

Memorandum 89-53

Subject: Study L-3013 - Uniform Statutory Rule Against Perpetuities

We have received a study on the Uniform Statutory Rule Against Perpetuities (USRAP) from Charles A. Collier, Jr., the Commission's consultant on this topic. (A copy of the study, with its exhibits, accompanies this memorandum.) Mr. Collier was the American Bar Association Advisor to the USRAP Drafting Committee.

The Background Study gives an overview of the rule against perpetuities, the California statute, and earlier proposals for reform. Mr. Collier also discusses perpetuities savings clauses commonly inserted in donative instruments. Mr. Collier urges the Commission to recommend enactment of USRAP in California and gives a number of reasons for enactment beginning on page 15 of the Background Study.

The staff has prepared a draft *Tentative Recommendation Proposing Enactment of the Uniform Statutory Rule Against Perpetuities* for Commission consideration. The draft tentative recommendation follows the exhibits attached to this memorandum.

The Uniform Statute has not met with unanimous acclaim. The Commission should be acquainted with the arguments opposing USRAP. Accordingly, we have included a copy of Professor Jesse Dukeminier's critique, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. Rev. 1023 (1987). (See Exhibit 1, attached to this memorandum.) Professor Lawrence Waggoner's response to this article, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 Cornell L. Rev. 157 (1988), is attached to this memorandum as Exhibit 2. Finally, a number of testimonial letters in support of USRAP are attached as Exhibit 3.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

#L-3013
Memo 89-53

su431
05/26/89

Tentative Recommendation

Proposing the

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Background

The common law rule against perpetuities, as developed in England beginning in the 17th Century, invalidated attempts to create interests in property that would remain contingent for more than the lives of certain people alive when the interest was created plus 21 years. The rule is now most commonly known in Professor Gray's formulation: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."¹ A central purpose of the rule is to mediate between those who seek to tie up their property for generations into the future and future generations who wish to control the property, free of the dead hand.

In general, the rule permits a person to create property interests that will vest in his or her grandchildren and require them to survive until 21 years of age, but not to create interests that will vest only in great grandchildren.² The common law rule can operate harshly, however, since it invalidates a disposition if there is any conceivable possibility that it will violate the rule, regardless of whether it is likely to do so, and regardless of how reasonable the disposition appears. Individuals who draft their own wills or trusts without expert advice can easily run afoul of the rule, but many lawyers have also failed the test, notwithstanding the prominent position the rule enjoys in the law school curriculum.³

-
1. J. Gray, *The Rule Against Perpetuities* § 201 (4th ed. 1942).
 2. See Halbach, *Rule Against Perpetuities*, in *California Will Drafting Practice* § 12.30, at 566 (Cal. Cont. Ed. Bar 1982).
 3. See, e.g., *Lucas v. Hamm*, 56 Cal. 2d 583, 592, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) ("[F]ew, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman").

The history of the rule against perpetuities in California is convoluted and confusing. From the early constitutional provision that "[n]o perpetuities shall be allowed except for eleemosynary purposes,"⁴ the rule has developed through decades of judicial interpretation, backtracking, and refinement, and periodic legislative attempts at clarification.⁵ California law includes the common law rule against perpetuities, with its lives in being plus 21 years,⁶ as well as an alternative 60-year period in gross.⁷ The harshness of judging the validity of nonvested interests at the time of their creation is mitigated by a *cy pres* provision permitting reform of instruments to avoid violation of the rule.⁸ Knowledgeable lawyers will also insert a perpetuities savings clause as appropriate to avoid violating the rule against perpetuities.

National movements for reform of perpetuities law have culminated in the Uniform Statutory Rule Against Perpetuities⁹, approved by the

4. Former Cal Const. art. XX, § 9 (repealed 1970); now stated in Civil Code § 715.

5. See generally 4 B. Witkin, *Summary of California Law Real Property*, §§ 377-404, at 568-92 (9th ed. 1987); Halbach, *Rule Against Perpetuities*, in *California Will Drafting Practice* §§ 12.1-12.54, at 547-79 (Cal. Cont. Ed. Bar 1982); Halbach, *id.*, §§ 12.1-12.54, at 215-20 (Cal. Cont. Ed. Bar Supp. 1988); Simes, *Perpetuities in California Since 1951*, 18 *Hastings L.J.* 247 (1967); Taylor, *A Study Relating to the "Vesting" of Interests Under the Rule Against Perpetuities*, 9 *Cal. L. Revision Comm'n Reports* 909, 910-15 (1969); Comment, *Rule Against Perpetuities: The Second Restatement Adopts Wait and See*, 19 *Santa Clara L. Rev.* 1063, 1081-91 (1979); Note, *California Revises the Rule Against Perpetuities--Again*, 16 *Stan. L. Rev.* 177-90 (1963).

6. Civil Code § 715.2. The section is quoted in the text *infra*.

7. Civil Code § 715.6 provides as follows:

715.6. No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code.

8. Civil Code § 715.5.

9. Unif. Statutory Rule Against Perpetuities (1986), 8A U.L.A. 132 (Supp. 1989) [hereinafter cited as "USRAP"].

National Conference of Commissioners on Uniform State Laws in 1986.¹⁰ The Uniform Statute has been enacted in five states -- Florida, Michigan, Minnesota, Nevada, and South Carolina¹¹ -- and is pending in several others.

The Uniform Statute has two principal virtues. It provides a simple, easily administered rule and it offers the best hope for achieving uniformity among the states.

Summary of USRAP

The Uniform Statute retains the common law rule against perpetuities as a validating rule,¹² but suspends its operation as an invalidating rule for a 90-year wait-and-see period running from the creation of the interest.¹³ The 90-year waiting period was chosen by the Uniform Drafting Committee as an approximation of (or proxy for) the common law period of lives in being plus 21 years.¹⁴ On petition

10. USRAP has also been approved by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers.

11. See Fla. Stat. Ann. § 689.225 (West Supp. 1989); Mich. Stat. Ann. §§ 26.48(1)-26.48(8) [88 PA 418] (Callaghan looseleaf 1989); Minn. Stat. Ann. §§ 501A.01-501A.07 (West Supp. 1989); Nev. Rev. Stat. Ann. §§ 111.103-111.1039 (Michie Supp. 1988); S.C. Code Ann. §§ 27-6-10 to 27-6-80 (Law. Co-op Supp. 1988).

12. The Prefatory Note to USRAP distinguishes between the validating and invalidating sides of the common law rule as follows:

Validating Side of the Common-law Rule: A nonvested property interest is valid when it is created (initially valid) if it is then certain to vest or terminate (fail to vest) -- one or the other -- no later than 21 years after the death of an individual then alive.

Invalidating Side of the Common-law Rule: A nonvested property interest is invalid when it is created (initially valid) if there is no such certainty.

13. For a fuller discussion, see the Prefatory Note to USRAP.

14. For background on the 90-year period, see Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 575-90 (1986); Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 Cornell L. Rev. 157 (1988).

of an interested person, a court may exercise a *cy pres* power to reform the disposition to approximate the donative transferor's manifested plan of distribution. The right of reformation does not arise until it is necessary. Generally, a disposition that violates the common law rule is not in need of reformation until the 90-year period expires or, in the case of a class gift, when a member of a class is entitled to enjoyment of a share before the expiration of the 90-year period.¹⁵

The Uniform Statute would also make other changes which are discussed below and in the comments to the sections in the proposed legislation.

USRAP and California Law Compared

Statement of the Rule Against Perpetuities

Civil Code Section 715.2 provides the basic California rule in the following language:

715.2. No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities.

The Uniform Statute provides a simplified form of this rule, holding that a "nonvested property interest is invalid" unless "when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive" or it "vests or terminates within 90 years after its creation."¹⁶ Thus, the common law rule against perpetuities continues as a validating principle, but

15. Reformation may also be had before the expiration of the 90-year period in the unlikely case where an interest can vest beyond the 90-year period but not before. See USRAP § 3(3) and comment.

16. See USRAP § 1(a). Special applications of the rule are provided for powers of appointment. See USRAP § 1(b)-(c).

its invalidating side is postponed in operation for the 90-year waiting period. No major changes would be made in the validating side of the rule by substituting the language of the Uniform Statute for the California provision.¹⁷

Cy Pres

In 1963, California enacted a *cy pres* rule permitting reformation of a disposition of property that otherwise would violate the rule against perpetuities "if and to the extent" that it can be reformed or construed to comply with the rule and to give effect to the general intent of the creator of the interest "whenever that general intent can be ascertained."¹⁸ Reformation can take place at any time after creation of the interest. Although the *cy pres* rule provides an opportunity to avoid some harsh applications of the rule against perpetuities, its reliance on judicial remedies is inefficient and expensive.

The Uniform Statute also provides a *cy pres* rule, as noted above, but makes resort to it unlikely because the 90-year waiting period should solve most of the problems before reformation would be necessary. Since the common law rule does not act to invalidate a disposition until the 90-year period has expired, the right of reformation under the Uniform Statute does not generally arise until it becomes useful, i.e., at the end of the waiting period. However, in the case of a class gift, where a member of a class is entitled to enjoyment of a share before that time, the disposition may be reformed on petition of an interested person. The *cy pres* standard under the Uniform Statute differs from the California standard, providing for reformation in the manner that "most closely approximates the transferor's manifested plan of distribution."¹⁹

17. The subsidiary doctrines of the common law rule are approved or disapproved in a comment to Section 1 of USRAP. A revised form of this comment is set out in the Background to Probate Code Section 21201 of the proposed legislation *infra*.

18. Civil Code § 715.5; see also Note, *California Revises the Rule Against Perpetuities -- Again*, 16 Stan. L. Rev. 177, 186-90 (1963).

19. USRAP § 3; see also Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 595-98 (1986).

Exclusions from Rule

By common law and statute, some types of interests are excluded from the coverage of the rule against perpetuities. The Uniform Statute explicitly excludes a variety of interests and in some respects would change California law.

Commercial Transactions. The California rule has been applied to commercial transactions, e.g., where a lease is to commence on completion of construction.²⁰ The Uniform Statute does not apply to commercial (nondonative) transactions.²¹ The period of a life in being plus 21 years is not relevant to commercial transactions.²² It makes no sense to apply a rule based on family-oriented donative transfers to interests created by contract whose nature is determined by negotiations between the parties. Limitations on the duration of commercial interests is better handled directly.²³

Charitable Dispositions. California law has always permitted perpetuities for eleemosynary purposes.²⁴ The Uniform Statute also excludes interests held by "a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision."²⁵

Insurance and Retirement Plans. By statute, California exempts trusts of hospital service contracts, group life insurance, group disability insurance, group annuities, profit-sharing, and retirement

20. See, e.g., *Wong v. Di Grazia*, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963); *Haggerty v. Oakland*, 161 Cal. App. 2d 407, 326 P.2d 957 (1958).

21. See USRAP § 4(1) and comment.

22. See Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 599-600 (1986).

23. See, e.g., Civil Code §§ 717-719 (limitations on duration of leases), 882.020-882.040 (ancient mortgages and deeds of trust), 883.210-883.270 (termination of dormant mineral rights).

24. Civil Code § 715 (continuing former Cal. Const. art. XX, § 9); see also 4 B. Witkin, *Summary of California Law Real Property* § 399, at 587-88 (9th ed. 1987).

25. See USRAP § 4(5).

plans from the rule against perpetuities.²⁶ The Uniform Statute exempts similar property interests from the statutory rule against perpetuities in different language.²⁷ The recommended legislation would continue much of the California language in addition to the exemption in the Uniform Statute.

Additional Exemptions. The Uniform Statute provides other explicit exemptions from the rule, including a fiduciary's administrative powers (as opposed to distributive powers),²⁸ a trustee's discretionary power to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in income and principal,²⁹ a power to appoint a fiduciary,³⁰ and any property interest, power of appointment, or arrangement that was not subject to the common law rule against perpetuities.³¹

Prospective Application

The Uniform Statute would apply only to dispositions made after the operative date, except that the reformation provision would apply to pre-operative date dispositions.³² This is not a major change in California law, since California already has a reformation provision.

Illustration

The operation of the common law, the California rules, and the Uniform Statute can be seen by way of an example: Suppose that A gives property in a testamentary trust to his daughter D for life, and the remainder to D's children who reach 25. Assume that D is alive at A's death.

26. Civil Code §§ 715.3, 715.4.

27. USRAP § 4(6).

28. USRAP § 4(2). This provision specifically lists the power to sell, lease, or mortgage property, and the power to determine principal and income.

29. USRAP § 4(4).

30. USRAP § 4(3).

31. USRAP § 4(7).

32. USRAP § 5.

This disposition would fail under the common law rule since the remainder interest could fail to vest within 21 years after the D's death.

Under California law, the interest could be saved by a petition to reform the disposition under Civil Code Section 715.5 to accomplish A's general intentions. The court could reduce the required age of D's children from 25 to 21 years.³³ Or, in appropriate circumstances, the will might be construed to provide that the remainder beneficiaries included only A's grandchildren alive at A's death.³⁴ Legal scholars have also urged that courts consider inserting an appropriate perpetuities saving clause in the course of reformation to preserve the 25-year contingency where possible.³⁵

Under the Uniform Statute, we would wait up to 90 years following A's death to see if the rule has been violated. In a normal case, this will be more than enough time and the property will pass as directed.³⁶ If the rule is violated at the end of the waiting period, such as where a grandchild was born after A's death and will not reach age 25 before the 90th anniversary of A's death, reformation would be appropriate under the Uniform Statute.³⁶

33. See, e.g., *Estate of Ghiglia*, 42 Cal. App. 3d 433, 442-43, 116 Cal. Rptr. 827 (1974) (required age reduced from 35 to 21 years).

34. See, e.g., *Estate of Grove*, 70 Cal. App. 3d 355, 363-65, 138 Cal. Rptr. 684 (1977).

35. See, e.g., Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. Rev. 1023, 1071-72 (1987) (insert saving clause immediately when disposition found to violate rule); Restatement (Second) of Property (Donative Transfers) § 1.5 comment d & Reporter's Note 5 (1983) (reformation in age contingency situations at end of wait-and-see period).

36. For a more detailed discussion of this type of case, see Example (3) in the comment to USAP § 3 (set out in revised form in the Background to Probate Code Section 21220 of the proposed legislation *infra*).

36. Reformation may take place under USRAP before the 90-year period has expired since some of A's grandchildren may have reached age 25. These grandchildren would be entitled to petition for reformation and it would be appropriate for the court to hold the share of the grandchild under 25 until the 90th anniversary of A's death.

Conclusion

The Commission recommends adoption of the Uniform Statute in California for a number of reasons.³⁷ The Uniform Statute (1) provides an easily administered rule, eliminating a number of complexities and ambiguities associated with the traditional rule, (2) offers the prospect for a significant degree of unity among the states, (3) eliminates the inappropriate coverage of commercial transactions from the rule, (4) reinforces the *cy pres* approach that is already a part of California law, and (5) avoids the need to litigate the validity of dispositions that will work out within the 90-year wait-and-see period.

37. See also the study by the Commission's consultant on this subject, Charles A. Collier, Jr., *The Uniform Statutory Rule Against Perpetuities* (February 1989) (on file at Commission's office).

#L-3013

su434
05/26/89

Probate Code §§ 21200-21231 (added). Uniform Statutory Rule Against Perpetuities and Related Provisions

Note. We have tentatively located USRAP in Division 11 of the new Probate Code concerning "Construction of Wills, Trusts, and Other Instruments." This seems logical, particularly since most of the trust statutes are in the Probate Code and perpetuities law relates mainly to trusts. There is also more room for USRAP here than in the Civil Code.

This draft also includes edited versions of the official comments from USRAP, which are set out in the Appendix. Much of the material in the official comments is important and useful, but other material is irrelevant or repetitious, or is directed toward those considering enactment of USRAP instead of to practitioners or courts seeking guidance after its enactment. Accordingly, the staff has edited these comments to eliminate nonrelevant material and to refer to the section numbers of the proposed draft, instead of to the Uniform Statute. This will make the relevant parts of the Uniform Statute comments readily accessible to California practitioners.

PART 2. PERPETUITIES

CHAPTER 1. UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Article 1. General Provisions

§ 21200. Short title

21200. This chapter shall be known and may be cited as the Uniform Statutory Rule Against Perpetuities.

Comment. Section 21200 provides a short title for this chapter and is the same as Section 6 of the Uniform Statutory Rule Against Perpetuities (1986). As to the construction of uniform acts, see Section 2(b).

§ 21201. Common law rule against perpetuities superseded

21201. This chapter supersedes the common law rule against perpetuities.

Comment. Section 21201 is the same in substance as part of Section 9 of the Uniform Statutory Rule Against Perpetuities (1986). This chapter supersedes the common law rule against perpetuities, which was specifically incorporated into California law by former Civil Code Section 715.2. This chapter and Chapter 2 (commencing with Section 21230) also supersede the statutory provisions relating to perpetuities in former Civil Code Sections 715-716.5 and 1391.1-1391.2.

Background. For background on Section 21201, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 31 *infra*.

Note. *The conclusive presumption of fertility -- the "fertile octogenarian" -- is a subsidiary common law rule that would be continued under this section. (See the discussion in the Appendix at page 30.) It should be remembered that the Commission modified this rule in the Trust Law as it relates to trust termination. Probate Code Section 15406 provides: "In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust pursuant to Section 15403 or 15404, the presumption of fertility is rebuttable."*

§ 21202. Prospective application

21202. (a) Except as provided by subdivision (b), this chapter applies only to nonvested property interests and powers of appointment created on or after the operative date of this chapter. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before the operative date of this chapter and is determined in a judicial proceeding, commenced on or after the operative date of this chapter, to violate this state's rule against perpetuities as that rule existed before the operative date of this chapter, a court on petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

Comment. Section 21202 is the same in substance as Section 5 of the Uniform Statutory Rule Against Perpetuities (1986). Under Section 21202, the new statutory rule against perpetuities applies only prospectively, except as provided in subdivision (b). The application of the reformation rule to preexisting interests is consistent with the reformation power under former Civil Code § 715.5.

Background (adapted from Prefatory Note to Uniform Statute). Section 21202 provides that the statutory rule against perpetuities applies only to nonvested property interests or powers of appointment created on or after this chapter's operative date. Although the statutory rule does not apply retroactively, Section 21202(b) authorizes a court to exercise its equitable power to reform

instruments that contain a violation of the former rule against perpetuities and to which the statutory rule does not apply because the offending property interest or power of appointment was created before the operative date of this chapter. Courts are urged to consider reforming such dispositions by judicially inserting a saving clause, since a saving clause would probably have been used at the drafting stage of the disposition had it been drafted competently.

For additional background on Section 21202, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 38 *infra*.

Note. The Uniform Statute takes a conservative approach and applies the 90-year waiting period and other aspects of the statutory rule only to nonvested interests created after the operative date of the new statute. It does, however, apply the reformation rule to interests that violate the state's preexisting perpetuities rule. In the interest of uniformity, the draft statute adopts the Uniform Statute's approach, but the Commission should consider whether the Uniform Statute should apply retroactively. The main effect would be to avoid the need to reform interests that violate the rule until 90 years after creation of the interest (or earlier in some cases discussed in draft Section 21220 and Comment). This approach would not invalidate any interest valid under prior law. It should not reopen any matters where the interest had been held invalid before the operative date. Nor would it disturb any settlements that had been made under prior law.

A distinct advantage of applying the new statute to all nonvested interests in existence on the operative date is that lawyers and judges will not have to keep two different bodies of law in mind. The Commission has taken the approach in other statutes of applying the new law to existing relationships to the extent possible. In this case, if the effect of retroactive application would be to invalidate interests valid under prior law, then it would not be appropriate. However, the effect of retroactive application in this statute would be to avoid invalidating existing interests and to avoid the need to commence judicial proceedings to reform the interest until the 90-year period had expired.

The following draft section would make USRAP apply to interests created before its operative date:

§ 21202 [alternative]. Application of chapter

21202. (a) Except as provided in subdivision (b), this chapter applies to nonvested property interests and powers of appointment regardless of whether they were created before, on, or after the operative date of this chapter.

(b) This chapter does not apply to any nonvested property interest or power of appointment the validity of which has been determined in a judicial proceeding or by a settlement among interested persons.

(b) If a nonvested property interest or a power of appointment was created before the operative date of this chapter and is determined in a judicial proceeding, commenced on or after the operative date of this chapter, to violate this state's rule against perpetuities as that rule existed

before the operative date of this chapter, a court on petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

Comment. Subdivision (a) of Section 21202 applies the new statutory rule against perpetuities to nonvested interests whether created before or after the operative date of this chapter, except as provided in subdivision (b). This differs from Section 5 of the Uniform Statutory Rule Against Perpetuities (1986).

Subdivision (b) is consistent with the first sentence of the general rule provided in Section 3(e). No liability attaches to actions taken under former law that would have been differently determined under this chapter. See Section 3(f). The application of this chapter to pending proceedings is governed by Section 3(h).

Article 2. Statutory Rule Against Perpetuities

§ 21205. Statutory rule against perpetuities as to nonvested property interests

21205. A nonvested property interest is invalid unless one of the following conditions is satisfied:

(a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive.

(b) The interest either vests or terminates within 90 years after its creation.

Comment. Section 21205 is the same in substance as Section 1(a) of the Uniform Statutory Rule Against Perpetuities (1986). See also Sections 21230 (validity of trusts), 21231 (spouse as life in being).

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21205 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a nonvested property interest that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is nevertheless valid if it does not actually remain nonvested when the allowable 90-year waiting period expires.

For additional background on Section 21205, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 42 *infra*.

