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A PROPOSAL FOR A SIMPLE AND SOCIALLY EFFECTIVE RULE AGAINST PERPETUITIES

PAUL G. HASKELL†

The Rule Against Perpetuities is one of the most complex and least understood areas of the common law. Because of this complexity it has been the subject of judicial and legislative reforms aimed both at simplifying the Rule's application as well as alleviating its sometimes seemingly arbitrary operation.

In this Article Professor Haskell proposes change. First, the Article examines the common law rule and the societal concerns that brought about its existence. Next, the Article examines the various reforms that have been adopted. Third, the Article compares the Rule's purposes to modern future interests in land and in trusts. Last, the Article proposes modification of the Rule Against Perpetuities so as to preserve the essential safeguards against dead hand control of wealth, but in such a way as to remove most of the uncertainty and confusion concerning the Rule's application.

I. INTRODUCTION

The classical statement of the Rule Against Perpetuities is brief and deceptively simple: no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. The determination of whether or not the future interest complies with the Rule is made prospectively, from the time of its creation. The question is not whether the interest in fact vests in interest within the time limit, but rather whether it is possible that it might vest in interest after the expiration of the time limit. Viewed from the time of the creation of the contingent future interest, if the possibility exists that the interest might vest in interest too remotely, however likely it is that it will vest within the time limit as a practical matter, the interest is void. This prospective application of the time limit to possible events, the elusive nature of measuring lives, and the distinction between vested and contingent interests, among other things, make the Rule Against Perpetuities one of the most difficult areas of our law.

Lawyers frequently create complexity without social purpose. A legal principle is legislatively or judicially established to achieve a specific societal objective. Over time, litigation and sometimes legislation cause the principle to expand into a massive and complex body of law. In the process the societal purpose for which the original principle was established is often overlooked. So it has been with the Rule Against Perpetuities.

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During the past several decades the Rule has been undergoing a process of reform. Reformation and "wait-and-see" reforms have been legislated in a number of states and adopted judicially in several others.¹ Under "wait-and-

1. Wait-and-see statutes have been enacted in a number of states. See ALASKA STAT. § 34.27.010 (1985); IOWA CODE ANN. § 558.68 (West Supp. 1987); KY. REV. STAT. ANN. § 381.216 (Michie/Bobbs-Merrill 1970); MINN. STAT. ANN. § 501A.01 (West Supp. 1988); N.M. STAT. ANN. § 47-1-17.1 (Supp. 1985); OHIO REV. CODE ANN. § 2131.08(C) (Anderson 1976); PA. STAT. ANN. tit. 20, § 6104 (Purdon 1975 & Supp. 1987); R.I. GEN. LAWS § 34-11-38 (1984); S.C. CODE ANN. § 27-6-20 (Law. Co-op. Supp. 1987); S.D. CODIFIED LAWS ANN. § 43-5-6 (1983); VT. STAT. ANN. tit. 27, § 501 (1975); VA. CODE ANN. § 55-13.3 (1986); WASH. REV. CODE ANN. § 11.98.130 (1987); Act of March 17, 1987, ch. 25, § 2, 1987 Nev. Stat. 62, 62-63 (to be codified at NEV. REV. STAT. ch. 111 (1987)) (adopting the Uniform Rule Against Perpetuities). Several states have enacted limited wait-and-see statutes in which only those events occurring up to the expiration of a life or life estate of a person living at the time of the transfer are considered. See CONN. GEN. STAT. ANN. § 45-95 (West 1981); FLA. STAT. ANN. § 689.22(2)(a) (West Supp. 1987); ME. REV. STAT. ANN. tit. 33, § 101 (1964); MD. EST. & TRUSTS CODE ANN. § 11-103(a) (1974); MASS. ANN. LAWS ch. 184A, § 1 (Law. Co-op. 1987). Wait-and-see has also received limited judicial recognition. See *Merchants Nat'l Bank v. Curtis*, 98 N.H. 225, 231-32, 97 A.2d 207, 212 (1953); see also *Grynberg v. Amerada Hess Corp.*, 342 F. Supp. 1314, 1321-22 (D. Colo. 1972) (applying Mississippi law to what appears to be a purely contractual interest); *Hansen v. Stroecker*, 699 P.2d 871, 875 (Alaska 1985) (wait-and-see applied after enactment of statute that was not retroactive); *Story v. First Nat'l Bank & Trust*, 115 Fla. 436, 443, 156 So. 101, 104 (1934) (implicitly applying wait-and-see); *Warner v. Whitman*, 353 Mass. 468, 471-472, 233 N.E.2d 14, 16-17 (1968) (retroactively applying wait-and-see to trust executed before enactment of statute which was not retroactive, but application was unnecessary because trust was valid under common-law rule); *Phelps v. Shropshire*, 254 Miss. 777, 785, 183 So. 2d 158, 161-62 (1966) (wait-and-see rule applied, but unnecessary because valid under common-law rule); *Nantt v. Pukett Energy Co.*, 382 N.W.2d 655 (N.D. 1986) (dictum) (would apply wait-and-see to oil and gas lease); *In re Frank*, 480 Pa. 116, 124-25, 389 A.2d 536, 541 (1978) (applying wait-and-see rule to gifts in default of appointment).

Reformation statutes have also been enacted in a number of states. See ALASKA STAT. § 34.27.010 (1985); CAL. CIV. CODE § 715.5 (West 1982); IOWA CODE ANN. § 558.68 (West Supp. 1987); KY. REV. STAT. ANN. § 381.216 (Michie/Bobbs-Merrill 1970); MO. ANN. STAT. § 442.555 (Vernon 1986); N.M. STAT. ANN. § 47-1-17.1 (Supp. 1985); OHIO REV. CODE ANN. § 2131.08(C) (Anderson 1976); OKLA. STAT. ANN. tit. 60, §§ 75-78 (West Supp. 1987); R.I. GEN. LAWS § 34-11-38 (1984); S.C. CODE ANN. § 27-6-40 (Law. Co-op. Supp. 1987); S.D. CODIFIED LAWS ANN. § 43-5-6 (1983); TEX. PROP. CODE ANN. § 5.043 (Vernon 1984); VT. STAT. ANN. tit. 27, § 501 (1975); VA. CODE ANN. § 55-13.3 (1986); WASH. REV. CODE ANN. § 11.98.150 (1987); Act of March 17, 1987, ch. 25, § 4, 1987 Nev. Stat. 62, 63 (to be codified at NEV. REV. STAT. ch. 111 (1987)). Several states have enacted limited reformation statutes that provide for the reduction of age contingencies to 21 if there is an invalid age contingency greater than 21. See CONN. GEN. STAT. ANN. § 45-96 (West 1958); FLA. STAT. ANN. § 689.22(4) (West 1987); ILL. ANN. STAT. ch. 30, para. 194(c)(2) (Smith-Hurd Supp. 1987); ME. REV. STAT. ANN. tit. 33, § 102 (1964); MD. EST. & TRUSTS CODE ANN. § 11-103(b) (1974); MASS. ANN. LAWS ch. 184A, § 2 (Law. Co-op. 1987); N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1967). Several courts have employed the reformation principle in the absence of a statute to reduce age or time contingencies. *In re Estate of Ghiglia*, 49 Cal. App. 3d 443, 116 Cal. Rptr. 827 (1974); *In re Estate of Chun Quan Yee Hop*, 52 Haw. 40, 45-47, 469 P.2d 183, 187 (1970); *Carter v. Berry*, 243 Miss. 321, 370-78, 140 So. 2d 843, 848-56 (1962); *North Bay Council Inc., Boy Scouts of America v. Grinnell*, 123 N.H. 321, 461 A.2d 114 (1983); *Ederly v. Barker*, 66 N.H. 434, 466-75, 31 A. 900, 911-16 (1891); *Berry v. Union Nat'l Bank*, 164 W. Va. 258, 264-67, 262 S.E.2d 766, 770-72 (1980); see *In re Estate of Kelly*, 193 So. 2d 575, 578 (Miss. 1967).

