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Application of the Rule against Perpetuities to Powers of Appointment: Ohio Style

C. Terry Johnson
Smith & Schnacke

Frank B. Williams III
First National Bank of Dayton, Ohio

APPLICATION OF THE RULE AGAINST PERPETUITIES TO POWERS OF APPOINTMENT: OHIO STYLE

*C. Terry Johnson, Esq.**

and

*Frank B. Williams, III, Esq.***

I. INTRODUCTION

Of all the instruments available to a donor wishing to transfer property, none has the versatility of the power of appointment.[1] The transfer of legal title to property combined with the creation of a power of appointment rids the donor of ownership of the property and provides the donee of the power with the flexibility to apportion the property in accordance with future needs and events arising long after the time of such transfer. This flexibility is often unavailable even in a carefully drafted trust which does not contain powers of appointment.[2] A trustee with power to invade principal or to spray income among a class of beneficiaries can control somewhat the eventual distribution, but the identity of the beneficiaries must be definite, at least as to such class, or the trust will fail for lack of a *cestui que trust*.[3] This is not the case with a power of appointment. The donor of a power can postpone

*C. Terry Johnson, Partner, Smith & Schnacke, Dayton, Ohio; A.B. Trinity College, 1960; J.D. Columbia Law School, 1963.

**Frank B. Williams, III, Trust Officer, First National Bank of Dayton, Ohio; B.A. Vanderbilt University, 1968; J.D. Chase College of Law, 1977.

1. 3 RESTATEMENT OF PROPERTY § 318 (1940), provides:

> [A] power of appointment, as the term is used in this Restatement, is a power created or reserved by a person (the donor) having property subject to his disposition enabling the donee of the power to designate, within such limits as the donor may prescribe, the transferees of the property or the shares in which it shall be received.

See generally L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 861, 871-879 (2d ed. 1956) [hereinafter cited as SIMES & SMITH]; 4 A G. THOMPSON, REAL PROPERTY § 2027 (1979 repl.) [hereinafter cited as THOMPSON]; 6 AMERICAN LAW OF PROPERTY § 24.30 (A.J. Casner ed. 1952) [hereinafter cited as CASNER]; R. POWELL, THE LAW OF REAL PROPERTY ¶¶ 385-86 (1979) [hereinafter cited as POWELL]; W. SCHWARTZ, FUTURE INTERESTS AND ESTATE PLANNING §§ 13.1, 13.2 (1965) [hereinafter cited as SCHWARTZ]; G. BOGERT, TRUSTS & TRUSTEES § 213 (2d rev. ed. 1979).

2. A trustee has a mandatory duty to execute the terms of the trust as directed by the donor. *See* SIMES & SMITH, *supra* note 1, at § 877.

3. "He who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another." BLACK'S LAW DICTIONARY, 208 (5th ed. 1979). A definite *cestui que trust* is a prerequisite to the establishment of a trust; otherwise, the trust is unenforceable for lack of a person with sufficient interest to seek enforcement.

until well after his death a final determination of both the amount of the gift and the identity of the recipient. The outcome of future events can thus be taken into consideration before ownership finally vests.

There are two types of powers of appointment: (1) special (or limited) powers, which are exercisable only in favor of certain individuals or a designated class of appointees; and (2) general powers, which can be exercised in favor of anyone, including the donee.[4] The donee may be authorized to exercise either type of power in two ways: (1) currently, as by written instructions to a trustee, often described as exercise "by deed"; and (2) by will, called a testamentary power.[5]

Because of the delay in the vesting of ownership by appointment, an ancient nemesis from the common law raises its hoary head — the Rule Against Perpetuities. The classic statement of the Rule, as formulated by John Chipman Gray, is deceptively simple: "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."[6] The application of the Rule is quite another matter, and has confounded attorneys, judges, legislators, and students alike for years.[7]

This confusion over the application of the Rule extends to powers of appointment. Suppose a testator gives the residue of his estate to his wife for her life, the remainder to go by general testamentary power of appointment in his wife's will, remainder in default to *A*. Suppose, further, that by her will, the wife appoints the property equally to her grandchildren living at her death, who are to receive the income until their twenty-fifth birthday, at which time they will receive their proportionate share of the corpus. Several perpetuities issues arise including: (1) whether the perpetuities period will be measured from the date of the testator's creation of the power or from the wife's exercise

4. *See generally* RESTATEMENT OF PROPERTY §§ 318(1) comment (d), § 320 (1940); SIMES & SMITH, *supra* note 1, at § 875; THOMPSON, *supra* note 1, at §§ 2025, 2027; CASNER, *supra* note 1, at § 24.30 p. 90; SCHWARTZ, *supra* note 1, at § 13.2. *Cf.* POWELL, *supra* note 1, at ¶ 386 p. 346 (criticizing this "general-special" classification as an oversimplification but nevertheless acceding to its use).

5. *See generally* RESTATEMENT OF PROPERTY § 318 comment (e), § 321 (1940); SIMES & SMITH, *supra* note 1, at § 874; THOMPSON, *supra* note 1, at § 2028 p. 735; CASNER, *supra* note 1, at § 24.30 p. 92; SCHWARTZ, *supra* note 1, at § 13.2. *Cf.* POWELL, *supra* note 1, at ¶ 386 p. 340 topic (2), and THOMPSON, *supra* note 1, at § 2025 p. 716 (discussing exercisability by will without contrasting this with exercisability by deed).

6. J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942) (footnote omitted) [hereinafter cited as GRAY].

7. The California Supreme Court reversed the malpractice conviction of an attorney who drafted an instrument which violated the Rule, saying the Rule was so esoteric that in its violation there was no actionable negligence. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

of the power; (2) whether the period would differ if the testator limited the appointees to his heirs or his descendents; (3) whether the donee can exercise the power by creating another power; (4) whether the entire gift will fail because of the possibility of the occurrence of certain events, when in fact such events do not occur; and (5) whether the donee's appointment will run afoul of the hobgoblins of Professor Leach, including the fertile octogenarian, the unborn widow, the precocious toddler, and the slothful executor.[8] In short, how will the Rule Against Perpetuities affect powers of appointment?