Note. Draft Sections 21205-21207 set out the basic statutory rule against perpetuities with the validating common law rule in subdivision (a) and the 90-year waiting period in subdivision (b). It should be noted that the 90-year period has been subject to some vigorous criticism. (See the article by Professor Dukeminier attached to Memorandum 89-53 as Exhibit 1.) The 90-year period was arrived at by adding the statistical life expectancy of a six-year-old (69.6) with 21 and rounding down. Professor Dukeminier disputes the selection of a six-year-old, and suggests that in actual cases, the youngest life in being might just as well be 20, 30, 40, or 50, in which case 90 years is overlong. He suggests that empirical studies of perpetuities cases would give a better number. In any event, Professor Dukeminier argues against a fixed statutory waiting period and prefers the lives-in-being approach which adjusts the period of the rule for the circumstances of the case. He is also concerned that the common law rule will fade and ultimately disappear since it has no invalidating function under USRAP. In this regime, Professor Dukeminier suggests, there will be a temptation to make family trusts last for the full 90-year period.

Professor Waggoner defends the 90-year period in his article attached as Exhibit 2 to Memorandum 89-53. He argues an empirical study of actual cases would not be useful because the facts are not sufficiently stated in the opinions. As for the length of the period, he also suggests that the increase in life expectancy results in an increase in the permissible period of the common law over the time period thought acceptable by commentators in earlier generations. Professor Waggoner concedes that a statutory waiting period does not replicate the self-adjusting function of the common law rule, but counters that this is outweighed by the advantages of USRAP -- the 90-year waiting period is "litigation free, easy to determine, and unmistakable." He also notes that the 90-year period is intended to provide a margin of safety, but that interests that vest in a shorter time will continue to do so without using the remainder of the 90 years.

Comment C.1 to Section 1 of USRAP notes that jurisdictions "adopting this Act are . . . strongly urged not to adopt a different period of time."

§ 21206. Statutory rule against perpetuities as to general power of appointment not presently exercisable because of condition precedent

21206. A general power of appointment not presently exercisable because of a condition precedent is invalid unless one of the following conditions is satisfied:

(a) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive.

(b) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

Comment. Section 21206 is the same in substance as Section 1(b) of the Uniform Statutory Rule Against Perpetuities (1986). See also Sections 21230 (validity of trusts), 21231 (spouse as life in being).

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21206 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a power of appointment that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is nevertheless valid if the power ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires.

For additional background on Section 21206, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 53 *infra*.

§ 21207. Statutory rule against perpetuities as to nongeneral power of appointment or general testamentary power of appointment

21207. A nongeneral power of appointment or a general testamentary power of appointment is invalid unless one of the following conditions is satisfied:

(a) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive.

(b) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

Comment. Section 21207 is the same in substance as Section 1(c) of the Uniform Statutory Rule Against Perpetuities (1986). See also Sections 21230 (validity of trusts), 21231 (spouse as life in being).

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21207 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a power of appointment that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is nevertheless valid if the power ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires.

For additional background on Section 21207, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 53 *infra*.

§ 21208. Possibility of posthumous birth disregarded

21208. In determining whether a nonvested property interest or a power of appointment is valid under this article, the possibility that a child will be born to an individual after the individual's death is disregarded.

Comment. Section 21208 is the same in substance as Section 1(d) of the Uniform Statutory Rule Against Perpetuities (1986).

Background. For background on Section 21208, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 61 *infra*.

Article 3. Time of Creation of Interest

§ 21210. When nonvested property interest or power of appointment created

21210. Except as provided in Sections 21211 and 21212 and in subdivision (a) of Section 20202, the time of creation of a nonvested property interest or a power of appointment is determined by other applicable statutes or, if none, under general principles of property law.

Comment. Section 21210 is the same in substance as Section 2(a) of the Uniform Statutory Rule Against Perpetuities (1986), with the addition of the reference to other statutory provisions. This section supersedes former Civil Code Section 1391.1(b).

Background (adapted from Prefatory Note to Uniform Statute). This article defines the time when, for purposes of this chapter, a nonvested property interest or a power of appointment is created. The period of time allowed by Article 2 (commencing with Section 21205) (statutory rule against perpetuities) is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 21202, with certain exceptions, provides that this chapter applies only to nonvested property interests and powers of appointment created on or after the operative date of this chapter.

For additional background on Section 21210, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 63 *infra*.

Note. Michigan also revised this provision of the Uniform Statute to refer to the "statutory or common law." See Mich. Stat. Ann. § 26.48(3) *subd.* (1).

§ 21211. Postponement of time of creation of nonvested property interest or power of appointment in certain cases

21211. For purposes of this chapter:

(a) If there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (1) a nonvested property interest or (2) a property interest subject to a power of appointment described in Section 21206 or 21207, the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(b) A joint power with respect to community property held by individuals married to each other is a power exercisable by one person alone.

Comment. Section 21211 is the same in substance as Section 2(b) of the Uniform Statutory Rule Against Perpetuities (1986). Section 21211(a) supersedes former Civil Code Sections 716 and 1391.1(a). The reference to the Uniform Marital Property Act in Section 2(b) of the Uniform Statutory Rule Against Perpetuities is not included in Section 21211(b) because it is unnecessary in light of the definition of community property in Section 28. See the Comment to Section 28.

Background (adapted from Prefatory Note to Uniform Statute). Section 21211 provides that, if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest (or a property interest subject to a power of appointment described in Section 21206 or 21207), the time of creation of the

nonvested property interest or the power of appointment is postponed until the power to become unqualified beneficial owner ceases to exist. This is in accord with existing common law.

For additional background on Section 21211, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 64 *infra*.

§ 21212. Time of creation of nonvested property interest or power of appointment arising from transfer to trust or other arrangement

21212. For purposes of this chapter, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

Comment. Section 21212 is the same in substance as Section 2(c) of the Uniform Statutory Rule Against Perpetuities (1986).

Background (adapted from Prefatory Note to Uniform Statute).

Section 21212 provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable trust. Arguably, at common law, each transfer starts the period of the rule running anew as to that transfer. This difficulty is avoided by Section 21212.

For additional background on Section 21212, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 69 *infra*.

Article 4. Reformation

§ 21220. Reformation

21220. On petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by the applicable provision in Article 2 (commencing with Section 21205), if any of the following conditions is satisfied:

(a) A nonvested property interest or a power of appointment becomes invalid under the statutory rule against perpetuities provided in Article 2 (commencing with Section 21205).

(b) A class gift is not but might become invalid under the

statutory rule against perpetuities provided in Article 2 (commencing with Section 21205), and the time has arrived when the share of any class member is to take effect in possession or enjoyment.

(c) A nonvested property interest that is not validated by subdivision (a) of Section 21205 can vest but not within 90 years after its creation.

Comment. Section 21220 is the same in substance as Section 3 of the Uniform Statutory Rule Against Perpetuities (1986). Section 21220 supersedes former Civil Code Section 715.5 (reformation or construction to avoid violation of rule against perpetuities).

Background (adapted from Prefatory Note to Uniform Statute). Section 21220 directs a court, on petition of an interested person, to reform a disposition within the limits of the allowable 90-year period, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: (1) when a nonvested property interest or a power of appointment becomes invalid under the statutory rule; (2) when a class gift has not but still might become invalid under the statutory rule and the time has arrived when the share of a class member is to take effect in possession or enjoyment; and (3) when a nonvested property interest can vest, but cannot do so within the allowable 90-year waiting period. It is anticipated that the circumstances requisite to reformation under this section will rarely arise, and consequently that this section will seldom need to be applied.

For additional background on Section 21220, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 70 *infra*.

Note. The standard applicable under California law and the USRAP differ. Civil Code Section 715.5 saves dispositions if the instrument can be reformed or construed to "give effect to the general intent of the creator of the interest whenever that general intent can be ascertained." Section 715.5 also provides that it is to be liberally construed "to validate such interest to the fullest extent consistent with such ascertained intent." USRAP provides for reformation "in the manner that most closely approximates the transferor's manifested plan of distribution," but does set out any special rule concerning liberal construction.

It should also be noted that the USRAP reformation procedure generally applies only at the end of the 90-year waiting period, whereas Civil Code Section 715.5 may be invoked at any time. This is a consequence of the USRAP approach of postponing the invalidating side of the common law rule for 90 years and is one of the major changes worked by USRAP.

Article 5. Exclusions from Statutory Rule Against Perpetuities

§ 21225. Exclusions from statutory rule against perpetuities

21225. This chapter does not apply to any of the following:

(a) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (1) a premarital or postmarital agreement, (2) a separation or divorce settlement, (3) a spouse's election, (4) or a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (5) a contract to make or not to revoke a will or trust, (6) a contract to exercise or not to exercise a power of appointment, (7) a transfer in satisfaction of a duty of support, or (8) a reciprocal transfer.

(b) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income.

(c) A power to appoint a fiduciary.

(d) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal.

(e) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision.

(f) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse.

(g) A property interest, power of appointment, or arrangement that

was not subject to the common law rule against perpetuities or is excluded by another statute of this state.

(h) A trust created for the purpose of providing for its beneficiaries under hospital service contracts, group life insurance, group disability insurance, group annuities, or any combination of such insurance, as defined in the Insurance Code.

Comment. Subdivisions (a)-(g) of Section 21225 are the same in substance as Section 4 of the Uniform Statutory Rule Against Perpetuities (1986). Subdivision (e) supersedes former Civil Code Section 715 (no perpetuities allowed except for eleemosynary purposes). Subdivision (h) restates former Civil Code Section 715.4 without substantive change.

Background (adapted from Prefatory Note to Uniform Statute). Section 21225 identifies the interests and powers that are excluded from the Statutory Rule Against Perpetuities. This section is in part declaratory of existing common law. All the exclusions from the common law rule recognized at common law and by statute in this state are preserved. In line with long-standing scholarly commentary, Section 21225(a) excludes nondonative transfers from the statutory rule. The rule against perpetuities is an inappropriate instrument of social policy to use as a control on such arrangements. The period of the rule -- a life in being plus 21 years -- is suitable for donative transfers only.

For additional background on Section 21225, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 77 *infra*.

Note. With some reluctance, we have continued the language of Civil Code Section 715.4 in draft Section 21225(h). This is the cautious approach since it is difficult to determine whether the uniform language in subdivision (f) covers all of the ground covered by Section 715.4.

CHAPTER 2. RELATED PROVISIONS

§ 21230. Validity of trusts

21230. (a) A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which nonvested property interests must vest, if the interest of all the beneficiaries must vest, if at all, within that time.

(b) If a trust is not limited in duration to the time within which nonvested property interests must vest, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond that time.

(c) If a trust has existed longer than the time within which nonvested property interests must vest, the following apply:

(1) The trust shall be terminated upon the request of a majority of the beneficiaries.

(2) The trust may be terminated by a court of competent jurisdiction on petition of the Attorney General or of any person who would be affected the termination if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected by the termination.

Comment. Section 21230 restates former Civil Code Section 716.5 without substantive change. The phrase "future interests in property" has been replaced with "nonvested property interests" to conform to the terminology of the Uniform Statutory Rule Against Perpetuities (1986) in Chapter 1 (commencing with Section 21200). The rules governing the time within which nonvested property interests must vest are provided in Sections 21205-21207 (statutory rule against perpetuities). For a discussion of trust termination at the end of the perpetuities period, see the Background to Section 21201.

§ 21231. Spouse as life in being

21231. In determining the validity of a nonvested property interest pursuant to Article 2 (commencing with Section 21205) of Chapter 1, an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a "life in being" at that time whether or not the individual so described was then in being.

Comment. Section 21231 restates former Civil Code Section 715.7 without substantive change.

Note. Civil Code Section 715.7 was enacted in 1963 to repudiate the unborn widow rule. This section has the effect of validating interests in the usual case where the spouse is a life in being and also in the highly unusual case where the spouse is not a life in being. This provision would have a very small part to play under the Uniform Statute since it would save an otherwise invalid interest only at the end of the 90-year waiting period. Should this California reform be preserved to play this role, or should it be retired in the interest of uniformity?

REPEALED SECTIONS AND CONFORMING REVISIONS

Heading for Article 3 (commencing with Section 715) (amended)

SEC. . The heading of Article 3 (commencing with Section 715) of Chapter 1 of Title 2 of Part 1 of Division 2 of the Civil Code is amended to read:

Article 3. ~~Restraints Upon Alienation~~ Duration of Leases

Civil Code § 715 (repealed). Perpetuities disallowed except for eleemosynary purposes

~~715.---No perpetuities shall be allowed except for eleemosynary purposes.~~

Comment. Former Section 715 is superseded by Probate Code Section 21225(e).

Civil Code § 715.2 (repealed). Rule against perpetuities

~~715.2.---No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies.---The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.---It is intended by the enactment of this section to make effective in this State the American common law rule against perpetuities.~~

Comment. Former Section 715.2 is superseded by the Uniform Statutory Rule Against Perpetuities in Probate Code Sections 21205-21207. See also Prob. Code § 21201 (common law rule against perpetuities superseded).

Note. The draft statute does not continue the provision in Section 715.2 relating to the permissible limits of the class of measuring lives. This was omitted in the interest of uniformity, but also because it does not seem very important in the face of a 90-year waiting period. However, the provision could be retained in Chapter 2 of the draft.

Civil Code § 715.3 (repealed). Rule against perpetuities as to profit-sharing and retirement plans

~~715.3.--No trust heretofore or hereafter created forming part of a profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries or forming part of a retirement plan formed primarily for the purpose of providing benefits for employees on or after retirement shall be deemed invalid as violating Section 715.2 of this code; and the income arising from such property, real or personal, held in such trust may be permitted to accumulate until the fund is sufficient, in the opinion of the trustee or trustees thereof, to accomplish the purposes of the trust.~~

Comment. The exception to the rule against perpetuities in the first clause of former Section 715.3 is superseded by Probate Code Section 21225(f) (exclusion from coverage of Uniform Statutory Rule Against Perpetuities). The exception from prohibitions on accumulations in the second clause of former Section 715.3 is continued in Section 724(b).

Civil Code § 715.4 (repealed). Rule against perpetuities as to insurance trusts

~~715.4.--No trust heretofore or hereafter created for the purpose of providing for the beneficiaries of such trust under hospital service contracts, group life insurance, group disability insurance, group annuities, or any combination of such insurance, as defined in the Insurance Code, shall be deemed invalid as violating Section 715.2 of this code.~~

Comment. Former Section 715.4 is restated without substantive change in Probate Code Section 21225(h) (exclusion from coverage of Uniform Statutory Rule Against Perpetuities).

Civil Code § 715.5 (repealed). Reformation

~~715.5.--No interest in real or personal property is either void or voidable as in violation of Section 715.2 of this code if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.~~

Comment. Former Section 715.5 is superseded by Probate Code Section 21220 (reformation under Uniform Statutory Rule Against Perpetuities).

Note. The liberal construction rule in the last sentence has not been explicitly continued in the draft statute, in the interest of uniformity. The reformation standard in USRAP differs from that stated in this section. However, in view of the length the USRAP comment goes to establish this same principle, it might be better to continue the rule as an additional provision in Chapter 2 or as part of draft Section 21220.

Civil Code § 715.6 (repealed). Vesting within 60 years

~~715.6. No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code.~~

Comment. Section 715.6 is superseded by the Uniform Statutory Rule Against Perpetuities, in particular, Probate Code Sections 21205-21207.

Civil Code § 715.7 (repealed). Spouse as life in being

~~715.7. In determining the validity of a future interest in real or personal property pursuant to Section 715.2 of this code, an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a "life in being" at such time whether or not the individual so described was then in being.~~

Comment. Former Civil Code Section 715.7 is restated without substantive change in Probate Code Section 21231.

Civil Code § 716 (repealed). Exclusion of time during which interest is destructible

~~716. The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not to be included in determining the permissible period for the vesting of an interest within the rule against perpetuities.~~

Comment. Former Civil Code Section 716 is superseded by Probate Code Section 21211.

Civil Code § 716.5 (repealed). Validity of trusts

~~716.5. (a) A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which future interests in property must vest under this title, if the interest of all the beneficiaries must vest, if at all, within that time.~~

~~(b) If a trust is not limited in duration to the time within which future interests in property must vest under this title, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond that time.~~

~~(c) Whenever a trust has existed longer than the time within which future interests in property must vest under this title, the following shall apply:~~

~~(1) It shall be terminated upon the request of a majority of the beneficiaries.~~

~~(2) It may be terminated by a court of competent jurisdiction upon the petition of the Attorney General or of any person who would be affected thereby if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected thereby.~~

Comment. Section 716.5 is restated without substantive change in Probate Code Section 21230.

Civil Code § 722 (amended). Time limit on accumulations

722 Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules ~~prescribed in this Title in relation~~ relating to future interests.

Comment. Section 722 is amended to reflect relocation of statutes concerning perpetuities to the Probate Code. See Prob. Code §§ 21200-21231 (superseding former Civil Code §§ 715-716.5).

Civil Code § 724 (amended). Time limit on accumulations

724. (a) An accumulation of the income of property may be directed by any will, trust or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, for

the benefit of one or more persons objects or purposes, but may not extend beyond the time ~~in this title~~ permitted for the vesting of future interests.

(b) Notwithstanding subdivision (a), the income arising from real or personal property held in a trust forming part of a profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries or forming part of a retirement plan formed primarily for the purpose of providing benefits for employees on or after retirement may be permitted to accumulate until the fund is sufficient, in the opinion of the trustee or trustees, to accomplish the purposes of the trust.

Comment. Section 724 is amended to reflect the revision and relocation of the statutes concerning perpetuities to the Probate Code. See Prob. Code §§ 21200-21231 (superseding former Civil Code §§ 715-716.5). Subdivision (b) restates the last clause of former Section 715.3 relating to accumulations without substantive change.

Civil Code § 773 (amended). Limitations on future estates

773. Subject to the rules of this title, and of Part 1 of this division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed ~~in Section 715.2~~ by the statutory rule against perpetuities in Article 2 (commencing with Section 21205) of Chapter 1 of Part 2 of Division 11 of the Probate Code.

Comment. Section 773 is amended to incorporate the new statutory rule against perpetuities that superseded the rule provided by former Section 715.2.

Civil Code § 1391 (added). Applicable rule against perpetuities

1391. The statutory rule against perpetuities provided by Chapter 1 (commencing with Section 21200) of Part 2 of Division 11 of the Probate Code applies to powers of appointment governed by this part.

Comment. Section 1391 is a new section providing a cross-reference to the statutory rule against perpetuities.

Civil Code § 1391.1 (repealed). Beginning of permissible period for powers of appointment

~~1391.1. The permissible period under the applicable rule against perpetuities with respect to interests sought to be created by an exercise of a power of appointment begins:~~

~~(a) In the case of an instrument exercising a general power of appointment presently exercisable by the donee alone, on the date the appointment becomes effective.~~

~~(b) In all other situations, at the time of the creation of the power.~~

Comment. Subdivision (a) of former Section 1391.1 is superseded by Probate Code Section 21211(a). Subdivision (b) is superseded by Probate Code Section 21210.

Civil Code § 1391.2 (repealed). Facts and circumstances affecting validity of interests created by exercise of power of appointment

~~When the permissible period under the applicable rule against perpetuities begins at the time of the creation of a power of appointment with respect to interests sought to be created by an exercise of the power, facts and circumstances existing at the effective date of the instrument exercising the power shall be taken into account in determining the validity of interests created by the instrument exercising the power.~~

Comment. Former Section 1391.2 is superseded by the statutory rule against perpetuities. See Prob. Code §§ 21206-21207 (statutory rule against perpetuities as to powers of appointment), 21220 (reformation). The second-look doctrine, codified in this section, is a part of the common law carried forward in the Uniform Statutory Rule Against Perpetuities (1986). See the Background to Prob. Code §§ 21206-21207.

Note. This section has not been continued in the draft statute in the interest of uniformity, and because it does not seem to be needed since USRAP would suspend the invalidating side of the common law rule for 90 years.

APPENDIX

BACKGROUND TO SECTION 21201

[Adapted from Comment G to Section 1 of the
Uniform Statutory Rule Against Perpetuities (1986)]

As provided in Section 21201, this chapter supersedes the common law rule against perpetuities (common law rule) and the statutory provisions previously in effect, replacing them with the statutory rule against perpetuities (statutory rule) set forth in Article 2 (commencing with Section 21205) and by the other provisions in this chapter.

Unless excluded by Section 21225, the statutory rule applies to nonvested property interests and to powers of appointment over property or property interests that are nongeneral powers, general testamentary powers, or general powers not presently exercisable because of a condition precedent. The statutory rule does not apply to vested property interests. See, e.g., X's interest in Example (23) in the Background to this section. Nor does the statutory rule apply to presently exercisable general powers of appointment. See, e.g., G's power in Example (19) in the Background to Section 21206; G's power in Example (1) in the Background to Section 21211; A's power in Example (2) in the Background to Section 21211; X's power in Example (3) in the Background to Section 21211; A's noncumulative power of withdrawal in Example (4) in the Background to Section 21211.

G. Subsidiary Common Law Doctrines: Whether Superseded by this Chapter

The courts, in interpreting the common law rule, developed several subsidiary doctrines. This chapter does not supersede those subsidiary doctrines except to the extent the provisions of this chapter conflict with them. As explained below, most of these common law doctrines remain in full force or in force in modified form.

1. Constructional Preference for Validity

Professor Gray in his treatise on the common law rule against perpetuities declared that a will or deed is to be construed without regard to the rule, and then the rule is to be "remorselessly" applied to the provisions so construed. J. Gray, *The Rule Against Perpetuities* § 629 (4th ed. 1942). Some courts may still adhere to this proposition. *Colorado Nat'l Bank v. McCabe*, 143 Colo. 21, 353 P.2d 385 (1960). Most courts, it is believed, would today be inclined to adopt the proposition put by the Restatement of Property § 375 (1944), which is that where an instrument is ambiguous -- that is, where it is fairly susceptible to two or more constructions, one of which causes a rule violation and the other of which does not -- the construction that does not result in a rule violation should be adopted. The California rule favors construction for validity. See, e.g., *Civil Code* § 3541; *Wong v. Di Grazia*, 60 Cal. 2d 525, 539-40, 386 P.2d 817, 35 Cal. Rptr. 241 (1963); *Estate of Phelps*, 182 Cal. 752, 761, 190 P. 17 (1920); *Estate of Grove*, 70 Cal. App. 3d 355, 362-63, 138 Cal. Rptr. 684 (1977). Other cases supporting this view include: *Southern Bank & Trust Co. v. Brown*, 271 S.C. 260, 246 S.E.2d 598 (1978); *Davis v. Rossi*, 326 Mo.