There have been several "patchwork" reforms of the Rule Against Perpetuities. One abolishes the common-law conclusive presumption of fertility which, under the common-law Rule Against Perpetuities, may invalidate the gift to children or grandchildren of a person who cannot have children. Several states have enacted statutes permitting the introduction of evidence to establish that a person is incapable of having children. Some statutes create a presumption that a person over a certain age such as 65, or 55 in the case of a woman, is incapable of having children, and that a person under a certain age, such as 12 in the case of a female and 14 in the case of a male, is incapable of having children. See FLA. STAT. ANN. § 689.22(5)(d) (West Supp. 1987); ILL. ANN. STAT. ch. 30, para. 194(c)(3) (Smith-Hurd Supp. 1987); N.Y. EST. POWERS & TRUSTS LAW § 9-1.23(e) (McKinney Supp. 1987); TENN. CODE ANN. § 24-5-112 (1980). Some cases in the property area have also done away with the conclusive presumption of fertility, including a case involving perpetuities. See *In re Will of Lattouf*, 87 N.J. Super. 137, 144, 208 A.2d 411, 415 (1965). Cases

see" the determination of the validity of a contingent future interest is made on the basis of whether it in fact does vest within the period of the Rule, rather than on the basis of whether the interest must of logical necessity vest, if it ever does, within the period of the Rule viewed from the time the period begins to run.² Under the reformation principle, the contingent future interest that violates the Rule is reformed to make it conform to the Rule and approximate the intent of the donor.³ Under the common-law Rule the invalid interest is stricken, causing a reversion to the transferor or his successors.

In 1979 these reforms were adopted in the Restatement (Second) of Property (Donative Transfers), which included a new feature of specifically designated measuring lives for purposes of wait-and-see.⁴ In 1986 the Uniform Statutory Rule Against Perpetuities was promulgated. The Uniform Rule adopts wait-and-see and reformation, and under wait-and-see includes the novel feature of a ninety-year period in gross as the perpetuities period in lieu of lives

illustrating operation of this presumption in other contexts include *Fletcher v. Hurdle*, 259 Ark. 640, 646, 536 S.W.2d 109, 113 (1976); *Citizens Nat'l Bank v. Longshore*, 304 So. 2d 287, 289 (Miss. 1974); *In re Bassett's Estate*, 104 N.H. 504, 507, 190 A.2d 415, 417 (1963); *In re Estate of Weeks*, 485 Pa. 329, 333-34, 402 A.2d 657, 659 (1979); see also 4 A. SCOTT, THE LAW OF TRUSTS § 340.1 (3d ed. 1967) (discussing the presumption of fertility prohibiting the termination of a trust).

The relationship between the presumption of fertility and adoption should be noted. Today an adopted child is likely to be deemed to be included in a class gift to children, grandchildren, descendants, and the like. An elderly person, incapable of having children, may adopt a child. Assuming fertility is rebuttable, does the inclusion of adopted children within the designated classes of offspring have the effect of reinstating the conclusive presumption of fertility? It appears to have that effect, but the Florida, Illinois, and New York statutes provide that for perpetuities purposes the possibility a person may have a child by adoption is to be disregarded. See FLA. STAT. ANN. § 689.22(5)(d) (West Supp. 1987); ILL. ANN. STAT. ch. 30, para. 194(c)(3) (Smith-Hurd Supp. 1987); N.Y. EST. POWERS & TRUSTS LAW § 9-1.23(e) (McKinney Supp. 1987). It should be noted that the patchwork reforms being discussed are in jurisdictions that do not have the broad wait-and-see reform.

Another "patchwork" reform involves the administrative contingency: testator bequeaths \$50,000 to such issue of his as are living when his estate is finally settled and distributed. This gift has been held invalid at common law. See *Prime v. Hyne*, 260 Cal. App. 2d 397, 400-01, 67 Cal. Rptr. 170, 173 (1968); *Ryan v. Beshk*, 339 Ill. 45, 53-54, 170 N.E. 699, 702 (1930); 3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1228, at 120-21 (2d ed. 1956). There is also contrary authority that the fiduciary obligation to administer the estate expeditiously precludes a delay of more than 21 years. See *Belfield v. Booth*, 63 Conn. 299, 306-08, 27 A. 585, 587-89 (1893); *Asche v. Asche*, 42 Del. Ch. 545, 557-59, 216 A.2d 272, 277-80 (1966). Several states have enacted statutes whose effect is to validate interests of this nature. See FLA. STAT. ANN. § 689.22(5)(c) (West Supp. 1987); ILL. ANN. STAT. ch. 30, para. 194(c)(1) (Smith-Hurd Supp. 1987); N.Y. EST. POWERS & TRUSTS LAW § 9-1.23(d) (McKinney 1967).

Still another patchwork reform involves the so-called "unborn widow" situation: testator bequeaths in trust to pay the income to A for life, then to pay the income to A's widow for her life, then to pay the principal to A's children who are then living. A is 40 years of age at testator's death. The interest in A's children is invalid under the common-law Rule because A's widow may be a person who was not living at testator's death. See *Dickerson v. Union Nat'l Bank*, 268 Ark. 292, 297, 595 S.W.2d 677, 680-81 (1980); *Lanier v. Lanier*, 218 Ga. 137, 142, 126 S.E.2d 776, 781 (1962); *Perkins v. Iglehart*, 183 Md. 520, 527-29, 39 A.2d 672, 677-78 (1944); *Brookover v. Grimm*, 118 W. Va. 227, 232-34, 190 S.E. 697, 701 (1937). Statutes in several states, however, validate such contingent interests by presuming that A's widow was intended to be a person who was living at testator's death. See CAL. CIV. CODE § 715.7 (West 1982); FLA. STAT. ANN. § 689.22(5)(b) (West Supp. 1987); ILL. ANN. STAT. ch. 30, para. 194(c)(1) (Smith-Hurd Supp. 1987); N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1967). It should be reiterated that if a broad wait-and-see statute is adopted, the patchwork reforms are generally unnecessary.

2. T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 213-18 (2d ed. 1984).

3. *Id.* at 218-22.

4. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) §§ 1.3, 1.4, 1.5 (1983).

in being plus twenty-one years.⁵ These reforms have much merit, but more radical reform is appropriate.

The Rule places a time limit on the power of a property owner to control the disposition of his wealth. If legal future interests in unborn persons are created in a parcel of land, alienability of the parcel is fettered. The original purpose of the Rule was to impose a time limit on dispositive provisions that made it difficult or impossible to convey a possessory fee in land, thereby effectively removing the land from commerce.⁶ That purpose remains relevant today to dispositions of legal interests in land, but not to dispositions of real or personal property in trust with a power of sale in the trustee. If a donor transfers land, stocks, or bonds in trust with equitable future interests in unborn persons, and empowers the trustee to sell at any time and reinvest the proceeds, alienability of the property so held has not been fettered in any way. The donor controls who is to benefit from a changing fund managed by a trustee who is required by law to invest conservatively. By using this mode of disposition the donor has determined that a certain quantum of value is going to be channeled into conservative investment for an extended period of time instead of being invested speculatively or consumed. Nothing is taken out of commerce; rather, assets are directed into a certain area of commerce.⁷ Today most donative future interests are equitable interests in stocks and debt securities under trusts with a power of sale in the trustee. In this circumstance a rule based on concerns about alienability needs to be reexamined.

