

IF YOU THINK YOU NO LONGER NEED TO KNOW ANYTHING ABOUT THE RULE AGAINST PERPETUITIES, THEN READ THIS!*

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Lawyers have dreaded the common-law rule against perpetuities¹ for many generations, and for good reason. It is difficult to teach and to comprehend;² consequently, most lawyers have never mastered it. Additionally, the rule is quirky,³ difficult to justify,⁴ and unfair.⁵ In recent

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1. Courts and commentators generally rely upon this summary of the common-law rule against perpetuities: "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." W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 639 (1938).

2. The most significant obstacle to understanding the common-law rule lies in the life in being concept and the requirement of absolute certainty as to the time limits for vesting. Inevitably, students wonder and ask: "Who is this life in being by which one determines that an interest is valid?" They ask this question because the identity of the validating life in being is usually unclear to them, and it becomes their major concern in trying to comprehend the common-law rule and apply it to specific examples. In an effort to clarify the problem, instructive guidelines are often given to students about the validating life in being. These guidelines might include: (1) the life in being can be anyone or any group of people, not unreasonably large or unreasonably difficult to trace; (2) such person need not be the recipient of any interest within the limitation or within the dispositive instrument itself; and (3) the life in being need not be explicitly mentioned in the dispositive instrument. Typically, students find these guidelines confusing when asked to interpret a given limitation and determine its validity. Frequently they respond: "If the life in being can be anyone, even someone not mentioned in the instrument, then why isn't the life in being anyone who was actually alive and why can't anyone in being be used to validate the interest?" Further, after being told that a particular limitation violates the common-law rule, students may persist in their quest for a life in being. They ask: "What lives in being were used to conclude that there is violation? If the life in being can be anyone or any group of people, why is it that in this limitation there is no life in being; indeed, doesn't there always have to be some life in being?" Although the answers to these questions seem obvious to those who have mastered the common-law rule, they are neither apparent nor easily understood by most students.

3. Given the manner in which it has been applied, violations of the common-law rule often rest upon factual assumptions that do not make sense. For example, under the common-law rule one must assume that a person can conceive a child at any time during his or her life. For discussion of this presumption of fertility from the moment of birth until the time of death, see 6 AMERICAN LAW OF PROPERTY § 24.22 (A. James Casner ed., 1952 & Supp. 1962); ROBERT J. LYNN, THE MODERN RULE AGAINST PERPETUITIES 58, 60-61 (1966); RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 49, 52-53 (1979); LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS § 1229 (2d ed. 1956 & Supp. 1995).

4. Historically, the policy of the common-law rule against perpetuities has been to promote the alienability of property, to prevent the removal of property from the market place, and to make property

years perpetuities law has undergone substantial legislative reform. The majority of these efforts has taken the form of “wait-and-see” conversions of the common-law rule.⁶ And the most significant and prevalent of these reforms has been the Uniform Statutory Rule Against Perpetuities (“USRAP”), which offers “wait-and-see” for a period of ninety years coupled with reformation of interests that fail to satisfy its test.⁷

productive. Nevertheless, most scholars have reached the conclusion that the rule can no longer be justified on this basis. Professor Simes has said: “I believe it is no exaggeration to say that, at the present time, due to changes both in the nature of capital investments and in the law, the proposition that contingent future interests make property unproductive is rarely true in the United States and almost never true in England.” Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 712 (1955). In defense of his conclusion, Simes observes that contingent future interests of today are nearly always equitable interests and that the trustee is almost always empowered to sell the subject matter and reinvest the proceeds. *Id.* at 713-14. Additionally, the subject matter of these trusts is usually corporate stock or government or corporate bonds. *Id.* at 714-15. And as to the stock, the economic value is in the property of the corporation, which is freely alienable. *Id.* Finally, there is the modern doctrine of unproductive property that permits a court, under limited circumstances, to order the sale of land and place the proceeds in trust for the benefit of the owners of possessory and future interests. *Id.* at 715-17. Simes does, however, believe that the rule can still be justified:

First, the Rule Against Perpetuities 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. . . .

But, in my opinion, a second and even more important reason for the Rule is this: it is socially desirable that the wealth of the world be controlled by its living members and not by the dead.

Id. at 723.

