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Recommended Citation

Lawrence W. Waggoner, *Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 Cornell L. Rev. 157 (1988)
Available at: <http://scholarship.law.cornell.edu/clr/vol73/iss2/1>

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THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES: THE RATIONALE OF THE 90-YEAR WAITING PERIOD

Lawrence W. Waggoner†

The Uniform Law Commissioners promulgated the Uniform Statutory Rule Against Perpetuities in 1986.¹ The perpetuity-reform efforts of the American Law Institute in the Restatement (Second) inspired the Uniform Act.² The Restatement and the Uniform Act employ the so-called wait-and-see approach to perpetuity reform. Wait-and-see is a two-step strategy. Step One preserves the validating side of the common-law Rule Against Perpetuities (the common-law Rule): By satisfying the common-law Rule, a nonvested future interest in property is valid at the moment of its creation.³ Step Two is a salvage strategy for future interests that would have been invalid at common law: Rather than invalidating such interests at creation, wait-and-see allows a period of time, called the waiting period, for the contingencies to work out harmlessly.⁴

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¹ UNIF. STATUTORY RULE AGAINST PERPETUITIES, 8A U.L.A. 103 (Supp. 1988) [hereinafter UNIF. ACT].

² RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) §§ 1.1-1.6 (1983) [hereinafter RESTATEMENT].

³ UNIF. ACT § 1(a)(1); RESTATEMENT § 1.3(1). In estate-planning practice, every incentive remains to comply with the common-law Rule, through the use of a standard perpetuity saving clause, *see infra* note 35, if appropriate, or one tailored to the particular trust or property arrangement, or otherwise.

⁴ UNIF. ACT § 1(a)(2); RESTATEMENT § 1.3(2). Nearly all trusts (or other property arrangements) will have terminated by their own terms long before the waiting period expires, leaving the waiting period to extend unused (and ignored) into the future long after the contingencies have been resolved and the property distributed. *See* Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP. PROB. & TR. J. 569, 579-90 (1986) [hereinafter Waggoner, *Uniform Statutory Rule*]. In the unlikely event that the contingencies have not been resolved by the expiration of the waiting period, the disposition is to be reformed by the court so that all contingencies are resolved within the allowable period. UNIF. ACT § 3; RESTATEMENT § 1.5.

Neither the Restatement nor the Uniform Act authorized judicial reformation at any time before the expiration of the waiting period (except in certain specified cases). The Drafting Committee of the Uniform Act and its Advisors discussed at length and specifically rejected the "immediate *cy pres*" idea, as it is sometimes called, under which the

Although the traditional method of measuring the waiting period is by reference to the period of lives in being at the creation of the interest (the measuring lives) plus 21 years, there are various difficulties and costs associated with identifying and tracing a set of actual measuring lives to see which one is the survivor and when he or she dies.⁵ Consequently, in a step the framers of a Restatement of the Law of Property could not appropriately have taken in the early 1980s, given the constraint of basing their position on existing law, the framers of the Uniform Act decided to forgo the use of actual measuring lives and use instead an allowable waiting period of a flat 90 years.⁶ The framers intended the 90 years to represent a reasonable approximation of the average period of time reached when actual measuring lives are used.

The Uniform Act has been endorsed by the House of Delegates of the American Bar Association (on the recommendation of the Council of the A.B.A. Section of Real Property, Probate and Trust

statute grants a right to reformation at any time, merely on a showing of a violation of the common-law Rule. A few states have adopted this approach, but the experience under it has not been satisfactory. Almost all of the cases that have arisen have involved age contingencies in excess of 21 or a variation thereof. An example of such an age-contingency case is set forth *infra* note 26. Although the vesting of the interests in such cases is almost certain to occur well within the period of a life in being plus 21 years, and although such interests can easily be validated in their original form by a perpetuity saving clause (*see infra* note 35 and accompanying text), the courts have chosen to "reform" such dispositions by lowering the age contingencies to 21. *E.g.*, Estate of Ghiglia, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974). Such an approach amounts to an unwarranted distortion of the donor's intention, a distortion that is avoided by the approach of the Uniform Act and the Restatement under which reformation is delayed until the contingencies as originally written by the donor have been given a chance to work out harmlessly. *See* Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1755-59 (1983); *see also* UNIF. ACT § 5 comment; Waggoner, *Uniform Statutory Rule, supra*, at 596 n.46.