911, 34 S.W.2d 8 (1930); *Watson v. Goldthwaite*, 184 N.E.2d 340, 343 (Mass. 1962); *Walker v. Bogle*, 244 Ga. 439, 260 S.E.2d 338 (1979); *Drach v. Ely*, 703 P.2d 746 (Kan. 1985).

The constructional preference for validity is not superseded by this chapter, but its role is likely to be different. The situation is likely to be that one of the constructions to which the ambiguous instrument is fairly susceptible would result in validity under Section 21205(a), 21206(a), or 21207(a), but the other construction does not necessarily result in invalidity; rather it results in the interest's validity being governed by Section 21205(b), 21206(b), or 21207(b). Nevertheless, even though the result of adopting the other construction is not as harsh as it is at common law, it is expected that the courts will incline toward the construction that validates the disposition under Section 21205(a), 21206(a), or 21207(a).

2. Conclusive Presumption of Lifetime Fertility

At common law, all individuals -- regardless of age, sex, or physical condition -- are conclusively presumed to be able to have children throughout their entire lifetimes. This principle is not superseded by this chapter, and in view of the widely accepted rule of construction that adopted children are presumptively included in class gifts, the conclusive presumption of lifetime fertility is not unrealistic. Since even elderly individuals probably cannot be excluded from adopting children based on their ages alone, the possibility of having children by adoption is seldom extinct. See, generally, *Waggoner, In re Lattouf's Will and the Presumption of Lifetime Fertility in Perpetuity Law*, 20 San Diego L. Rev. 763 (1983). Under this chapter, the main force of this principle is felt as in Example (7) in the Background to Section 21205, where it prevents a nonvested property interest from passing the test for initial validity under Section 21205(a).

For a California case approving the common law rule, see *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 184, 187 P. 425 (1920).

3. Act Supersedes Doctrine of Infectious Invalidity

At common law, the invalidity of an interest can, under the doctrine of infectious invalidity, be held to invalidate one or more otherwise valid interests created by the disposition or even invalidate the entire disposition. The question turns on whether the general dispositive scheme of the transferor will be better carried out by eliminating only the invalid interest or by eliminating other interests as well. This is a question that is answered on a case-by-case basis. Several items are relevant to the question, including who takes the stricken interests in place of those the transferor designated to take. For the rule applied in California, see, e.g., *Estate of Willey*, 128 Cal. 1, 11, 60 P. 471 (1900) (severance allowed); *Estate of Gump*, 16 Cal. 2d 535, 547, 107 P.2d 17 (1940) (severance allowed); *Estate of Van Wyck*, 185 Cal. 49, 63, 196 P. 50 (1921) (severance denied); *Sheean v. Michel*, 6 Cal. 2d 324, 329, 57 P.2d 127 (1936) (severance denied).

The doctrine of infectious invalidity is superseded by Section 21220, under which the court, on petition of an interested person, is required to reform the disposition to approximate as closely as possible the transferor's manifested plan of distribution when an invalidity under the statutory rule occurs.

4. Separability.

The common law's separability doctrine is that when an interest is expressly subject to alternative contingencies, the situation is treated as if two interests were created in the same person or class. Each interest is judged separately; the invalidity of one of the interests does not necessarily cause the other one to be invalid. This common law principle was established in *Longhead v. Phelps*, 2 Wm. Bl. 704, 96 Eng. Rep. 414 (K.B. 1770), and is followed in this country. L. Simes & A. Smith, *The Law of Future Interests* § 1257 (2d ed. 1956); 6 *American Law of Property* § 24.54 (A. Casner ed. 1952); *Restatement of Property* § 376 (1944). Under this doctrine, if property is devised "to B if X-event or Y-event happens," B in effect has two interests, one contingent on X-event happening and the other contingent on Y-event happening. If the interest contingent on X-event but not the one contingent on Y-event is invalid, the consequence of separating B's interest into two is that only one of them, the one contingent on X-event, is invalid. B still has a valid interest -- the one contingent on the occurrence of Y-event.

The separability principle is not superseded by this chapter. As illustrated in the following example, its invocation will usually result in one of the interests being initially validated by Section 21205(a) and the validity of the other interest being governed by Section 21205(b).

Example (22) -- Separability case. G devised real property "to A for life, then to A's children who survive A and reach 25, but if none of A's children survives A or if none of A's children who survives A reaches 25, then to B." G was survived by his brother (B), by his daughter (A), by A's husband (H), and by A's two minor children (X and Y).

The remainder interest in favor of A's children who reach 25 fails the test of Section 21205(a) for initial validity. Its validity is, therefore, governed by Section 21205(b) and depends on each of A's children doing any one of the following things within 90 years after G's death: predeceasing A, surviving A and failing to reach 25, or surviving A and reaching 25.

Under the separability doctrine, B has two interests. One of them is contingent on none of A's children surviving A. That interest passes Section 21205(a)'s test for initial validity; the validating life is A. B's other interest, which is contingent on none of A's surviving children reaching 25, fails Sections 21205(a)'s test for initial validity. Its validity is governed by Section 21205(b) and depends on each of A's surviving children either reaching 25 or dying under 25 within 90 years after G's death.

Suppose that after G's death, A has a third child (Z). A subsequently dies, survived by her husband (H) and by X, Y, and Z. This, of course, causes B's interest that was contingent on none of A's children surviving A to terminate. If X, Y, and Z had all reached the age of 25 by the time of A's death, their interest would vest at A's death, and that would end the matter. If one or two, but not all three of them, had reached the age of 25 at A's death, B's other

interest -- the one that was contingent on none of A's surviving children reaching 25 -- would also terminate. As for the children's interest, if the after-born child Z's age was such at A's death that Z could not be alive and under the age of 25 at the expiration of the allowable waiting period, the class gift in favor of the children would be valid under Section 21205(b), because none of those then under 25 could fail either to reach 25 or die under 25 after the expiration of the allowable 90-year waiting period. If, however, Z's age at A's death was such that Z could be alive and under the age of 25 at the expiration of the allowable 90-year waiting period, the circumstances requisite to reformation under Section 21220(b) would arise, and the court would be justified in reforming G's disposition by reducing the age contingency with respect to Z to the age he would reach on the date when the allowable waiting period is due to expire. See Example (3) in the Background to Section 21220. So reformed, the class gift in favor of A's children could not become invalid under Section 21205(b), and the children of A who had already reached 25 by the time of A's death could receive their shares immediately.

5. The "All-or-Nothing" Rule with Respect to Class Gifts

The common law applies an "all-or-nothing" rule with respect to class gifts, under which a class gift stands or falls as a whole. The all-or-nothing rule, usually attributed to *Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), is commonly stated as follows: If the interest of any potential class member might vest too remotely, the entire class gift violates the rule. Although this chapter does not supersede the basic idea of the much-maligned "all-or-nothing" rule, the evils sometimes attributed to it are substantially if not entirely eliminated by the wait-and-see feature of the statutory rule and by the availability of reformation under Section 21220, especially in the circumstances described in Section 21220(b)-(c). For illustrations of the application of the all-or-nothing rule under this chapter, see Examples (3), (4), and (6) in the Background to Section 21220.

For application and interpretation of the all-or-nothing rule California, see, e.g., *Estate of Troy*, 214 Cal. 53, 3 P.2d 9300 (1931); *Estate of Grove*, 70 Cal. App. 3d 355, 361-62, 138 Cal. Rptr. 684 (1977); *Estate of Ghiglia*, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974).

6. The Specific Sum Doctrine

The common law recognizes a doctrine called the specific sum doctrine, which is derived from *Storrs v. Benbow*, 3 De G.M. & G. 390, 43 Eng. Rep. 153 (Ch. 1853), and states: If a specified sum of money is to be paid to each member of a class, the interest of each class member is entitled to separate treatment and is valid or invalid under the rule on its own. The specific sum doctrine is not superseded by this chapter.

The operation of the specific sum doctrine under this chapter is illustrated in the following example.

Example (23) -- Specific sum case. G bequeathed "\$10,000 to each child of A, born before or after my death, who attains 25." G was survived by A and by A's two children (X and Y).

X but not Y had already reached 25 at G's death. After G's death a third child (Z) was born to A.

If the phrase "born before or after my death" had been omitted, the class would close as of G's death under the common law rule of construction known as the rule of convenience: The after-born child, Z, would not be entitled to a \$10,000 bequest, and the interests of both X and Y would be valid upon their creation at G's death. X's interest would be valid because it was initially vested; neither the common law rule nor the statutory rule applies to interests that are vested upon their creation. Although the interest of Y was not vested upon its creation, it would be initially valid under Section 21205(a) because Y would be his own validating life; Y will either reach 25 or die under 25 within his own lifetime.

The inclusion of the phrase "before or after my death," however, would probably be construed to mean that G intended after-born children to receive a \$10,000 bequest. See Earle Estate, 369 Pa. 52, 85 A.2d 90 (1951). Assuming that this construction were adopted, the specific sum doctrine allows the interest of each child of A to be treated separately from the others for purposes of the statutory rule. For the reasons cited above, the interests of X and Y are initially valid under Section 21205(a). The nonvested interest of Z, however, fails Section 21205(a)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could reach 25 or die under 25 more than 21 years after the death of the survivor of A, X, and Y. Under Section 21205(b), the validity of Z's interest depends on Z's reaching (or failing to reach) 25 within 90 years after G's death.

7. The Sub-Class Doctrine

The common law recognizes a doctrine called the sub-class doctrine, which is derived from *Cattlin v. Brown*, 11 Hare 372, 68 Eng. Rep. 1318 (Ch. 1853), and states: If the ultimate takers are not described as a single class but rather as a group of subclasses, and if the share to which each separate subclass is entitled will finally be determined within the period of the rule, the gifts to the different subclasses are separable for the purpose of the rule. *American Security & Trust Co. v. Cramer*, 175 F. Supp. 367 (D.D.C. 1959); *Restatement of Property* § 389 (1944). The sub-class doctrine is not superseded by this chapter.

The operation of the sub-class doctrine under this chapter is illustrated in the following example.

Example (24) -- Sub-class case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to the children of such child." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. A now has died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the children of a child of A is treated separately from the others. This allows the remainder interest in favor of X's children and the remainder interest in favor of Y's children to be validated under Section 21205(a). X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the children of Z fails Section 21205(a)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could have children more than 21 years after the death of the survivor of A, X, and Y. Under Section 21205(b), the validity of the remainder interest in favor of Z's children depends on Z's dying within 90 years after G's death.

Note why both of the requirements of the sub-class rule are met. The ultimate takers are described as a group of sub-classes rather than as a single class: "children of the child so dying," as opposed to "grandchildren." The share to which each separate sub-class is entitled is certain to be finally determined within a life in being plus 21 years: As of A's death, who is a life in being, it is certain to be known how many children he had surviving him; since in fact there were three, we know that each sub-class will ultimately be entitled to one-third of the corpus, neither more nor less. The possible failure of the one-third share of Z's children does not increase to one-half the share going to X's and Y's children; they still are entitled to only one-third shares. Indeed, should it turn out that X has children but Y does not, this would not increase the one-third share to which X's children are entitled.

Example (25) -- General testamentary powers -- sub-class case. G devised property in trust, directing the trustee to pay income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to such persons as the one so dying shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. The general testamentary powers conferred on each of A's children are entitled to separate treatment under the principles of the sub-class doctrine. See above. Consequently, the powers conferred on X and Y, A's children who were living at G's death, are initially valid under Section 21207(a). But the general testamentary power conferred on Z, A's child who was born after G's death, fails the test of Section 21207(a) for initial validity. The validity of Z's power is governed by Section 21207(b). Z's death must occur within 90 years after G's death if any provision in Z's will purporting to exercise his power is to be valid.

8. Duration of Indestructible Trusts -- Termination of Trusts by Beneficiaries

The widely accepted view in American law is that the beneficiaries of a trust other than a charitable trust can compel its premature termination if all beneficiaries consent and if such termination is not expressly restrained or impliedly restrained by the existence of a "material purpose" of the settlor in establishing the trust. Restatement (Second) of Trusts § 337 (1959); 4 A. Scott, *The Law of Trusts* § 337 (3d ed. 1967). California law varies this rule by giving the court discretion in applying the material purposes doctrine, except as to a restraint on disposition of the beneficiaries interest. See Section 15403.

A trust that cannot be terminated by its beneficiaries is called an indestructible trust. It is generally accepted that the duration of the indestructibility of a trust, other than a charitable trust, is limited to the applicable perpetuity period. See Restatement (Second) of Trusts § 62 comment o (1959); Restatement (Second) of Property (Donative Transfers) § 2.1 & Legislative Note & Reporter's Note (1983); 1 A. Scott, *The Law of Trusts* § 62.10(2) (3d ed. 1967); J. Gray, *The Rule Against Perpetuities* § 121 (4th ed. 1942); L. Simes & A. Smith, *The Law of Future Interests* §§ 1391-93 (2d ed. 1956). In California this rule is provided by statute. See Section 21230 (continuing former Civil Code § 716.5). Nothing in this chapter supersedes this principle. One modification, however, is necessary: As to trusts that contain a nonvested property interest or power of appointment whose validity is governed by the wait-and-see element adopted in Section 21205(b), 21206(b), or 21207(b), the courts can be expected to determine that the applicable perpetuity period is 90 years.

BACKGROUND TO SECTION 21202

[Adapted from the Comment to Section 5 of the
Uniform Statutory Rule Against Perpetuities (1986)]

1. Subdivision (a): Chapter Not Retroactive

This section provides that, except as provided in subdivision (b), the statutory rule against perpetuities and the other provisions of this chapter apply only to nonvested property interests or powers of appointment created on or after this chapter's operative date. With one exception, in determining when a nonvested property interest or a power of appointment is created, the principles of Article 3 (commencing with Section 21210) are applicable. Thus, for example, a property interest (or a power of appointment) created in a revocable inter vivos trust is created when the power to revoke terminates. See Example (1) in the Background to Section 21211.

The second sentence of subdivision (a) establishes a special rule for nonvested property interests (and powers of appointment) created by the exercise of a power of appointment. For purposes of this section only, a nonvested property interest (or a power of appointment) created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise of the power becomes irrevocable. Consequently, all the provisions of this chapter except Section 21202(b) apply to a nonvested property interest (or power of appointment) created by a donee's exercise of a power of appointment where the donee's exercise, whether revocable or irrevocable, occurs on or after the operative date of this chapter. All the provisions of this chapter except Section 21202(b) also apply where the donee's exercise occurred before the operative date of this chapter if: (1) that pre-operative-date exercise was revocable and (2) that revocable exercise becomes irrevocable on or after the operative date of this chapter. This special rule applies to the exercise of all types of powers of appointment -- presently exercisable general powers, general testamentary powers, and nongeneral powers.

If the application of this special rule determines that the provisions of this chapter (except Section 21202(b)) apply, then for all such purposes, the time of creation of the appointed nonvested property interest (or appointed power of appointment) is determined by reference to Article 3 (commencing with Section 21210), without regard to the special rule contained in the second sentence of Section 21202(a).

If the application of this special rule of Section 21202(a) determines that the provisions of this chapter (except Section 21202(b)) do not apply, then Section 21202(b) is the only potentially applicable provision of this chapter.

Example (1) -- Testamentary power created before but exercised after the operative date of this chapter. G was the donee of a general testamentary power of appointment created by the will of his mother, M. M died in 1980. Assume that the operative date of the chapter is January 1, 1991. G died in 1992, leaving a will that exercised his general testamentary power of appointment.

Under the special rule in the second sentence of Section 21202(a), any nonvested property interest (or power of

appointment) created by G in his will in exercising his general testamentary power was created (for purposes of Section 21202) at G's death in 1992, which was after the operative date of this chapter.

Consequently, all the provisions of this chapter apply (except Section 21202(b)). That point having been settled, the next step is to determine whether the nonvested property interests or powers of appointment created by G's testamentary appointment are initially valid under Section 21205(a), 21206(a), or 21207(a), or whether the wait-and-see element established in Section 21205(b), 21206(b), or 21207(b) apply. If the wait-and-see element does apply, it must also be determined when the allowable 90-year waiting period starts to run. In making these determinations, the principles of Article 3 (commencing with Section 21210) control the time of creation of the nonvested property interests (or powers of appointment); under Article 3, since G's power was a general testamentary power of appointment, the common law relation back doctrine applies and the appointed nonvested property interests (and appointed powers of appointment) are created at M's death in 1980.

If G's testamentary power of appointment had been a nongeneral power rather than a general power, the same results as described above would apply.

Example (2) -- Presently exercisable nongeneral power created before but exercised after the operative date of this chapter. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable nongeneral power. If G exercised the power in 1992, after the operative date of this chapter (or, if a pre-operative-date revocable exercise of his power became irrevocable in 1992, after the operative date of this chapter), the same results as described above in Example (1) would apply.

Example (3) -- Presently exercisable general power created before but exercised after the operative date of this chapter. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable general power. If G exercised the power in 1992, after the operative date of this chapter (or, if a pre-operative-date revocable exercise of his power became irrevocable in 1992, after the operative date of this chapter), all the provisions of this chapter (except Section 21202(b)) apply; for such purposes, Article 3 (commencing with Section 21210) controls the date of creation of the appointed nonvested property interests (or appointed powers of appointment), without regard to the special rule of the second sentence of Section 21202(a). With respect to the exercise of a presently exercisable general power, it is possible -- indeed, probable -- that the special rule of the second sentence of Section 21202(a) and the rules of Article 3 agree on the same date of creation for their respective purposes, that date being the date the power was irrevocably exercised (or a revocable exercise thereof became irrevocable).

2. Subdivision (b): Reformation of Pre-existing Instruments

Although the statutory rule against perpetuities and the other provisions of this chapter do not apply retroactively, subdivision (b) recognizes a court's authority to exercise its equitable power to reform instruments that contain a violation of the common law rule against perpetuities (or of a statutory version or variation thereof) and to which the statutory rule does not apply because the offending nonvested property interest or power of appointment in question was created before the operative date of this chapter. This equitable power to reform is recognized only where the violation of the former rule against perpetuities is determined in a judicial proceeding that is commenced on or after the operative date of this chapter. Subdivision (b) constitutes statutory authority for a court to exercise its equitable reformation power.

3. Guidance as to How to Reform

Subdivision (b) is to be understood as authorizing a judicial insertion of a saving clause into the instrument. See Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 Mich. L. Rev. 1 (1963); Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718, 1755-59 (1983); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 546-49 (1982). This method of reformation allows reformation to achieve an after-the-fact duplication of a professionally competent product. Such a technique would have been especially suitable in the cases that have already arisen, for it probably would have allowed the dispositions in all of them to have been rendered valid without disturbing the transferor's intent at all. See Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718, 1756 n. 103 (1983). The insertion of a saving clause grants a more appropriate opportunity for the property to go to the intended beneficiaries. Furthermore, it would also be a suitable technique in fertile octogenarian, unborn widow, and administrative contingency cases. A saving clause is one of the formalistic devices that a professionally competent lawyer would have used before the fact to ensure initial validity in these cases. Insofar as other violations are concerned, the saving clause technique also grants every appropriate opportunity for the property to go to the intended beneficiaries.

In selecting the lives to be used for the perpetuity-period component of the saving clause that in a given case is to be inserted after the fact, the principle to be adopted is the same one that ought to guide lawyers in drafting such a clause before the fact: The group selected should be appropriate to the facts and the disposition. While the exact make-up of the group in each case would be settled by litigation, the individuals designated in Section 1.3(2) of the Restatement (Second) of Property (Donative Transfers) (1983) as the measuring lives would be an appropriate referent for the court to consider. Care should be taken in formulating the gift-over component, so that it is appropriate to the dispositive scheme. Among possible recipients that the court might consider designating are: (1) the persons entitled to the income on the 21st anniversary of the death of the last surviving individual designated by the court for the perpetuity-period component and in the proportions thereof to which they are then so entitled; if no proportions are specified, in equal

shares to the permissible recipients of income; or (2) the grantor's descendants per stirpes who are living 21 years after the death of the last surviving individual designated by the court for the perpetuity-period component; if none, to the grantor's heirs at law determined as if the grantor died 21 years after the death of the last surviving individual designated in the perpetuity-period component.

4. Violation Must be Determined in a Judicial Proceeding Commenced On or After the Effective Date of This Chapter

The equitable power to reform is recognized by Section 21202(b) only in situations where the violation of the former rule against perpetuities is determined in a judicial proceeding commenced on or after the operative date of this chapter. The equitable power to reform would typically be exercised in the same judicial proceeding in which the invalidity is determined.

BACKGROUND TO SECTION 21205

[Adapted from Comments A-C to Section 1 of the
Uniform Statutory Rule Against Perpetuities (1986)]

A. General Purpose

Sections 21205-21207 set forth the statutory rule against perpetuities (statutory rule). As provided in Section 21201, the statutory rule supersedes the common law rule against perpetuities (common law rule) and prior statutes. See the Comment to Section 21201.

1. The Common Law Rule's Validating and Invalidating Sides

The common law rule against perpetuities is a rule of initial validity or invalidity. At common law, a nonvested property interest is either valid or invalid as of its creation. Like most rules of property law, the common law rule has both a validating and an invalidating side. Both sides are derived from John Chipman Gray's formulation of the common law rule:

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

J. Gray, *The Rule Against Perpetuities* § 201 (4th ed. 1942). From this formulation, the validating and invalidating sides of the common law rule are derived as follows:

Validating Side of the Common Law Rule. A nonvested property interest is valid when it is created (initially valid) if it is then certain to vest or terminate (fail to vest) -- one or the other -- no later than 21 years after the death of an individual then alive.

Invalidating Side of the Common Law Rule. A nonvested property interest is invalid when it is created (initially invalid) if there is no such certainty.