5. The common-law rule is deemed unfair because it frequently invalidates interests that actually, or will most probably, vest within the allowed time and because it produces very harsh consequences whenever a violation occurs. See Jesse Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 3, 53-59 (1960). In essence, critics of the common-law rule have advocated reform because the rule too often destroys a reasonable and appropriate dispositive design, usually one that could have been preserved by modest adjustment of language.

Perpetuities cases that have arisen in the courts, English or American, in recent decades do not reveal testators and settlors who have long-term designs which press against the limits of the Rule Against Perpetuities. Rather they deal with persons who, starting from reasonable plans for the support of their families, have run afoul of the Rule through the ignorance or oversight of the particular member of our profession to whom they have entrusted their affairs. I do not recall a single twentieth-century case, English or American, in which the will or trust could not have been so drafted as to carry out the client’s essential desires within the limits of the Rule.

W. Barton Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 HARV. L. REV. 721, 722-23 (1952).

6. In 1983, the American Law Institute summarized the states that had adopted some form of “wait-and-see.” RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 stat. notes (1)(a)-(c) (1983). At that time, their list included 11 states. *Id.* Since then, the National Conference of Commissioners on Uniform State Laws produced the Uniform Statutory Rule Against Perpetuities. UNIF. STAT. RULE AGAINST PERPETUITIES, 8B U.L.A. 321-82 (1993 & Supp. 1995) [hereinafter USRAP]. This statute also embraces a “wait-and-see” test. *Id.* at 323, 333. As of 1995, 23 states had enacted the USRAP. *Id.* at 321 (listing states that have adopted the USRAP). In most states the USRAP replaced the common-law rule; however, in some states the USRAP replaced another version of “wait-and-see.” Compare *id.* with RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 stat. notes (1)(a)-(c) (1983).

7. USRAP, *supra* note 6, §§ 1, 3, 5. For discussion and explanation of the USRAP, see Lawrence W.

Undoubtedly, lawyers and law students will celebrate the arrival of these reforms and the end of the common-law rule's reign of terror.⁸ They will celebrate the ostensible obsolescence of an entire body of law, one they seldom understood and often ignored. But should they? This article asks the question: What must estate planners in every jurisdiction know about the common-law rule against perpetuities? The answer: *A lot!*

I. THE COMMON-LAW RULE AGAINST PERPETUITIES AND PREVENTIVE PERPETUITIES COMPLIANCE UNDER "WAIT-AND-SEE"

In answering the foregoing question, one must first inquire whether "wait-and-see" statutes completely abandon the common-law rule against perpetuities. To begin with, these statutes ordinarily do not apply retroactively.⁹ However, when they do, their application is usually limited to reformation of interests that are deemed invalid under the prior rule.¹⁰ Consequently, when the earlier perpetuities law is the common-law rule, this rule will continue to govern the validity of interests that are irrevocably created before the effective date of the statute that introduces the "wait-and-see" test.

More importantly, however, the common-law rule has great relevance to interests created after the enactment of these reform statutes. There are essentially two species of "wait-and-see" statutes. The first group is directly tied to the time period allowed under the common-law rule, namely, a life in being plus twenty-one years.¹¹ Under these statutes, an interest is valid if it

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

8. For the article that touched off the wave of criticism, commentary, and ultimately reformation of the common-law rule, see Leach, *supra* note 5. See also Ronald Maudsley, *Perpetuities: Reforming the Common-Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355 n.1 (1975) (articles cited therein).

9. For example, the USRAP applies prospectively. USRAP, *supra* note 6, § 5. More specifically, the USRAP and the statutes patterned after it apply only to nonvested interests and powers of appointment that are created after the effective date of such statute. *Id.* Nevertheless, as to interests and powers created before such effective date, the USRAP empowers courts to reform interests deemed invalid under the previous rule in a manner that satisfies such earlier rule and approximates most closely the estate owner's manifested plan of distribution. *Id.* One should also observe that nonvested interests created by exercise of a power of appointment are viewed as created when the appointment is deemed irrevocably made and not as of the time the power was itself created. *Id.*