This article is an examination of these and other associated problems in the application of the Rule to powers of appointment in Ohio under both the common law and the 1967 reform statute.[9] The following section will sketch the important general principles of law regarding the Rule's application. Ohio law will be developed in section III.

II. THE RULE AGAINST PERPETUITIES AS APPLIED TO POWERS OF APPOINTMENT

With respect to the exercise of special powers and general powers exercisable presently by deed or by will, there has been relatively little difficulty in the application of the Rule Against Perpetuities. The application of the Rule to general testamentary powers, however, has been "[f]raught with considerable difficulty . . . . invok[ing] warm discussions among the writers,"[10] and is a question upon which the hand of Professor Gray has lain heavily indeed.

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8. Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938) [hereinafter cited as *Perpetuities in a Nutshell*]. "A future interest is invalid unless it is absolutely certain that it must vest within the period of perpetuities." *Id.* at 642. Thus, due to drafting, many reasonable dispositions may fail because of some improbable circumstance which might possibly cause vesting to occur too remotely. *Id.* at 643. For example, a bequest to *A*, who is 80 years of age, of income for life, then to *A*'s children of income for life, with the remainder to the children of *A*'s children, will fail due to a presumption that the octogenarian is fertile. If *A* has a child after the bequest, it will be possible that the children's children's interest will not vest within 21 years after the termination of all lives in being at the time of the bequest. *Id.*

This same approach invalidates a gift to *B*, a male of 45 years of age, to receive income for life then the income to *B*'s widow for her life. It is possible that *B* will marry a woman forty-five years his junior who would be an "unborn widow" at the time of the testator's bequest. *Id.* at 644.

9. OHIO REV. CODE ANN. § 2131.08 (Page Supp. 1979).

10. Bettner, *The Rule Against Perpetuities as Applied to Powers of Appointment*, 27 VA. L. REV. 149, 171 (1940). "The general powers [sic] to appoint by will only falls between the two extremes exemplified by the special power, on the one hand, and the general power to appoint by deed or by will, on the other hand." *Id.* (emphasis omitted). The problem occurs in determining whether to compute the Rule Against Perpetuities from the date of the creation of the power, or from the date of its exercise. *Id.* at 172.

A. General Powers Currently Exercisable

The general rule at common law and in all American jurisdictions is that general powers currently exercisable by deed are measured, for compliance with the perpetuities period, from the date of their exercise.[11] The rationale is that the donee of the power is substantially the owner of the property subject to the power because he can easily appoint to himself. There is no restraint on alienation and no remote vesting.[12] The donee is not a mere conduit, as is the donee of a special power, and for this reason, appointment by exercise of the general power is not "read back" into the original instrument.

B. Special Powers However Exercisable

The rule at common law[13] and in most American states, is that the perpetuities measuring period for a special power, whether exercisable currently or by will, is from the date of the creation of the power.[14] The limitation of the donee's power to appoint to a specific group of possible appointees constitutes an impairment on the alienability of the property, and it is this impaired alienability which the Rule was designed to limit.[15] The exercise of the power is therefore "read back" or "interpolated" into the original instrument, and the act of the donee is

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11. SIMES & SMITH, *supra* note 1, at § 1274. *See generally* RESTATEMENT OF PROPERTY § 391 (1940); CASNER, *supra* note 1, at § 24.33; POWELL, *supra* note 1, at ¶ 788[1]; SCHWARTZ, *supra* note 1, at § 13.26.

12. The donee has the power and privilege to extinguish all future interests and pass an absolute interest. SIMES & SMITH, *supra* note 1, at § 1274.

13. Robinson v. Hardcastle, 29 Eng. Rep. 11 (1786); *In re* Powell's Trust, 70 Eng. Rep. 141 (1857).

14. *See generally* RESTATEMENT OF PROPERTY § 392 (1940); SIMES & SMITH, *supra* note 1, at § 1275; CASNER, *supra* note 1, at § 24.34; POWELL, *supra* note 1, at ¶ 788[1]; SCHWARTZ, *supra* note 1, at § 13.26.

15. "The Rule Against Perpetuities is a rule against remoteness of vesting. A contingent future interest is invalid under the orthodox Rule if, at the time of the creation of the interest, the circumstances are such that the contingency may go unresolved for too long a time." R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 9 (1966). There has been some disagreement, but this characterization is generally accepted today. *See* GRAY, *supra* note 6, at §§ 1-4; LYNN, *Perpetuities Reform: An Analysis of Developments in England and the United States*, 113 U. PA. L. REV. 508 (1965) [hereinafter cited as *Perpetuities Reform*].

The period is computed *from* the established date, whether it be the date of exercise of the power, as is the case with a general power presently exercisable, or the date of the power's creation, as with a special power. The longer the period computed, the greater is the probability that vesting will not be certain within the period of the Rule, and that a violation of the Rule will be found. Thus, because creation of a power precedes its exercise, invalidation under the Rule is more likely and the objectives of invalidation under the Rule are more likely served, if the period is computed from the date of creation of the power.

considered to be the act of the donor. This almost-universal rule seems eminently reasonable, since the capacity of the donee stems directly from and is limited by the donor.

Only Delaware and Florida differ.[16] By statutes, the perpetuities period for the exercise of any power in these states is measured from the date of its exercise, not from the date of its creation.[17]

C. General Testamentary Powers

The real controversy in the application of the Rule Against Perpetuities to the exercise of powers of appointment has centered around general testamentary powers. The majority American view is

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16. DEL. CODE ANN. tit. 25, § 501 (1974); FLA. STAT. ANN. § 689.22(2)(b) (West Supp. 1979).