Notice that the invalidating side focuses on a lack of certainty, which means that invalidity under the common law rule is not dependent on actual post-creation events but only on possible post-creation events. Actual post-creation events are irrelevant, even those that are known at the time of the lawsuit. It is generally recognized that the invalidating side of the common law rule is harsh because it can invalidate interests on the ground of possible post-creation events that are extremely unlikely to happen and that in actuality almost never do happen, if ever.

2. The Statutory Rule Against Perpetuities

The essential difference between the common law rule and its statutory replacement is that the statutory rule preserves the common law rule's overall policy of preventing property from being tied up in unreasonably long or even perpetual family trusts or other property arrangements, while eliminating the harsh potential of the common law

rule. The statutory rule achieves this result by codifying (in slightly revised form) the validating side of the common law rule and modifying the invalidating side by adopting a wait-and-see element. Under the statutory rule, interests that would have been initially valid at common law continue to be initially valid, but interests that would have been initially invalid at common law are invalid only if they do not actually vest or terminate within the allowable waiting period set forth in Section 21205(b). Thus, the Uniform Act recasts the validating and invalidating sides of the rule against perpetuities as follows:

Validating Side of the Statutory Rule: A nonvested property interest is initially valid if, when it is created, it is then certain to vest or terminate (fail to vest) -- one or the other -- no later than 21 years after the death of an individual then alive. The validity of a nonvested property interest that is not initially valid is in abeyance. Such an interest is valid if it vests within the allowable waiting period after its creation.

Invalidating Side of the Statutory Rule: A nonvested property interest that is not initially valid becomes invalid (and subject to reformation under Section 21220) if it neither vests nor terminates within the allowable waiting period after its creation.

As indicated, this modification of the invalidating side of the common law rule is generally known as the wait-and-see method of perpetuity reform. The wait-and-see method of perpetuity reform was approved by the American Law Institute as part of the Restatement (Second) of Property (Donative Transfers) §§ 1.1-1.6 (1983). For a discussion of the various methods of perpetuity reform, including the wait-and-see method and the Restatement (Second)'s version of wait-and-see, see Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718 (1983).

B. Section 21205(a): Nonvested Property Interests That Are Initially Valid

1. Nonvested Property Interest

Section 21205 sets forth the statutory rule against perpetuities with respect to nonvested property interests. A nonvested property interest (also called a contingent property interest) is a future interest in property that is subject to an unsatisfied condition precedent. In the case of a class gift, the interests of all the unborn members of the class are nonvested because they are subject to the unsatisfied condition precedent of being born. At common law, the interests of all potential class members must be valid or the class gift is invalid. As pointed out in the Background to Section 21201, this so-called all-or-nothing rule with respect to class gifts is not superseded by this chapter, and so remains in effect under the statutory rule. Consequently, all class gifts that are subject to open are to be regarded as nonvested property interests for the purposes of this chapter.

2. Section 21205(a) Codifies the Validating Side of the Common Law Rule

The validating side of the common law rule is codified in Section 21205(a) and, with respect to powers of appointment, in Sections 21206(a) and 21207(a).

A nonvested property interest that satisfies the requirement of Section 21205(a) is initially valid. That is, it is valid as of the time of its creation. There is no need to subject such an interest to the waiting period set forth in Section 21205(b), nor would it be desirable to do so.

For a nonvested property interest to be valid as of the time of its creation under Section 21205(a), there must then be a certainty that the interest will either vest or terminate -- an interest terminates when vesting becomes impossible -- no later than 21 years after the death of an individual then alive. To satisfy this requirement, it must be established that there is no possible chain of events that might arise after the interest was created that would allow the interest to vest or terminate after the expiration of the 21-year period following the death of an individual in being at the creation of the interest. Consequently, initial validity under Section 21205(a) can be established only if there is an individual for whom there is a causal connection between the individual's death and the interest's vesting or terminating no later than 21 years thereafter.

The individual described in Sections 21205(a), 21206(a), and 21207(a) is often referred to as the "validating life," the term used throughout the Background Comments to this chapter.

3. Determining Whether There Is a Validating Life

The process for determining whether a validating life exists is to postulate the death of each individual connected in some way to the transaction, and ask the question: Is there with respect to this individual an invalidating chain of possible events? If one individual can be found for whom the answer is No, that individual can serve as the validating life. As to that individual there will be the requisite causal connection between his or her death and the questioned interest's vesting or terminating no later than 21 years thereafter.

In searching for a validating life, only individuals who are connected in some way to the transaction need to be considered, for they are the only ones who have a chance of supplying the requisite causal connection. Such individuals vary from situation to situation, but typically include the beneficiaries of the disposition, including the taker or takers of the nonvested property interest, and individuals related to them by blood or adoption, especially in the ascending and descending lines. There is no point in even considering the life of an individual unconnected to the transaction -- an individual from the world at large who happens to be in being at the creation of the interest. No such individual can be a validating life because there will be an invalidating chain of possible events as to every unconnected individual who might be proposed: Any such individual can immediately die after the creation of the nonvested property interest without causing any acceleration of the interest's vesting or termination. (The life expectancy of any unconnected individual, or even the probability that one of a number of new-born babies will live a long life, is irrelevant.)

Example (1) -- Parent of devisees as the validating life. G devised property "to A for life, remainder to A's children who attain 21." G was survived by his son (A), by his daughter (B), by A's wife (W), and by A's two children (X and Y).

The nonvested property interest in favor of A's children who reach 21 satisfies Section 21205(a)'s requirement, and the interest is initially valid. When the interest was created (at G's death), the interest was then certain to vest or terminate no later than 21 years after A's death.

The process by which A is determined to be the validating life is one of testing various candidates to see if any of them have the requisite causal connection. As noted above, no one from the world at large can have the requisite causal connection, and so such individuals are disregarded. Once the inquiry is narrowed to the appropriate candidates, the first possible validating life that comes to mind is A, who does in fact fulfill the requirement: Since A's death cuts off the possibility of any more children being born to him, it is impossible, no matter when A dies, for any of A's children to be alive and under the age of 21 beyond 21 years after A's death. (See the Background to Section 21208.)

A is therefore the validating life for the nonvested property interest in favor of A's children who attain 21. None of the other individuals who is connected to this transaction could serve as the validating life because an invalidating chain of possible post-creation events exists as to each one of them. The other individuals who might be considered include W, X, Y, and B. In the case of W, an invalidating chain of events is that she might predecease A, A might remarry and have a child by his new wife, and such child might be alive and under the age of 21 beyond the 21-year period following W's death. With respect to X and Y, an invalidating chain of events is that they might predecease A, A might later have another child, and that child might be alive and under 21 beyond the 21-year period following the death of the survivor of X and Y. As to B, she suffers from the same invalidating chain of events as exists with respect to X and Y. The fact that none of these other individuals can serve as the validating life is of no consequence, however, because only one such individual is required for the validity of a nonvested interest to be established, and that individual is A.

4. Rule of Section 21208 (Posthumous Birth)

See the Background to Section 21208.

5. Recipients as Their Own Validating Lives

It is well established at common law that, in appropriate cases, the recipient of an interest can be his or her own validating life. See, e.g., *Rand v. Bank of California*, 236 Or. 619, 388 P.2d 437 (1964). Given the right circumstances, this principle can validate interests that are contingent on the recipient's reaching an age in excess of 21, or are contingent on the recipient's surviving a

particular point in time that is or might turn out to be in excess of 21 years after the interest was created or after the death of a person in being at the date of creation.

Example (2) -- Devisees as their own validating lives. G devised real property "to A's children who attain 25." A predeceased G. At G's death, A had three living children, all of whom were under 25.

The nonvested property interest in favor of A's children who attain 25 is validated by Section 21205(a). Under Section 21208, the possibility that A will have a child born to him after his death (and since A predeceased G, after G's death) must be disregarded. Consequently, even if A's wife survived G, and even if she was pregnant at G's death or even if A had deposited sperm in a sperm bank prior to his death, it must be assumed that all of A's children are in being at G's death. A's children are, therefore, their own validating lives. (Note that Section 21208 requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death must be disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual.) Each one of A's children, all of whom under Section 21208 are regarded as alive at G's death, will either reach the age of 25 or fail to do so within his or her own lifetime. To say this another way, it is certain to be known no later than at the time of the death of each child whether or not that child survived to the required age.

6. Validating Life Can Be Survivor of Group

In appropriate cases, the validating life need not be individualized at first. Rather the validating life can initially (i.e., when the interest was created) be the unidentified survivor of a group of individuals. It is common in such cases to say that the members of the group are the validating lives, but the true meaning of the statement is that the validating life is the member of the group who turns out to live the longest. As the court said in *Skatterwood v. Edge*, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1697), "for let the lives be never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once."

Example (3) -- Case of validating life being the survivor of a group. G devised real property "to such of my grandchildren as attain 21." Some of G's children are living at G's death.

The nonvested property interest in favor of G's grandchildren who attain 21 is valid under Section 21205(a). The validating life is that one of G's children who turns out to live the longest. Since under Section 21208, it must be assumed that none of G's children will have post-death children, it is regarded as impossible for any of G's grandchildren to be alive and under 21 beyond the 21-year period following the death of G's last surviving child.

Example (4) -- Sperm bank case. G devised property in trust, directing the income to be paid to G's children for the life of the survivor, then to G's grandchildren for the life of the survivor, and on the death of G's last surviving grandchild, to pay the corpus to G's great-grandchildren then living. G's children all predeceased him, but several grandchildren were living at G's death. One of G's predeceased children (his son, A) had deposited sperm in a sperm bank. A's widow was living at G's death.

The nonvested property interest in favor of G's great-grandchildren is valid under Section 21205(a). The validating life is the last surviving grandchild among the grandchildren living at G's death. Under Section 21208, the possibility that A will have a child conceived after G's death must be disregarded. Note that Section 21208 requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death is disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual. Thus in this example, by disregarding the possibility that A will have a conceived-after-death child, G's last surviving grandchild becomes the validating life because G's last surviving grandchild is deemed to have been alive at G's death, when the great-grandchildren's interests were created.

Example (5) -- Child in gestation case. G devised property in trust, to pay the income equally among G's living children; on the death of G's last surviving child, to accumulate the income for 21 years; on the 21st anniversary of the death of G's last surviving child, to pay the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to X Charity. At G's death his child (A) was 6 years old, and G's wife (W) was pregnant. After G's death, W gave birth to their second child (B).

The nonvested property interests in favor of G's descendants and in favor of X Charity are valid under Section 21205(a). The validating life is A. Under Section 21208, the possibility that a child will be born to an individual after the individual's death must be disregarded for the purposes of determining validity under Section 21205(a). Consequently, the possibility that a child will be born to G after his death must be disregarded; and the possibility that a child will be born to any of G's descendants after their deaths must also be disregarded.

Note, however, that the rule of Section 21208 does not apply to the question of the entitlement of an after-born child to take a beneficial interest in the trust. The common law rule (sometimes codified) that a child in gestation is treated as alive, if the child is subsequently born viable, applies to this question. Thus, Section 21208 does not prevent B from being an income beneficiary under G's trust, nor does it prevent a descendant in gestation on the 21st anniversary of the death of G's last surviving child from

being a member of the class of G's "then-living descendants," as long as such descendant has no then-living ancestor who takes instead.

7. Different Validating Lives Can and in Some Cases Must Be Used

Dispositions of property sometimes create more than one nonvested property interest. In such cases, the validity of each interest is treated individually. A validating life that validates one interest might or might not validate the other interests. Since it is not necessary that the same validating life be used for all interests created by a disposition, the search for a validating life for each of the other interests must be undertaken separately.

8. Perpetuity Saving Clauses and Similar Provisions

Knowledgeable lawyers almost routinely insert perpetuity saving clauses into instruments they draft. Saving clauses contain two components, the first of which is the perpetuity-period component. This component typically requires the trust or other arrangement to terminate no later than 21 years after the death of the last survivor of a group of individuals designated therein by name or class. (The lives of corporations, animals, or sequoia trees cannot be used.) The second component of saving clauses is the gift-over component. This component expressly creates a gift over that is guaranteed to vest at the termination of the period set forth in the perpetuity-period component, but only if the trust or other arrangement has not terminated earlier in accordance with its other terms.

It is important to note that regardless of what group of individuals is designated in the perpetuity-period component of a saving clause, the surviving member of the group is not necessarily the individual who would be the validating life for the nonvested property interest or power of appointment in the absence of the saving clause. Without the saving clause, one or more interests or powers may in fact fail to satisfy the requirement of Section 21205(a), 21206(a), or 21207(a) for initial validity. By being designated in the saving clause, however, the survivor of the group becomes the validating life for all interests and powers in the trust or other arrangement: The saving clause confers on the last surviving member of the designated group the requisite causal connection between his or her death and the impossibility of any interest or power in the trust or other arrangement remaining in existence beyond the 21-year period following such individual's death.

Example (6) -- Valid saving clause case. A testamentary trust directs income to be paid to the testator's children for the life of the survivor, then to the testator's grandchildren for the life of the survivor, corpus on the death of the testator's last living grandchild to such of the testator's descendants as the last living grandchild shall by will appoint; in default of appointment, to the testator's then-living descendants, per stirpes. A saving clause in the will terminates the trust, if it has not previously terminated, 21 years after the death of the testator's last surviving descendant who was living at the testator's death. The testator was survived by children.

In the absence of the saving clause, the nongeneral power of appointment in the last living grandchild and the nonvested property interest in the gift-in-default clause in favor of the testator's descendants fail the test of Sections 21205(a) and 21207(a) for initial validity. That is, were it not for the saving clause, there is no validating life. However, the surviving member of the designated group becomes the validating life, so that the saving clause does confer initial validity on the nongeneral power of appointment and on the nonvested property interest under Sections 21205(a) and 21207(a).

If the governing instrument designates a group of individuals that would cause it to be impracticable to determine the death of the survivor, the common law courts have developed the doctrine that the validity of the nonvested property interest or power of appointment is determined as if the provision in the governing instrument did not exist. See cases cited in Restatement (Second) of Property (Donative Transfers) Reporter's Note No. 3, at 45 (1983). See also Restatement (Second) of Property (Donative Transfers) § 1.3(1) comment a (1983); Restatement of Property § 374 & comment 1 (1944); 6 American Law of Property § 24.13 (A. Casner ed. 1952); 5A R. Powell, The Law of Real Property ¶ 766[5] (1985); L. Simes & A. Smith, The Law of Future Interests § 1223 (2d ed. 1956). If, for example, the designated group in Example (6) were the residents of X City (or the members of Y Country Club) living at the time of the testator's death, the saving clause would not validate the power of appointment or the nonvested property interest. Instead, the validity of the power of appointment and the nonvested property interest would be determined as if the provision in the governing instrument did not exist. Since without the saving clause the power of appointment and the nonvested property interest would fail to satisfy the requirements of Sections 21205(a) and 21207(a) for initial validity, their validity would be governed by Sections 21205(b) and 21207(b).

The application of the above common law doctrine, which is not superseded by this chapter and so remains in full force, is not limited to saving clauses. It also applies to trusts or other arrangements where the period thereof is directly linked to the life of the survivor of a designated group of individuals. An example is a trust to pay the income to the grantor's descendants from time to time living, per stirpes, for the period of the life of the survivor of a designated group of individuals living when the nonvested property interest or power of appointment in question was created, plus the 21-year period following the survivor's death; at the end of the 21-year period, the corpus is to be divided among the grantor's then-living descendants, per stirpes, and if none, to the XYZ Charity. If the group of individuals so designated is such that it would be impracticable to determine the death of the survivor, the validity of the disposition is determined as if the provision in the governing instrument did not exist. The term of the trust is therefore governed by the allowable 90-year period of Section 21205(b), 21206(b), or 21207(b) of the statutory rule.

9. Additional references

Restatement (Second) of Property (Donative Transfers) § 1.3(1) & comments (1983); Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718, 1720-26 (1983).

C. Section 21205(b): Wait-and-See -- Nonvested Property Interests Whose Validity Is Initially in Abeyance

Unlike the common law rule, the statutory rule against perpetuities does not automatically invalidate nonvested property interests for which there is no validating life. A nonvested property interest that does not meet the requirements for validity under Section 21205(a) might still be valid under the wait-and-see provisions of Section 21205(b). Such an interest is invalid under Section 21205(b) only if in actuality it does not vest (or terminate) during the allowable waiting period. Such an interest becomes invalid, in other words, only if it is still in existence and nonvested when the allowable waiting period expires.

1. The 90-Year Allowable Waiting Period

Since a wait-and-see rule against perpetuities, unlike the common law rule, makes validity or invalidity turn on actual post-creation events, it requires that an actual period of time be measured off during which the contingencies attached to an interest are allowed to work themselves out to a final resolution. The statutory rule against perpetuities establishes an allowable waiting period of 90 years. Nonvested property interests that have neither vested nor terminated at the expiration of the 90-year allowable waiting period become invalid.

As explained in the Prefatory Note to the Uniform Statutory Rule Against Perpetuities (1986), the allowable period of 90 years is not an arbitrarily selected period of time. On the contrary, the 90-year period represents a reasonable approximation of -- a proxy for -- the period of time that would, on average, be produced through the use of an actual set of measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor.

2. Technical Violations of the Common Law Rule

One of the harsh aspects of the invalidating side of the common law rule, against which the adoption of the wait-and-see element in Section 21205(b) is designed to relieve, is that nonvested property interests at common law are invalid even though the invalidating chain of possible events almost certainly will not happen. In such cases, the violation of the common law rule could be said to be merely technical. Nevertheless, at common law, the nonvested property interest is invalid.

Cases of technical violation fall generally into discrete categories, identified and named by Professor Leach in *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938), as the fertile octogenarian, the administrative contingency, and the unborn widow. The following three examples illustrate how Section 21205(b) affects these categories.

Example (7) -- Fertile octogenarian case. G devised property in trust, directing the trustee to pay the net income therefrom "to A for life, then to A's children for the life of the survivor, and upon the death of A's last surviving

child to pay the corpus of the trust to A's grandchildren." G was survived by A (a female who had passed the menopause) and by A's two adult children (X and Y).

The remainder interest in favor of G's grandchildren would be invalid at common law, and consequently is not validated by Section 21205(a). There is no validating life because, under the common law's conclusive presumption of lifetime fertility, which is not superseded by this chapter (see the Background to Section 21201), A might have a third child (Z), conceived and born after G's death, who will have a child conceived and born more than 21 years after the death of the survivor of A, X, and Y.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the grandchildren's remainder interest will become invalid under Section 21205(b) is negligible.

Example (8) -- Administrative contingency case. G devised property "to such of my grandchildren, born before or after my death, as may be living upon final distribution of my estate." G was survived by children and grandchildren.

The remainder interest in favor of A's grandchildren would be invalid at common law, and consequently is not validated by Section 21205(a). The final distribution of G's estate might not occur within 21 years of G's death, and after G's death grandchildren might be conceived and born who might survive or fail to survive the final distribution of G's estate more than 21 years after the death of the survivor of G's children and grandchildren who were living at G's death.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. Since it is almost certain that the final distribution of G's estate will occur well within this 90-year period, the chance that the grandchildren's interest will be invalid is negligible.

Example (9) -- Unborn widow case. G devised property in trust, the income to be paid "to my son A for life, then to A's spouse for her life, and upon the death of the survivor of A and his spouse, the corpus to be delivered to A's then living descendants." G was survived by A, by A's wife (W), and by their adult children (X and Y).

Unless the interest in favor of A's "spouse" is construed to refer only to W, rather than to whoever is A's spouse when he dies, if anyone, the remainder interest in favor of A's descendants would be invalid at common law, and consequently is not validated by Section 21205(a). There is no validating life because A's spouse might not be W; A's spouse might be someone who was conceived and born after G's

death; she might outlive the death of the survivor of A, W, X, and Y by more than 21 years; and descendants of A might be born or die before the death of A's spouse but after the 21-year period following the death of the survivor of A, W, X, and Y.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the descendants remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the descendants remainder interest will become invalid under the statutory rule is small.

3. Age Contingencies in Excess of 21

Another category of technical violation of the common law rule arises in cases of age contingencies in excess of 21 where the takers cannot be their own validating lives (unlike Example (2), above). The violation of the common law rule falls into the technical category because the insertion of a saving clause would in almost all cases allow the disposition to be carried out as written. In effect, the statutory rule operates like the perpetuity-period component of a saving clause.

Example (10) -- Age contingency in excess of 21 case. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

The remainder interest in favor of A's children who reach 30 is a class gift. At common law, the interests of all potential class members must be valid or the class gift is totally invalid. *Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817). This chapter does not supersede the all-or-nothing rule for class gifts (see the Background to Section 21201), and so the all-or-nothing rule continues to apply under this chapter. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would be invalid at common law and consequently is not validated by Section 21205(a).

Under Section 21205(b), however, the possibility of the occurrence of this chain of events does not invalidate the children's remainder interest. The interest becomes invalid only if an interest of a class member remains nonvested 90 years after G's death.

Although unlikely, suppose that at A's death Z's age is such that he could be alive and under the age of 30 at the expiration of the allowable waiting period. Suppose further that at A's death X or Y or both is over the age of 30. The court, upon the petition of an interested person, must under Section 21220 reform G's disposition. See Example (3) in the Background to Section 21220.

BACKGROUND TO SECTIONS 21206 AND 21207

[Adapted from Comments D-F to Section 1 of the
Uniform Statutory Rule Against Perpetuities (1986)]

D. Sections 21206(a) and 21207(a): Powers of Appointment That Are Initially Valid

Sections 21206 and 21207 set forth the statutory rule against perpetuities with respect to powers of appointment. A power of appointment is the authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in or powers of appointment over property. Restatement (Second) of Property (Donative Transfers) § 11.1 (1986). The property or property interest subject to a power of appointment is called the "appointive property."

The various persons connected to a power of appointment are identified by a special terminology. The "donor" is the person who created the power of appointment. The "donee" is the person who holds the power of appointment, i.e., the powerholder. The "objects" are the persons to whom an appointment can be made. The "appointees" are the persons to whom an appointment has been made. The "takers in default" are the persons whose property interests are subject to being defeated by the exercise of the power of appointment and who take the property to the extent the power is not effectively exercised. Restatement (Second) of Property (Donative Transfers) § 11.2 (1986).