10. *Id.*

11. See, e.g., KY. REV. STAT. ANN. § 381.216 (Baldwin 1989). The Kentucky statute provides:

In determining whether an interest would violate the rule against perpetuities the period of perpetuities shall be measured by actual rather than possible events; provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest. Any interest which would violate said rule as thus modified shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of

actually vests within this time period. And so one must “wait-and-see” whether interests vest within the appropriate time period. Some of these statutes have been silent as to the lives in being used to measure the waiting period.¹² Others, however, have used either a principle of causation or a statutory list to identify the lives in being that govern the permissible waiting period.¹³ With respect to each of these statutory formulations, it is extremely important that one recognizes that valid interests under the common-law rule also achieve instant validity under this specie of “wait-and-see” statute. And they do so with absolute certainty immediately upon creation of the interest. By way of explanation, an interest that must vest or fail within the common-law rule’s permitted period of time—and therefore satisfies its requirements—must actually vest, if at all, within the allowed period of time for waiting. Stated otherwise, it cannot in actuality ever vest beyond the statutory waiting period.¹⁴

The second kind of “wait-and-see” test substitutes a specific number of years for the common-law life in being plus twenty-one years to measure the

the interest.

Id.

12. See, e.g., OHIO REV. CODE ANN. § 2131.08 (Baldwin 1994); 20 PA. CONS. STAT. ANN. § 6104 (1975); VT. STAT. ANN. tit. 27, § 501 (1989).

13. For an example of a “wait-and-see” statute that adopts a principle of causation to measure the waiting period, see KY. REV. STAT. ANN., *supra* note 11, § 381.216; Perpetuities Act, R.S.O., ch. 343, § 6 (1970) (Can.). For an example of a “wait-and-see” statute that creates a list of acceptable lives in being that can be used to govern the permissible waiting period, see Perpetuities and Accumulations Act, 1964, ch. 55, §§ 3(4)-3(5) (Eng.).

14. The reason for this is that all of the lives in being that can possibly validate an interest under the common-law rule will be found among the lives in being that govern the waiting period under this kind of “wait-and-see” statute. Under causal lives formulations this conclusion should be obvious because common-law validations can only be made with lives in being that are causally connected to vesting or to the time of possession. See, e.g., Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985). Further, under statutes that use a specific list of lives in being to govern the waiting period, one should observe that such a statutory list inevitably comprehends all potential validating lives in being under the common-law rule. For example, one statute includes within its statutory list the following lives in being: the person by whom the disposition was made; a person to whom or in whose favor the disposition was made; a person having a child or grandchild within the group of persons to whom or in whose favor the disposition was made or any of whose children or grandchildren, if subsequently born, would by virtue of descent fall within the foregoing group; and any person on the failure of determination of whose prior interest the disposition is limited to take effect. See Perpetuities and Accumulations Act, *supra* note 13, § 3(5). (For a formula that solves perpetuities determinations under the common-law rule and does so by drawing upon statutory lists of lives in being developed for “wait-and-see” statutes, see David M. Becker, *A Methodology for Solving Perpetuities Problems Under the common-law rule: A Step-by-Step Process That Carefully Identifies All Testing Lives in Being*, 67 WASH. U. L.Q. 949 (1989)). Consequently, because all validating lives in being under the common-law rule fall within the lives that measure the waiting period under “wait-and-see,” one can conclude that interests that satisfy the common-law rule can never actually vest beyond the permitted time for “wait-and-see.”

duration of the permitted waiting period. Presumably, one can achieve immediate validation under this kind of statute by creating interests that must vest, if at all, within the allowed number of years. Nevertheless, the USRAP—which allows a waiting period of ninety years—also offers an opportunity to validate interests immediately through the common-law rule itself.¹⁵ Consequently, even though an interest cannot or does not actually vest within ninety years, it will be upheld if it must vest or fail within a life in being plus twenty-one years. Therefore, one can achieve preventive perpetuities compliance upon the creation of interests under both species of “wait-and-see” statutes by satisfying the requirements of the common-law rule. Stated differently, compliance with the common-law rule assures immediate validity without any “wait-and-see.”

II. THE CASE FOR PREVENTIVE PERPETUITIES COMPLIANCE

Despite opportunities for achieving immediate validation through the common-law rule, some estate planners will undoubtedly reject this course of action, especially those in jurisdictions with “wait-and-see” reform. They might argue:

Preventive perpetuities compliance presents unnecessary complexities and, therefore, should be avoided. Why not draft without regard to any rule against perpetuities, and then simply ‘wait-and-see’? Surely, this seems more attractive. Perpetuities compliance is no easy matter. It consumes chargeable hours and enlarges fees at a time when our clients are justifiably concerned with the costs of legal services. Further, because all contingent interests are in actuality apt to vest, or fail, within the permitted waiting period, the risk of invalidity is never very great.