17. The Delaware statute, for example, will compute the perpetuities period from the date of exercise of a special power rather than from the date of its creation. DEL. CODE ANN. tit. 25, § 501 (1974). In effect, the Delaware statute permits the continual transfer of property by appointment from generation to generation. Without special provision, such transfers would not be subject to federal estate tax. *See, e.g.*, S. REP. NO. 382 (to accompany H.R. REP. NO. 2084), 82d Cong., 1st Sess. (1951) *reprinted in* [1951] U.S. CODE CONG. & AD. NEWS 1530, 1530; *Perpetuities in a Nutshell, supra* note 8, at 653 n.37. Each donee would be given a life estate in the property, which expires at death. This interest would not normally be included in their respective gross estates. I.R.C. § 2036. Similarly, the remainders subject to the special powers of appointment are not included in estates because under local law they do not own it, I.R.C. § 2031, and also because property subject to a special power of appointment is not ordinarily taxed as part of the gross estate. I.R.C. §§ 2041(a)(1), (2). To prevent this technique of tax avoidance, Congress enacted the Powers of Appointment Act of 1951, § 811(f)(4) of the Internal Revenue Code of 1939, the predecessor to current I.R.C. § 2041(a)(3).

I.R.C. § 2041(a)(3) generally requires the inclusion in the gross estate of the value of any property with respect to which the decedent under certain circumstances exercises a post-1942 power, creating a second power which can be validly exercised, which: (a) postpones the vesting of any interest in property; or (b) suspends the absolute ownership or the power of alienation of the property for a period ascertainable without regard to the date of creation of the first power (if the applicable Rule Against Perpetuities is stated in terms of suspension of ownership or of the power of alienation, rather than vesting). Treas. Reg. § 20.2041-3(e)(1)(ii) (1958).

The significance of § 2041(a)(3) is that it taxes a power of appointment which is exercised by creating a second power, which under the applicable local law can be validly exercised to postpone the vesting of any estate or interest in property or suspend the absolute ownership or power of alienation of such property for an otherwise impermissible period of time. Estate of Murphy v. Commissioner, 71 T.C. 671, 679 (1979).

If *Dollar Savings* would have been differently decided, so that Ohio would compute its period of perpetuities from the exercise of powers rather than from their creation, then § 2041(a)(3) might have had an impact on Ohio practice. *See* notes 86 and 87 and accompanying text *infra*. If the perpetuities period is measured from the exercise date, I.R.C. § 2041(a)(3) would require inclusion in the gross estate of the value of property with respect to which the decedent has exercised a post-1942 power by creating a second power. Section 2041(a)(3) is applicable to general or special powers of appointments. S. REP. NO. 382, *supra*.

that in such cases the perpetuities period is to be measured from the date of the power's creation rather than from the date of its exercise.[18]

This view has long since been rejected by the English courts and has been attacked vigorously by certain American writers.[19] The English view would be certain to receive support only in Delaware,[20] Florida,[21] and perhaps Wisconsin.[22]

At issue is the nature and extent of the donee's control when he has a general testamentary power. Professor Gray states that the donee of a power to appoint by will is not "practically" the owner. The donee cannot appoint to himself; indeed, he is the only person to whom he cannot possibly appoint.[23] Therefore, Gray believes that the perpetuities period runs from the date of creation of the power. Professor Kales has countered that we do not need to be concerned with whether the donee can enjoy the property personally. Rather, Kales maintains that the donee's right of ownership consists of the power to dispose of it.[24] Because the donee can dispose of the entire interest, he has complete control, and the measuring period for perpetuities purposes should be from the date of the exercise.[25] Gray, in turn, has responded that the reason for calculating the perpetuities period from the date of creation and not from the date of exercise is that if a limitation would be bad, it cannot be made good by delegating the power to someone else. If what is given to the donee is an authority to act for the settlor or the testator, then the appointment by the donee must be considered as an appointment by the settlor or the testator himself.[26] After the donee has died, he cannot be an appointee, says Gray.[27] Somewhat surprisingly, Kales considered unimportant the fact that the property could be appointed to the donee's estate or his creditors.[28]

The weight of American authority supports the view of Gray.[29] In

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18. *See, e.g.*, Mondell v. Thom., 143 F.2d 157 (D.C. Cir. 1944); Amerige v. Attorney General, 324 Mass. 648, 88 N.E.2d 126 (1949). *See also* authorities cited in note 11 *supra*.

19. *See, e.g.*, *Perpetuities in a Nutshell*, *supra* note 8.

20. DEL. CODE ANN. tit. 25, § 501 (1974).

21. FLA. STAT. ANN. § 689.22(2)(b) (West Supp. 1979).

22. WIS. STAT. § 700.16(1)(C) (1979).

23. GRAY, *supra* note 6, at § 526.

24. Kales, *General Powers and the Rule Against Perpetuities*, 26 HARV. L. REV. 64, 67 (1912).

25. *Id. See also* Thorndyke, *General Powers and Perpetuities*, 27 HARV. L. REV. 705 (1913).

26. Gray, *General Testamentary Powers and the Rule Against Perpetuities*, 26 HARV. L. REV. 720 (1912) [hereinafter cited as *General Testamentary Powers*].

27. *Id.* at 722.

28. *See* Kales, *supra* note 24.

29. Bettner, *supra* note 10, at 175. *See also* authorities cited at note 11 *supra*.

essence, the majority view characterizes a general testamentary power as being in the nature of a special power, and, as such, a part of the creating instrument of the donor.[30] This is also the approach taken in the current tentative draft of the Second Restatement of Property,[31] with Professor A. James Casner as the Reporter:

> In situations where the donee cannot appoint to himself or herself by deed at any time, the existence of the non-vested interests under the trust, or which may be created by the exercise of the power, interfere with the bringing of the trust property under the unqualified control of one person. The interference becomes less and less as the number of objects to whom an appointment can be made increases, but *it is not eliminated unless the power is exercisable in favor of the donee by deed at any time.*[32]

In a limited number of states, however, statutes have been enacted which support Kales' view.[33] Moreover, in the absence of a governing statute, some American courts will occasionally follow the minority rule. One example is the case of *Industrial National Bank of Rhode Island v. Barrett*,[34] which involved a bill in equity brought by a trustee for construction of a will. In 1959, Arthur Tilley died conferring upon his wife a general testamentary power of appointment over his estate. When Mrs. Tilley died in 1963, she exercised her power granting the income of the trust to her two granddaughters equally for their lives and upon their deaths to the granddaughters' issue. The will provided that the trust would terminate "twenty one (21) years after the death of the last survivor of the younger grandchild or issue of either grandchild of mine living at my death."[35] One of the issues presented was whether the power of appointment under Mrs. Tilley's husband's will violated the Rule Against Perpetuities.