It is not proposed that there should be unlimited "dead hand" control of wealth held in trust with a power of sale in the trustee. It makes no sense to permit an individual to control the benefit or investment of wealth for centuries. The donor should be permitted to protect his descendants for a reasonable period of time, and thereafter the living generation should be permitted to make the decisions as to the use of the wealth. It is submitted that the massive and complex body of law dealing with this matter, which is scarcely understood by the bar, is not necessary to achieve the objectives of the Rule. This Article proposes that the Rule Against Perpetuities be changed in several respects which would simplify the Rule and make it comport with its modern purpose.

First, legal future interests in land and equitable future interests under trusts in which the trustee has the power of sale present different problems and

5. UNIF. STAT. RULE AGAINST PERPETUITIES §§ 1, 3, 8A U.L.A. 80, 86, 105 (Supp. 1987).

6. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) 5-10 (1981) (Introduction to Part I); L. SIMES, PUBLIC POLICY AND THE DEAD HAND 33, 40 (1955); Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977).

7. The trustee has the duty to invest in a manner that is designed to produce a reasonable income and to preserve principal. The hallmark of trustee investment policy is conservatism; significant risk-taking for the purpose of realizing large capital gains is not permissible, in the absence of some specific provision in the trust instrument authorizing or directing speculative investment. Most states have statutes adopting the "prudent person" rule—that is, a trustee is to invest as a prudent person would invest his funds. See, e.g., N.C. GEN. STAT. § 36A-2 (1984). Prudent people sometimes set aside a small fraction of their portfolios for speculative purposes. The "prudent person" rule, however, does not permit this. See 3 A. SCOTT, THE LAW OF TRUSTS §§ 227, 227.13 (3d ed. 1967).

require separate treatment. In the case of equitable future interests under a trust with a power of sale in the trustee, the period of the Rule should be changed from "lives in being plus twenty-one years" to a fixed period that should not be less than 100 years nor more than 125 years. "Vesting in interest" of the contingent future interest as the event that must occur within the period of the Rule should be replaced with the principle that the trust must terminate and the fee simple absolute, legal and equitable, must vest in possession in one or more persons within the period of the Rule.⁸ The wait-and-see and reformation principles should also apply. In the case of equitable future interests under a trust in which the trustee does not have the power of sale over the assets or a specific asset, the trustee should be deemed to have the power of sale after fifty years, and otherwise the principles of a fixed period, vesting in possession, wait-and-see and reformation should be applicable.

In the case of legal future interests in land, the same principles should be applicable as in the trust with the power of sale. In addition, after fifty years any person in possession, such as a life tenant, should be unconditionally empowered to sell the fee simple absolute and have the proceeds held in trust for the interested parties, with power of sale in the trustee, all pursuant to judicial direction and control.⁹

Significantly, in 1986 Delaware legislated that "the rule against perpetuities for property held in trust is that at the expiration of 110 years from the date on which any trust became irrevocable by the trustor, such trust, if not already terminated by its terms, shall terminate."¹⁰ This statute appears to be the only perpetuities legislation of its kind.¹¹

8. Professor John Chipman Gray, in his organizing treatise on the subject, stated it would have been preferable for the courts to have adopted vesting in possession rather than vesting in interest. J. GRAY, *THE RULE AGAINST PERPETUITIES* 821-22 (4th ed. 1942). Professor Lewis Simes has discussed the advisability of adopting vesting in possession. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 737-38 (1955). Professor Daniel Schuyler has advocated this principle. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 887, 926 (1958). Professor Philip Mechem also thought vesting in possession was preferable. Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965, 970 (1959). Last, Professor Jesse Dukeminier has stated that vesting in possession would have better served the objectives of the Rule. See, Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1869 (1986).

9. In Great Britain, by statute, the only purely legal estates that can be created are the fee simple absolute and the term of years. If other legal interests are created, such as a life estate and remainder or reversion, a trust with power of sale is deemed to exist for the benefit of those who were given legal interests in the instrument of transfer. Law of Property Act, 1925, 15 Geo. 5, ch. 20; see R. MEGARRY & H. WADE, *THE LAW OF REAL PROPERTY* 134 (4th ed. 1975); Bostick, *Loosening the Grip of the Dead Hand: Shall We Abolish Legal Future Interests in Land?*, 32 VAND. L. REV. 1061, 1093-94 (1979).

The generalization in the text must be qualified to deal with the following type of transfer: To A in fee, but if the premises are used for other than single-family residential purposes, then to B in fee. It would make no sense to empower A to sell in fee simple absolute after 50 years and have the proceeds held in trust under the terms of the original disposition. In this situation, the executory interest would cease to exist after 50 years, and A would own the fee simple absolute.

10. DEL. CODE ANN. tit. 25, § 503(b) (Supp. 1986).

11. The Delaware statute provides for distribution of the assets to those who would take on termination pursuant to the terms of the trust. *Id.* § 503(c). The Illinois statute provides that if a trust violates the traditional Rule Against Perpetuities, the trust shall terminate 21 years after the death of the last to die of all beneficiaries living at the time of its creation, and be distributed to the

This proposal is concerned only with noncharitable donative transfers. Commercial transactions such as options, leases, and the variety of trusts in a business context involve different considerations. Similarly, the proposal is not concerned with charitable trusts or nontrust transfers of a wholly charitable nature. Existing law places no time limit on charitable trusts and any reversionary interests therein, and no change is proposed here. Further, a future interest in a charity following a present interest in a charity is not subject to the Rule Against Perpetuities under existing law, and no change is proposed.

II. THE PROBLEMS AND SHORTCOMINGS OF THE REFORMS

The complexity of the common-law Rule Against Perpetuities, and the arbitrary results it sometimes produces, result from several factors: the prospective application of the time limit of the Rule to the range of possible events; the elusive quality of the measuring lives necessary for validity; the distinction between the future interest that is contingent and the future interest that is vested, vested with enjoyment postponed, or vested subject to divestment; the "all-or-nothing" class gift rule, which provides that if the interest of any member of a class violates the Rule, the entire class gift is invalid; and the mechanical excision of the future interest that violates the Rule, causing a dispositive vacuum that is usually filled by a reversion.

The wait-and-see reform replaces the prospective application of the time limit to the range of possible events with the determination of validity on the basis of events that actually occur. Note that if the contingent future interest is valid under the common-law Rule, there is no need to wait to determine validity. If as a matter of logical necessity the interest must vest, if it ever does, within the period of the Rule, then obviously it is valid if one waits for it to vest within the period of the Rule. Only if the interest is invalid under the common-law Rule is there any need to wait to determine validity.

On its face the wait-and-see reform appears sound. It seems unnecessarily harsh to invalidate a future interest *ab initio* on the basis of far-fetched hypothetical facts. For example, testator bequeaths in trust to pay the income to *A* for life, and on *A*'s death to pay the principal to *A*'s children who survive *A* and live to age twenty-five. At testator's death *A* is living, as are three children of *A*, ages eighteen, twenty, and twenty-two. Under the traditional Rule the contingent remainder to *A*'s children is invalid because *A* may have another child whose interest may vest more than twenty-one years after the deaths of *A* and his three children and, indeed, after the deaths of everyone else on earth who was living at testator's death. If the interest of any member of the class violates the Rule, the entire class gift fails. However, it is unlikely that *A* will have another child or adopt another child. If he did, it is highly unlikely that *A* and the other three children would all die before that child reaches four years of age. In all likeli-

heirs of the transferor as if he had died at the termination, unless the trust has terminated earlier in accordance with its terms. ILL. ANN. STAT. ch. 30, para. 195 (Smith-Hurd Supp. 1987).

hood the class gift, which is invalid under the common-law Rule, will be valid under wait-and-see.