Finally, an estate planner might think—but seldom expressly ask—“Why should I be concerned about an unlikely perpetuities violation that can only happen after the waiting period has expired? Whether it be a delay until twenty-one years after the death of particular lives in being or until ninety

15. The USRAP provides that nonvested interests are 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 living *or* the interest actually vests or terminates within 90 years after its creation. USRAP, *supra* note 6, § 1. For discussion and explanation of how the USRAP offers an opportunity to use the common-law rule to validate an interest upon its creation, see Waggoner, *supra* note 7, at 570-73.

years have expired, why should I be concerned with a problem that will not arise until long after my death?"

The reply to this argument must begin with some observations about professional responsibility. Surely there is something wrong with a view that: "Potential perpetuities violations are not my problem because they reach beyond my lifetime and, consequently, will not affect me." At a time when lawyers are being skewered for most anything, surely the legal profession ought to guard against any defense of oversights and rule violations because such problems will not touch the offending lawyer personally. If preventive perpetuities compliance afforded estate owners no benefits whatsoever, then one might think otherwise. On the other hand, if the costs of immediate compliance over shadowed the benefits, one might begin to think otherwise. But "wait-and-see" or preventive compliance must be the *estate owner's choice*, not the estate planner's.¹⁶ Further, if costs exceeded benefits because of unsurmountable difficulties arising from the rule's application, lawyers should seriously question its efficacy. Indeed, what does any rule accomplish if its complexity exceeds the competence of the reasonable practitioner and as a result is ignored by the bar? Nevertheless, upon careful examination one should conclude that estate planners will not face this dilemma. Great benefits derive from preventive compliance and, further, such compliance can be managed without any significant increase in the costs of legal services.¹⁷ In short, preventive perpetuities compliance is the professionally responsible way to practice law because it truly advantages estate owners.

What then are the advantages of immediate perpetuities compliance? To be sure, final vesting and distribution under most estate plans will occur within the permitted time period for "wait-and-see."¹⁸ Nevertheless, there are

16. This must be the estate owner's choice because it is, after all, her estate plan and her will or trust and it concerns her estate. If there is a choice, then such choice must be communicated to the estate owner along with all information necessary to making an intelligent election.

17. The costs of legal services are ultimately governed by the time it takes to perform them. Because preventive compliance with the common-law rule is not difficult to accomplish, it should not take much additional time. Consequently, it will not add significantly to the costs associated with an estate plan. For discussion of the ease with which one can achieve preventive compliance—and the time it takes to do so—see *infra* sections IV and V.

18. Most estate plans make ultimate distribution of principal to children or at least grandchildren. The waiting period under "wait-and-see" statutes is either the common law time frame—a life in being plus 21 years—or a specific number of years—90 years under the USRAP. Assuming that the waiting period commences at the estate owner's death, in the case of children, the common law time frame will always be satisfied with any condition that must occur, if at all, within a child's lifetime or at his death. This is true because the estate owner's child is always deemed a life in being. In the case of grandchildren, the most common conditions to vesting and distribution are survivorship requirements by grandchildren of children and of particular ages (usually 21). As to survivorship of children, the common-law time frame will always

dispositive designs that will not end in time.¹⁹ And if they do not, some provisions will be struck while others will be reformed by using *cy-pres* principles to overcome the perpetuities problem, in a manner that best carries out the estate owner's intention.²⁰ One thing is certain: there will be uncertainty. Until contingent interests vest or fail there will be uncertainty as to validity.²¹ If "wait-and-see" exists without *cy-pres* reformation and interests do not vest in time, there will also be uncertainty as to the consequences of a violation. For example, will merely the invalid interest be struck or will the doctrine of "infectious invalidity" affect interests that otherwise satisfy the requirements of the rule?²² Finally, even if a court is empowered to reform invalid interests, there will be uncertainty concerning the exercise of its discretion. And this might evoke additional disputes and litigation. These uncertainties can be avoided by preventive perpetuities

be met because such children are necessarily lives in being. If the age requirement is merely 21, it also will always satisfy the common-law time frame because no grandchild can attain age 21 beyond 21 years of the death of a child—a life in being. And as to age requirements or other requirements that can happen beyond 21 years of the death of all children—but within the lifetime of the grandchild—nearly all should be fulfilled, if at all, within 90 years of the estate owner's death. For example, even an age requirement of 50 would fall within the 90 year waiting period as to any grandchild born within 40 years of the estate owner's (the grandparent's) death.