Another possible approach under a general reformation ("immediate *cy pres*") doctrine is for the courts to insert a perpetuity saving clause into dispositions that violate the common-law Rule. This type of reformation has been advocated by academics, *e.g.*, Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963), but not adopted by any court. This approach, were a court to adopt it, would be superior to lowering age contingencies to 21. The donor's intention would not be unnecessarily frustrated. However, even this approach is less efficient than the approach of the Uniform Act. The period of time produced by a judicially inserted perpetuity saving clause would be about the same in length as that which is automatically granted by the Uniform Act without front-end litigation. The more efficient course, opted for by the Uniform Act (and the Restatement), is to defer the right to reformation until after the waiting period has run its course. Deferring the right to reformation enormously reduces the necessity and cost of litigation because the contingencies attached to most future interests that would otherwise have fallen victim of the common-law Rule will be resolved well within the allowable waiting period. Litigation to reform an offending disposition will seldom become necessary. *See* UNIF. ACT § 3 comment; Waggoner, *Uniform Statutory Rule, supra*, at 596 & n.46.

⁵ *See infra* notes 17-25 and accompanying text.

⁶ UNIF. ACT § 1(a)(2).

Law), the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers. It has been enacted, so far, in three states⁷ and appears to be on its way toward enactment in several others.

I

MISUNDERSTANDINGS ABOUT THE 90-YEAR PERIOD

My purpose in this short Article is to set the record straight concerning the rationale for the 90-year waiting period. The question arises because, in a pair of recent law review articles,⁸ Professor Dukeminier labels the 90-year waiting period a clone⁹ of the "twelve-healthy-babies ploy," a device that is unused in actual practice by estate-planning attorneys and that was denounced by the father of wait-and-see reform, Professor W. Barton Leach. The device is one that allows drafters of trusts and other property arrangements to tie up property for an abnormally long time; it accomplishes this purpose by using, as measuring lives, babies from long-lived families. As Professor Leach put it, a testator or settlor could, by using this ploy,

tie up his property, regardless of lives and deaths in his family, for an unconscionable period — viz. twenty-one years after the deaths of a dozen or so healthy babies chosen from families noted for longevity, a term which, in the ordinary course of events, will add up to about a century.¹⁰

Professor Leach rejected this ploy as a "capricious exercise of the power of the dead hand."¹¹

Professor Dukeminier charges that the framers of the Uniform Act intended the 90-year waiting period to institutionalize this ploy. He writes:

[W]hy did the Uniform Statutory Rule against Perpetuities come to insert in every trust a 90-year wait-and-see period? It is, in effect, a proxy for a period measured by the lives of a dozen healthy

⁷ The states are Minnesota, Nevada, and South Carolina. MINN. STAT. §§ 501A.01-501A.07 (West Supp. 1988); NEV. REV. STAT. ANN. §§ 111.103-111.1035 (Michie Supp. 1987) (repealing its former wait-and-see statute, which delimited the allowable waiting period by reference to actual measuring lives determined by the causal-relationship method); S.C. CODE ANN. §§ 27-6-10 to -80 (Law. Co-op. Supp. 1987).

⁸ Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023 (1987) [hereinafter Dukeminier, *Ninety Years in Limbo*]; Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1884-87 (1986) [hereinafter Dukeminier, *Modern Guide*].

⁹ Dukeminier, *Modern Guide*, *supra* note 8, at 1886 ("The Uniform Statute has cloned Professor Leach's dozen healthy babies.").

¹⁰ VI AMERICAN LAW OF PROPERTY § 24.16, at 52 (A. Casner ed. 1952).

¹¹ J. MORRIS & W. LEACH, *THE RULE AGAINST PERPETUITIES* 13 (2d ed. 1962).

babies plus 21 years. This is implicitly conceded in the Rationale for the Uniform Statute, set forth in the Prefatory Note. . . .

The Uniform Statute attempts to justify the 90-year period as a saving clause on the ground that, under existing common law, a knowledgeable lawyer can, if he wishes, tie up property in trust for approximately 90 years. But the fundamental fact is: Lawyers do not use saving clauses that have a dozen healthy babies as measuring lives or that always, or even on average, produce a 90-year perpetuities period. The Uniform Statute thus provides another ironic twist of fate: It takes what might happen, what lawyers might do, and not what actually occurs, as the justification for its version of an actualities test.¹²

This account of the rationale for the 90-year period is a misunderstanding. As the Reporter for the Uniform Act, I can say with certainty that the 90-year period was not derived in the fashion Professor Dukeminier suggests, that is, by approximating the period of time that would be reached, on average, by the length of the lifetime of the survivor of twelve healthy babies from unrelated families (plus 21 years). To my recollection, such an idea was never seriously discussed in the deliberations of the Drafting Committee or on the floor of the National Conference of Commissioners on Uniform State Laws. Nor is there anything in the Uniform Act, its prefatory note and comments, or my writings that implicitly concedes or even mildly suggests that this ploy was the actual basis for selecting 90 years.¹³ There is, in short, no foundation for the claim that the Act takes as the justification for its selection of 90 years the twelve-healthy-babies ploy denounced by Professor Leach.