When one scratches the surface, however, problems with wait-and-see appear with respect to the measuring lives. Bear in mind that wait-and-see is used only if the contingent future interest violates the common-law Rule. Thus, measuring lives as they exist under the common-law Rule are not logically identifiable under wait-and-see. How does one determine measuring lives under wait-and-see? It has been maintained that any life having a reasonable relationship to the future interest in question may be a measuring life.

In the preceding example—income to *A* for life, remainder to *A*'s children who survive *A* and live to age twenty-five—suppose that *A* has another child one year after testator's death, and one month after the birth, *A*, *A*'s spouse, and the other three children of *A* die in a plane crash. The next-door neighbor of *A*, who was living at testator's death, is living when the afterborn child of *A* reaches age four. Does the neighbor's life validate the gift to the afterborn child? It is generally agreed that an extraneous life, such as the neighbor's, cannot serve as a measuring life under wait-and-see.¹²

Let us assume that *A* is living when the afterborn child reaches age four. It is universally accepted that *A* can serve as a measuring life. Several explanations are available. *A* has a relationship to the future interest in question as the holder of the preceding life estate whom the children must survive.¹³ *A* has a beneficial interest in the property that is the subject of the future interest in question.¹⁴ *A* would serve as a validating life under the common-law Rule for a similar but different future interest, such as remainder to the children of *A* who survive *A* and live to age twenty-one.¹⁵ These explanations have been subsumed under the reasonable relationship standard.

Assume *A* dies before the afterborn child reaches age four, but the other three children of *A* are living when the fourth child reaches age four. It is generally accepted that the three children can serve as measuring lives because they are members of the class whose future interest is in question, and clearly are related lives.¹⁶

Let us assume that *A* is the father and that *A* and his three children, who are all living at testator's death, die before the afterborn child reaches age four, but the mother of all the children is alive when the fourth child reaches age four.

12. See discussions in Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 3, 62-63 (1960); Jones, *Measuring Lives Under the Pennsylvania Statutory Rule Against Perpetuities*, 109 U. PA. L. REV. 54, 59-60 (1960); Maudsley, *Perpetuities: Reforming the Common Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355, 367 (1975); Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1767 (1983).

13. See P. BREGY, *INTESTATE, WILLS AND ESTATES ACT OF 1947* 5269-71 (1949); Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124, 1145 (1960); Waggoner, *supra* note 12, at 1767.

14. See Waggoner, *supra* note 12, at 1767.

15. T. BERGIN & P. HASKELL, *supra* note 2, at 214-15.

16. Note that the three children would not serve as validating lives under the common-law Rule for the similar but different gift of the remainder to the children of *A* who survive *A* and live to age 21; this is so because the other three children could die one day after the testator's death, and *A* could have a fourth child one year after the testator's death.

Is she a permissible measuring life under wait-and-see? She is not a beneficiary under the trust, and she has no relationship to the gift in question except as the parent of a beneficiary. Is she reasonably related to the future interest? She may well be considered an extraneous life, although the matter is not free from doubt.¹⁷ The spouses of the three children living at the testator's death would undoubtedly be ineligible as measuring lives; they simply have no relationship to the future interest.

Suppose testator bequeaths in trust to pay the income to his children *A* and *B*, in equal parts, for their lives, and on the death of each, to pay one-half the principal to the child's children who survive the child and live to age twenty-five. *A*, *B*, and *C*, a child of *A*, age five, are living at testator's death. The remainders are invalid under the common-law Rule. *B* has a child two years after testator's death. *B* dies before his child reaches age four, but *A* and *C* are alive at that time. Are *A* and *C* measuring lives under wait-and-see? They bear no relationship to the gift to the afterborn child, except that they are beneficiaries of the other half of the trust. That relationship is probably sufficient, but the matter is not completely clear.

Let us assume that testator bequeaths and devises his entire estate in trust, to pay the income to *A* for life, then to *A*'s children for their lives, and on the death of the survivor of *A*'s children, to pay the principal to *A*'s grandchildren. At testator's death only *A* is living. Under the common-law Rule the life estates in the children of *A* are valid, but the remainder in the grandchildren is invalid. Suppose *A* later has one child, *C*, who survives *A* and has one child, *GC*. *C* dies twenty-five years after *A*'s death, survived by *GC*. At *C*'s death testator's sole heir, *B*, his brother, is living. *B* had a reversionary interest. Is *B* reasonably related to the remainder in *A*'s grandchildren? That may be the case, but no one knows for sure.

The imprecise nature of the permissible measuring lives under wait-and-see has brought about the enactment of modified wait-and-see statutes, which attempt to define measuring lives by disallowing "any lives whose continuance does not have a causal relationship to the vesting or failure of the interest."¹⁸ What lives qualify under this definition? Assume testator bequeaths \$100,000 to the grandchildren of *A* who reach age twenty-one. At testator's death, *A*, two children of *A*, and three grandchildren of *A*, are living, but no grandchild has reached twenty-one. The interests of the grandchildren are invalid under the common-law Rule because of the possibility of afterborn children of *A* whose children could take beyond the period of the Rule. It has been maintained that under such a statute the lives having a causal relationship to the vesting or failure of the grandchildren's interests are *A* and the children and grandchildren of *A* living at the testator's death. *A* is a measuring life because he may have a child who may have a child who may take; *A*'s children are measuring lives because they may have children who may take; *A*'s grandchildren are measuring

17. See Waggoner, *supra* note 12, at 1768.

18. ALASKA STAT. § 34.27.010 (1985); KY. REV. STAT. ANN. § 381.216 (Michie/Bobbs-Merrill 1970); N.M. STAT. ANN. § 47-1-17.1 (Supp. 1985); R.I. GEN. LAWS § 34-11-38 (1984).

lives because they may take.¹⁹

What about the other parent of the living children of *A*, and the parents of the living grandchildren of *A* other than the children of *A*? It is maintained that they are not measuring lives because they are redundant—after the deaths of their respective spouses they cannot affect the identity of the grandchildren who take.²⁰

Assume that in this example a provision excludes grandchildren by adoption and natural children of adopted children of *A*. Do *A* and his two children alive at the testator's death cease to be measuring lives once they cease to be capable of having children because the continuance of their lives cannot have a causal relationship to vesting or failure? If that is the case, are their lives thereafter ignored, or are they treated as having "died" when they become infertile?²¹

Suppose testator bequeaths in trust to *A* for life, remainder in fee to the children of *A* who live to age 25. *A* and two children of *A*, ages ten and twenty-six, are living at testator's death. It has been maintained that *A* and the two children of *A* are measuring lives under the "causal relationship" criterion.²² In what respect is the continuance of the life of the twenty-six-year-old child causally related to vesting or failure? That child's interest is already vested.