The court examined the weight of authority, which measures the perpetuity period from the date of creation, and acknowledged that the reason behind the rule is that, because the donee can not freely alienate the property, the donee is not the practical owner. The minority view was thought to be that actual ownership is irrelevant because when "the donee exercises his power, he is *at that time* the practical owner thereof, *for the purposes of the rule*, as he can appoint to anyone of his choice as well as his own estate."[36] The court followed

30. *See, e.g.*, Northern Trust Co. v. Porter, 368 Ill. 256, 13 N.E.2d 487 (1938).
31. RESTATEMENT (SECOND) OF PROPERTY § 1.2 (Tent. Draft No. 2, 1979).
32. *Id.* at comment d, Reporter's Note 5.
33. *See* notes 20-22 *supra*.
34. 101 R.I. 89, 220 A.2d 517 (1966). *See also* Miller v. Douglass, 192 Wis. 486, 213 N.W. 320 (1927) (prior to current statute; *see* note 22 *supra*).
35. 101 R.I. at ____ , 220 A.2d at 520.
36. *Id.* at ____ , 220 A.2d at 524 (emphasis in original).

the minority view stating that the majority view "misapprehends the fundamental concepts involved here."[37] The court indicated its desire to avoid the harshness of the majority view and chose a rule that would "decide cases on the substance of things."[38]

Also on the side of Kales is the English rule which, except for a brief hiatus in the 19th Century, has consistently measured the perpetuities period from the date of the exercise of the power.[39] Such was the rule prior to 1869, at which time *In re Powell's Trusts*[40] was decided, holding that the proper date was that of creation. This case was specifically repudiated in England in 1885, with the court commenting that there must have been some "error" in the *Powell* decision.[41] Presently, by statute, the date of exercise is the date for measuring compliance with the Rule in England.[42]

The traditional American rule mandated strict application. If the contingency upon which the vesting of an interest was delayed might possibly be resolved at a time beyond that prescribed by the perpetuities rule, then the interest was bad *ab initio* despite the fact that it was probable that the contingency would be resolved well within the perpetuities period.[43] Application of the Rule in such cases was based upon possibilities of remote vesting existing at the time of the creation of the power on the theory that the interest must be certain to vest, if at all, within the perpetuities period.

D. Reform Movements

Reform movements in many states have changed the emphasis from possibilities to actualities.[44] For example, the actualities approach is the basis of the "wait and see" statute adopted by Pennsylvania in 1947.[45] This statute provides that a decision regarding possible viola-

37. *Id.*

38. *Id.*

39. Bettner, *supra* note 10, at 172-73.

40. 39 L.J. (Ch. 1869). The testator bequeathed stock to a married daughter *H*, for life, with remainder to persons *H* would appoint in her will. *H* appointed it to *L* for life with a remainder to *L*'s children who reached 21. But *L* was born after the death of the testator clearly placing the validity of *L*'s appointment to his children upon whether the perpetuities period was computed from the date of the creation of the power or from its exercise. The appointment was invalidated.

41. Rous v. Jackson, 29 Ch. D. 521 (1885).

42. Perpetuities and Accumulations Act, 1964, c. 55; *Perpetuities Reform*, *supra* note 15, at 522 n.77.

43. *See, e.g.*, *Perpetuities in a Nutshell*, *supra* note 8, at 643.

44. *See generally* Lynn, *Reforming the Common Law Rule Against Perpetuities*, 28 U. CHI. L. REV. 488 (1960) [hereinafter cited as *Common Law Rule*]; Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124 (1960).

45. *See* PA. STAT. ANN. tit. 20, § 6104(b) (Purdon 1975). If the contingency is resolved at a remote time, the contingent future interest is not bad *ab initio* under the "wait and see" reform. LYNN, *supra* note 15.

tion of the Rule will be postponed until the end of the period allowed by the common law rule, at which time actual events will determine whether the Rule has in fact been violated. Other states have enacted limited versions of the "wait and see" type of statute which defer consideration of the "actualities," but not for the entire period of the Rule. Thus, in Connecticut,[46] the "wait" is only until the expiration of the life estates of persons in being when the period of the Rule commences running, at which time existing facts are examined to "see" if following interests are violative of the Rule. Idaho appears to employ a "wait and see" approach with respect to subject matter, rather than time, by addressing in particular the possibility of a fertile octogenarian: "[T]here shall be no presumption that a person is capable of having children at any stage of adult life."[47]

The current tentative draft of the Second Restatement of Property, with Professor Casner as the Reporter, adopts a broad "wait and see" rule.[48] Although the draft acknowledges that an examination of "possibilities" remains the majority rule,[49] it suggests that legislative modifications toward assessment of "actualities" in a "fairly significant number of jurisdictions" is indicative of a trend.[50] Moreover, the draft states that objections to the "wait and see" rule on the basis of uncertainty during the waiting period are nothing more than objections to the period of the Rule Against Perpetuities; even in "possibilities" states, transferors have discovered that interests which might vest too remotely can be made valid by appropriate language which, in effect, precludes vesting if not within the period of the rule.[51] Thus, the Second Restatement seeks to equalize treatment of interests without regard to the drafting skill of the transferor.[52]

In the case of the special power of appointment, the perpetuity period is generally measured from the creation of the power rather than from the date of appointment.[53] Some courts have employed the

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46. CONN. GEN. STAT. ANN. § 45-95 (West 1960).
47. IDAHO CODE § 55-111 (1979).
48. RESTATEMENT (SECOND) OF PROPERTY § 1.4 (Tent. Draft No. 2, 1979).
49. *Id.* comment a.
50. *Id.* pp. 16-17 (Introduction). *See also id.* Reporter's Note to § 1.4.
51. *Id.* p. 17 (Introduction).

> Every non-vested interest that conceivably might vest too remotely could be made valid by simply providing that such non-vested interest will take effect if, and only if, it vests [within the period of the Rule]. In all jurisdictions, such non-vested interest would be valid and it would be necessary to wait and see whether the interest in fact vests in time.

Id.