Actual justification aside, what of the claim that the 90-year period is in effect a proxy for the period that would be reached by the twelve-healthy-babies ploy? The life expectancy of a new-born baby

¹² Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1031, 1035-36; *see also* Dukeminier, *Modern Guide*, *supra* note 8, at 1885 ("The proponents of the Uniform Statute believe that a ninety-year perpetuities period is justified by the fact that, under existing law, a knowledgeable lawyer can tie up property in trust for approximately ninety years by selecting youthful measuring lives.").

¹³ The actual basis for selecting 90 years is set forth in the prefatory note to the Uniform Act. In explaining that the 90-year period is built on the life expectancy (plus 21 years) of the youngest measuring life, the prefatory note cites Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 INST. ON EST. PLAN. ch. 7 (1986) [hereinafter Waggoner, *Progress Report*], which shows in table 1, *Id.* ¶ 703.4, at 7-17, that the reference to the youngest measuring life was to the *transferor's youngest descendant* in being when the trust was created; no reference to twelve healthy babies from unrelated families appears in *Progress Report*, in the prefatory note to the Uniform Act, or my other writings about the Uniform Act. *See* Waggoner, *Uniform Statutory Rule*, *supra* note 4; Waggoner, *Wait-and-See: The New American Uniform Act on Perpetuities*, 46 CAMBRIDGE L.J. 234 (1987) [hereinafter Waggoner, *Wait-and-See*].

For further discussion of the actual basis for selecting 90 years, see Part II of this Article, *infra* notes 17-33 and accompanying text.

today is 75 years.¹⁴ With the 21-year tack-on period, this method would, at first impression, appear to produce a total period of 96 years (75 + 21). Ninety-six years is longer than the 90 years actually adopted in the Uniform Act, but only by about 6.7 percent. If that were all there were to it, the claim that the 90-year period is in effect a proxy for the twelve-healthy-babies ploy, while an exaggeration, would not be an exaggeration of such proportion as to be wholly unfair.

But that is not all there is to it. An actual approximation of the twelve-healthy-babies ploy would, in fact, produce a much longer period of time—a period of about 113 years, not 96 years. The reason is as follows. It is true that, *as a whole*, the average number of years lived per member of a group of twelve healthy babies, selected at random (not specially chosen from families noted for longevity), is 75 years—that is, the average life expectancy of each individual member of the group is 75 years. An average group of twelve, however, will include babies who will die prematurely and babies who will outlive their individual life expectancies. Under the twelve-healthy-babies ploy, the period would be measured by the lifetime (plus 21 years) of the longest living member of the group, not by the average number of years lived per member of the group as a whole. The life expectancy of the longest living member of a group of twelve new-born babies is about 92 years,¹⁵ not 75 years; with the 21-year tack-on period, the twelve-healthy-babies ploy would produce, on average, the period of 113 years (92 + 21) mentioned above.¹⁶ One hundred thirteen years is 25.6 percent longer than the 90 years actually adopted in the Uniform Act. The claim that the 90-year period is in effect a proxy for the twelve-healthy-babies ploy

¹⁴ U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987, at 71 table 108 (107th ed. 1986).

¹⁵ The 92-year life expectancy was computed by applying a complicated actuarial formula to the data set forth in table LN, Treas. Reg. § 20.2031-7 (1984). Starting with an original cohort of 100,000 new-borns, table LN gives the number of people who live to age one (97,998), age two (97,876), and so on to ages 109 (14) and 110 (0).

I would like to express my gratitude to Dr. Cecil Nesbitt, professor emeritus of mathematics at the University of Michigan, for deriving the actuarial formula used in the computation; he derived the formula from the principles set forth in N. BOWERS, H. GERBER, J. HICKMAN, D. JONES & C. NESBITT, ACTUARIAL MATHEMATICS ch. 16 (1986).