Assume testator bequeaths in trust to pay the income to *A* for life, then to pay the income to the children of *A* for their respective lives, and on the death of each child of *A*, to pay to the children of such child a percentage of the principal equal to the percentage of the income the parent was receiving. At testator's death *A* is alive, one child of *A*, *C1*, is alive, and *A* has no grandchildren. Under the common-law Rule the children of each child of *A* constitute a separate class for perpetuities purposes; the remainder to the children of *C1* is valid because *C1* is a life in being, but remainders to children of unborn children of *A* are invalid. Five years later *C2* is born to *A*. *A* then dies and twenty-five years thereafter *C2* dies leaving children surviving him. *C1* is alive at *C2*'s death. Is the remainder to the children of *C2* valid under the causal relationship test, using *C1* as the causally related life? It seems that *C1*'s life is causally related only in the sense that *C1*'s existence is related to the size of the remainder interest, but it does not appear to be related to the failure or the vesting of the remainder as those words are generally understood. In addition, the size of the remainder interest in *C2*'s children is determined at *A*'s death; *C1*'s continued existence thereafter does not

19. J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS AND ESTATES* 847-51 (3d ed. 1984). Professor Dukeminier is the architect and principal advocate of the causal relationship test. For very different analyses of this example, which illustrate the difficulty with the causal relationship criterion, see COMMITTEE ON RULES AGAINST PERPETUITIES, SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, AMERICAN BAR ASSOCIATION, *PERPETUITY LEGISLATION HANDBOOK* (3d ed. 1967), reprinted in 2 *REAL PROP., PROB. & TR. J.* 176, 185 (1967) [hereinafter COMMITTEE ON RULES AGAINST PERPETUITIES]; Maudsley, *supra* note 12, at 374.

20. See Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1651 (1985).

21. This example assumes that the presumption of fertility is rebuttable, which although not the rule in a majority of states, is the trend. Statutes and cases have abolished the traditional conclusive presumption of fertility. See *supra* note 1.

22. Dukeminier, *supra* note 20, at 1667.

affect the size.²³

Assume testator devises Blackacre to *X* in fee, but if Blackacre is ever used for other than single-family residential purposes, then to *Y* in fee. Twenty years later *X* transfers to *A* who was not living at testator's death, and *Y* transfers to *B* who was not living at testator's death. What lives in being are causally related to the vesting or failure of *B*'s (*Y*'s) interest? When does the perpetuities period end?²⁴

It is apparent that the "causal relationship" test does little to clarify the problem of measuring lives under wait-and-see. The disagreements among academicians over its meaning convincingly establish this point.

In 1979 the perpetuities provisions of the Restatement (Second) of Property (Donative Transfers) were promulgated.²⁵ These provisions included wait-and-see, and purported to clarify the issue of measuring lives thereunder by stating specifically who they are:

(2) . . . [T]he measuring lives for purposes of the rule against perpetuities . . . 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 nonfiduciary 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.²⁶

Subsection (1) of section 1.3 of the Restatement, immediately preceding the subsection quoted above, provides that a future interest which complies with the common-law Rule is valid.²⁷ It is only if the interest fails to comply with the common-law Rule that wait-and-see comes into play using the specifically designated lives.

The Restatement definition of lives has its complications. A class of beneficiaries may have no living members, yet the "parents" and "grandparents" of the unborn are included, and this is so even if no member of the class ever comes into existence. If the class is the unborn children of *A*, *A*'s wife and her parents

23. This analysis appears in T. BERGIN & P. HASKELL, *supra* note 2, at 217. See the discussion of this example in COMMITTEE ON RULES AGAINST PERPETUITIES, *supra* note 19, at 185.

24. For a heated disagreement over this perplexing causal relationship problem, see Dukeminier, *supra* note 20, at 1659-74, 1705; Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714, 1719-24 (1985); Dukeminier, *A Response by Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985); Waggoner, *A Rejoinder by Professor Waggoner*, 85 COLUM. L. REV. 1739 (1985); Dukeminier, *A Final Comment by Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985).

25. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.1-1.6 (1983).

26. *Id.* § 1.3(2).

27. See *id.* § 1.3(1).

are measuring lives, but will cease to be when *A* divorces her and marries another, who then becomes a measuring life together with her parents. If the class is the children of *A* and several exist, the mother (*A*'s wife) is a measuring life as are her parents, and they will continue to be when *A* divorces her and marries another, who then becomes a measuring life together with her parents. Also, a parent who is a measuring life may cease to be if the child is adopted by others who then become measuring lives.²⁸ Presumably if a beneficiary assigns her interest to another, the assignee and his parents and grandparents become measuring lives, and the assignor and her parents and grandparents cease to be measuring lives.²⁹ Keeping track of measuring lives could become very complicated. Iowa has legislated the Restatement concept and expanded it to include the descendants of grandparents as measuring lives.³⁰

The Uniform Statutory Rule Against Perpetuities (USRAP),³¹ promulgated in 1986, provides in part as follows:

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.³²

As does the Restatement, the USRAP validates contingent future interests that are valid under the common-law Rule.³³ Alternatively, if the contingent future interest is not valid under the common-law Rule, wait-and-see is employed to validate it if it vests within ninety years after its creation.³⁴ For purposes of wait-and-see, the USRAP gives up on measuring lives because of the definitional and administrative difficulties just examined.³⁵ Ninety years was chosen as an approximation of the maximum duration available to transferors under the common-law Rule and under wait-and-see reforms using lives in being plus twenty-one years. The reasoning is that the transferor may have a child or grandchild, aged five or six at the time of the transfer, who has a life expectancy in the seventies, thereby making ninety an approximation of the maximum common-law period available.³⁶ The USRAP allows an interest to vest more than ninety years after its creation if it complies with the common-law Rule, but if it does not comply with the common-law Rule it is valid only if it vests not later

28. *Id.* § 1.3 comment e (1981).

29. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP., PROB. & TR. J. 569, 576 (1986).

30. IOWA CODE ANN. § 558.68 (West Supp. 1987).

31. 8A U.L.A. 80 (Supp. 1987).

32. UNIF. STAT. RULE AGAINST PERPETUITIES § 1, 8A U.L.A. 80, 86 (Supp. 1987). For a critical examination of the difficulties with the USRAP approach see Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 U.C.L.A. L. REV. 1023 (1987).

33. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.3(1) (1983); UNIF. STAT. RULE AGAINST PERPETUITIES § 1(a)(1), 8A U.L.A. 80, 86 (Supp. 1987).

34. UNIF. STAT. RULE AGAINST PERPETUITIES § 1(a)(2), 8A U.L.A. 80, 86 (Supp. 1987).

35. Waggoner, *supra* note 29, at 575.

36. Waggoner, *supra* note 29, at 579.

than that approximation of the maximum period available under the common-law Rule. The USRAP is designed to achieve the objectives of the Restatement wait-and-see, and other forms of wait-and-see that use lives in being plus twenty-one years as the period, without their difficulties. Minnesota, Nevada, and South Carolina have legislated the USRAP.³⁷

That is the state of wait-and-see reform. Note that there has been and still is opposition to wait-and-see. One objection is the problem of the measuring lives. Another objection involves the uncertainty of title during the wait-and-see period.³⁸ Under the common-law Rule the contingent future interest is valid or invalid from the beginning; in theory, all one has to do is apply logic to find the answer. This certainty, however, is often more apparent than real when one considers the constructional problems that frequently arise in connection with perpetuities questions, and the doctrine of infectious invalidity.³⁹ Under wait-and-see, of course, it may take a while to determine if the contingent future interest is valid. Uncertainty of a similar nature, however, seems to inhere in the contingent future interest that complies with the common-law Rule in the sense that one does not know if the condition will be satisfied.

A further objection to wait-and-see is that major reform is unnecessary because of the small amount of litigation concerning perpetuities issues.⁴⁰ It is certainly true that the number of reported cases in the perpetuities area is surprisingly small. It is also true that practitioners specializing in trusts and estates often do not pretend to be familiar with the esoterica of the Rule. It may be that lawyers make a practice of not coming anywhere near the limits of the Rule because of their fear of it. Be that as it may, there is no justification for complexity in the law that serves no social purpose. Wait-and-see reforms, if properly drafted, do simplify the problem.