19. Clearly, this will be true of those estate plans that test the durational limits of the rule by deferring ultimate vesting and distribution for a considerable period of time. For a description and discussion of such dispositive designs, see *infra* notes 58-64, 89-97 and accompanying text. See also DAVID M. BECKER, PERPETUITIES AND ESTATE PLANNING: POTENTIAL PROBLEMS AND EFFECTIVE SOLUTIONS § 12.1 (1993).

20. For an example of a "wait-and-see" statute that invalidates interests that do not vest within the allowed period of time, see Perpetuities and Accumulations Act, 1964, ch. 55 (Eng.). For an example of a "wait-and-see" statute that offers remedial action through *cy-pres* principles, see KY. REV. STAT. ANN., *supra* note 11, § 381.216.

21. One should also observe that contingent interests always produce some uncertainty. Because an interest is subject to a condition, there will always be uncertainty as to who will take until that condition is satisfied or breached. Nevertheless, whenever a contingent interest fails to achieve preventive compliance under the common-law rule, the uncertainty engendered by the contingent interest is compounded. For example, there will be additional uncertainty as to whether a violation will arise. And if it does arise, there will be uncertainty as to the consequences of such violation.

22. Ordinarily, interests that violate the common-law rule are stricken, while those that satisfy it are upheld. Perhaps for punitive reasons, some courts have tended to invalidate the entire instrument. Nevertheless, there are circumstances in which most courts will go beyond the invalid interests themselves and strike provisions that do not violate the rule against perpetuities. They do so because of a principle of "infectious invalidity." This principle fundamentally rests upon a notion of preferred intent. Whenever it becomes clear that the invalid interest is essential to the estate owner's dispositive scheme and that the enforcement of valid interests alone would distort such plan, courts have tended to invalidate other interests within and without the provision that contains the invalid limitation. And when intestacy would produce a distribution consonant with the estate owner's apparent dispositive design, courts will sometimes go further and strike all valid interests and force an intestate distribution on the assumption that such action reflects the preferred intent of the estate owner. For a discussion of the principle of "infectious invalidity" and some of the instances in which such principle is applied, see 6 AMERICAN LAW OF PROPERTY, *supra* note 3, §§ 24.47-24.52; SIMES & SMITH, *supra* note 3, § 1262.

compliance. An estate owner can make choices that she immediately knows will be enforced. Further, if her devolutionary scheme does not unfold within the time limits of the rule, she can personally redirect distribution without having to rely on the speculative choices a court might make many years later.

Preventive perpetuities compliance achieves these benefits, but what are its costs? The answer is a lawyer's time—the time it takes to learn the rule as well as the time it takes to apply techniques needed to assure immediate validation. To begin with, one should observe that “wait-and-see” statutes patterned after the USRAP offer two methods for validation and, therefore, preventive perpetuities compliance. These methods draw upon either ninety years or the common-law rule's life in being plus twenty-one years. Interests that must vest, or fail, within ninety years of their creation will necessarily satisfy the requirements of such statutes. Stated differently, interests that *must* vest or fail within ninety years will *actually* vest or *terminate* within this period of time. Preventive compliance becomes, then, an easy matter. One simply needs to create interests that must vest or fail within ninety years. And this can be accomplished either through a saving clause²³ or tailor made provision-by-provision compliance.²⁴

Most lawyers will, however, want to achieve preventive perpetuities compliance by satisfying the common-law rule. There are two reasons that support this position. First, compliance with the common-law rule will achieve immediate validation under all forms of “wait-and-see” statutes, including the USRAP,²⁵ and under all other laws that incorporate the