¹⁶ Recall that Professor Leach judged the twelve-healthy-babies ploy to produce a period of about 100 years. *See supra* text accompanying note 10. Professor Leach wrote this in the early 1950s, when individual life expectancy was about 68 years, not 75 years as it is today. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 (pt. 1), at 55 table B 107-115 (1975). Professor Leach, in projecting a 100-year period, must, therefore, have attempted to take account of the phenomenon described in the text, above, that the longest living member of a group of new-born babies will outlive, by an appreciable margin, his or her individual life expectancy. Otherwise, Professor Leach would have projected a period of about 89 years (68 + 21), not 100 years, for the twelve-healthy-babies ploy.

is, therefore, an exaggeration of considerable proportion. The 90-year period of the Uniform Act falls substantially short of the longest time permissible under the current common-law Rule.

II

THE RATIONALE OF THE 90-YEAR PERIOD

In truth, the philosophy behind the 90-year period was to fix a period of time that approximates the average period of time that would traditionally be allowed by the wait-and-see doctrine.¹⁷ There was no intention to use the flat-period-of-years method as a means of lengthening the waiting period beyond its traditional boundaries. The fact that the traditional period roughly averages out to a longish-sounding 90 years is a reflection of a quite different phenomenon: the dramatic increase in longevity that society as a whole has experienced in the course of the twentieth century.¹⁸ Seen in this light, the 90-year period is an evolutionary step in the development of the wait-and-see doctrine.

As mentioned earlier, the traditional method of delimiting the allowable waiting period is to use actual measuring lives plus 21 years. Specifically, under this method, a group of persons—called the measuring lives—is identified. Once the group is identified, the lives of all its members are traced to see which one outlives all the others and when that survivor dies. The allowable waiting period extends 21 years beyond the death of that last surviving measuring life.

From its inception, the actual-measuring-lives approach has been plagued by two problems: identification and tracing. The identification problem concerns the method by which the measuring lives are to be chosen. Rival methods have been advanced. Under one method, long advocated by Professor Dukeminier,¹⁹ the measuring lives are identified by testing each disposition to determine the persons whose lives have a "causal relationship" to the vesting or failure of the future interest in question. The actual meaning of causal relationship is in dispute,²⁰ and the adoption of that method

¹⁷ The philosophy appears in the prefatory note to the Uniform Act.

¹⁸ The average life expectancy in 1900 was 47 years, as compared to the 75 years projected today. See Waggoner, *Uniform Statutory Rule*, *supra* note 4, at 588 n.32 (table).

¹⁹ Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 Ky. L.J. 1 (1960); Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985) [hereinafter Dukeminier, *Measuring Lives*]; Dukeminier, *Modern Guide*, *supra* note 8; Dukeminier, *Wait-and-See: The Causal Relationship Principle*, 102 L.Q. REV. 250 (1986) [hereinafter Dukeminier, *Causal Relationship*].

²⁰ Compare Dukeminier, *Measuring Lives*, *supra* note 19, at 1660 ("causal relationship must include any person who can affect vesting, either in possession or interest") with Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714, 1719

could require front-end litigation to determine the identity of the measuring lives in a given case. Neither the Restatement nor the Uniform Act adopted the causal-relationship method.²¹ The Restatement specifies the measuring lives in a different way. The Restatement uses a list composed, generally speaking, of the transferor, the beneficiaries of the disposition, the parents and grandparents of the beneficiaries, and, in certain cases, the donee of a nonfiduciary power of appointment; of the foregoing, those who are in being at the creation of the interest are the measuring lives.²² It soon became apparent that the Restatement's list contained ambiguities, at least at the fringes,²³ which could also require front-end litigation to determine the full compliment of measuring lives in a given case. The framers of the Uniform Act concluded that an ambiguity-free formulation of the specified-list method would necessitate a complex set of statutory provisions.²⁴

In sum, both methods of identifying actual measuring lives entail identification problems: If the specified-list method is used, the measuring lives are difficult to describe in statutory language that is both uncomplicated and unambiguous; the statutory language necessary to adopt the causal-relationship method is not so difficult to draft as it is to apply to actual cases.

The second problem plaguing the actual-measuring-lives approach is that of tracing. No matter how the measuring lives are identified, the lives of those actual individuals must be traced to determine which one is the longest survivor and when he or she died.

The tracing and identification problems are exacerbated by the premise, seemingly accepted under both methods, that the measuring lives cannot always remain a static group, assembled once and for all at the beginning. Instead, individuals who were once measuring lives must be dropped from the group if certain events happen (such as the individual's divorce, adoption out of the family, or assignment of his or her beneficial interest to another); conversely,

(1985) (causal relationship formula, "in certain of its particulars, is arbitrary and ambiguous").