52. *Id.*
53. J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 152 (2d ed. 1962). *See also* THOMPSON, *supra* note 1, at § 2021.

"second look" doctrine, a variation of the "wait and see" approach, to avoid inequities respecting the rule against remoteness.[54] Under this doctrine, the court will examine the facts of the case as they existed at the time of appointment as well as at the time of the creation of the power.[55] For example, a court will consider the facts when a will became effective and at the time of the execution of the will. For the court to "close its eyes" to facts that existed at the time of appointment "would be to engage in an artificial and unnecessary destruction of interests, and would produce manifest absurdity."[56] Thus, the court will first look to the creation of the power and then take a "second look" at the date of appointment.

Consider the facts of the leading case, *Wilkinson v. Duncan*.[57] *P* gave property in trust to *A* for life with power for *A* to appoint to his children. *A* directed a sum of money to be dispersed to his daughters when they reached the age of twenty-four with the remainder going to his sons in equal amounts when they attained the age of twenty-four. *A* died leaving ten children, one son and one daughter being under the age of three years. The issue was whether the appointment to the children at twenty-four was too remote under the Rule and thus invalid. The appointment was held valid by the court for those daughters who were older than three at the time of the father's death. The court, in effect, took a "second look" at the ages of *A*'s children at the time of his death. The court closed the class of children involved in the will at the death of *A*: thus, part of the class was able to receive the inheritance.

Another reform movement has involved enactment of *cy pres*[58] reformation statutes. The *cy pres* statutes apply the rule of construction of instruments in equity by which the donor's intention is carried out as nearly as possible: the instrument will be reformed, if possible, to comply with the common law rule.[59]

III. OHIO LAW

A. *Prior to the* 1967 *Statute*

Ohio's attempts to deal with the perpetuities question have taken several forms. Arguably, the strict common law rule applied during

54. *See generally* Hill v. Birmingham, 131 Conn. 174, 38 A.2d 604 (1944); Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952); Applegate v. Brown, 168 Neb. 190, 95 N.W.2d 341 (1959); Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953).

55. J. MORRIS & W. LEACH, *supra* note 53, at 152.

56. *Id.*

57. 30 Beav. 111, 7 Jur. (N.S.) 1182 (1861).

58. "As nearly as possible." BLACK'S LAW DICTIONARY 464 (rev. 4th ed. 1968).

59. *See Perpetuities Reform*, *supra* note 15, at 523-28.

Ohio's early history. It is clear from the authorities that it was abrogated, at least for real property, by the legislature in 1811.[60] The Ohio Supreme Court never decided whether the common law Rule Against Perpetuities applied to personalty, but neither did it ever hold any future interest or estate over to be void.[61]

The 1811 enactment endured until 1932, at which time the common law rule was reinstated.[62] In enforcing this common law statute, the courts applied the "possibilities" test.[63] Cases decided under the 1932 statute in Ohio, however, were not without their suprises. In 1955, the Probate Court of Cuyahoga County, in *Cleveland Trust Co. v. McQuade*,[64] held valid the exercise of a general testamentary power of appointment by measuring perpetuities from the date of the exercise of the power. In a case of first impression, the court cited the authorities on both sides and upheld the exercise.[65]

In *McQuade*, Anne Baldwin Schultze had executed a trust dated February 27, 1922, with the trust property to be held for the benefit of her nephew, Gouverneur Morris, for his life. She directed that the

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60. 10 Ohio Laws 7, effective June 1, 1812, stated:

> No estate in fee simple, fee tail, or any lesser estate in lands or tenements lying within this state shall be given or granted by deed or will to any person or persons, but such as are in being, or the immediate issue or descendents of such as are in being at the time of the making of such deed or will . . . .

Leach claims that no one has ever found out what the latter phrase meant. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 724 (1952). This statute, later codified at § 8622 of the OHIO GENERAL CODE, was repealed in 1932.

61. Black, *Ohio Rule Against Perpetuities*, 3 CIN. L. REV. 79, 82 (1929).

62. In 1931 Ohio Laws 320, 470, it was provided:

> No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest. All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail. It is the intention by the adoption of this section to make effective in Ohio what is generally known as the common law rule against perpetuities.

63. Before 1967, an Ohio court would normally void a conveyance if there existed the possibility of an event occurring which would violate the Rule Against Perpetuities. Eisenmann v. Eisenmann, 520 Ohio Misc. 119 (1976). *See* Jones v. Webster, 133 Ohio St. 492, 14 N.E.2d 928 (1938); Abram v. Wilson, 8 Ohio Misc. 420 (1966); Braun v. Central Trust Co., 46 Ohio Op. 198, 104 N.E.2d 480 (1951), *aff'd*, 92 Ohio App. 110, 109 N.E.2d 476 (1952); Rudolph v. Schmalstig, 9 Ohio Op. 452 (1937).

64. 72 Ohio Law Abst. 120, 133 N.E.2d 664 (1955), *modified*, 106 Ohio App. 237, 142 N.E.2d 249 (1957).

65. The court took notice of the position advocated by Professor Kales, and the Delaware and Wisconsin courts, following the English view which measures the perpetuities time period from the date of its exercise. Conversely, it noted the American majority rule advocated by Professor Gray which measures the perpetuities period from the date of the power's creation. *Id. See Perpetuities in a Nutshell, supra* note 8.

property should "vest in and be distributed to his nominees and appointees by his last will and testament."[66] Morris died in 1953. His will transferred the property to the Trust Company as trustee, directed limited income for life to certain named persons, and left the remainder to two other named persons "so long as both of them shall live," then to their survivor.[67] Indicating that the controlling question was whether the perpetuities period was to be computed from 1922 or 1953 and noting that the question had not previously been decided in Ohio, the court held that upon the facts presented there was no restriction on Morris so far as the exercise was concerned and that in Ohio the period of the Rule Against Perpetuities should be measured from the date of the exercise of the power.[68]

The combination of a life estate plus the power to appoint was considered to be enough "control" to satisfy the court that marketability of the property was not suspended. The decision placed Ohio squarely in the minority camp.[69]

The probate court opinion was appealed, however, and in 1957 was reversed by the Cuyahoga County Court of Appeals.[70] The appellate court noted that three of the eight income beneficiaries named in Morris' will were not in being at the time of the creation of the power, further noted that additional gifts were conditioned upon survival of the eight named beneficiaries, and concluded that the dispositive scheme violated the Rule Against Perpetuities at least in part.[71] The gifts to the persons alive at the creation of the power were upheld, but the gifts to those not alive at the creation of the power and the gifts over relating to the same property were held to be in violation.[72] Thus, the measuring period to be applied was from the date of the power's creation. It is worthy of note, however, that the court apparently applied the "actualities" test in arriving at its decision, although the perpetuities statute in effect at the time did not have such an "actualities" provision.[73] By so holding, the court chose to

66. 72 Ohio Law Abst. at 121, 133 N.E.2d at 664.