The other major reform of the common-law Rule Against Perpetuities is *cy pres*, or reformation. This principle permits the court to reform a future interest that violates the Rule Against Perpetuities to make it conform to the Rule in a manner approximating the intention of the donor. The Restatement, the USRAP, and a number of state statutes have adopted reformation.⁴¹ There is gen-

37. MINN. STAT. ANN. § 501A.01 to .07 (West Supp. 1988); S.C. CODE ANN. § 26-7 (Law. Co-op. Supp. 1987); Act of March 17, 1987, ch. 25, 1987 Nev. Stat. 62 (to be codified at NEV. REV. STAT. ch. 111 (1987)).

38. See Maudsley, *supra* note 12, at 364; Mechem, *supra* note 8, at 979; Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179, 188 (1953); Waggoner, *supra* note 12, at 1771-72.

39. Infectious invalidity means that if the invalidation of a future interest as a perpetuities violation substantially distorts the transferor's dispositive plan, present or future interests that are otherwise valid may also be stricken if this would effect more closely the perceived dispositive purpose of the transferor. See T. BERGIN & P. HASKELL, *supra* note 2, at 208-10.

40. See 5A R. POWELL, THE LAW OF REAL PROPERTY § 827H (1987); L. SIMES, *supra* note 6, at 64; Bloom, *Perpetuities Refinement: There is an Alternative*, 62 WASH. L. REV. 23, 35 (1987); Mechem, *supra* note 8, at 966; Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 MINN. L. REV. 41, 79 (1957).

41. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5 (1983); UNIF. STAT. RULE AGAINST PERPETUITIES § 3, 8A U.L.A. 80, 105 (Supp. 1987); *supra* note 1.

eral agreement that reformation is sound.⁴²

All the proposed reforms and almost all the statutory reforms retain the common-law perpetuities principle of vesting in interest within the time limit as the determinant for validity. That determinant involves the esoteric distinctions between vested and contingent, vested with enjoyment postponed and contingent, vested subject to divestment and contingent, and the concomitant sophistry. Furthermore, the vesting in interest of a legal future interest in land does not remove the fetters from alienability. The party or parties necessary to convey the fee can be identified after vesting, but the present and future interest holders must all agree to convey and agree on their shares of the proceeds of sale. Vesting in interest as the determinant of validity is true complexity without societal purpose. The determinant for validity should be vesting in possession within the time period; this idea was recognized as the sounder principle almost a century ago by none other than John Chipman Gray.⁴³ Vesting in possession, when combined with wait-and-see and a fixed period, is simple and effects the objectives of the Rule.

The perpetuities principle that a class gift is invalid in its entirety if the interest of any member of the class violates the Rule has often been criticized. The only policy justification for this all-or-nothing result is that the donor would prefer that no member receive any benefit if one member could not. This result may be preferred in some instances but not in others. In any event, reformation removes the sting of this sometimes harsh rule because the court can modify the invalidating interest to make it conform to the Rule. The wait-and-see reform also makes it less likely that the interest of some class members will be invalid and others will be valid.

42. Certain "patchwork" reforms involving the presumption of fertility, the "unborn widow" situation, and the "administrative contingency" situation, are discussed *supra* note 1.

Wait-and-see has been described as a statutory "saving clause." Sophisticated draftsmen often include a saving clause in their dispositive instruments when appropriate to protect against a perpetuities violation under the common-law Rule. For example, testator bequeaths in trust to pay the income to *A* for life, then to pay the income to the children of *A* for their respective lives, and on the death of each child of *A*, to pay to the issue of such child a percentage of the principal equal to the percentage of income to which such child was entitled. *A* and one child (*CI*) were living at testator's death. Under the traditional rule, the remainder to the issue of *CI* is valid, but the remainder to the issue of any afterborn children of *A* is invalid. To deal with this problem, the draftsman adds a saving clause as follows: "... provided that if the trust has not terminated within 21 years following the death of the survivor of *A* and *CI*, it shall terminate at that time and the remaining principal shall be distributed to the individuals then receiving the income in the same proportions that they were entitled to the income." The likelihood is substantial that the trust will run its intended course within the lives of *A* and *CI* plus 21 years. *A* and *CI* become, in effect, wait-and-see lives established by the draftsman.

Wait-and-see reforms provide, in effect, that if the draftsman fails to create "wait-and-see lives" by a saving clause, such lives are created by operation of law. The Uniform Statutory Rule substitutes 90 years for actual lives in being plus 21 years, as an approximation of the maximum period available under a saving clause. The draftsman's saving clause provides for disposition in the event the trust is prematurely terminated; the statutory counterpart to this is the judicial power of reformation.

43. See *supra* note 8.

III. A SIMPLE AND SOCIALLY EFFECTIVE RULE

It is clear that dead hand control of legal interests in real property is a different issue from dead hand control of equitable interests under a trust in which the trustee has a power of sale.⁴⁴ The original purpose of the Rule Against Perpetuities was to place a time limit on the indirect fettering of alienability of real property.⁴⁵ The existence of legal future interests in land indirectly fetters alienability. This results from the absence of a market for anything but a fee interest; if title is divided among several different people or classes in time sequence, including usually those who are unborn at the time of the transfer, the conveyance of the fee is either impossible or very difficult to effect. Even if all the future interests are vested it is difficult to convey the fee because of the number of individuals who must agree to the sale and the valuation of their shares. It is true that equity may authorize, and some statutes provide for, the sale of the fee on the petition of a holder of a present or future interest, with the proceeds to be held for the benefit of the interested parties, but such a sale requires a showing that retention of the land is significantly disadvantageous to the petitioner.⁴⁶

On the other hand, if a trust is created in which the trustee has the power of sale over property held in trust, alienability has not been fettered in any way. A time limit is imposed in this situation, because it is deemed socially undesirable for other reasons to permit dead hand control of wealth. Most future interests today are equitable future interests under trusts, and trustees almost invariably have the power of sale.

A. *Trust With Power of Sale*

Why should society be concerned that a trust lasts for hundreds of years so long as the trustee has power to sell and reinvest the assets? The people of South Dakota and Wisconsin are not concerned; legislation in those states permits such a trust to last in perpetuity.⁴⁷

One argument for a time limit is that the trust assets are invariably channeled into conservative investments. Risk capital is necessary in a private enterprise system, and a perpetual trust would limit the availability of such capital. Family trusts, however, constitute a very small portion of available investment

44. See *supra* text accompanying notes 6-9.

45. See *supra* note 6 and accompanying text.

46. Ball v. Curtis, 276 Ark. 498, 637 S.W.2d 571 (1982); Dunn v. Sanders, 243 Ga. 684, 256 S.E.2d 366 (1979); Baker v. Weedon, 262 So. 2d 641 (Miss. 1972); Caine v. Griffin, 232 S.C. 562, 103 S.E.2d 37 (1958); IND. CODE ANN. § 32-4-8-1 (Burns 1980); MD. REAL PROP. CODE ANN. § 14-110 (1981); MASS. ANN. LAWS ch. 183, § 49 (Law. Co-op. 1987); N.C. GEN. STAT. § 41-11 (1984); see L. SIMES & A. SMITH, *supra* note 1, §§ 1941-46; Rogers, *Removal of Future Interest Encumbrances—Sale of the Fee Simple Estate*, 17 VAND. L. REV. 1437 (1964); Annotation, *Court's Power to Order Sale of Property Subject to Legal Life Estate In Order to Relieve Economic Distress of Life Tenant*, 57 A.L.R.3d 1189 (1974).