23. For an explanation and illustration of savings clauses, see *infra* notes 72-73, 92 and accompanying text.

24. Indeed some practicing lawyers and academics already favor the use of a 90 year saving clause to guarantee validity wherever the USRAP is adopted, and they predict that such a clause might even become standard. See, e.g., David S. King & Alexander M. Meiklejohn, *The Uniform Statutory Rule Against Perpetuities: Wait-and-See for 90 Years*, 17 EST. PLAN. 24, 30 (1990); Ira M. Bloom, *Perpetuities Refinement: There Is an Alternative*, 62 WASH. L. REV. 23, 52 (1987). One should observe that this kind of preventive perpetuities compliance can be achieved through tailor-made provision-by-provision compliance as well as through a single all-purpose saving clause. A saving clause almost always governs different kinds of dispositive provisions. And given the mandatory redirection of principal that most saving clauses adopt, if vesting does not occur within the specified period of time, the ultimate disposition may completely miss the mark with a particular provision, thereby causing severe distortion of the estate owner's dispositive design. For this reason, tailor-made *saving phrases* that use 90 years as the measuring period may be far superior to saving clauses that rest upon this same time period. Because these kinds of *saving phrases* use 90 years instead of the common law's life in being plus 21 years, one should have no difficulty with their formulation. For discussion of how to accomplish tailor-made provision-by-provision compliance with the common-law rule, see *infra* notes 88-97 and accompanying text. See also BECKER, *supra* note 19, §§ 4.4, 10.3-11.2.

25. See *supra* notes 11-15 and accompanying text.

common-law rule.²⁶ This is especially important because the estate owner may move to another jurisdiction that may not apply the USRAP or some variation of “wait-and-see.”²⁷ Second, a time period measured by a life in being plus twenty-one years is more likely to match-up with an estate owner’s

26. Professor Waggoner, who was the Reporter for the Uniform Statutory Rule Against Perpetuities, has offered the following comments on preventive compliance under the common-law rule for lawyers practicing in states—such as Oregon—that adopt the USRAP.

Because of this central feature, considerable benefits accrue to trusts or other property arrangements that satisfy the common-law Rule. A straightforward benefit is that, from the moment of creation, the property arrangement is valid under the Act. In our mobile society, this is a significant benefit. For example, a testamentary trust drawn by an Oregon lawyer in compliance with accepted common-law practice not only will be valid in Oregon but also will be valid if the client dies domiciled in (or owns land covered by the trust in) a common-law jurisdiction. Conversely, a testamentary trust drawn in compliance with accepted common-law practice by a lawyer in a common-law jurisdiction also will be valid if the client dies domiciled in (or owns land covered by the trust in) Oregon or any other state that has adopted the Act.

Compliance with the common-law Rule confers another very attractive benefit: It renders the trust or other property arrangement invulnerable to any possible future reformation suit under the Act’s deferred-reformation feature. Only interests whose validity is governed by the wait-and-see element are vulnerable to reformation under the Act. Reformation is never necessary—or permitted—for dispositions that are valid initially under the common-law Rule.

In estate-planning practice, then, every incentive remains to comply with the common-law Rule, through the use of a standard perpetuity saving clause, if appropriate, or one tailored to the particular trust or property arrangement. Oregon practitioners who successfully draft for initial validity, as most do by far, can continue with business as usual. They need not learn a new and complicated scheme of perpetuity law and they need not make any adjustment in their forms or practice.

Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: Oregon Joins Up*, 26 WILLAMETTE L. REV. 259, 261 (1990). Thus far, it appears that Professor Waggoner’s prediction—as to how estate planners should and will respond to the USRAP—has become reality. In a memorandum dated April 21, 1995 to the teachers of wills and trusts, Professor Mary Louise Fellows, Law School Teachers Liaison to the Joint Editorial Board for the Uniform Probate Code, said:

USRAP has enjoyed incredible success in the legislatures around the country. It has now been enacted by nearly half of the states. . . .

On a related point, we have not found any evidence that lawyers in USRAP states are establishing 90-year trusts or using 90 year saving clauses. When asked, the lawyers say that lives in being plus 21 years produces a longer period. They treat USRAP as it was intended—as providing a *default* saving clause for cases of inadvertent violation of the common-law rule.

Letter from Mary L. Fellows, Law School Teachers Liaison to Joint Editorial Board for the Uniform Probate Code, to Teachers of Wills and Trusts 9-10 (Apr. 21, 1995) (on file with author).