A power of appointment is "general" if it is exercisable in favor of the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate. A power of appointment that is not general is a "nongeneral" power of appointment. Restatement (Second) of Property (Donative Transfers) § 11.4 (1986).

A power of appointment is "presently exercisable" if, at the time in question, the donee can by an exercise of the power create an interest in or a power of appointment over the appointive property. Restatement (Second) of Property (Donative Transfers) § 11.5 (1986). A power of appointment is "testamentary" if the donee can exercise it only in the donee's will. Restatement of Property § 321 (1940). A power of appointment is "not presently exercisable because of a condition precedent" if the only impediment to its present exercisability is a condition precedent, i.e., the occurrence of some uncertain event. Since a power of appointment terminates on the donee's death, a deferral of a power's present exercisability until a future time (even a time certain) imposes a condition precedent that the donee be alive at that future time.

A power of appointment is a "fiduciary" power if it is held by a fiduciary and is exercisable by the fiduciary in a fiduciary capacity. A power of appointment that is exercisable in an individual capacity is a "nonfiduciary" power. As used in this chapter, the term "power of appointment" refers to "fiduciary" and to "nonfiduciary" powers, unless the context indicates otherwise.

Although Gray's formulation of the common law rule against perpetuities (see the Background to Section 21205) does not speak directly of powers of appointment, the common law rule is applicable to powers of appointment (other than presently exercisable general powers

of appointment). The principle of Sections 21206(a) and 21207(a) is that a power of appointment that satisfies the common law rule against perpetuities is valid under the statutory rule against perpetuities, and consequently it can be validly exercised, without being subjected to a waiting period during which the power's validity is in abeyance.

Two different tests for validity are employed at common law, depending on what type of power is at issue. In the case of a nongeneral power (whether or not presently exercisable) and in the case of a general testamentary power, the power is initially valid if, when the power was created, it is certain that the latest possible time that the power can be exercised is no later than 21 years after the death of an individual then in being. In the case of a general power not presently exercisable because of a condition precedent, the power is initially valid if it is then certain that the condition precedent to its exercise will either be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then in being. Sections 21206(a) and 21207(a) codify these rules. Under either test, initial validity depends on the existence of a validating life. The procedure for determining whether a validating life exists is essentially the same procedure explained in Part B, above, pertaining to nonvested property interests.

Example (11) -- Initially valid general testamentary power case. G devised property "to A for life, remainder to such persons, including A's estate or the creditors of A's estate, as A shall by will appoint." G was survived by his daughter (A).

A's power, which is a general testamentary power, is valid as of its creation under Section 21207(a). The test is whether or not the power can be exercised beyond 21 years after the death of an individual in being when the power was created (G's death). Since A's power cannot be exercised after A's death, the validating life is A, who was in being at G's death.

Example (12) -- Initially valid nongeneral power case. G devised property "to A for life, remainder to such of A's descendants as A shall appoint." G was survived by his daughter (A).

A's power, which is a nongeneral power, is valid as of its creation under Section 21207(a). The validating life is A; the analysis leading to validity is the same as applied in Example (11), above.

Example (13) -- Case of initially valid general power not presently exercisable because of a condition precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint." G was survived by his daughter (A), who was then childless.

The power in A's first born child, which is a general power not presently exercisable because of a condition precedent, is valid as of its creation under Section 21206(a). The power is subject to a condition precedent --

that A have a child -- but this is a contingency that under subdivision (d) is deemed certain to be resolved one way or the other within A's lifetime. A is therefore the validating life: The power cannot remain subject to the condition precedent after A's death. Note that the latest possible time that the power can be exercised is at the death of A's first born child, which might occur beyond 21 years after the death of A (and anyone else who was alive when G died). Consequently, if the power conferred on A's first born child had been a nongeneral power or a general testamentary power, the power could not be validated by Section 21207(a); instead, the power's validity would be governed by Section 21207(b).

E. Sections 21206(b) and 21207(b): Wait-and-See -- Powers of Appointment Whose Validity Is Initially in Abeyance

1. Powers of Appointment

Under the common law rule, a general power not presently exercisable because of a condition precedent is invalid as of the time of its creation if the condition might neither be satisfied nor become impossible to satisfy within a life in being plus 21 years. A nongeneral power (whether or not presently exercisable) or a general testamentary power is invalid as of the time of its creation if it might not terminate (by irrevocable exercise or otherwise) within a life in being plus 21 years.

Sections 21206(b) and 21207(b), by adopting the wait-and-see method of perpetuity reform, shift the ground of invalidity from possible to actual post-creation events. Under these subdivisions, a power of appointment that would have violated the common law rule, and therefore fails the tests in Section 21206(a) or 21207(a) for initial validity, is nevertheless not invalid as of the time of its creation. Instead, its validity is in abeyance. A general power not presently exercisable because of a condition precedent is invalid only if in actuality the condition neither is satisfied nor becomes impossible to satisfy within the allowable 90-year waiting period. A nongeneral power or a general testamentary power is invalid only if in actuality it does not terminate (by irrevocable exercise or otherwise) within the allowable 90-year waiting period.

Example (14) -- General testamentary power case. G devised property "to A for life, then to A's first born child for life, then to such persons, including the estate or the creditors of the estate of A's first born child, as A's first born child shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

Since the general testamentary power conferred on A's first born child fails the test of Section 21207(a) for initial validity, its validity is governed by Section 21207(b). If A has a child, such child's death must occur within 90 years of G's death for any provision in the child's will purporting to exercise the power to be valid.

Example (15) -- Nongeneral power case. G devised property "to A for life, then to A's first born child for life, then to such of G's grandchildren as A's first born child shall appoint; in default of appointment, to the children of G's late nephew, Q." G was survived by his daughter (A), who was then childless, by his son (B), who had two children (X and Y), and by Q's two children (R and S).

Since the nongeneral power conferred on A's first born child fails the test of Section 21207(a) for initial validity, its validity is governed by Section 21207(b). If A has a child, such child must exercise the power within 90 years after G's death or the power becomes invalid.

Example (16) -- General power not presently exercisable because of a condition precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint after reaching the age of 25; in default of appointment, to G's grandchildren." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

The power conferred on A's first born child is a general power not presently exercisable because of a condition precedent. Since the power fails the test of Section 21206(a) for initial validity, its validity is governed by Section 21206(b). If A has a child, such child must reach the age of 25 (or die under 25) within 90 years after G's death or the power is invalid.

2. Fiduciary Powers

Purely administrative fiduciary powers are excluded from the statutory rule under Section 21225(b)-(c), but the only distributive fiduciary power that is excluded is the power described in Section 21225(d). Otherwise, distributive fiduciary powers are subject to the statutory rule. Such powers are usually nongeneral powers.

Example (17) -- Trustee's discretionary powers over income and corpus. G devised property in trust, the terms of which were that the trustee was authorized to accumulate the income or pay it or a portion of it out to A during A's lifetime; after A's death, the trustee was authorized to accumulate the income or to distribute it in equal or unequal shares among A's children until the death of the survivor; and on the death of A's last surviving child to pay the corpus and accumulated income (if any) to B. The trustee was also granted the discretionary power to invade the corpus on behalf of the permissible recipient or recipients of the income.

The trustee's nongeneral powers to invade corpus and to accumulate or spray income among A's children are not excluded by Section 21225(d), nor are they initially valid under Section 21207(a). Their validity is, therefore, governed by Section 21207(b). Both powers become invalid

21205(a)'s test for initial validity: Since B was dead at M's death, the validating life is the survivor of B's children, X and Y.

Suppose that G's power was exercisable only in favor of G's own descendants, and that G appointed the identical interests in favor of his own children and grandchildren. Suppose further that at M's death, G had two children, X and Y, and that a third child, Z, was born later. X, Y, and Z survived G. In this case, the remainder interest in favor of G's grandchildren would not pass Section 21205(a)'s test for initial validity. Its validity would be governed by Section 21205(b), under which it would be valid if G's last surviving child died within 90 years after M's death.

If G's power were a general testamentary power of appointment, rather than a nongeneral power, the solution would be the same. The period of the statutory rule with respect to interests created by the exercise of a general testamentary power starts to run when the power was created (at M's death, in this example), not when the power was exercised (at G's death).

Example (19) -- Exercise of a presently exercisable general power of appointment. G was the life income beneficiary of a trust and the donee of a presently exercisable general power of appointment over the succeeding remainder interest. G exercised the power by deed, directing the trustee after his death to pay the income to G's children in equal shares for the life of the survivor, and upon the death of his last surviving child to pay the corpus of the trust to his grandchildren.

The validity of G's power is not in question: A presently exercisable general power of appointment is not subject to the statutory rule against perpetuities. G's appointment, however, is subject to the statutory rule. If G reserved a power to revoke his appointment, the remainder interest in favor of G's grandchildren passes Section 21205(a)'s test for initial validity. Under Sections 21210-21211, the appointed remainder interest was created at G's death. The validating life for his grandchildren's remainder interest is G's last surviving child.

If G's appointment were irrevocable, however, the grandchildren's remainder interest fails the test of Section 21205(a) for initial validity. Under Sections 21210-21211, the appointed remainder interest was created upon delivery of the deed exercising G's power (or when the exercise otherwise became effective). Since the validity of the grandchildren's remainder interest is governed by Section 21205(b), the remainder interest becomes invalid, and the disposition becomes subject to reformation under Section 21220, if G's last surviving child lives beyond 90 years after the effective date of G's appointment.

Example (20) -- Exercises of successively created nongeneral powers of appointment. G devised property to A for life, remainder to such of A's descendants as A shall appoint. At

his death, A exercised his nongeneral power by appointing to his child B for life, remainder to such of B's descendants as B shall appoint. At his death, B exercised his nongeneral power by appointing to his child C for life, remainder to C's children. A and B were living at G's death. Thereafter, C was born. A later died, survived by B and C. B then died survived by C.

A's nongeneral power passes Section 21207(a)'s test for initial validity. A is the validating life. B's nongeneral power, created by A's appointment, also passes Section 21207(a)'s test for initial validity. Since under Sections 21210-21211 the appointed interests and powers are created at G's death, and since B was then alive, B is the validating life for his nongeneral power. (If B had been born after G's death, however, his power would have failed Section 21207(a)'s test for initial validity; its validity would be governed by Section 21207(b), and would turn on whether or not it was exercised by B within 90 years after G's death.)

Although B's power is valid, his exercise may be partly invalid. The remainder interest in favor of G's children fails the test of Section 21205(a) for initial validity. The period of the statutory rule begins to run at G's death, under Sections 21210-21212. (Since B's power was a nongeneral power, B's appointment under the common law relation back doctrine of powers of appointment is treated as having been made by A. If B's appointment related back no further than that, of course, it would have been validated by Section 21205(a) because C was alive at A's death. However, A's power was also a nongeneral power, so relation back goes another step. A's appointment -- which now includes B's appointment -- is treated as having been made by G.) Since C was not alive at G's death, he cannot be the validating life. And, since C might have more children more than 21 years after the deaths of A and B and any other individual who was alive at G's death, the remainder interest in favor of his children is not initially validated by Section 21205(a). Instead, its validity is governed by Section 21205(b), and turns on whether or not C dies within 90 years after G's death.

Note that if either A's power or B's power (or both) had been a general testamentary power rather than a nongeneral power, the above solution would not change. However, if either A's power or B's power (or both) had been a presently exercisable general power, B's appointment would have passed Section 21205(a)'s test for initial validity. (If A had the presently exercisable general power, the appointed interests and power would be created at A's death, not G's; and if the presently exercisable general power were held by B, the appointed interests and power would be created at B's death.)

2. Common Law "Second-Look" Doctrine

As indicated above, both at common law and under this chapter (except for purposes of Section 21202 only, as explained in the Background to that section), appointed interests and powers established

by the exercise of a general testamentary power or a nongeneral power are created when the power was created, not when the power was exercised. In applying this principle, the common law recognizes a so-called doctrine of second-look, under which the facts existing on the date of the exercise are taken into account in determining the validity of appointed interests and appointed powers. E.g., Warren's Estate, 320 Pa. 112, 182 A. 396 (1930); In re Estate of Bird, 225 Cal. App. 2d 196, 37 Cal. Rptr. 288 (1964). The common law's second-look doctrine in effect constitutes a limited wait-and-see doctrine, and is therefore subsumed under but not totally superseded by this chapter. The following example, which is a variation of Example (18) above, illustrates how the second-look doctrine operates at common law and how the situation would be analyzed under this chapter.

Example (21) -- Second-look case. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of G's descendants. The trust was created by the will of his mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his children for the life of the survivor, and upon the death of his last surviving child, to pay the corpus of the trust to his grandchildren. At M's death, G had two children, X and Y. No further children were born to G, and at his death X and Y were still living.

The common law solution of this example is as follows: G's appointment is valid under the common law rule. Although the period of the rule begins to run at M's death, the facts existing at G's death can be taken into account. This second look at the facts discloses that G had no additional children. Thus the possibility of additional children, which existed at M's death when the period of the rule began to run, is disregarded. The survivor of X and Y, therefore, becomes the validating life for the remainder interest in favor of G's grandchildren, and G's appointment is valid. The common law's second-look doctrine would not, however, save G's appointment if he actually had one or more children after M's death and if at least one of these after-born children survived G.

Under this chapter, if no additional children are born to G after M's death, the common law second-look doctrine can be invoked as of G's death to declare G's appointment then to be valid under Section 21205(a); no further waiting is necessary. However, if additional children are born to G and one or more of them survives G, Section 21205(b) applies and the validity of G's appointment depends on G's last surviving child dying within 90 years after M's death.

3. Additional References

Restatement (Second) of Property (Donative Transfers) § 1.2 comments d, f, g, & h; § 1.3 comment g; § 1.4 comment 1 (1983).

21206(a), or 21207(a) has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in Example (1) in the Background to Section 21205 it in fact turns out that A does leave sperm on deposit at a sperm bank and if in fact A's wife does become pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift. Cf. Restatement (Second) of Property (Donative Transfers) Introductory Note to Ch. 26, at 2-3 (Tent. Draft No. 9, 1986). Without trying to predict how that matter will be settled in the future, the best way to handle the problem from the perpetuity perspective is Section 21208's rule requiring the possibility of post-death children to be disregarded.

BACKGROUND TO SECTION 21210

[Adapted from the Comment to Section 2(a) of the
Uniform Statutory Rule Against Perpetuities (1986)]

General Principles of Property Law; When Nonvested Property Interests
and Powers of Appointment Are Created

Under Sections 21205-21207, the period of time allowed by the statutory rule against perpetuities is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 21202, with certain exceptions, provides that this chapter applies only to nonvested property interests and powers of appointment created on or after the operative date of this chapter.

Except as provided in Sections 21211 and 21212, and in the second sentence of Section 21202(a) for purposes of that section only, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law.

Since a will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the will, general principles of property law determine that the time when a nonvested property interest or a power of appointment created by will is created is at the decedent's death.

With respect to a nonvested property interest or a power of appointment created by inter vivos transfer, the time when the interest or power is created is the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed.

With respect to a nonvested property interest or a power of appointment created by the testamentary or inter vivos exercise of a power of appointment, general principles of property law adopt the "relation back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was created not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power. If the exercised power was a general power presently exercisable, the relation back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably exercised, not when the power was created.

BACKGROUND TO SECTION 21211

[Adapted from the Comment to Section 2(b) of the
Uniform Statutory Rule Against Perpetuities (1986)]

1. Postponement, for Purposes of This Chapter, of the Time When a
Nonvested Property Interest or a Power of Appointment Is Created
in Certain Cases

The reason that the significant date for purposes of this chapter is the date of creation is that the unilateral control of the interest (or the interest subject to the power) by one person is then relinquished. In certain cases, all beneficial rights in a property interest (including an interest subject to a power of appointment) remain under the unilateral control of one person even after the delivery of the deed or even after the decedent's death. In such cases, under Section 21211, the interest or power is created, for purposes of this chapter, when no person, acting alone, has a power presently exercisable to become the unqualified beneficial owner of the property interest (or the property interest subject to the power of appointment).

Example (1) -- Revocable inter vivos trust case. G conveyed property to a trustee, directing the trustee to pay the net income therefrom to himself (G) for life, then to G's son A for his life, then to A's children for the life of the survivor of A's children who are living at G's death, and upon the death of such last surviving child, the corpus of the trust is to be distributed among A's then-living descendants, per stirpes. G retained the power to revoke the trust.

Because of G's reservation of the power to revoke the trust, the creation for purposes of this chapter of the nonvested property interests in this case occurs at G's death, not when the trust was established. This is in accordance with common law, for purposes of the common law rule against perpetuities. *Cook v. Horn*, 214 Ga. 289, 104 S.E.2d 461 (1958).

The rationale that justifies the postponement of the time of creation in such cases is as follows. A person, such as G in the above example, who alone can exercise a power to become the unqualified beneficial owner of a nonvested property interest is in effect the owner of that property interest. Thus, any nonvested property interest subject to such a power is not created for purposes of this chapter until the power terminates (by release, expiration at the death of the donee, or otherwise). Similarly, as noted above, any property interest or power of appointment created in an appointee by the irrevocable exercise of such a power is created at the time of the donee's irrevocable exercise.

For the date of creation to be postponed under Section 21211, the power need not be a power to revoke, and it need not be held by the settlor or transferor. A presently exercisable power held by any person acting alone to make himself the unqualified beneficial owner of the nonvested property interest or the property interest subject to a

power of appointment is sufficient. If such a power exists, the time when the interest or power is created, for purposes of this chapter, is postponed until the termination of the power (by irrevocable exercise, release, contract to exercise or not to exercise, expiration at the death of the donee, or otherwise). An example of such a power that might not be held by the settlor or transferor is a power, held by any person who can act alone, fully to invade the corpus of a trust.

An important consequence of the idea that a power need not be held by the settlor for the time of creation to be postponed under this section is that it makes postponement possible even in cases of testamentary transfers.

Example (2) -- Testamentary trust case. G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall appoint; in default of appointment, the property to remain in trust to pay the income to A's children for the life of the survivor, and upon the death of A's last surviving child, to pay the corpus to A's grandchildren." A survived G.

If A exercises his presently exercisable general power, any nonvested property interest or power of appointment created by A's appointment is created for purposes of this chapter when the power is exercised. If A does not exercise the power, the nonvested property interests in G's gift-in-default clause are created when A's power terminates (at A's death). In either case, the postponement is justified because the transaction is the equivalent of G's having devised the full remainder interest (following A's income interest) to A and of A's having in turn transferred that interest in accordance with his exercise of the power or, in the event the power is not exercised, devised that interest at his death in accordance with G's gift-in-default clause. Note, however, that if G had conferred on A a nongeneral power or a general testamentary power, A's power of appointment, any nonvested property interest or power of appointment created by A's appointment, if any, and the nonvested property interests in G's gift-in-default clause would be created at G's death.

2. Unqualified Beneficial Owner of the Nonvested Property Interest or the Property Interest Subject to a Power of Appointment

For the date of creation to be postponed under Section 21211, the presently exercisable power must be one that entitles the donee of the power to become the unqualified beneficial owner of the nonvested property interest (or the property interest subject to a nongeneral power of appointment, a general testamentary power of appointment, or a general power of appointment not presently exercisable because of a condition precedent). This requirement was met in Example (2), above, because A could by appointing the remainder interest to himself become the unqualified beneficial owner of all the nonvested property interests in G's gift-in-default clause. In Example (2) it is not revealed whether A, if he exercised the power in his own favor, also had the right as sole beneficiary of the trust to compel the

termination of the trust and possess himself as unqualified beneficial owner of the property that was the subject of the trust. Having the power to compel termination of the trust is not necessary. If, for example, the trust in Example (2) was a spendthrift trust or contained any other feature that under Section 15403 would prevent A as sole beneficiary from compelling termination of the trust, A's presently exercisable general power over the remainder interest would still postpone the time of creation of the nonvested property interests in G's gift-in-default clause because the power enables A to become the unqualified beneficial owner of such interests.

Furthermore, it is not necessary that the donee of the power have the power to become the unqualified beneficial owner of all beneficial rights in the trust. In Example (2), the property interests in G's gift-in-default clause are not created for purposes of this chapter until A's power expires (or on A's appointment, until the power's exercise) even if someone other than A was the income beneficiary of the trust.

3. Presently Exercisable Power

For the date of creation to be postponed under Section 21211, the power must be presently exercisable. A testamentary power does not qualify. A power not presently exercisable because of a condition precedent does not qualify. If the condition precedent later becomes satisfied, however, so that the power becomes presently exercisable, the interests or powers subject thereto are not created, for purposes of this chapter, until the termination of the power. The common law decision of *Fitzpatrick v. Mercantile Safe Deposit Co.*, 220 Md. 534, 155 A.2d 702 (1959), appears to be in accord with this proposition.

Example (3) -- General power in unborn child case. G devised property "to A for life, then to A's first-born child for life, then to such persons, including A's first-born child or such child's estate or creditors, as A's first-born child shall appoint." There was a further provision that in default of appointment, the trust would continue for the benefit of G's descendants. G was survived by his daughter (A), who was then childless. After G's death, A had a child, X. A then died, survived by X.

As of G's death, the power of appointment in favor of A's first-born child and the property interests in G's gift-in-default clause would be regarded as having been created at G's death because the power in A's first-born child was then a general power not presently exercisable because of a condition precedent.

At X's birth, X's general power became presently exercisable and excluded from the statutory rule. X's power also qualifies as a power exercisable by one person alone to become the unqualified beneficial owner of the property interests in G's gift-in-default clause. Consequently, the nonvested property interests in G's gift-in-default clause are not created, for purposes of this chapter, until the termination of X's power. If X exercises his presently exercisable general power, before or after A's death, the appointed interests or powers are created, for purposes of this chapter, as of X's exercise of the power.

does not prevent the power held by such person from postponing the time of creation under Section 21211, unless the governing instrument extinguishes the power (or prevents it from coming into existence) for that reason.

