intended by donors, the technique will fail. On the other hand, if the courts use the doctrine sparingly, carrying out the scheme of the donor as reasonably as possible, the technique has many advantages.

A third possibility of reform (not incorporated in the proposed statute) that can be used with "wait and see" or cy pres statutes is the gross period of years provision, containing an optional perpetu-

83. KY. REV. STAT. ANN. § 381.216 (1973); VT. STAT. ANN. tit. 27, § 501 (1967).
84. CAL. CIV. CODE § 715.5 (West Supp. 1974); MO. ANN. STAT. § 442.555 (Supp. 1974).

ity period within which an interest must vest. The English Perpetuities and Accumulations Act of 1964 provides that the perpetuity period may, if desired, be a duration equal to a gross term of years, not exceeding eighty, as is specified in the instrument itself.[85] This was said to be an attempt on the part of the Law Reform Committee in England to attract draftsmen away from the so called "royal lives" clause under which it is often difficult to ascertain the identity and status of all the relevant lives.[86] California has adopted a similar provision limiting the gross period to sixty, rather than eighty, years.[87] The simplicity of this alternative is attractive, especially where there is a conscious desire to restrict the time of vesting for long periods and hence the ultimate disposition of property.

Finally, there have been discussions on reform which involve a change in the concept of the Rule from one of remoteness of vesting *in interest,* to a concept requiring a vesting in "possession."[88] If the societal purpose served by the Rule is one of preventing a long term tie up of property, this discussion deserves considerable attention. Property is effectively controlled by some long term "vested" interests that may not become possessory until long beyond the period of the Rule. The principal concern in converting the Rule from one requiring "vesting in interest" to one requiring "vesting in possession" is that this process, in itself, would make the Rule much more rigid and inflexible than it is presently.

APPLICATION TO TENNESSEE

Tennessee today is in a position to take advantage of the experience in reform acquired since the initial Pennsylvania statute of 1947. There seems to be little doubt that the common-law rule ought to be modified in some fashion to produce a more workable formula that would balance the rights of property owners to direct the disposition of their property and the societal interest in limiting those rights. Tennessee, then, has the opportunity to consider an unqualified "wait and see" approach; a modified "wait and see;" a "wait and see," (modified or not) combined with judicial cy pres provisions; or cy pres without the "wait and see" intervention. Any of these techniques may be combined with an alternative gross period provision of the English or California variety. As examined above,

85. Perpetuities and Accumulations Act 1964, c. 55, § 1.

86. 25 HALSBURY'S STATUTES OF ENGLAND 3 gen. note (3d ed. 1970).

87. CAL. CIV. CODE § 715.6 (West Supp. 1974).

88. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?* in LEGISLATORS' HANDBOOK ON PERPETUITIES 31 (ABA 1958).

serious objections have developed to both the unlimited "wait and see" and the unlimited cy pres reforms; in the former case the principal objections are the long period of uncertainty and the difficulty in identifying measuring lives; in the latter case the objection relates to the possibility of judicial abuse of an essentially uncontrolled power to rewrite the instrument. Given these concerns and the evolving judicial treatment of them, a less ambitious departure from common law principals would appear prudent. Specifically, it seems a sensible course for Tennessee to adopt a modified "wait and see" provision along the following lines.

Where interests are created to take effect at or after the end of one or more life estates or at the end of some life in being at the time the interest is created, the validity of the interest should be determined on the basis of facts existing at the end of the life estate or lives and not on facts existing at the time the interest is created. This proposal has a two-fold advantage. There is no severe problem as to the selection of measuring lives. Further, the waiting period is cut down either to the duration of intervening life estates when the corpus is not distributable anyway, or to other lives in being at the time the interest is created on which distribution hinges but which are not necessarily income beneficiaries under life estates. Together with the adoption of such a "wait and see" doctrine, the legislature should enact either separate reform measures specifically directed at those evils which have become traps for the draftsman and serve no reasonable purpose or should enact a statute providing the broad cy pres or reform power to remedy the same problems. Should the legislature issue separate statutes addressing specific problems, then:

1. There should be a statute permitting courts to reduce an age contingency in order to bring the conveyance into conformity with the Rule;

2. There should be a statute denying the presumption that a person is capable of having children at any stage of adult life, and therefore permitting the introduction of evidence whether a person is or is not capable of child bearing at the time in issue;

3. There should be a statute providing that in determining the validity of future interests for perpetuity purposes, a person described as the "spouse" of a person in being at the time the estate is created shall be conclusively presumed to be a "life in being" at the time the interest is created for purposes of applying the Rule;

4. There should be a statute providing that where the vesting of an interest is made to occur on a specified contingency not related

to the existence of a life in being—as for example on the probate of a will—the presumed intent of the creator of the interest is that the contingency would occur, if at all, within twenty-one years from the effective date of the instrument;

5. There should be legislation that no class gift should be invalidated by the failure of the gift to some members of the class and that persons shall be excluded from the class if they come into the class at any time beyond the "wait and see" period.

The proposed statute, in effect, would achieve all of these reforms through a broad cy pres enactment rather than through the "bits and pieces" approach outlined above. The first portion of the statute is copied from that of Massachusetts, which was developed largely through the efforts of Professor Leach of Harvard. The effect is, of course, to adopt a modified wait and see approach with all dispositions' validity determined at the end of life estates or other appropriate lives, rather than at the creation of the interests or, at the other extreme, at the expiration of the full term of the Rule. The third sentence of the proposed statute adopts the "cy pres" or reform principle, thus permitting the courts to ascertain the intent of the donor and to reform the instrument, if indicated, in order to give effect to that intent. This is a simple and therefore preferable way to meet specific problems of age contingency and the like. The effect of the entire statute would be to eliminate many of the harsh results so often accompanying the application of the common-law rule. The statute would validate some gifts that are void under the present Rule by upholding gifts, which as events evolve, do not in fact violate the Rule. The statute would also reform those gifts partially or totally violating the Rule by saving them and carrying out the donor's intent to the extent possible. It is believed that simplicity is essential in the reform legislation. For this reason, the approach of a modified "wait and see" coupled with a generalized statement of reform powers is preferable to the coupling of a modified "wait and see" approach with specific cy pres authorizations as to age contingencies, class gifts and the like. Section 2(a) of the proposed statute is patterned generally on the Kentucky law,[89] and undertakes to control possibilities of reverter and rights of entry for condition broken created after the effective date of the statute by limiting their effective lives to thirty years from the date of their creation. Section 2(b) of the statute undertakes to control the same future

89. KY. REV. STAT. ANN. § 381.219,-.221 (1973). No effort is made here to suggest the form or content of the required notice. Presumably any legislation adopted would include such details.

estates created before the effective date of the statute.

In view of the difficult experience elsewhere with change of the common-law rule, the proposed statute would avoid the most objectionable difficulties of reform while achieving more simply the underlying goal of the common-law Rule against Perpetuities: a balance between free alienation of private property and the right of a donor to control future dispositions of his property.