²¹ In his most recent article, Professor Dukeminier appears to have largely abandoned the wait-and-see cause in favor of the reformation ("immediate *cy pres*") method of perpetuity reform. Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1079-80. Neither the Restatement nor the Uniform Act adopted that method, either. The Drafting Committee of the Uniform Act and its Advisors discussed that method at length and, for the reasons set forth *supra* note 4, found it less attractive than wait-and-see coupled with a *deferred* right to reformation.

²² RESTATEMENT § 1.3(2).

²³ Ambiguities in the Restatement's list are identified in Dukeminier, *Measuring Lives*, *supra* note 19, at 1681-1701.

²⁴ The draft of such a set of statutory provisions prepared for the consideration of, but not adopted by, the Drafting Committee of the Uniform Act, is set forth in Waggoner, *Progress Report*, *supra* note 13, ¶ 703.1, at 7-26 n.18.

individuals who were not among the initial group of measuring lives must be included later if certain events happen (such as marriage, adoption into the family, or receipt of another's beneficial interest by assignment or succession) and if they were living when the interest in question was created.²⁵ This instability within the group of measuring lives heightens the potential for a further round of litigation at one point or another during the running of the waiting period.

By opting for a flat period of years, the framers of the Uniform Act eliminated the clutter that has heretofore plagued the wait-and-see strategy—the problems of identifying, tracing, and possibly litigating the make-up of a sometimes-fluctuating group of measuring lives. The expiration of a waiting period measured by a flat period of years is litigation free, easy to determine, and unmistakable.

The framers of the Uniform Act considered objections to replacing the actual-measuring-lives approach with a flat period of years, despite the gain in administrative simplicity that would result. One such objection was the idea that the use of actual measuring lives—especially if determined by the causal-relationship method—generates a waiting period that self-adjusts to each situation, somehow extending the dead hand no further than necessary in each case.²⁶ A flat period of years obviously cannot replicate a self-

²⁵ Dukeminier, *Measuring Lives*, *supra* note 19, at 1672-73 (causal-relationship method); *id.* at 1697-99 (Restatement's specified-list method).

²⁶ Perpetuity specialists may wish to notice that Professor Dukeminier has made such a claim: He has stated that the causal-relationship method for determining the measuring lives produces a waiting period that "extends the dead hand no further than necessary" in each case. Dukeminier, *Causal Relationship*, *supra* note 19, at 250, 265; *see also* Dukeminier, *Measuring Lives*, *supra* note 19, at 1710-11 ("The causal relationship principle provides appropriate measuring lives—persons who can affect vesting—and it automatically adjusts the lives to fit the facts of each particular case. Because it self-adjusts to each limitation, the causal relationship principle, following the principle of parsimony, effects what scientists would call an elegant solution. It provides no more measuring lives than are necessary to deal with the scrivener's particular mistake. . . . [T]he causal relationship principle . . . fit[s] the shoe to the foot . . .").

To test Professor Dukeminier's claim, consider the following example, which is Example 1 from Waggoner, *Uniform Statutory Rule*, *supra* note 4, at 577, 581:

G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren, remainder in corpus to G's grandchildren who reach age 30; if none reaches 30, to a specified charity.

The youngest causal-relationship measuring life in this example is G's youngest grandchild living at G's death. Taking G's death to occur at age 75 (G's life expectancy), and placing G's disposition in each of four hypothetical families (deemed to be representative of actual families) developed in that article, *see id.* at 582-85, the projected time of actual vesting (when G's youngest grandchild will reach age 30) is 5 years after G's death in Family I, 15 years after G's death in Family II, 25 years after G's death in Family III, and 35 years after G's death in Family IV. The projected allowable waiting period under a causal-relationship regime is much longer: 72 years in Family I, 82 years in Family II, 92 years in Family III, and 96 years in Family IV. *See id.* at 590-91 n.39. Thus,

adjusting function. This objection proved unfounded, however, for the actual-measuring-lives approach also fails to perform a self-adjusting function. Although that approach produces waiting periods of different lengths from one case to another, it does *not* generate a waiting period that expires at a natural or logical stopping point along the continuum of each disposition, thereby pinpointing the time before which actual vesting ought to be allowed and beyond which it ought not to be permitted. Instead, the actual-measuring-lives approach—under either the specified-list or causal-relationship method—generates a waiting period whose length almost always *exceeds* by some arbitrary period of time the point of actual vesting in cases that are traditionally validated by the wait-and-see strategy.²⁷ The actual-measuring-lives approach, therefore, performs a margin-of-safety function,²⁸ a function that *can* be replicated by the use of a

the projected waiting period produced by the causal-relationship method *exceeds* the time of projected *actual* vesting by periods ranging from 61 years (Family IV) to 67 years (Families I, II, and III).