6. Joint Powers -- Community Property; Marital Property

For the date of creation to be postponed under Section 21211, the power must be exercisable by one person alone. A joint power does not qualify, except that, under Section 21211(b), a joint power over community property (or over marital property under a Uniform Marital Property Act held by individuals married to each other, pursuant to the definition of community property in Section 46) is, for purposes of this chapter, treated as a power exercisable by one person acting alone. See Restatement (Second) of Property (Donative Transfers) § 1.2 comment b & illustrations 5, 6, & 7 (1983) for the rationale supporting the enactment of the bracketed sentence and examples illustrating its principle.

BACKGROUND TO SECTION 21212

[Adapted from the Comment to Section 2(c) of the
Uniform Statutory Rule Against Perpetuities (1986)]

No Staggered Periods

For purposes of this chapter, Section 21212 in effect treats a transfer of property to a previously funded trust or other existing property arrangement as having been made when the nonvested property interest or power of appointment in the original contribution was created. The purpose of Section 21212 is to avoid the administrative difficulties that would otherwise result where subsequent transfers are made to an existing irrevocable trust. Without Section 21212, the allowable period under the statutory rule would be marked off in such cases from different times with respect to different portions of the same trust.

Example (5) -- Series of transfers case. In Year One, G created an irrevocable inter vivos trust, funding it with \$20,000 cash. In Year Five, when the value of the investments in which the original \$20,000 contribution was placed had risen to a value of \$30,000, G added \$10,000 cash to the trust. G died in Year Ten. G's will poured the residuary of his estate into the trust. G's residuary estate consisted of Blackacre (worth \$20,000) and securities (worth \$80,000). At G's death, the value of the investments in which the original \$20,000 contribution and the subsequent \$10,000 contribution were placed had risen to a value of \$50,000.

Were it not for Section 21212, the allowable period under the statutory rule would be marked off from three different times: Year One, Year Five, and Year Ten. The effect of Section 21212 is that the allowable period under the statutory rule starts running only once -- in Year One -- with respect to the entire trust. This result is defensible not only to prevent the administrative difficulties inherent in recognizing staggered periods. It also is defensible because if G's inter vivos trust had contained a perpetuity saving clause, the perpetuity-period component of the clause would be geared to the time when the original contribution to the trust was made; this clause would cover the subsequent contributions as well. Since the major justification for the adoption by this chapter of the wait-and-see method of perpetuity reform is that it amounts to a statutory insertion of a saving clause, Section 21212 is consistent with the theory of this chapter.

BACKGROUND TO SECTION 21220

[Adapted from the Comment to Section 3 of the
Uniform Statutory Rule Against Perpetuities (1986)]

1. Reformation

This section requires a court, on petition of an interested person, to reform a disposition whose validity is governed by the wait-and-see element of Section 21205(b), 21206(b), or 21207(b) so that the reformed disposition is within the limits of the 90-year period allowed by those sections, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: First, when (after the application of the statutory rule) a nonvested property interest or a power of appointment becomes invalid under the statutory rule; second, when a class gift has not but still might become invalid under the statutory rule and the time has arrived when the share of one or more class members is to take effect in possession or enjoyment; and third, when a nonvested property interest can vest, but cannot do so within the allowable 90-year period under the statutory rule.

It is anticipated that the circumstances requisite to reformation will seldom arise, and consequently that this section will be applied infrequently. If, however, one of the three circumstances arises, the court in reforming is authorized to alter existing interests or powers and to create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole. In reforming, the court is urged not to invalidate any vested interest retroactively (the doctrine of infectious invalidity having been superseded by this chapter, as indicated in the Background to Section 21201). The court is also urged not to reduce an age contingency in excess of 21 unless it is absolutely necessary, and if it is deemed necessary to reduce such an age contingency, not to reduce it automatically to 21 but rather to reduce it no lower than absolutely necessary. See Example (3) below; Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718, 1755-59 (1983); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 546-49 (1982).

2. Judicial Sale of Land Affected by Future Interests

Although this section -- except for cases that fall under subdivisions (b) or (c) -- defers the time when a court is directed to reform a disposition until the expiration of the allowable 90-year waiting period, this section is not to be understood as preventing an earlier application of other remedies. In particular, in the case of interests in land not in trust, the principle, codified in many states, is widely recognized that there is judicial authority, under specified circumstances, to order a sale of land in which there are future interests. See 1 American Law of Property §§ 4.98-.99 (A. Casner ed. 1952); L. Simes & A. Smith, *The Law of Future Interests* §§ 1941-46 (2d ed. 1956); see also Restatement of Property § 179, at 485-95 (1936); L. Simes & C. Taylor, *Improvement of Conveyancing by Legislation* 235-38 (1960). Nothing in Section 21220 should be taken as precluding this type of remedy, if appropriate, before the expiration of the allowable 90-year waiting period.

death (precluding new entrants thereafter), by moving back the condition of survivorship on the class so that the remainder interest is in favor of G's descendants who survive the 90th anniversary of G's death (rather than in favor of those who survive the death of A's last surviving grandchild), and by redefining the class so that its makeup is formed as if A's last surviving grandchild died on the 90th anniversary of G's death.

Example (2) -- Sub-class case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child the proportionate share of corpus of the one so dying shall go to the descendants of such child surviving at such child's death, per stirpes." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the descendants of a child of A is treated separately from the others. Consequently, the remainder interest in favor of X's descendants and the remainder interest in favor of Y's descendants are valid under Section 21205(a): X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the descendants of Z is not validated by Section 21205(a) because Z, who was not alive when the interest was created, could have descendants more than 21 years after the death of the survivor of A, X, and Y. Instead, the validity of the remainder interest in favor of Z's descendants is governed by Section 21205(b), under which its validity depends on Z's dying within 90 years after G's death.

Although unlikely, suppose that Z is still living 90 years after G's death. The remainder interest in favor of Z's descendants will then become invalid under the statutory rule, giving rise to subdivision (a)'s prerequisite to reformation. In such circumstances, a court would be justified in reforming the remainder interest in favor of Z's descendants by making it indefeasibly vested as of the 90th anniversary of G's death. To do this, the court would reform the disposition by eliminating the condition of survivorship of Z and closing the class to new entrants after the 90th anniversary of G's death.

5. Subdivision (b): Class Gifts Not Yet Invalid

Subdivision (b), which, upon the petition of an interested person, requires reformation in certain cases where a class gift has not but still might become invalid under the statutory rule, is illustrated by the following examples.

Example (3) -- Age contingency in excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust

is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

Since the remainder interest in favor of A's children who reach 30 is a class gift, at common law (*Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817)) and under this chapter (see the Background to Section 21201) the interests of all potential class members must be valid or the class gift is totally invalid. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. There is no validating life, and the class gift is therefore not validated by Section 21205(a).

Under Section 21205(b), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death. If in fact there is an afterborn child (Z), and if upon A's death, Z has at least reached an age such that he cannot be alive and under the age of 30 on the 90th anniversary of G's death, the class gift is valid. (Note that at Z's birth it would have been known whether or not Z could be alive and under the age of 30 on the 90th anniversary of G's death; nevertheless, even if it was then certain that Z could not be alive and under the age of 30 on the 90th anniversary of G's death, the class gift could not then have been declared valid because, A being alive, it was then possible for one or more additional children to have later been born to or adopted by A.)

Although unlikely, suppose that at A's death (prior to the expiration of the 90-year period), Z's age was such that he could be alive and under the age of 30 on the 90th anniversary of G's death. Suppose further that at A's death X and Y were over the age of 30. Z's interest and hence the class gift as a whole is not yet invalid under the statutory rule because Z might die under the age of 30 within the remaining part of the 90-year period following G's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after G's death. Consequently, the prerequisites to reformation set forth in subdivision (b) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on reaching the age he can reach if he lives to the 90th anniversary of G's death. This would render Z's interest valid so far as the statutory rule against perpetuities is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to reach the required age under the reformed disposition, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Example (4) -- Case where subdivision (b) applies, not involving an age contingency in excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who graduate from an accredited medical school or law school." G was survived by A, by A's spouse (H), and by A's two minor children (X and Y).

As in Example (3), the remainder interest in favor of A's children is a class gift, and the common law principle is not superseded by this chapter by which the interests of all potential class members must be valid or the class gift is totally invalid. Although X and Y will either graduate from an accredited medical or law school, or fail to do so, within their own lifetimes, there is at G's death the possibility that A will have an after-born child (Z), who will graduate from an accredited medical or law school (or die without having done either) more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would not be valid under the common law rule and is, therefore, not validated by Section 21205(a).

Under Section 21205(b), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death.

Suppose in fact that there is an afterborn child (Z), and that at A's death Z was a freshman in college. Suppose further that at A's death X had graduated from an accredited law school and that Y had graduated from an accredited medical school. Z's interest and hence the class gift as a whole is not yet invalid under Section 21205(b) because the 90-year period following G's death has not yet expired; but the class gift might become invalid because Z might be alive but not a graduate of an accredited medical or law school 90 years after G's death. Consequently, the prerequisites to reformation set forth in Section 21220(b) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on graduating from an accredited medical or law school within 90 years after G's death. This would render Z's interest valid so far as the Section 21205(b) is concerned and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to graduate from an accredited medical or law school within the allowed time under the disposition as so reformed, the remaining one-third share would be divided equally between X and Y or their successors in interest.

6. Subdivision (c): Interests that Can Vest But Not Within the Allowable 90-Year Period

In exceedingly rare cases, an interest might be created that can vest, but not within the allowable 90-year period of the statutory rule. This may be the situation when the interest was created (See

Example (5)), or it may become the situation at some time thereafter (see Example (6)). Whenever the situation occurs, the court, upon the petition of an interested person, is required by subdivision (c) to reform the disposition within the limits of the allowable 90-year period.

Example (5) -- Case of an interest, as of its creation, being impossible to vest within the allowable 90-year period. G devised property in trust, directing the trustee to divide the income, per stirpes, among G's descendants from time to time living, for 100 years. At the end of the 100-year period following G's death, the trustee is to distribute the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's descendants who are living 100 years after G's death can vest, but not within the allowable 90-year period of Section 21205(b). The interest would violate the common law rule, and hence is not validated by Section 21205(a), because there is no validating life. In these circumstances, a court is required by Section 21220(c) to reform G's disposition within the limits of the allowable 90-year period. An appropriate result would be for the court to lower the period following G's death from a 100-year period to a 90-year period.

Note that the circumstance that triggers the direction to reform the disposition under this subdivision is that the nonvested property interest still can vest, but cannot vest within the allowable 90-year period of Section 21205(b). It is not necessary that the interest be certain to become invalid under that subdivision. For the interest to be certain to become invalid under Section 21205(b), it would have to be certain that it can neither vest nor terminate within the allowable 90-year period. In this example, the interest of G's descendants might terminate within the allowable period (by all of G's descendants dying within 90 years of G's death). If this were to happen, the interest of XYZ Charity would be valid because it would have vested within the allowable period. However, it was thought desirable to require reformation without waiting to see if this would happen: The only way that G's descendants, who are G's primary set of beneficiaries, would have a chance to take the property is to reform the disposition within the limits of the allowable 90-year period on the ground that their interest cannot vest within the allowable period and subdivision (c) so provides.

Example (6) -- Case of an interest after its creation becoming impossible to vest within the allowable 90-year period. G devised property in trust, with the income to be paid to A. The corpus of the trust was to be divided among A's children who reach 30, each child's share to be paid on the child's 30th birthday; if none reaches 30, to the XYZ Charity. G was survived by A and by A's two children (X and Y). Neither X nor Y had reached 30 at G's death.

The class gift in favor of A's children who reach 30 would violate the common law rule against perpetuities and, thus, is not validated by Section 21205(a). Its validity is therefore governed by Section 21205(b).

Suppose that after G's death, and during A's lifetime, X and Y die and a third child (Z) is born to or adopted by A. At A's death, Z is living but her age is such that she cannot reach 30 within the remaining part of the 90-year period following G's death. As of A's death, it has become the situation that Z's interest cannot vest within the allowable period. The circumstances requisite to reformation under subdivision (c) have arisen. An appropriate result would be for the court to lower the age contingency to the age Z can reach 90 years after G's death.

7. Additional References

For additional discussion and illustrations of the application of some of the principles of this section, see the comments to Restatement (Second) of Property (Donative Transfers) § 1.5 (1983).

BACKGROUND TO SECTION 21225

[Adapted from the Comment to Section 4 of the
Uniform Statutory Rule Against Perpetuities (1986)]

Section 21225 lists seven exclusions from the statutory rule against perpetuities (statutory rule). Some are declaratory of existing law; others are contrary to existing law. Since the common law rule against perpetuities and the Civil Code perpetuities provisions are superseded by this chapter, a nonvested property interest, power of appointment, or other arrangement excluded from the statutory rule by this section is not subject to the rule against perpetuities, statutory or otherwise.

A. Subdivision (a): Nondonative Transfers Excluded1. Rationale

In line with long-standing scholarly commentary, subdivision (a) excludes (with certain enumerated exceptions) nonvested property interests and powers of appointment arising out of a nondonative transfer. The rationale for this exclusion is that the rule against perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule -- a life in being plus 21 years -- is not suitable for nondonative transfers, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Sections 21205-21207 because that period represents an approximation of the period of time that would be produced, on average, by using a statutory list identifying actual measuring lives and adding a 21-year period following the death of the survivor.

No general exclusion from the common law rule against perpetuities is recognized for nondonative transfers, and so subdivision (a) is contrary to existing common law. (But see *Metropolitan Transportation Authority v. Bruken Realty Corp.*, 67 N.Y.2d 156, 492 N.E.2d 379, 384 (1986), pointing out the inappropriateness of the period of a life in being plus 21 years to cases of commercial and governmental transactions and noting that the rule against perpetuities can invalidate legitimate transactions in such cases.)

Subdivision (a) is therefore inconsistent with decisions holding the common law rule to be applicable to the following types of property interests or arrangements when created in a nondonative, commercial-type transaction, as they almost always are: options (e.g., *Milner v. Bivens*, 335 S.E.2d 288 (Ga. 1985)); preemptive rights in the nature of a right of first refusal (e.g., *Atchison v. City of Englewood*, 170 Colo. 295, 463 P.2d 297 (1969); *Robroy Land Co., Inc. v. Prather*, 24 Wash. App. 511, 601 P.2d 297 (1969)); leases to commence in the future, at a time certain or on the happening of a future event such as the completion of a building (e.g., *Southern Airways Co. v. DeKalb County*, 101 Ga. App. 689, 115 S.E.2d 207 (1960)); nonvested easements; top leases and top deeds with respect to interests in minerals (e.g., *Peveto v. Starkey*, 645 S.W.2d 770 (Tex. 1982)); and so on.

2. Consideration Does Not Necessarily Make the Transfer Nondonative

A transfer can be supported by consideration and still be donative in character and hence not excluded from the statutory rule. A

transaction that is essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration. Thus, for example, the exclusion would not apply if a parent purchases a parcel of land for full and adequate consideration, and directs the seller to make out the deed in favor of the purchaser's daughter for life, remainder to such of the daughter's children as reach 25. The nonvested property interest of the daughter's children is subject to the statutory rule.

3. Some Transactions Not Excluded Even If Considered Nondonative

Some types of transactions -- although in some sense supported by consideration and hence arguably nondonative -- arise out of a domestic situation, and should not be excluded from the statutory rule. To avoid uncertainty with respect to such transactions, subdivision (a) specifies that nonvested property interests or powers of appointment arising out of any of the following transactions are not excluded by subdivision (a)'s nondonative-transfers exclusion: a premarital or postmarital agreement; a separation or divorce settlement; a spouse's election, such as the "widow's election" in community property states; an arrangement similar to any of the foregoing arising out of a prospective, existing, or previous marital relationship between the parties; a contract to make or not to revoke a will or trust; a contract to exercise or not to exercise a power of appointment; a transfer in full or partial satisfaction of a duty of support; or a reciprocal transfer. The term "reciprocal transfer" is to be interpreted in accordance with the reciprocal transfer doctrine in the tax law (see *United States v. Estate of Grace*, 395 U.S. 316 (1969)).

4. Other Means of Controlling Some Nondonative Transfers Desirable

Some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded by subdivision (a) from the statutory rule because, as noted above, the period of a life in being plus 21 years -- actual or by the 90-year proxy -- is inappropriate for them; that period is appropriate for family-oriented, donative transfers.

B. Subdivisions (b)-(g): Other Exclusions

1. Subdivision (b) -- Administrative Fiduciary Powers

Fiduciary powers are subject to the statutory rule against perpetuities, unless specifically excluded. Purely administrative fiduciary powers are excluded by subdivisions (b) and (c), but distributive fiduciary powers are generally speaking not excluded. The only distributive fiduciary power excluded is the one described in subdivision (d).

The application of subdivision (b) to fiduciary powers can be illustrated by the following example.

Example (1). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children for the life of the survivor, and on the death of A's last surviving child to pay the corpus to B. The trustee is granted the discretionary power to sell and to reinvest the trust assets and to invade the corpus on behalf of the income beneficiary or beneficiaries.

The trustee's fiduciary power to sell and reinvest the trust assets is a purely administrative power, and under subdivision (b) of this section is not subject to the statutory rule.

The trustee's fiduciary power to invade corpus, however, is a nongeneral power of appointment that is not excluded from the statutory rule. Its validity, and hence its exercisability, is governed by Sections 21205-21207. Since the power is not initially valid under Section 21207(a), Section 21207(b) applies and the power ceases to be exercisable 90 years after G's death.

2. Subdivision (c) -- Powers to Appoint a Fiduciary

Subdivision (c) excludes from the statutory rule against perpetuities powers to appoint a fiduciary (a trustee, successor trustee, or co-trustee, a personal representative, successor personal representative, or co-personal representative, an executor, successor executor, or co-executor, etc.). Sometimes such a power is held by a fiduciary and sometimes not. In either case, the power is excluded from the statutory rule.

3. Subdivision (d) -- Certain Distributive Fiduciary Power

The only distributive fiduciary power excluded from the statutory rule against perpetuities is the one described in subdivision (d); the excluded power is a discretionary power of a trustee to distribute principal before the termination of a trust to a beneficiary who has an indefeasibly vested interest in the income and principal.

Example (2). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children; each child's share of principal is to be paid to the child when he or she reaches 40; if any child dies under 40, the child's share is to be paid to the child's estate as a property interest owned by such child. The trustee is given the discretionary power to advance all or a portion of a child's share before the child reaches 40. G was survived by A, who was then childless.

The trustee's discretionary power to distribute principal to a child before the child's 40th birthday is excluded from the statutory rule against perpetuities. (The trustee's duty to pay the income to A and after A's death to A's children is not subject to the statutory rule because it is a duty, not a power.)

4. Subdivision (e) -- Charitable or Governmental Gifts

Subdivision (e) codifies the common law principle that a nonvested property interest held by a charity, a government, or a governmental

agency or subdivision is excluded from the rule against perpetuities if the interest was preceded by an interest that is held by another charity, government, or governmental agency or subdivision. See L. Simes & A. Smith, *The Law of Future Interests* §§ 1278-87 (2d ed. 1956); Restatement (Second) of Property (Donative Transfers) § 1.6 (1983); Restatement of Property § 397 (1944).

Example (3). G devised real property "to the X School District so long as the premises are used for school purposes, and upon the cessation of such use, to Y City."

The nonvested property interest held by Y City (an executory interest) is excluded from the statutory rule under subdivision (e) because it was preceded by a property interest (a fee simple determinable) held by a governmental subdivision, X School District.

The exclusion of charitable and governmental gifts applies only in the circumstances described. If a nonvested property interest held by a charity is preceded by a property interest that is held by a noncharity, the exclusion does not apply; rather, the validity of the nonvested property interest held by the charity is governed by the other sections of this chapter.

Example (4). G devised real property "to A for life, then to such of A's children as reach 25, but if none of A's children reaches 25, to X Charity."

The nonvested property interest held by X Charity is not excluded from the statutory rule.

If a nonvested property interest held by a noncharity is preceded by a property interest that is held by a charity, the exclusion does not apply; rather, the validity of the nonvested property interest in favor of the noncharity is governed by the other sections of this chapter.

Example (5). G devised real property "to the City of Sidney so long as the premises are used for a public park, and upon the cessation of such use, to my brother, B."

The nonvested property interest held by B is not excluded from the statutory rule by subdivision (e).

5. Subdivision (f) -- Trusts for Employees and Others; Trusts for Self-Employed Individuals

Subdivision (f) excludes from the statutory rule against perpetuities nonvested property interests and powers of appointment with respect to a trust or other property arrangement, whether part of a "qualified" or "unqualified" plan under the federal income tax law, forming part of a bona fide benefit plan for employees (including owner-employees), independent contractors, or their beneficiaries or spouses. The exclusion granted by this subdivision does not, however, extend to a nonvested property interest or a power of appointment created by an election of a participant or beneficiary or spouse.

6. Subdivision (g) -- Pre-existing Exclusions from the Common Law Rule Against Perpetuities

Subdivision (g) ensures that all property interests, powers of appointment, or arrangements that were excluded from the common law rule against perpetuities or are excluded by another statute of this state are also excluded from the statutory rule against perpetuities. Possibilities of reverter and rights of entry (also known as rights of re-entry, rights of entry for condition broken, and powers of termination) are not subject to the common law rule against perpetuities, and so are excluded from the statutory rule.

THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

by

Charles A. Collier, Jr.

FEBRUARY 1989

• This report was prepared for the California Law Revision Commission by Charles A. Collier, Jr. No part of this report may be published without prior written consent of the Commission.

• The Commission assumes no responsibility for any statement made in this report, and no statement in this report is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this report. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

• Copies of this report are furnished to interested persons solely for the purpose of giving the Commission the benefit of their views, and the report should not be used for any other purpose at this time.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

THE UNIFORM STATUTORY RULE AGAINST
PERPETUITIES

The National Conference of Commissioners on Uniform State Laws in August of 1986 approved and recommended for enactment in all states the Uniform Statutory Rule Against Perpetuities ("USRAP"). The House of Delegates of the American Bar Association approved the act as has the Board of Regents of the American College of Probate Counsel and the Board of Governors of the American College of Real Estate Lawyers.