67. *Id.* at 122, 133 N.E.2d at 665.

68. *Id.* at 124, 133 N.E.2d at 666.

69. The minority position measures the perpetuities period from the date of the exercise of a testamentary power. This decision attracted out-of-state attention. *See Property Application of Rule Against Perpetuities to General Power of Appointment*, 14 WASH. & LEE L. REV. 132 (1957).

70. 106 Ohio App. 237, 142 N.E.2d 249 (1957).

71. *Id.* at 250, 142 N.E.2d at 257-58.

72. *Id.* at 257-58, 142 N.E.2d at 262.

73. In an actualities test, the court would determine the conveyance to be void only if it actually violates the Rule Against Perpetuities but not if there is merely a mathematical possibility of the Rule's violation. *See* notes 44-52 and accompanying text *supra*.

not follow the earlier strict Ohio cases[74] and the common law "all or nothing" decisions.[75]

Thus, although the probate court decision in *McQuade*[76] appeared to suggest movement toward the minority position, its modification on appeal[77] did not clearly return Ohio to the majority position.

B. *The* 1967 *Statute*

In 1967 Ohio followed the examples of the New Hampshire Supreme Court[78] and other state legislatures by adopting a full-scale reform statute.[79] The new statute is the common law rule, plus a "wait

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74. Jones v. Webster, 133 Ohio St. 492, 14 N.E.2d 928 (1938); Abram v. Wilson, 8 Ohio Misc. 420 (1966); Braun v. Central Trust Co., 46 Ohio Op. 198, 104 N.E.2d 480 (1951), *aff'd*, 92 Ohio App. 110, 109 N.E.2d 476 (1952); Rudolph v. Schmalstig, 9 Ohio Op. 452 (1937).

75. Jee v. Audley, 29 Eng. Rep. 1186 (1787).

76. 72 Ohio Law Abst. 120, 133 N.E.2d 664 (1955), *modified*, 106 Ohio App. 237, 142 N.E.2d 249 (1957).

77. Cleveland Trust Co. v. McQuade, 106 Ohio App. 237, 142 N.E.2d 249 (1957), *modifying* 133 N.E.2d 664 (1955).

78. New Hampshire's reform is a judge made rule. Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953).

79. OHIO REV. CODE ANN. § 2131.08 (Page Supp. 1979) states:

(A) No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest. All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail. It is the intention by the adoption of this section to make effective in Ohio what is generally known as the common law rule against perpetuities, except as set forth in paragraphs (B) and (C) of this section.

(B) For the purposes of this section, the time of the creation of an interest in real or personal property subject to a power reserved by the grantor to revoke or terminate such interest shall be the time at which such reserved power expires, either by reason of the death of the grantor or by release of the power or otherwise.

(C) Any interest in real or personal property which would violate the rule against perpetuities, under paragraph (A) hereof, shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate the rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events.

(D) Paragraphs (B) and (C) of this section shall be effective with respect to interests in real or personal property created by wills of decedents dying after December 31, 1967, and with respect to interests in real or personal property created by inter vivos instruments executed December 31, 1967, and with respect to interests in real or personal property created by inter vivos instruments executed on or before December 31, 1967, which by reason of paragraph (B) of this section will be treated as interests created after December 31, 1967. An interest in real or personal property which comes into effect through the exercise of a power of appointment shall be regarded as having been created by the instrument exercising the power rather than the instrument which created the power.

and see" actualities test coupled with *cy pres* mandatory reform of violating instruments. The common law rule is expressly adopted, "except as set forth in paragraphs (B) [revocable trusts and powers] and (C) [reformation and wait and see]."[80] Powers of appointment are not included in the exceptions to the common law rule. However, the last sentence to paragraph (D) states: "An interest . . . which comes into effect through the exercise of a power of appointment shall be regarded as having been created by the instrument *exercising* the power rather than the instrument which *created* the power."[81] To enforce paragraph (D), then, would reverse the common law as applied in America; yet the common law was expressly adopted, except for the exceptions in paragraphs (B) and (C).

These seemingly contradictory sections left confused and undetermined the status of perpetuities and powers of appointment, especially special and general testamentary powers. According to Ohio State University Professor Robert J. Lynn, it was "at least arguable" that general testamentary powers would be measured from their exercise, but he noted that judicial interpretation would be necessary.[82] Lynn felt that the minority exercise position had little to recommend itself, particularly in view of the tax response of the United States Congress to the Delaware statute.[83] He also noted that the last sentence of sec-

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80. *Id.* § 2131.08(A).

81. *Id.* § 2131.08(D).

82. Lynn, *The Ohio Perpetuities Reform Statute*, 29 OHIO ST. L.J. 1, 1-2 (1968) [hereinafter cited as *Ohio Perpetuities*].

83. *See* note 17 *supra*. A related tax question under § 2041 of the Internal Revenue Code, I.R.C. § 2041, is the difference in treatment between the exercise, lapse, and release of a power of appointment. I.R.C. § 2041. The Ohio Revised Code statutorily defines release and disclaimer of a power. A release of a power of appointment may be accomplished by the donee signing a written instrument acknowledging the release. OHIO REV. CODE ANN. § 1339.16 (Page Supp. 1979). The release may be for or without consideration and delivery need not be made as provided in OHIO REV. CODE ANN. § 1339.17 (Page Supp. 1979). § 1339.16 does not effect the validity of a release of a power effected in any other form or manner.