In fact, if I had fashioned the above example more realistically, *see infra* note 30, I would have made the gift-over (in case none of the grandchildren reaches age 30) in favor of G's *descendants* rather than a specified charity. This simple modification of the example does not alter the projected time of actual vesting. But it does shift the identity of the youngest causal-relationship measuring life from G's youngest grandchild to G's youngest descendant in each family; this, in turn, makes the length of the projected causal-relationship waiting period be 92 years in one of the families (Family III) and 96 years in the other families (Families I, II, and IV). As modified, the projected causal-relationship waiting period *exceeds* the projected time of *actual* vesting by as much as 91 years. The idea that the causal-relationship formula "extends the dead hand no further than necessary" in each case by "fit[ting] the shoe to the foot" appears to be a questionable proposition. *See also infra* note 28.

The above example, in either its originally published form or as modified above, illustrates the fact that the waiting period for wait-and-see (no matter by what method it is delimited) performs a margin-of-safety function, not a self-adjusting function. The example also illustrates the idea that the margin of safety can be quite extensive in given cases. *See supra* note 4. The contingencies in the vast majority of perpetuity-violation cases will be resolved long before the waiting period expires. In challenging the 90-year period allowed by the Uniform Act, Professor Dukeminier has noted this point and asked: Why, then, "have a 90-year period?" Dukeminier, *Ninety Years in Limbo, supra* note 8, at 1047. The answer is that this is how the waiting period works—even under the causal-relationship formula. Having an *unused* end-portion of the waiting period does no harm and its length has nothing at all to do with dead-hand control. Vesting will occur when it does in trusts such as the one illustrated in the above example, whether the unused end-portion of the waiting period is 5 years, 50 years, or 500 years.

²⁷ *See supra* note 26. For further demonstration of this point, see Waggoner, *Uniform Statutory Rule, supra* note 4, at 577-79, 581-90; Waggoner, *Wait-and-See, supra* note 13, at 236-38.

²⁸ In point of fact, the margin of safety produced by the actual-measuring-lives approach (even under a causal-relationship regime) can be quite erratic from one case to another: The waiting period produced by the causal-relationship method can be longer in cases in which actual vesting is projected to take place sooner, and shorter (though still ample) in cases in which actual vesting is projected to take place later. For demonstration of this phenomenon, see Waggoner, *Progress Report, supra* note 13, ¶ 703.4, at 7-18 to 7-19.

proxy such as the flat 90-year period under the Uniform Act.

In standard cases, the rivalry between the causal-relationship and the specified-list methods of identifying actual measuring lives is very little concerned with the length of the waiting period. Often, the specified-list method will produce a greater number of measuring lives than the causal-relationship method. In the normal course of events, however, the waiting period is not governed by the number of measuring lives, but by the lifetime of the youngest. Unless the additional measuring lives are younger than the others or are clustered in very young age groups, such as under the twelve-healthy-babies ploy, a greater number of measuring lives seldom adds to the length of the waiting period.²⁹ In the normal course of events, the youngest measuring life is the key to the length of the allowable waiting period, and no matter which method is used for determining the identity of the measuring lives, the youngest measuring life, in standard trusts, is likely to be the transferor's youngest descendant living when the trust was created.³⁰ The 90-year period of the Uniform Act is premised on this proposition. Using

²⁹ Professor Dukeminier has attacked the Restatement by observing that it specifies a greater number of measuring lives than the causal-relationship formula and stating that the greater the number of measuring lives, the longer the waiting period. Dukeminier, *Measuring Lives*, *supra* note 19, at 1710-11; Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1032 n.22, 1075. Usually, however, the measuring lives added by the Restatement are older (the transferor; the parents and grandparents of the beneficiaries) and their addition to the group would seldom end up adding to the length of the waiting period. A greater number of measuring lives does, however, add to the administrative burden of tracing their lives out; tracing out the lives of the older measuring lives cannot be dispensed with, because of the remote possibility, in every case, that one of them will beat the odds and outlive all the others, either because the younger ones die prematurely or one of the older ones sufficiently outlives his or her life expectancy.