27. A lawyer cannot always guarantee that a particular “wait-and-see” statute or other reform adopted by her jurisdiction will govern the interests created by the dispositive instruments she drafts. Although a lawyer can make some effort to select applicable law by establishing ties between the estate owner and that particular jurisdiction, a lawyer cannot control either a client’s place of residence or the situs of real property that comprises the client’s estate. In short, the law of the jurisdiction in which the instrument is drawn—and the one with which the lawyer is most familiar—may not be the law that governs the validity of interests created. For a discussion of what perpetuities law governs, see 6 AMERICAN LAW OF PROPERTY, *supra* note 3, § 24.5A.

objectives than a gross number of years.²⁸ At the very least, it enables the estate owner to extend his dispositive reach beyond ninety years, and this may be very important to fulfillment of his objectives.²⁹

Preventive compliance through the common-law rule can be accomplished with either a saving clause or tailor-made provision-by-provision revisions. At first, this process appears more difficult because it utilizes the life in being concept that lies at the heart of every lawyer's problems with the common-law rule.³⁰ However, in reality, creative compliance with the common-law rule is not difficult. It is a matter that is clearly within the competence of every estate planner. Consequently, if the

28. Although 90 years affords a margin-of-safety sufficient to administer most estate plans, it is not superior to a provision that uses lives in being that are most relevant to the estate design. For example, suppose *A* wants his estate preserved for the needs of his children and grandchildren. Until their deaths, he wants to create a family bank that meets the needs of these descendants and, at the same time, avoids all transfer taxes. See *infra* notes 60-64 and accompanying text. Further, assume that *A* currently has four children and eight grandchildren (ages two to ten). Tentatively, one might create a testamentary trust that leaves all income to his children and grandchildren—according to need—until the survivor of them dies. Thereafter, one would terminate the trust and leave the remaining principal to *A*'s descendants who are then living in whatever shares *A* might select. As written, the gift of principal does not satisfy the common-law rule against perpetuities. *A*'s children may bear for *A* another grandchild after *A*'s death, and such afterborn grandchild might live more than 21 years beyond the deaths of all lives in being at *A*'s death. Upon such grandchild's death, the principal would then vest in *A*'s descendants then living. Indeed, it could then vest in a group of takers who were entirely born after *A*'s death, and it would do so beyond 21 years of the deaths of all lives in being.

A 90 year saving clause, if adopted, would automatically terminate this trust at the end of such period of time. If all of *A*'s grandchildren die before then, *A*'s dispositive objective will be fully satisfied. If not, such saving clause is apt to mandate redirection of principal to those entitled to income immediately prior to the time it forcibly terminates the trust. Conceivably, this might occur during the lifetimes of grandchildren born before *A*'s death. However, at the very least, *A* does not want ultimate distribution of principal to pass to these grandchildren who would then be quite old. He does not want the principal passing through and taxed as a part of their respective estates within several years of its earlier distribution to them. Instead, *A* wants his family bank to last until the time of their deaths. With a saving clause or phrase that utilizes the common-law rule, one can fine tune the trust's duration so that it accomplishes exactly this objective. One can terminate the trust at the deaths of the people whose life spans are most important to his objectives. These are the children and grandchildren he will actually know. And their full lifetimes all fit conveniently within the period of time sanctioned by the common-law rule. And if this were not enough for *A*—if *A* wanted to try to defer distribution of principal until the deaths of all his grandchildren, including those born after his death—one could add the 21 years allowed by the common-law rule to the death of the survivor of children and grandchildren alive at *A*'s death. Unlike the 90 year margin-of-safety, which is geared to the estate plans of everyone, one could tailor-make a margin-of-safety by adding 21 years to the lives of *A*'s children—people causally related to the birth and, therefore, the death of all grandchildren. Moreover, one could stretch even further the margin-of-safety by adding 21 years to the lives of grandchildren born by the time of his death—people who, because of their youth, are apt to live until a point in time within 21 years of the last to die of all of *A*'s grandchildren (whenever born).

29. For discussion of the kinds of benefits that can be achieved with a trust that takes full advantage of the extended time period allowed by the common-law rule against perpetuities, see *infra* notes 60-64 and accompanying text.

30. See *supra* note 2.

process for preventive compliance involves merely some self education start-up costs that can be spread over the wills and trusts of many clients, then the costs of preventive compliance become manageable and, therefore, reasonable in light of the benefits to be gained. Surely this would be true if the actual costs of each effort at preventive compliance were minimal. Section IV of this article will elaborate the techniques for immediate validation and demonstrate the ease with which a lawyer can master and apply them.

III. PERPETUITIES PROBLEMS AMONG THE DISPOSITIVE PROVISIONS LAWYERS ACTUALLY ADOPT

The preceding section described the advantages of preventive perpetuities compliance. In doing so, it assumes that lawyers often adopt or draft provisions that do not by their own terms satisfy the common-law rule against perpetuities. Many lawyers, however, believe that they do not create such provisions because the dispositive reach of their clients is short term only. Indeed, they always satisfy the requirements of the common-law rule, albeit unwittingly. Clearly, if this were so, then the benefits of a perpetuities consciousness—and with it conscious perpetuities compliance—would be negligible. But is it true that lawyers seldom draft dispositive provisions that trespass the limits of the common-law rule?