The significance of § 1339.16 is pointed out in its comments. The federal law provides that property subject to a power of appointment created before 1942 will not be included in the gross taxable estate of the person who had such power unless the power was general in nature and was in fact exercised by the decedent. *See* I.R.C. § 2041(a)(1). Current law also requires that there be included in the gross taxable estate of a decedent some part of the value of all property over which the decedent had a general power of appointment, created after 1942, whether exercised, released, or allowed to lapse. I.R.C. §§ 2041(a)(2), (b)(2). There are qualifications to this rule. Property subject to a general power of appointment created after 1942 is includible in the gross estate of a decedent under I.R.C. § 2041(a)(2), even though he does not have the power at his death, if during his life he exercised or released the power under circumstances such that, if the property subject to the power would have been owned and transferred by the decedent, the property would be includible in the decedent's gross

tion 2131.08(D) was not part of the statute as formulated by the Committee on Probate and Trust Law of the State Bar Association.[84]

Judicial construction of section 2131.08(D) did not come for four and one-half years. In the case of *Dollar Savings & Trust Co. v. First National Bank of Boston*,[85] the Probate Court of Mahoning County held that the common law was not changed and that the perpetuities period of a general testamentary power is still measured from the date of its creation.[86] The power of appointment in question was created in 1921 by Grace Tod Arrel, a Mahoning County resident. One-fourth of her residuary estate was left in trust for the benefit of her daughter, Frances Parson, to be distributed at Frances' death to the persons directed by Frances' will. Frances died in 1969, a resident of Maine. Her residuary estate, including "all powers over which I may have a power of appointment at my death," was devised to a pre-existing trust established by her with the defendant Bank of Boston. By the terms of the trust, Frances' children were to have a life estate, with yet another testamentary power for *them* to appoint among their issue.[87]

As is so often the case, the suit was brought by the next of kin,[88] who sought to invalidate the exercise and take by intestate succession the entire corpus of over $500,000, rather than merely the income.[89] The position which the plaintiffs urged upon the court was that the exercise should be governed by the statute in effect in 1921, when Grace's will was probated and at which time Frances was quite capable of having more children.[90]

The court refused to so hold. The 1967 amendment was applied, as the reform statute specifically states that it applies to interests created

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estate under §§ 2035, 2036, 2037, or 2038 of the Internal Revenue Code. Treas. Reg. § 20.2041-3(d)(1) (1942). *See* I.R.C. §§ 2035, 2036, 2037, 2038. § 2041(a)(2) is not applicable to a complete release of a general power created after 1942, whether exercisable during life or by will, if the release was not made in contemplation of death within the meaning of § 2035, and if the retained interest or control requirements in § 2036 through § 2038 were not met. Treas. Reg. § 20.2041-3(d)(2) (1942) (regulations prior to Tax Reform Act of 1976, 26 U.S.C. § 2035(c) (1976), which Act created a statutory contemplation of death period of three years).

84. *Ohio Perpetuities, supra* note 82.

85. 61 Ohio Op. 2d 134, 285 N.E.2d 768 (1972). *See* 34 OHIO ST. L.J. 433 (1973).

86. 61 Ohio Op. 2d at 143, 285 N.E.2d at 778.

87. *Id.* at 135, 285 N.E.2d at 770-71.

88. In this instance, the next of kin were Frances' children, the income beneficiaries. *Id.*

89. The next of kin did not attack the pre-existing trust which contained over $3,000,000. *Id.*

90. *Id.* at 142, 285 N.E.2d at 777. This would void the conveyance as the measure of perpetuities would be from the date of creation when there was a possibility of more heirs being born.

by wills of decedents dying after December 31, 1967.[91] Further, the "wait and see" clause applied,[92] and because Frances did not actually have any children after the date of Grace's death the gift to her children did not violate the Rule.[93] Their life estates vested at the death of their mother. Finally, the *cy pres* reform clause applied.[94] Therefore, while the powers of appointment of remainders given to the plaintiffs and the remainders over in default did violate the Rule, the entire exercise would not fail.[95] Rather, the court would reform the appointment and uphold the part which was valid. Thus, while the reform statute would not allow measurement of the power of appointment period from date of the exercise of the power, it was used to uphold through *cy pres* reform and "actualities" the exercise of a power which well might have failed under a more strict perpetuities statute.

To reach this conclusion, it was necessary for the court in *Dollar Savings* to wrestle with the enigmatic last sentence of paragraph (D) of the reform statute. This sentence reads: "An interest in real or personal property which comes into effect through the exercise of a power of appointment shall be regarded as having been *created* by the instrument *exercising* the power, rather than the instrument which created the power."[96] This sentence, read independently, would appear to dictate that the perpetuities period is to be computed from the time a power of appointment is exercised. The sentence quoted does not make clear whether the substantive rule of the statute, "lives in being plus twenty-one years,"[97] is to be applied as of the time of the creation or as of the time of the exercise of a power of appointment. It could be argued, after all, that this sentence was intended to establish only the effective date of the amendments in relationship to various interests and was not intended to effect any substantive changes in the law; that is to say, its application was meant to be limited to clarifying the effective date of the amendment with respect to a power of appointment.[98]

The latent ambiguity contained in this sentence was noted, in fact,

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91. OHIO REV. CODE ANN. § 2131.08(D) (Page Supp. 1979).

92. *Id.* § 2131.08(C). "The period of perpetuities shall be measured by actual rather than possible events." *Id.*

93. 61 Ohio Op. 2d at 144, 285 N.E.2d at 779. The plaintiffs were all in existence in 1922.

94. "Any interest . . . shall be reformed, within the limits of the rule, to approximate most closely with the intention of the creator of the interest." OHIO REV. CODE ANN. § 2131.08(C) (Page Supp. 1979).

95. 61 Ohio Op. 2d at 143, 285 N.E.2d at 778.

96. OHIO REV. CODE ANN. § 2131.08(D) (Page Supp. 1979) (emphasis added).

97. *Id.* § 2131.08(A).

98. 61 Ohio Op. 2d at 143, 285 N.E.2d at 778.

at the time the amendment was passed,[99] but the Ohio Legislature, with the indifference towards the plight of the practicing attorney which unfortunately has become increasingly common in our time, neglected to clarify its intention on this point and did not revise the sentence involved.