47. S.D. CODIFIED LAWS ANN. § 43-5-4 (1967); WIS. STAT. ANN. § 700.16 (West 1981). These two states have the Rule Against Suspension of the Power of Alienation, rather than the Rule Against Perpetuities.

capital.⁴⁸ Pension trusts, which are subject to a modified form of the prudent person rule,⁴⁹ constitute a much larger portion, are growing at a more rapid rate than family trusts,⁵⁰ and are exempted from the Rule Against Perpetuities by statute as they must be if they are to function. Investment companies,⁵¹ insurance companies,⁵² and direct private investment⁵³ are far more significant investment factors than family trusts. There is no shortage of risk capital now. If a shortage of risk capital should develop, family trusts would be a very small part of the problem.

Another argument for a time limit on family trusts is that the current generation rather than the deceased ancestor should be permitted to choose how to use the capital. What would the current generation at any given time do differently that would be socially preferable? The current generation might choose to use the wealth for consumption rather than investment. In modern times our economy is considered to be suffering from too little saving in relation to consumption. A time may come, of course, when the reverse is true; this would, however, require a radical change in the American character. In any event, family trusts constitute a very small portion of disposable wealth. Also, the current generation might choose to add to the availability of risk capital but, again, family trusts are not a major source of capital.

Another argument for a time limit is that trusts create and perpetuate socio-economic advantage and class distinction. These attributes are permitted under the present Rule for a generation or two. When the trust comes to an end under the present Rule, the descendants of the settlor have three choices. They can reestablish the trust for succeeding generations, pass it on outright to the next generation, or consume it. The first two actions maintain the class advantage. Viewed in isolation, consumption presumably is not preferable to continued investment, but it does have the effect of terminating the socio-economic advantage to the family line.⁵⁴

We have been examining the question of a time limit in terms of reasons for imposing it. The reasons are significant but not compelling. It is appropriate to examine the question from the standpoint of why a property owner should be allowed to control the benefit of wealth without a time limit. What societal

48. As of 1984, the total amount held in personal trusts by banks insured by the Federal Deposit Insurance Corporation and noninsured banks in the Federal Reserve System was approximately \$276 billion. FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, TRUST ASSETS OF FINANCIAL INSTITUTIONS—1984, at 16 table 1.

49. See 29 U.S.C. § 1104(A)(1) (1982); 29 C.F.R. 2550.404a-1 (1987); B. LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE 32-36 (1986).

50. As of 1985, \$1,705.9 billion was held in public and private pension funds. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1987, at 354 table 598 (107th ed. 1987).

51. As of 1985, \$495 billion was held by mutual funds. *Id.* at 497 table 841.

52. As of 1985, life insurance companies held assets of \$825.9 billion. *Id.* at 497 table 842.

53. As of 1985, individuals held \$1,549.4 billion in corporate stock, and \$1,016.5 billion in debt securities. *Id.* at 476 table 795.

54. It should be noted that the trust for two or more successive generations junior to the transferor no longer avoids the impact of a capital tax at each generation as in the past. The generation-skipping tax imposes, in effect, an estate tax on the principal at the termination of each generation's interest.

objective would be furthered by such dispositive power? We allow the property owner to dispose of his wealth during life or at his death as an aspect of ownership. The institution of private property exists for the reason, among others, that it is conducive to productivity. But experience clearly establishes that a reasonable time limit upon the dispositive power, as under the common-law Rule, does not inhibit industry.

The law allows a donor to create a trust whose duration is unlimited if its purposes are exclusively charitable.⁵⁵ The social benefit of the charitable purpose outweighs the social interest in limiting dead hand control of the investment and disposition of wealth. Under the judicial *cy pres* power, however, the dispositive terms of the trust may be changed if the purposes cease to be functional. This mechanism adjusts the charitable trust for changing circumstances.

The exercise of control over the disposition of wealth for ten generations or more for private, noncharitable purposes serves no apparent societal interest. On the other hand, there are reasons for limiting the duration of trusts with power of sale, although they are not compelling. A time limit probably should exist, but it is not important that it be very short or that it be defined in a highly technical manner that produces a massive and complex body of law. In other words, the present Rule Against Perpetuities with all its complexity is not necessary to achieve the desired objective in the case of a trust with a power of sale.

The existing Rule is structured to permit the donor to control the benefit of his property for the immediately following generation or generations whose members are living, plus twenty-one years thereafter to provide for the situation of the immaturity of the ultimate takers or any other contingency the donor wishes within that gross time period. The vast majority of trusts that are calculated to achieve such an objective terminate before one hundred years from the time of creation because the lives in being who are benefited do not live more than seventy-nine years from the creation of the trust, and the contingency, if one exists, which triggers the ultimate disposition thereafter does not require twenty-one additional years. On the other hand, a trust calculated to achieve those objectives may last over 100 years if the lives in being who are benefited are very young when the trust is created. The likelihood of any such trust lasting 125 years is extremely remote. If from the standpoint of societal consequences it does not make a great deal of difference whether the trust lasts 50 years or 80 years or 125 years, why not discard all the pointless learning surrounding lives in being plus twenty-one years and the vesting of contingent interests, and adopt the simple rule that in the case of a trust with power of sale, the trust must terminate and the assets must become the absolute property of an individual or individuals within 125 years of its creation? Again, 125 years is not a magical number; the period may be reduced but it should not be reduced below 100 years.

This rule would allow the lawyer to prepare a trust to satisfy the desires of the overwhelming majority of donors without fear of violating the limits of the

55. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.6 (1983); UNIF. STAT. RULE AGAINST PERPETUITIES § 4(5), 8A U.L.A. 80, 109 (Supp. 1987).

Rule Against Perpetuities. The testator who wishes to exploit the limits of the rule—125 years—could probably create a trust for his children for their lives, his grandchildren for their lives, his great-grandchildren for their lives, and remainder outright to his great-great-grandchildren, assuming the testator dies at age 80 and his youngest child is 40, and the generational age relationship continues successively. Is a trust of that nature socially undesirable? It seems the desire to protect family for several generations is an admirable one, the effectuation of which should not be denied absent seriously adverse social or economic consequences. Any adverse consequences do not appear to be serious.⁵⁶ Under the existing Rule, the calculating testator could often keep the trust going for 100 years or more if he had very young children or grandchildren living at his death.

The proposed rule of vesting in fee in possession within 125 years, or a shorter period but not less than 100 years, also contemplates the applicability of the wait-and-see and reformation principles. In the vast majority of situations the trust will terminate within the period of the Rule. Suppose testator creates a trust for several generations, which does not provide for termination after 125 years, and which turns out, after waiting and seeing, to violate the Rule. The proposed rule does not operate to leave the present interest, such as a life estate existing at the 125-year deadline, intact to run its course. Rather, the trust terminates at the end of 125 years. It is proposed that the principal then be distributed to the parties receiving the income at that time, in the shares they were receiving it or in equal shares if the income distribution is discretionary. The disposition of the principal would be subject to the power of the court, pursuant to the reformation principle, to order a different distribution on the petition of an interested party, if such appeared to be more consonant with the transferor's dispositive purpose.

Although almost all trusts provide for a power of sale in the trustee, occasionally the trustee is not given the power or is forbidden from selling a specific asset. It is proposed that after the trust has been in existence for fifty years, the trustee would be deemed to have the power of sale by operation of law. In all respects, the perpetuities principles described above would also apply.