³⁰ All beneficiaries of a trust who are living when the trust was created are on the Restatement's list of measuring lives. RESTATEMENT § 1.3(2). Though the point is disputed, Professor Dukeminier maintains that all beneficiaries of an otherwise invalid interest are automatically to be counted as causal-relationship measuring lives. Dukeminier, *Measuring Lives*, *supra* note 19, at 1661; Dukeminier, *Modern Guide*, *supra* note 8, at 1881; Dukeminier, *Causal Relationship*, *supra* note 19, at 257. It should also be noted that the transferor's descendants are typically measuring lives under standard perpetuity saving clauses, either by direct designation or by virtue of a designation of the beneficiaries of the trust as the measuring lives. *See infra* note 35.

In the judgment of the Drafting Committee and its Advisors (a group that included experienced estate-planning attorneys), almost all family-oriented trusts, at some point, create a beneficial interest in favor of a multiple-generation class such as the transferor's descendants or issue. Usually, that beneficial interest is a nonvested future interest in the corpus of the trust; and, that beneficial interest is one that is otherwise invalid in the fraction of trusts that violate the common-law Rule and to which wait-and-see applies. In the judgment of the Drafting Committee and its Advisors, this is true even in fertile-octogenarian and unborn-widow cases. In such cases (contrary to the suggestion in Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1033), the youngest measuring life ordinarily is not the youngest child of the "fertile octogenarian" (who likely is an adult) or the life tenant whose income interest precedes that of the "unborn widow" (who also likely is an adult), but the beneficiaries of the remainder interest in the trust's corpus

four hypothetical families deemed to be representative of actual families, the framers determined that, on average, the transferor's youngest descendant in being at the transferor's death—assuming the transferor's death to occur between ages 60 and 90, which is when 73 percent of the population die—is about 6 years old.³¹ The remaining life expectancy of a 6-year-old is about 69 years.³² The 69 years, plus the 21-year tack-on period, gives an allowable waiting period of 90 years. Although this method may not be scientifically accurate to the nth degree,³³ the Drafting Committee considered it

that takes effect on the death of the "fertile octogenarian's" last living child or on the death of the "unborn widow."

In actual trusts, the typical set of beneficiaries of that remainder interest are the transferor's "issue" or "descendants," although law professors (myself included, *see supra* note 26) are not always careful to fashion their hypothetical cases so. For hypothetical cases that are realistic on this point, however, see J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS AND ESTATES* 794 (3d ed. 1984) (Case 7, an unborn-widow case in which the remainder interest is in favor of T's "son's issue."); Dukeminier, *Modern Guide*, *supra* note 8, at 1876-77 (Illustration 8, a fertile-octogenarian case in which the remainder interest is in favor of A's "grandchildren," who presumably are T's great-grandchildren; it would be unlikely for T to have a descendant in being at his or her death younger than a great-grandchild); *id.* at 1878 (Illustration 9, an unborn-widow case in which the remainder interest is in favor of A's "issue," who presumably are also T's issue).

If the transferor has no descendants or issue, a family-oriented trust will likely be for the benefit of a collateral line of descent (such as descendants of the transferor's parents). (This is not only true today—*e.g.*, *Estate of Pearson*, 442 Pa. 172, 275 A.2d 336 (1971)—but also true in even so ancient a case as *Jee v. Audley*, 29 Eng. Rep. 1186 (Ch. 1787). In that case, the beneficiaries of Edward Audley's testamentary trust included "my niece Mary Hall and the issue of her body lawfully begotten and to be begotten"; as it turned out in the actual case, Mary Hall had no issue living at Edward's death, and, had that case arisen today, only this fortuitous turn of events would prevent the youngest measuring life under the Restatement's list or the causal-relationship formula from being a very young child.) In most such cases, the youngest measuring life would be the youngest descendant in that collateral line of descent. *See Pearson*, 442 Pa. at 172, 275 A.2d at 336. There is no reason to think that the age of that youngest descendant, on average, would be appreciably different from the age of the 6-year-old descendant of the transferor upon whose remaining life expectancy the 90-year waiting period of the Uniform Act is built.

³¹ Waggoner, *Progress Report*, *supra* note 13, ¶ 703.4, at 7-17.

³² U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1986, at 69 table 108 (106th ed. 1985).

³³ Professor Dukeminier has suggested that a more accurate method of determining the average length of the waiting period under an actual-measuring-lives approach would be to examine appellate cases in which a perpetuity violation was found to exist. Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1033-34 n.24, 1047 n.51. With respect, this is an unrealistic suggestion, for two reasons. First, only a fraction of perpetuity violations reach the appellate-court stage. *See Waggoner, Uniform Statutory Rule*, *supra* note 4, at 580 n.23. Second, in those that do reach that stage the appellate courts seldom give sufficient information about the facts of the case to determine the age of the person who would be the youngest measuring life under a wait-and-see regime. *See, e.g.*, *Estate of Pearson*, 442 Pa. 172, 275 A.2d 336 (1971) (youngest measuring life, under either the Restatement's list or a causal-relationship formula, would have been the youngest of the testator's grandnephews and grandnieces in being at his death; court does not identify that person or give that person's age).

reliable enough to support a waiting period of 90 years, given the margin-of-safety function that it performs.