This report is submitted to the Law Revision Commission in connection with its consideration of whether the Uniform Statutory Rule Against Perpetuities should be enacted in California.

Common-Law Rule Against Perpetuities

The generally accepted statement of the common-law rule is as follows:

"No interest is good unless it must vest if at all not later than 21 years after some life in being at the creation of the interest." John Chipman Gray, The Rule Against Perpetuities, Section 201 (4th Ed. 1942).

The rule against perpetuities has its origins in English law. The rule limits the period of time property interests can be in suspense, that is, non-vested.

Under the common-law rule against perpetuities, the validity or invalidity of a non-vested property interest is determined for all times on the basis of the facts existing when the interest is created. There must be certainty at the time of creation that an interest will vest within the period of the rule or the interest is invalid under the common-law rule. Among the more commonly cited examples of dispositions which can be rendered invalid because of remote possibilities that the interest will not vest are: (1) a woman who is no longer able to give birth to a child adopting additional children ("fertile octogenarian"), (2) the settlement of an estate taking more than 21 years to complete ("administrative contingency"), and (3) a married individual in his or her middle or late years survives the spouse and then marries a person born after the transfer ("the after-born widow"). In most situations, these remote possibilities would not actually occur. This often produces harsh results. Since the common-law rule requires certainty at the time of creation that the non-vested interest will vest within the period of the rule, a number of interests have been held invalid, even though the remote contingencies never occurred that might have prevented vesting. That is, the non-vested interest in fact vested within the period of the rule, although the actual vesting was not certain upon creation of the interest.

California Law

Civil Code Section 715.2 states the California version of the common-law rule against perpetuities as follows:

"§ 715.2. Rule against perpetuities; vesting of interest in property

No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities."

Civil Code Section 715.6 provides as follows:

"No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code."

California eliminated the contingency of the after-born widow mentioned under the common-law rule by enactment of Civil Code Section 715.7, which states that for purposes of determining the validity of a future interest in real or personal property an individual described as a spouse is deemed a life in being at the time of the creation whether or not in fact living at that time.

California further has a fairly liberal statute dealing with the reformation of interests, so as not to violate the rule against perpetuities. Civil Code Section 715.5. Section 716.5 states that a trust may extend beyond the period of the common-law rule against perpetuities so long as all interests vest within that time. That section gives the beneficiaries a right to terminate a trust where all interests are vested if its duration exceeds the period of the common-law rule against perpetuities.

Restatement, 2d, Property (Donative Transfers)

The American Law Institute in 1981 approved the Restatement, Property 2d (Donative Transfers). The Restatement adopted a wait-and-see approach to the rule against perpetuities. That is, a disposition of property does not violate the rule if, in fact, the non-vested interest vests within the period of the rule. This departs from the common-law rule which requires initial certainty as to vesting. Adoption of a

wait-and-see approach to the rule against perpetuities has been advocated by legal scholars for several decades to eliminate the harsh results caused by the common-law rule which requires initial certainty as to vesting. The Restatement approach takes into account the actual events or occurrences during the normal period of the rule against perpetuities in determining whether the interest is valid. The common-law concept of initial certainty of vesting within the period of the rule is replaced by the actual events which occur within the period of the rule.

The basic formulation of the Restatement position is in Section 1.1 and Section 1.4. Section 1.1 states:

"The period of the rule against perpetuities in donative transfers is 21 years after lives in being (the measuring lives) at the time the period of the rule begins to run."

Section 1.4 provides:

"Except as provided in Section 1.6 [dealing with charitable bequests] a donative transfer of an interest in property fails, if the interest does not vest within the period of the rule against perpetuities."

In the introduction to Chapter 1 of the Restatement, the following comment is made with reference to the wait-and-see approach:

"Most non-vested interests that conceivably might vest too remotely, so far as the rule against perpetuities is concerned, will not in fact vest too remotely, if given an opportunity to vest."

Although the wait-and-see approach is at this time a minority view in the United States, with its adoption by the Restatement, Property 2d, Donative Transfers, the wait-and-see approach to the rule against perpetuities is expected to become the majority view.

Drafting for the Rule Against Perpetuities

In preparing wills which contain testamentary trusts and in preparing inter vivos trusts which continue after the death of the grantor, it is common practice in California and in other jurisdictions to include language dealing with the rules against perpetuities.

A typical clause found in the will is as follows:

"Perpetuities Savings Clause - Spouse and Descendants: All trusts created by this will or by the exercise of any power of appointment shall terminate twenty-

one (21) years after the last death of my spouse and descendants living at my death. The trustee shall distribute the principal and undistributed income of a terminated trust to the then-living income beneficiaries of that trust in the same proportion that the beneficiaries are entitled to receive income when the trust terminates. If at the time of such termination the trust does not fix the rights to income, then the trustee shall distribute the trust by right of representation to the persons who in the trustee's reasonable judgment are entitled to receive trust payments." California Will Drafting, Willmaster System, Block 11.3-1 (CEB).

A typical clause for a revocable trust is as follows:

"Unless terminated earlier in accordance with other provisions of this instrument, all trusts created under this instrument shall terminate 21 years after the death of the last survivor of ... [name or describe class of those best suited to be measuring lives] ... living on the date of the death of the first settlor to die. The principal and undistributed income of a terminated trust shall be distributed to the income beneficiaries of that trust in the same proportion that the beneficiaries are entitled to receive income when the trust terminates. If at the time of termination the rights to income are not

fixed by the terms of the trust, distribution under this clause shall be made, by right of representation, to the persons who are then entitled or authorized, in the trustee's discretion, to receive trust payments." Drafting California Revocable Living Trusts, Second Edition, page 257 (CEB).

These clauses provide that, if an interest has not in fact vested within the period of the common-law rule against perpetuities, the trust at the expiration of that period will terminate, thereby vesting that interest and avoiding an actual violation of the rule. Under these clauses, the interests, therefore, must vest with certainty within the period of the rule against perpetuities.

How Long to Wait and See?

The most controversial aspect of the wait-and-see approach to the rule against perpetuities is determining the appropriate means of measuring the period during which to wait and see if the interests actually vest.

The Restatement, Property 2d (Donative Transfers), Section 1.3, defines the measuring lives as follows:

"(1) If an examination of the situation with respect to a donative transfer as of the time the period of the rule against perpetuities begins to run reveals a life or

lives in being within 21 years after whose deaths the non-vested interest in question will necessarily vest, if it ever vests, such life or lives are the measuring lives for purposes of the rule against perpetuities so far as such non-vested interest is concerned and such non-vested interest cannot fail under the rule. A provision that terminates a non-vested interest if it has not vested within 21 years after the death of the survivor of a reasonable number of persons named in the instrument of transfer and in being when the period of the rule begins to run is within this subsection.

(2) If no measuring life with respect to a donative transfer is produced under subsection (1), the measuring lives for purposes of the rule against perpetuities as applied to the non-vested interest in question are:

- (a) The transferor if the period of the rule begins to run in the transferor's lifetime; and
- (b) Those individuals alive when the period of the rule begins to run, if reasonable in number, who have beneficial interests vested or contingent in the property in which the non-vested interest in question exists and the parents and grandparents

alive when the period of the rule begins to run of all beneficiaries of the property in which the non-vested interest exists, and

- (c) The donee of a non-fiduciary power of appointment alive when the period of the rule begins to run if the exercise of such power could affect the non-vested interest in question.

A child in gestation when the period of the rule begins to run who is later born alive is treated as a life in being at the time the period of the rule begins and, hence, may be a measuring life."

An alternate approach vigorously advocated by Professor Jesse Dukeminier, a Professor of Law at UCLA, is the causal relationship concept. It states that the wait-and-see period "shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest." A number of states, including Kentucky, Alaska, Nevada, New Mexico and Rhode Island, have adopted a wait-and-see approach with the causal relationship test for the applicable lives in being. Generally, see Dukeminier, Perpetuities: The Measuring Lives, 85 Colum. L. Rev. 1648-1701 (1985). Professor Dukeminier argues that the Restatement

formulation of measuring lives contains various ambiguities and advocates the causal relationship concept of lives in being. After considering both the Restatement concept of measuring lives (Restatement, Property 2d (Donative transfers), Section 1.3) and the causal relationship approach advocated by Professor Dukeminier, the Drafting Committee for USRAP adopted a third and, it is believed, a much simpler approach to measuring a period of wait and see by adopting a period of 90 years in which the interest must either vest or terminate after its creation.

The relative merits of the causal relationship concept advocated by Professor Dukeminier and the 90 years from creation adopted by the Drafting Committee have been the subject of a number of law review articles written respectively by Professor Dukeminier and by Professor Lawrence Waggoner, the Reporter on the Uniform Statutory Rule Against Perpetuities. These articles are lengthy and very scholarly in their nature. These include Dukeminier, Perpetuities: The Measuring Lives, 85 Colum. L. Rev. 1648 (1985); Waggoner, Perpetuities: A Perspective on Wait and See, 85 Colum. L. Rev. 1714 (1985); Waggoner, A Rejoinder, 85 Colum. L. Rev. 1739 (1985); Dukeminier, A Modern Guide to Perpetuities, 74 Calif. L. Rev. 1867 (1986); Dukeminier, The Uniform Statutory Rule Against Perpetuities; 90 Years in Limbo, 34 UCLA L. Rev. 1023 (1987); Waggoner, Perpetuities: A Progress Report on the Draft

Uniform Statutory Rule Against Perpetuities, No. 20, U. Miami Inst. on Est. Plan. 7-26; Waggoner, The Uniform Statutory Rule Against Perpetuities, Real Property, Probate & Trust Law Journal, Item 21, No. 4 (1986), p. 569. Attached hereto as Exhibit 1 is a copy of Professor Waggoner's article on the Uniform Statutory Rule Against Perpetuities published in the Real Property, Probate & Trust Law Journal. That article gives an overview of the Uniform Act and sets forth statistical information as to the basis of the selection of 90 years as a reasonable time to wait and see if interests actually vest.

As discussed by Professor Waggoner at pages 575 and 576 of Exhibit 1 hereto, using measuring lives has various difficulties both in drafting language to identify those persons who can be measuring lives, including instances where individuals who are not measuring lives initially might later become measuring lives by becoming beneficiaries, by becoming ancestors or descendants of beneficiaries through adoption, marriage, assignment or other changes in interest, etc. Further, because of the wait-and-see approach, the lives of individuals identified as the measuring lives would have to be traced to determine who is the survivor and when the survivor dies. The measuring lives group would not be a static group. Births, deaths, adoptions, divorces, assignments and devises over a long period of time would impact on the measuring lives. Any

such tracing under a measuring lives concept is difficult and, as a practical matter, might mean that no effort actually would be made to trace those lives. Consequently, any perpetuities violation may not be recognized.

The Drafting Committee believed that the wait-and-see approach should be made as simple as possible to understand and apply and, therefore, adopted the concept of a fixed period of time measured by years rather than an ever-changing group of measuring lives or causally related lives.

In Exhibit 1 attached hereto at pages 582-585 are a series of charts showing the approximate period that would be covered by a properly drafted perpetuities savings clause referring to children and grandchildren of the testator or grantor. These charts indicated that a grandchild on average would be perhaps six years of age and that six-year-old grandchild would have a life expectancy of about 69.5 years based upon current actuarial tables. Adding 21 years to such a life would produce a result of approximately 95 or 96 years (six years of age plus a life expectancy of a six-year old of 69.5 years plus 21 years). The period of 90 years was arrived at as a reasonable approximation of the period covered by normal measuring lives, that is, children and grandchildren, plus 21 years. Although Professor Dukeminier argues in his article in 34 UCLA L. Rev., supra, that the 90-year period is unduly long

and will create 90-year trusts, the Drafting Committee made inquiries in the State of Wisconsin, which has no rule against perpetuities in its law, and found that there was no tendency of trusts from other jurisdictions to move into Wisconsin to avoid the limitation of the rule against perpetuities nor was there any practice among Wisconsin lawyers, so far as could be ascertained, to write documents creating trusts in perpetuity. Notwithstanding Civil Code Section 715.6, lawyers in California do not normally draft 60-year trusts.

In short, the Drafting Committee felt that the 90-year period was clear, simple to administer, avoided difficult drafting problems in identifying measuring lives and eliminated all of the tracing problems that might be involved in waiting to see what occurred over a period of time measured either by the common-law rule (lives in being plus 21 years), the measuring lives concept of the Restatement, or lives causally related.

Uniform Statutory Rule Against Perpetuities

Attached hereto, made a part hereof and marked Exhibit 2, is a short article which appeared in Probate and Property, a magazine published by the Real Property, Probate and Trust Law Section, American Bar Association, written by one of the consultants to the Drafting Committee. Attached hereto, made a part hereof and marked Exhibit 3, is the Uniform Statutory

Rule Against Perpetuities without the comments. Attached hereto, made a part hereof and marked Exhibit 4, is the Uniform Statutory Rule Against Perpetuities with the Official Comments.

Why the Law Revision Commission Should Recommend
Enactment of the Uniform Statutory Rule Against
Perpetuities in California

The following are reasons why it is appropriate for the California Law Revision Commission to recommend enactment of the Uniform Statutory Rule Against Perpetuities in California:

1. The Uniform Act has been approved by the National Conference of Commissioners on Uniform State Laws, the House of Delegates of the American Bar Association on recommendation of the Council of the ABA Section of Real Property, Probate and Trust Law, by the Board of Regents of the American College of Probate Counsel, the Board of Governors of the American College of Real Estate Lawyers and others.

2. It has already been enacted in Minnesota, Nevada, South Carolina, Florida and Michigan. Enactment in other jurisdictions is anticipated.

3. USRAP adopts the wait-and-see approach to the rule against perpetuities. The wait-and-see concept has been adopted in a number of jurisdictions (prior to USRAP),

including Kentucky, Florida, Mississippi, New Hampshire, Ohio, Pennsylvania, South Dakota, Vermont and Virginia (see Dukeminier, supra, 85 Colum. L. Rev. 1648, Notes 28, 30-37).

4. USRAP adopts the wait-and-see approach of the Restatement, Property 2d (Donative Transfers).

5. USRAP eliminates the complexities and ambiguities found in measuring lives or lives causally connected with the property interests by adopting a flat period of 90 years for vesting or termination of interests.

6. USRAP is limited to donative transfers and thereby excludes commercial transactions (Section 4), thereby clarifying the law as to the extent to which the rule against perpetuities may relate to non-donative situations.

7. USRAP allows reformation in a manner most closely approximating the transferor's manifest plan of distribution, if the interest would not otherwise vest or terminate within 90 years (Section 3). California already, of course, has a reformation section, Section 715.5.

8. Any non-vested interest that is valid under the common-law rule against perpetuities is valid under USRAP, (Section 1(a)(1)).

9. Adoption of USRAP will increase uniformity among the states as to the rule against perpetuities.

10. From an administrative point of view, the flat period of 90 years in which an interest must vest or terminate makes it very easy for a trustee, for example, to calendar that date to make sure that all interests have vested or terminated.

11. As a practical matter, most interests created by a normal testamentary trust or inter vivos trust will according to their own terms vest or terminate well in advance of the 90 years. Further, where there is a properly drafted perpetuity savings clauses in a trust or will, there again would be no violation of the rule. The 90 years is an approximation of the period normally encompassed by such a perpetuity savings clause.

12. California already has a section (Civil Code Section 715.6) which states that, if the property must vest, if at all, not later than 60 years from creation, it is valid. USRAP extends this to 90 years and refers to interests that do in fact vest within that time rather than those which must vest within 60 years of creation.

13. USRAP and the general wait-and-see approach lessens the harsh and unintended effects of the rule against

perpetuities and allows a grantor's or testator's dispositive plans to be carried out, subject to an outer limitation of time.

14. USRAP is prospective only in its application (Section 5) but does allow a court upon petition of an interested party to reform an instrument that violates the state's rule against perpetuities prior to enactment of USRAP.

Enactment of the Uniform Statutory Rule Against Perpetuities, it is believed, would be beneficial and would update the California rules relating to perpetuities in light of the changes in the Restatement, Property 2d (Donative Transfers), and other trends to adopt the wait-and-see approach with a clear, simple time period to wait and see if the non-vested interests in fact actually vest or terminate.

Respectfully submitted,



Charles A. Collier Jr., Consultant

THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES*

Lawrence W. Waggoner†

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

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

I. GENERAL THEORY OF THE UNIFORM ACT

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

*Copyright © 1987 by Lawrence W. Waggoner. All rights reserved to the author.

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

The members of the Drafting Committee for the Uniform Act were: Henry M. Kittleson of the Florida bar, Chairman; Frank W. Daykin of the Nevada bar, Drafting Liaison; Robert H. Henry of the Oklahoma bar; Justice Marian P. Opala of the Supreme Court of Oklahoma; Francis J. Pavetto of the Connecticut bar; Phillip Carroll of the Arkansas bar, President of the Conference and Ex Officio member of the Committee; Michael P. Sullivan of the Minnesota bar, Chairman of the Executive Committee of the Conference and Ex Officio member of the Committee; Professor William J. Pierce of the University of Michigan Law School, Executive Director of the Conference; and John W. Wagster of the Tennessee bar, Chairman of Division 8 of the Conference and Ex Officio member of the Committee.

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

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

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

570 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

No [nonvested² property] interest³ is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.⁴

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

Validating Side of the Common-law Rule: A nonvested property interest is valid when it is created (initially valid) if it is then certain to vest or terminate⁵ no later than 21 years after the death of an individual then alive.

Invalidating Side of the Common-law Rule: A nonvested property interest is invalid when it is created (initially invalid) if there is no individual then alive with respect to whom there is no such certainty.

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

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

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

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

⁴J. GRAY, *supra* note 3, at § 201.

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

Uniform Statutory Rule Against Perpetuities 571

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

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

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

⁶This is the so-called fertile-octogenarian type of case, illustrated by the following example:
Fertile-Octogenarian Case. G devised property in trust, directing the trustee to pay the net income therefrom "to A for life, then to A's children for the life of the survivor, and upon the death of A's last surviving child to pay the corpus of the trust to A's grandchildren." G was survived by his daughter A (who had passed the menopause) and by A's two adult children (X and Y).

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

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

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

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

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

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

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

572 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

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

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

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

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

Validating Side of the Statutory Rule: A nonvested property interest is initially valid if, when it is created, it is then *certain* to vest or terminate no later than 21 years after the death of an individual then alive. A nonvested property interest that is not *initially* valid is not necessarily invalid. Such an interest is valid if it vests within the allowable waiting period after its creation.

Invalidating Side of the Statutory Rule: A nonvested property interest that is not *initially* valid becomes invalid (but is subject to reformation to make it valid) if it neither vests nor terminates within the allowable waiting period after its creation.

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

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

Uniform Statutory Rule Against Perpetuities 573

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

B. The Allowable Waiting Period:
The Conventional Approach

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

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

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

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

574 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³See Dukeminier, *supra* note 10, at 1681-1701.

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

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

576 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

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

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

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

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

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

To illustrate these points, consider the following two examples:

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

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

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

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

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

578 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

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

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

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

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

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

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

E. Rationale of the Allowable 90-year Waiting Period

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

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

F. Policy of the Rule

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

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

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

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

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

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

580 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

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

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

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

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

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

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

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

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

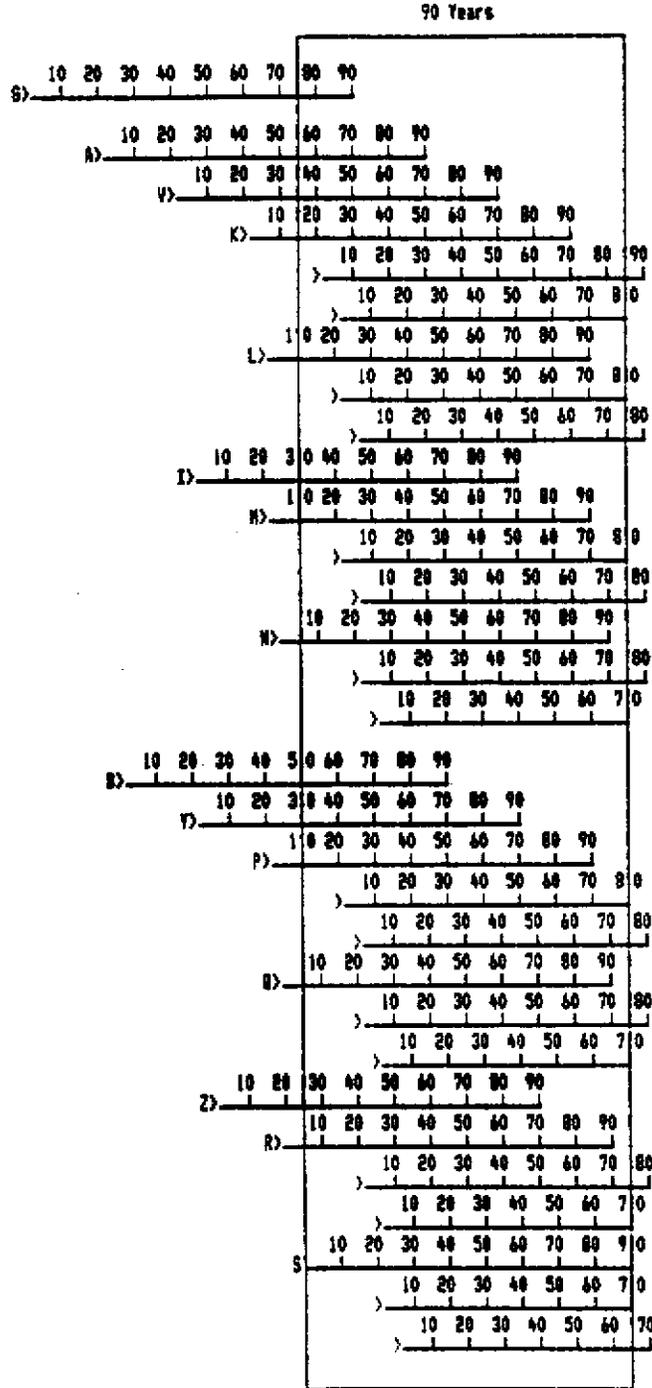
Coifler, Jr., Esq., the American Bar Association Advisor to the USRAP Drafting Committee, represented to the Committee that in Los Angeles County a number of perpetuity violations have been reformed, without appeal, by the lower courts under the California reformation statute, Cal. Civ. Code § 715.5.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

²⁴Text at 577 *supra*.