B. *Legal Interests in Land*

The existence of legal future interests in land presents several different considerations from equitable future interests under a trust with power of sale. Legal future interests in land tend to fetter alienability because they make it difficult to convey the fee.⁵⁷ If the future interests are contingent because the holders are unborn, it is peculiarly difficult to convey the fee. But even if the future interests are vested, which requires that the holders be presently identifiable, alienability is nevertheless fettered because it takes the joinder of the holders of successive interests to convey the fee. One of several holders of the

56. See *supra* notes 48-54 and accompanying text.

57. See *supra* note 6 and accompanying text.

interests may choose not to sell, or if all wish to sell, they may not be able to agree on the division of the proceeds. The point is that vesting in interest does not make the land easily alienable. The fetters on alienability are removed when the only interest is the present fee. Whatever time limit is imposed on the creation of future interests, compliance with it should require the fee to vest in possession rather than vest in interest.

It is true that equity may authorize, and some statutes provide for, the sale of the fee on the petition of a holder of a present or future interest, with the proceeds to be held for the benefit of the interested parties. Such a sale, however, requires a showing that retention of the land is significantly disadvantageous to the petitioner.⁵⁸

The testator who creates a legal life estate in land in one person with remainder in fee in that person's issue is thinking of keeping the land in the family. His plan necessarily fetters alienability. The present time limit of lives in being plus twenty-one years can have the effect of fettering alienability for over 100 years. In most cases involving a life estate and remainder in fee, however, alienability will be fettered for not more than fifty years. An eighty-year-old testator who leaves his fifty-year-old daughter a life estate with remainder to her children ties up the property probably for only thirty or forty years.

It is proposed, subject to qualifications set forth below, that in the case of legal present and future interests in land, any holder of a present interest would have the unconditional power to sell the fee simple absolute after fifty years. The proceeds of the sale would be held in trust, with power of sale in the trustee, in accordance with the terms of the original disposition.⁵⁹ The court would supervise the sale of the fee, appoint the trustee, and establish the administrative terms of the trust. If no sale occurs, the fee simple absolute must vest in possession within 125 years; if there is a sale, the trust must end and the fee simple absolute, legal and equitable, in the trust assets must vest in possession within 125 years. Again, there is no magic in 125 years; the period may be reduced but it should not be less than 100 years. The same reformation and wait-and-see principles applicable to the transfer that is originally in trust, described above, would be applicable to the transfer of legal interests in land whether or not it becomes transformed into a trust. If the transfer is to several successive generations of the transferor, and after 125 years the fee has not vested in possession, the dispositive provisions cease to be effective, and the fee in possession is deemed to be in the holders of the present interest or those who are receiving the income at the time, as the case may be. This disposition would be subject to the power of the court to order a different disposition, pursuant to the reformation principle, on the petition of an interested party, if such appeared to be more consonant with the transferor's intent.

58. See *supra* note 46 and accompanying text.

59. This sale and the trust thereby created effectively turn legal interests in land into equitable interests in trust proceeds, which as previously discussed, do not implicate alienability concerns. Hence, the testator's intent and society's concerns over the fettering of real property both may be served simultaneously.

Occasionally a donor creates legal interests in land such as the following: Blackacre to *A* in fee, but if the land is ever used for other than single-family residential purposes, then to *B* in fee. It would make no sense to give *A* the power to sell the fee simple absolute after fifty years and have the proceeds held in trust under the terms of the original disposition. In this circumstance the executory interest would cease to exist after fifty years, and *A* would own the fee simple absolute. That is to say, the legal future interest in land, which becomes possessory upon the happening of an event concerning the use of the land, becomes void after fifty years.

Sometimes this type of donative future interest takes the form of a possibility of reverter or power of termination (right of entry): *A* in fee, so long as the premises are used only for single-family residential purposes. After fifty years *A*'s fee simple determinable would become a fee simple absolute, and the donor's possibility of reverter would cease to exist.⁶⁰

Of course, there may be a legal executory interest or a legal possibility of reverter or power of termination in land that becomes possessory on account of an event unrelated to the use of the land: donor conveys Blackacre to *A* in fee, so long as neither *A* nor any descendant of *A* becomes a member of the bar. After 50 years *A* would have the power to sell Blackacre in fee simple absolute, and the proceeds would be held in trust in accordance with the terms of the original disposition for not more than 125 years. *A* and his successors would be entitled to the income until the time of the deadline. If the present and future interests are still in existence after 125 years, *A*'s successors would have the possessory fee simple absolute, subject to the judicial reformation principle.

It should be emphasized that the proposed requirement of vesting in possession in fee simple absolute after 125 years applies to transfers in which the only future interest is a reversion. When a testator transfers in trust to pay the income to his descendants per stirpes for 150 years, no remainder interest is created. The trust ends at 125 years, and those receiving income are then entitled to the possessory fee simple absolute, subject to judicial reformation if a different disposition appears more consonant with the transferor's dispositive purpose.

C. *Powers of Appointment and Revocable Trusts*

When *A* has the unconditional power to make himself the absolute owner of property the title to which is in *B*, *A* is functionally the absolute owner of the property. For the purposes of the proposed rule, if a settlor reserves the power to revoke the trust, the perpetuities period does not begin to run until he ceases to have the power. If, at the time any transfer is made, a person has a presently exercisable general power of appointment over the property transferred, the perpetuities period does not run. If a presently exercisable general power is exercised to create present and future interests, the period of the rule begins to run

60. Several states have statutes limiting the duration of a possibility of reverter or Power of Termination to a specific number of years, such as 30. See CONN. GEN. STAT. § 45-97 (1975); KY. REV. STAT. ANN. §§ 381.218, 381.219 (Michie/Bobbs-Merrill 1972); NEB. REV. STAT. § 76-2, 102 (1986); R.I. GEN. LAWS § 34-4-19 (1984).

from the time of the exercise. This result is identical to that of the traditional Rule. The proposed rule would not change the "relation back" of the exercise of the special power and the general testamentary power, as under the traditional Rule. In short, existing law would not change with respect to the relationship of powers of appointment to the Rule Against Perpetuities.

Suppose at the time a transfer is made there is no presently exercisable general power, but the terms of the transfer provide for a person to have a presently exercisable general power at a later time. Because that person can make himself the absolute owner, it is arguable that the acquisition of the power at the later time should be deemed to be the equivalent of the legal and equitable fee in possession for purposes of the proposed rule. It may then follow from that premise that the perpetuities clock would stop at the time the power was acquired; if the power is never exercised, the perpetuities clock would begin anew at year one at the expiration of the power, as far as the remaining provisions of the transfer are concerned. This would significantly change existing law, and it is not proposed that this change should occur. The perpetuities clock would stop and start again at year one only when the power is exercised. As long as the power is not exercised the clock continues. If the rule were otherwise, it would provide an opportunity for the creation of the gimmick of the very short-term presently exercisable general power that would not be exercised in order to achieve an excessively long-term disposition.

IV. CONCLUSION

The Rule Against Perpetuities is a complex and esoteric body of law. The complexity and esoterica are unnecessary to achieve the social objective of the Rule. The adoption of vesting in possession within a specific number of years, and provision for a power of sale by operation of law when it does not otherwise exist, would greatly simplify the Rule and better achieve its objective. It should be noted that in 1986 Delaware enacted a statute which, with respect to trusts, replaces the traditional Rule Against Perpetuities with the rule that the trust must terminate after 110 years.⁶¹

There is no magic in the 125-year period proposed in this Article. It was selected to have the effect of removing the Rule Against Perpetuities as a consideration in almost all donative dispositions. It may be considered to be too long a period. Maybe 110 or 100 years would be more acceptable. In any event, the period should be long enough to allow a donor to create a trust for the life of a very young beneficiary.

61. See *supra* notes 10-11 and accompanying text.