III CONCLUSION

The Uniform Act unclutters the wait-and-see strategy of perpetuity reform. It makes wait-and-see simple to administer, fair, and workable. It achieves this objective without the necessity or cost of front-end or mid-period litigation and without supplying a waiting period that exceeds traditional boundaries. Rather than institutionalizing the twelve-healthy-babies ploy, the 90-year period fits well within the range of the margin of safety provided by an actual-measuring-lives approach to wait-and-see, using either the specified-list or causal-relationship method.³⁴ Standard perpetuity saving clauses routinely grant such a margin-of-safety period to thousands upon thousands of trusts without any demonstrated harm befalling society as a result.³⁵

³⁴ See the tables set forth in Waggoner, *Uniform Statutory Rule*, *supra* note 4, at 590 n.39, showing that the waiting period under either of these methods in standard cases can easily exceed the 90-year period that the Uniform Act authorizes.

³⁵ Without a saving clause, many trusts would violate the common-law Rule.

Note that, by the term standard perpetuity saving clause, I mean to refer to one in which the descendants of the transferor (or of an ancestor of the transferor) in being at the creation of the trust (either by direct designation or by virtue of a designation of the beneficiaries of the trust then in being), plus 21 years, are used to measure a period of time that provides an adequate margin of safety in which to allow the contingencies in the trust's future interests to work out harmlessly. I do not mean to refer to a saving clause using twelve healthy babies from unrelated families.

Professor Dukeminier charges that the Uniform Act "increases the period practically available to the dead hand by about 50%." Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1023 n.2; *see also id.* at 1046 ("The potential for extension of the dead hand by about 50 percent is striking."). (Elsewhere, Professor Dukeminier likened the 90-year period to "pollution." *Id.* at 1054-55; Dukeminier, *Modern Guide*, *supra* note 8, at 1886 n.66.) If Professor Dukeminier means this claim literally, he is charging that the Uniform Act increases by 50 percent the margin-of-safety period traditionally granted by the wait-and-see strategy and by its privately established counterpart, the standard perpetuity saving clause. If true, the solution would seem to be to propose shortening the Uniform Act's waiting period to 60 years. But, with respect, the claim does not seem credible. For it to be credible, the youngest person among groups of measuring lives would have to average out to be about 38 years old rather than 6 years old, as determined by the Drafting Committee of the Uniform Act and its Advisors. (The remaining life expectancy of a 38-year-old is 39 years, U.S. BUREAU OF THE CENSUS, *supra* note 32, at 69 table 108, which, with the 21-year tack-on period, gives a period of 60 years (39 + 21).) More likely, if a 38-year-old is in the group of measuring lives, he or she is not the youngest. It is more plausible to think that the youngest is that 38-year-old's 6-year-old child, upon whose remaining life expectancy the 90-year period of the Uniform Act is predicated.

Professor Dukeminier offers no evidence to support his charge. He mentions again, *see supra* note 12 and accompanying text, the assertion that a 90-year margin-of-safety period can only be achieved by the twelve-healthy-babies ploy—a false assertion. *See supra* notes 14-16 and accompanying text; notes 17-18 and accompanying text; note 26;

notes 31-34 and accompanying text. His other evidence relates to the actual duration of existing trusts, as reported to him by three law firms from whom he made inquiries. Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1045-46. Such anecdotal evidence has nothing to do with the average length of the margin-of-safety period that can be provided under the current common-law Rule by a standard perpetuity saving clause. If perpetuity saving clauses are to provide an adequate margin of safety, they must of necessity establish a period that extends beyond—often substantially beyond—the time when the contingencies in the trusts work themselves out. The length of the unused end-portion of the margin-of-safety period has nothing at all to do with dead-hand control. See *supra* notes 4 & 26; see also Waggoner, *Uniform Statutory Rule*, *supra* note 4, at 590 n.39.

In the final analysis, the 90-year period of the Uniform Act does not increase by 50 percent the margin-of-safety period traditionally granted by wait-and-see or standard perpetuity saving clauses. It is, in fact, well within traditional boundaries.