²⁵See note 15 *supra*.

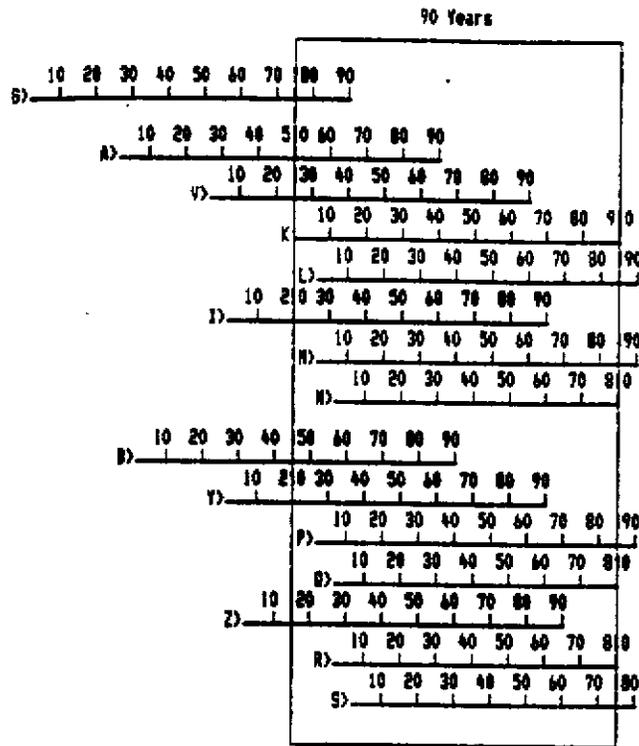
582 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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



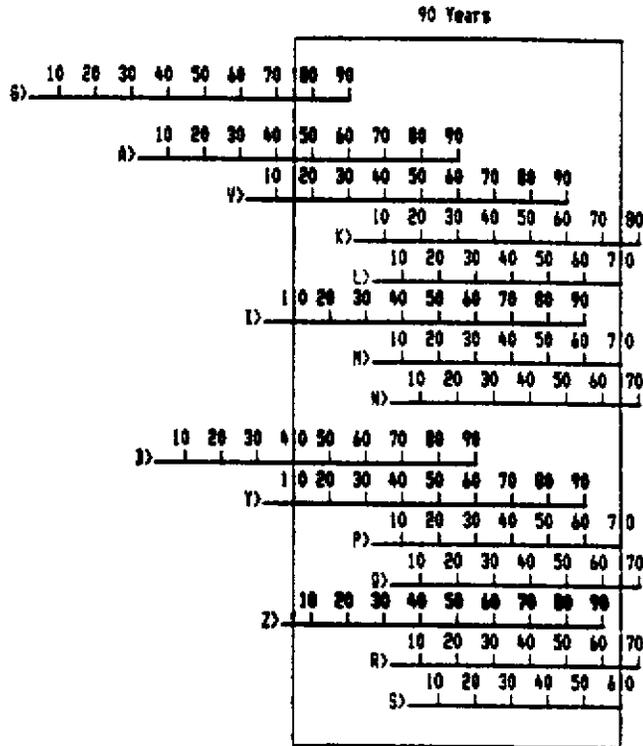
Uniform Statutory Rule Against Perpetuities 583

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



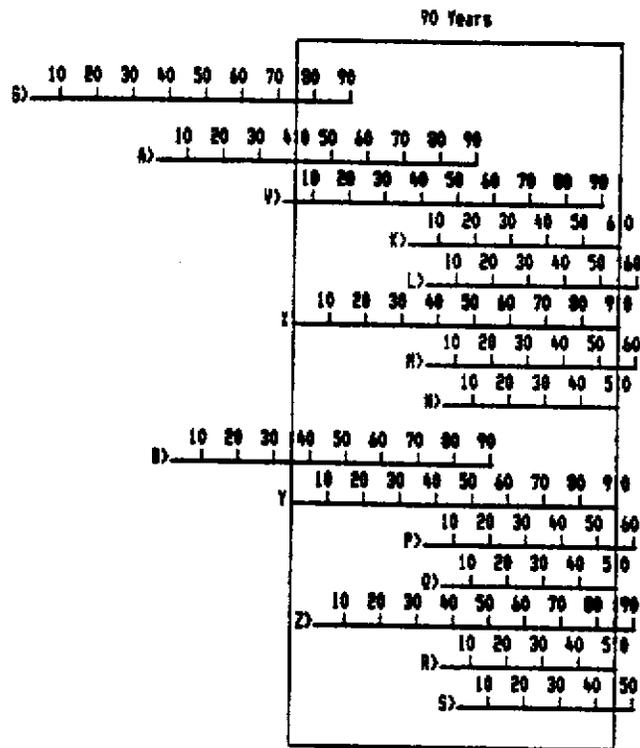
584 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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



Uniform Statutory Rule Against Perpetuities 585

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



586 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

Hypothesizing that G's death will occur at age 75, the preceding charts show that G's youngest grandchild, Z, will reach 30 within: (i) 5 years after G's death in Family I, (ii) 15 years after G's death in Family II, (iii) 25 years after G's death in Family III, and (iv) 35 years after G's death in Family IV.²⁴ No matter what standard is applied to gauge excessive dead-hand control, it would be hard to make out a case that this trust violates the policy of the Rule. Yet the grandchildren's remainder interest would violate the Common-law Rule and be invalid without a saving clause or, in its absence, without a wait-and-see element such as would be effected under the Uniform Act. This example also provides a good illustration of how the period determined by the perpetuity-period component of a saving clause or the 90-year waiting period under the Uniform Act extends unused into the future long after the nonvested interests have vested (or terminated) and the trust has been distributed.

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

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

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

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

²⁴Because the corpus of the trust is not distributable until the death of G's last living child, the trust itself will last a little longer. If we assume that G's children live out their life expectancies of 75 years, B will be G's last living child, and will die: (i) 25 years after G's death in Family I, (ii) 30 years after G's death in Family II, (iii) 35 years after G's death in Family III, and (iv) 40 years after G's death in Family IV. Note the import of this: Even in Family IV, the most spread out of the four families, the interest of each grandchild, in the ordinary course of events, vests (or terminates) within the lifetimes of G's children, who were lives in being at G's death.

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

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

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

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

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

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

²⁹The plausible function of the tack-on 21-year part of the period is to allow the inclusion of after-born members of a generation occupied by lives *in being* at the creation of the interest. See text at 576 *supra*.

588 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

Obviously, there is a cost of having an imprecise period that performs a margin-of-safety rather than a precisely self-adjusting function: It will sometimes be overpermissive. That is, an imprecise period that in almost all if not all cases extends beyond the death of the last living member of the youngest known-and-seen generation³² will of necessity be generous enough to allow some donors in some cases to extend control through or into generations completely unknown and unseen by them.³³ Perpetuity saving clauses and, in

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

³¹See notes 18 and 29 *supra*.

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

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

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

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

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

their absence, their proxy, the 90-year allowable waiting period under the Uniform Act, allow excessive dead-hand control only if one asserts the view that the line delimited by the youngest known-and-seen generation must never, ever, be allowed to be crossed³⁴—and can justify such a view by substantiating the precise harm caused by those few individual cases in which it is crossed.

The study cited earlier³⁵ suggests that, on average, the youngest descendant that donors know and see before they die is a 6-year old. The preceding charts show that that youngest descendant seldom is a child.³⁶ Seldom also will that youngest descendant be at the other extreme, a great-great-grandchild.³⁷ More likely, he or she is a grandchild, perhaps a great-grandchild.³⁸

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

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

³⁵Progress Report, *supra* note 14.

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

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

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

590 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

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

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

Example 2 Under A "Causal-Relationship" Regime

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

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

**II. SECTION-BY-SECTION ANALYSIS OF
THE UNIFORM ACT, WITH STATUTORY TEXT**

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

SECTION 1. STATUTORY RULE AGAINST PERPETUITIES.

(a) A nonvested property interest is invalid unless:

- (1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
- (2) the interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

- (1) when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or
- (2) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

- (1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or
- (2) the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subsection (a)(1), (b)(1), or (c)(1), the possibility that a child will be born to an individual after the individual's death is disregarded.

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

Example 1 Under A "Causal-Relationship" Regime

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

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

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

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

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

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

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

validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common-law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of a deceased pregnant woman long enough to develop the fetus to viability⁴⁰—advances in medical science unanticipated when the Common-law Rule was in its developmental stages—having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 1(a)(1) on the interest of A's children in the above example. The rule of subsection (d), however, does insure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

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

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

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

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

(b) For purposes of this [Act], if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in Section 1(b) or 1(c), the nonvested property interest or power of appointment is created when the power to become the un-

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

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

594 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

(c) For purposes of this [Act], a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

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

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

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

Uniform Statutory Rule Against Perpetuities 595

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

SECTION 3. REFORMATION.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by Section 1(a)(2), 1(b)(2), or 1(c)(2) if:

- (1) a nonvested property interest or a power of appointment becomes invalid under Section 1 (statutory rule against perpetuities);
- (2) a class gift is not but might become invalid under Section 1 (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or
- (3) a nonvested property interest that is not validated by Section 1(a)(1) can vest but not within 90 years after its creation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Uniform Statutory Rule Against Perpetuities 597

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

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

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

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

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

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

598 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

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

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

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

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

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

Uniform Statutory Rule Against Perpetuities 599

SECTION 4. EXCLUSIONS FROM STATUTORY RULE AGAINST PERPETUITIES.

Section 1 (statutory rule against perpetuities) does not apply to:

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

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

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

The major departure from existing common law comes in subsection (1). In line with long-standing scholarly commentary,²⁰ subsection (1) excludes

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

600 REAL PROPERTY, PROBATE AND TRUST JOURNAL

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

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

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

The Committee was aware that a few states have adopted statutes on perpetuities that include special limits on certain commercial transactions,⁵¹ and in fact the Committee itself drafted a comprehensive version of Section 4 that would have imposed a 40-year period-in-gross limitation in specified cases. In the end, however, the Committee did not present that version to the National Conference for approval because it was of the opinion that the control of commercial transactions that directly or indirectly restrain alienability is better left to other types of statutes, such as marketable title acts⁵² and the Uniform Dormant Mineral Interests Act, backed up by the potential application of the common-law rules regarding unreasonable restraints on alienation.

SECTION 5. PROSPECTIVE APPLICATION.

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

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

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

Uniform Statutory Rule Against Perpetuities 601

when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before the effective date of this [Act] and is determined in a judicial proceeding, commenced on or after the effective date of this [Act], to violate this State's rule against perpetuities as that rule existed before the effective date of this [Act], a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

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

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

SECTION 6. SHORT TITLE.

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

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

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

602 REAL PROPERTY, PROBATE AND TRUST JOURNAL

SECTION 8. TIME OF TAKING EFFECT.

This [Act] takes effect _____

SECTION 9. [SUPERSESION] [REPEAL].

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

III. CONCLUSION

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

Modernizing the Rule Against Perpetuities

By James M. Pedowitz

There is now an opportunity for the various states to modernize the ancient Rule against Perpetuities. Ancient though it may be, it continues to plague bona fide purchasers and optionees of various real property interests, as well as drafters of wills and trusts.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has approved and recommended for adoption by the various states a Uniform Statutory Rule Against Perpetuities Act (USRAP). The proposed Act has gained the approval of the American Bar Association, the American College of Real Estate Lawyers and the American College of Probate Counsel. In the jurisdictions in which it is adopted, it could bring welcome relief to lawyers who practice in the fields of real estate, probate and trust law, as well as others who forget the draconian effect of an inadvertent violation of the long established rule with respect to remoteness of vesting. The states of South Carolina and Nevada acted quickly and have adopted USRAP effective July 1, 1987.

The common law Rule against Perpetuities, as stated in Gray, *The Rule Against Perpetuities* (4th ed., 1942) at page 191, is: "No interest is good unless it must vest, if at all, not later than

twenty-one years after some life in being at the creation of the interest." Many states have adopted statutory provisions which follow the rule either strictly or with some modifications. Some state statutes also limit the suspension of the power of alienation by the same time standard.

The common law rule and its statutory derivatives require the attention of the courts all too frequently, particularly since careful drafters easily can avoid its impact. Most recently, in *Metropolitan Transp. Auth. v. Bruken Realty Corp.* (492 N.E.2d 379 (N.Y. 1986)), the highest Court in New York considered whether that part of the New York statutory rule that limits remote vesting applies to certain preemptive rights. After reviewing the law and the statute, the Court decided the case upon principles of the "reasonableness" of the particular preemptive right, and the public nature of one of the parties to the transaction.

The Metropolitan Transportation Authority decision referred to other circumstances that required application of the rule; e.g., for options appurtenant to leases (See *Buffalo Seminary v. McCarthy*, 337 N.E.2d 76 (N.Y. 1983), to mineral rights (*Weber v. Texas Co.*, 83 F.2d 807 (5th Cir. 1936), *cert. denied*

299 U.S. 561 (1936)), to franchise rights (*Todd v. Citizens' Gas Co.*, 46 F.2d 855 (7th Cir. 1931), *cert. denied*, 283 U.S. 852 (1931) [dicta]), for options to expand an easement (*Caruthers v. Peoples Natural Gas Co.*, 38 A.2d 713 (Pa. Super 1944)) or to acquire an interest in a party wall if the optionee decided to build adjacent to the optionor's land (*Beloit Bldg. Co. v. Quinn*, 66 P.2d 549 (Kan. 1937)) Recent decisions have held that, because the management of condominium developments has a valid interest not only in securing the occupancy of the units but also in protecting the ownership of the common areas and the underlying fee, its preemptive rights to repurchase units before sale to third parties should be excepted from the operation of the rule. (See, e.g., *Cambridge Co. v. East Slope Inv. Corp.*, 700 P.2d 537 (Colo. 1985); *Anderson v. 50 E. 72nd St. Condominium*, 492 N.Y.S.2d 989 (N.Y. Sup. 1985); see generally, Note, *Condominiums and the Right of First Refusal*, 48 St. John's L. Rev. 1146, 1149 *et seq.* See also *Anderson v. 50 E. 72nd St. Condominium*, 505 N.Y.S. 2d 101 (N.Y.A.D. 1986).)

The foregoing is merely an indication of current aspects of the problem in

one state; the problems exist in most jurisdictions. USRAP would do away with the common law rule and with any state statutory rule with respect to remoteness of vesting, and replace it with a new modernized version that will be understood more easily, and will be simpler to apply.

Prof. Lawrence W. Waggoner of the University of Michigan Law School was the reporter of the drafting committee of NCCUSL that produced USRAP as a uniform law. It was approved and recommended for enactment by the state representatives at the annual conference of the commissioners held in Boston August 1-8, 1986. The prefatory note accompanying the Act, written by Waggoner, indicates that the common law rule on remoteness of vesting is altered by adopting a "wait and see" approach, as previously set forth in the American Law Institute's Restatement (Second) of Property, but with certain variations.

The prefatory note first explains that the common law rule has both a validating and invalidating side, as follows:

Validating side of the common law rule. A non-vested property interest is valid when it is created (initially valid) if it is then *certain* either to vest or to terminate (fail to vest) within the lifetime of an individual then alive, or within 21 years after the death of that individual.

Invalidating side of the common law rule. A non-vested property interest is invalid when it is created (initially invalid) if there is no individual then alive with respect to whom there is a certainty that the interest either will vest or terminate within the individual's lifetime, or within 21 years after that individual's death.

The invalidating side focuses on a lack of *certainty*, which means invalidity under the common law rule is *not* dependent on the *actual* events that subsequently occur, but only on *possible* post-creation events. Since *actual* post-creation events are irrelevant at common law (even those known at the time of the controversy) so that interests in fact would vest well within the period of a life in being plus 21 years as provided in the rule, they are nevertheless invalid if *at the time of the creation* of the interest there was any possibility, no matter how remote, that it might not vest within the permissible time period.

The harshness of the common law rule led scholars to consider an acceptable alternative. The "wait and see" approach is one such alternative that has gained considerable support, although there is still debate, particularly in the academic community, on the acceptability of that alternative as the preferred solution to the problem.

The Restatement (Second) of Property (Donative Transfers) adopts the wait and see approach, and its introductory note to chapter 1 at p.13 (1983) states it "is largely motivated by the equality of treatment that is produced by placing the validity of all non-vested interests on the same plane, whether the interest is created by a skilled draftsman or one not so skilled". For an opposing point of view, one should read Dukeminier, *Perpetuities: The Measuring Lives*, 85 Colum. L. Rev. 1648 (1985).

Under the Uniform Act, the validating and invalidating sides are set forth as follows:

Validating side of the new statutory rule. A non-vested property interest is initially valid if, when it is created, it is then *certain* either to vest or to terminate (fail to vest) within the lifetime of an individual then alive or within 21 years after the death of that individual. The validity of a non-vested property interest that is not *initially* valid remains in abeyance. Such an interest is valid if it actually vests within the allowable waiting period after its creation.

Invalidating side of the new statutory rule. A non-vested property interest that is not *initially* valid becomes invalid if it neither vests nor terminates within 90 years, the allowable waiting period after its creation.

Thus, the Uniform Act takes a radical step in using a flat period of 90 years for the allowable waiting period, instead of lives in being plus 21 years. The reasoning is that the 90-year period, on average, would approximate average lives in being plus 21 years after the creation of an interest, in most actual situations.

The comments to the Uniform Act contain various examples to support this analysis. The adoption of the flat 90-year waiting period avoids the tortuous and often difficult process of identifying and tracing appropriate measuring lives.

Although there is bound to be some criticism of this departure from the traditional "lives in being plus 21 years" measurement, it certainly will be much easier to apply.

As a final protective step to help ensure carrying out the intent of a donor or testator who has violated the new statutory rule, there are provisions for reformation of the instrument that created the interest, to approximate the transferor's manifested intention and thus to avoid a total destruction of the gift or devise.

One feature of the Uniform Act that should appeal to most real estate practitioners is that the new statutory rule applies only to donative transfers and is inapplicable to genuine commercial transactions. Although this is a radical change, it will have no immediate effect, since the Uniform Act is prospective only, and existing documents and transfers would remain unaffected.

However, there generally has been considerable support among the members of the real estate bar for the exemption of bona fide commercial transactions from the operation of any Rule against Perpetuities as to vesting, since the social and economic policy that gave rise to the Rule initially is largely inapplicable to modern real estate transactions such as convertible mortgages, long-term options, preemptive rights and other sophisticated structuring of real estate transactions.

There can be little argument that the common law Rule against Perpetuities is difficult to understand and even more difficult to apply. It continues to plague law students and most lawyers who do not deal with it on a regular basis. It indeed has been a trap for the unwary, and in its strict application it often has destroyed totally the testamentary intent.

USRAP, as a result of the careful and intensive study given to its development, deserves acceptance by the members of the bar and through them by the various state legislatures. Its widespread adoption would be a long step toward simplification of an unnecessarily complex aspect of the law.

A copy of USRAP can be obtained by writing to the National Conference of Commissioners on Uniform State Laws (645 North Michigan Ave., Chicago, IL 60611).

James M. Pedowitz is special counsel with Rosenman & Colin, New York, New York.

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

<p>Section</p> <p>1. Statutory Rule Against Perpetuities.</p> <p>2. When Nonvested Property Interest or Power of Appointment Created.</p> <p>3. Reformation.</p> <p>4. Exclusions from Statutory Rule Against Perpetuities.</p>	<p>Section</p> <p>5. Prospective Application.</p> <p>6. Short Title.</p> <p>7. Uniformity of Application and Construction.</p> <p>8. Time of Taking Effect.</p> <p>9. [Supersession] [Repeal].</p>
--	---

§ 1. Statutory Rule Against Perpetuities

- (a) A nonvested property interest is invalid unless:
 - (1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
 - (2) the interest either vests or terminates within 90 years after its creation.
- (b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:
 - (1) when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or
 - (2) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.
- (c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:
 - (1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or
 - (2) the power is irrevocably exercised or otherwise terminates within 90 years after its creation.
- (d) In determining whether a nonvested property interest or a power of appointment is valid under subsection (a)(1), (b)(1), or (c)(1), the possibility that a child will be born to an individual after the individual's death is disregarded.

§ 2. When Nonvested Property Interest or Power of Appointment Created

- (a) Except as provided in subsections (b) and (c) and in Section 5(a), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.
- (b) For purposes of this [Act], if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in Section 1(b) or 1(c), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates. [For purposes of this [Act], a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.]
- (c) For purposes of this [Act], a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

§ 3. Reformation

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by Section 1(a)(2), 1(b)(2), or 1(c)(2) if:

- (1) a nonvested property interest or a power of appointment becomes invalid under Section 1 (statutory rule against perpetuities);
- (2) a class gift is not but might become invalid under Section 1 (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or
- (3) a nonvested property interest that is not validated by Section 1(a)(1) can vest but not within 90 years after its creation.

§ 4. Exclusions From Statutory Rule Against Perpetuities

Section 1 (statutory rule against perpetuities) does not apply to:

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

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

§ 5. Prospective Application

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

(b) If a nonvested property interest or a power of appointment was created before the effective date of this [Act] and is determined in a judicial proceeding, commenced on or after the effective date of this [Act], to violate this State's rule against perpetuities as that rule existed before the effective date of this [Act], a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

§ 6. Short Title

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

§ 7. Uniformity of Application and Construction

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

§ 8. Time of Taking Effect

This [Act] takes effect _____

§ 9. [Supersession] [Repeal]

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