The *Dollar Savings* court undertook to do what the Ohio Legislature had not. The court, citing *McQuade*,[100] noted that prior to the 1967 reform legislation Ohio had adopted the common law rule which stated that the period for testing the validity of an exercise of a general power of appointment was measured from the time of the creation of the power and not from its exercise.[101] The court noted that paragraph (A) of the statute, as re-enacted in 1967, confirms the common law in Ohio with the express exception of paragraphs (B) and (C), but not (D), of the section.[102] Furthermore, paragraph (B), the sole purpose of which is to establish the starting time for the perpetuities period with respect to revocable *inter vivos* trusts, refers to the "time" of expiration of powers of revocation and termination.[103] The court noted that the absence of the word "time" in the last sentence of paragraph (D) fortifies the conclusion that the purpose of the sentence was not to establish a general starting time for all powers of appointment nor to change the Ohio common law rule as enunciated in *McQuade*.[104]

Having thus dispatched the demon created by the legislature, the court was able to find that the perpetuities period of an interest derived from the exercise of a general testamentary power of appointment is measured from the time of the creation of power and not from its exercise.[105] From the date of this decision it appeared that Ohio had returned to the majority camp in measuring the perpetuities period of a testamentary power.[106]

But a problem remains. The *Dollar Savings* court, after all, was the Probate Court of Mahoning County and its holding is not controlling outside the county where it was heard. This case was not appealed, and the interpretation of section 2131.08(D) has not been litigated in any subsequent cases. The Mahoning County Probate Court has only

99. *See Ohio Perpetuities, supra* note 82, at 6.
100. 106 Ohio App. 237, 142 N.E.2d 249 (1957), *modifying* 133 N.E.2d 664 (1955).
101. 61 Ohio Op. 2d at 142-43, 285 N.E.2d at 778.
102. OHIO REV. CODE ANN. § 2131.08(A) (Page Supp. 1979).
103. *Id.* § 2131.08(B).
104. 61 Ohio Op. 2d at 143, 285 N.E.2d at 778.
105. *Id. Cf.* note 17 *supra*.
106. For favorable comment upon the action of the court in *Dollar Savings*, see *Ohio Perpetuities, supra* note 82, at 6; Note, *Application of the Revised Ohio Perpetuities Statute*, 34 OHIO ST. L.J. 433, 439 (1973).

"scotched" the snake, not killed it,[107] and it would seem wise at this point to make a cursory review of the reasoning which might be adopted by the next Ohio court to decide this question.

Those who espouse the minority approach, that the date of exercise controls, will point out the similarity between a general power to appoint by will and a general power to appoint by deed. There exist, they will say, no real restrictions on the donee of a general power to appoint by will.[108] In addition, if one of the purposes of the Rule Against Perpetuities is to preclude the suspension of the marketability or transferability of property or interests, it is probable that the life interest of both kinds of donees would be computable in value, assignable in nature and reachable by creditors. Finally, to interpret the Rule as requiring that the exercise by the donee of a general testamentary power must be related back to the date of the creation of the power would seriously compromise the donee in the exercise of the power and thus defeat the expressed intention of the donor to give to the donee an unrestricted right to determine in whom, upon the donee's death, the property should vest, and to whom it should be distributed.[109] One commentator has questioned whether the majority view might not constitute just another of the Rule's hidden traps for the unwary, because property subject to a general testamentary power and property owned by the testator must, pursuant to the majority view, be subjected to two different measuring periods.[110]

Proponents of the majority view, which measures from the date of creation, will argue, *inter alia*, that unless their view is adopted it is entirely possible that wealthy madmen, who sire succeeding generations of wealthy madmen, might be able to effectively tie up vast amounts of this country's wealth. If each succeeding donee exercises his testamentary power of appointment by creating a succeeding power of appointment there is no violation of the Rule Against Perpetuities only if the period of the Rule is measured from the date of each

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107. "We have scotch'd the snake, not kill'd it: She'll close and be herself, whilst our poor malice remains in danger of her former tooth." William Shakespeare, Macbeth, Act III, Scene 2. The Mahoning County Probate Court, of course, had authority only to "scotch" the snake. The question of whether the perpetuities period runs from the date of exercise or the date of creation of a general testamentary power of appointment can be settled finally for Ohio purposes only by the Ohio Supreme Court or the Ohio legislature.

108. SIMES & SMITH, *supra* note 1, at § 874.

109. Jones, *The Rule Against Perpetuities and Powers of Appointment: An Old Controversy Revived*, 54 IOWA L. REV. 456 (1968).

110. *Id.*

power's exercise.[111] This argument may have the cold, clear ring of truth.

IV. CONCLUSION

At heart it appears that the question of which date should determine whether a general testamentary power of appointment is valid for perpetuities purposes must be answered by choosing the lesser of two evils: the possibility of unnecessary complexity, the common law, date of creation, view; or possible future abuse, the minority, date of exercise, view. To these writers, it appears that the rule of perpetuities has been so updated that the once troublesome majority rule with its risks of complexity and traps for the draftsman is no longer the threat it once was. Consequently, it is better to eschew the possibility of future abuse in favor of a now-tamed majority rule.

However this question is decided by future Ohio tribunals, it seems clear that at the present there is no bogeyman in Ohio, at least in Mahoning County.[112]

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111. That the Rule is fair game is usually assumed. It has been successfully attacked at its most vulnerable points. In classic form its defenders are few. It is one thing, however, to attack the Rule insofar as it is inherently defective. It is quite another to attack it insofar as it is badly handled by courts. And it is patently misleading to imply that the Rule must be fashioned in such a way that it can be flouted by a donor, however unreasonable, or violated with impunity by a draftsman, however inept. There is still something to be said for keeping madmen with property in check, both directly, by striking down dispositions that violate the Rule, and indirectly, by alerting draftsmen to the dangers inherent in intemperate, indiscriminate creation of future interests.

Common Law Rule, supra note 44, at 489-90.

112. *Compare Id.* at 503. (The application of the rule has already been limited in other jurisdictions).