The answer lies in the responses one might give to these more specific questions. Do your clients ever leave gifts of principal to their grandchildren? In doing so, do your clients ever attach conditions; for example that grandchildren must survive a particular age or ages? If so, chances are that your disposition—without more³¹—does not by its terms satisfy the common-law rule.³² Do your clients ever create irrevocable living trusts? In doing so, do they ever make class gifts that are subject to some kind of condition of survivorship?³³ For example, do your clients ever use irrevocable trusts to

31. The answers to the questions within this paragraph assume that an effective saving clause has been omitted from the dispositive instrument. Ordinarily, lawyers do include a saving clause. Nevertheless, one should carefully observe that some saving clauses do not save at all. Further, among those that do avoid a perpetuities violation, many do not save effectively. Indeed, some saving clauses will misfire the time for actuation, while others will misdirect the redirection of principal. For further discussion, see Section IV.

32. For discussion and illustration of this kind of potential perpetuities problem, see *infra* notes 45-53 and accompanying text. See also BECKER, *supra* note 19, §§ 2.3.1-2.3.2.

33. Age requirements present the most common kind of perpetuities problem that arises within the context of irrevocable trusts. See *infra* note 34 and accompanying text. There are, however, other survivorship requirements that cause potential violations. These requirements might involve a gift of principal to the estate owner's children living at the death of her surviving spouse. Or they might involve a gift of principal to the estate owner's grandchildren living at the death of her children. Neither of these gifts

pass principal to their own children and are these gifts subject to age requirements? If so, chances are that your disposition does not by its own terms satisfy the common-law rule against perpetuities.³⁴ Do your clients ever create gifts of principal in the children or grandchildren of named individuals; for example, the children or grandchildren of a living child, a living sibling, or a living friend? In doing so, do they ever attach age requirements to the gifts to children of the named individual? If so, chances are that your disposition to the children does not by its own terms satisfy the common-law rule³⁵ and, further, neither does the provision for grandchildren of the named individual even though each grandchild receives a vested interest upon birth.³⁶ Do your clients ever create testamentary powers of appointment in favor of a donee's children or descendants? If so, is the donee entitled to condition appointed interests? Or do your clients ever receive testamentary powers of appointment in favor of their children or descendants and do they exercise them? In doing so, does your client ever condition gifts to children or extend the appointment beyond children and thereby include grandchildren? If so, chances are the power is valid,³⁷ but the appointment itself does not by its own terms satisfy the common-law rule.³⁸ And chances are that the usual saving clause, which is added to the will that exercises the power, will not validate the appointed interests under the common-law rule.³⁹

would present perpetuities problems if the trust were revocable or testamentary. Nevertheless, they do raise serious concerns when the instrument of transfer is a living irrevocable trust. For discussion of these potential perpetuities problems, see BECKER, *supra* note 19, § 2.3.4.

34. For discussion and illustration of this kind of potential perpetuities problem, see BECKER, *supra* note 19, §§ 2.3.4, 8.2.11, 12.5.

35. For discussion and illustration of this kind of potential perpetuities problem, see *infra* notes 54-55 and accompanying text. See also BECKER, *supra* note 19, § 2.4.

36. For discussion and illustration of this kind of potential perpetuities problem, see BECKER, *supra* note 19, §§ 2.4, 8.2.7.

37. The testamentary power is valid provided that it must be exercised, if at all, within the period of the rule as measured from the time such power was created. Consequently, if the donee of the power is restricted to a life in being at the moment the power was created, then the power itself must necessarily satisfy the common-law rule. This would be true, of course, if the donee is identified by name in the instrument that creates the power. Quite differently, an invalid power is usually marked by donation of powers to a person or group of people that may be unborn at the time of creation. For discussion and illustration of perpetuities law as it applies to powers of appointment, see BECKER, *supra* note 19, §§ 2.5.1-2.5.2, 7.2.3, 12.6.1-12.6.2.

38. For further discussion and illustration of the perpetuities problems presented by this kind of appointment, see *infra* notes 56-59, 89-97 and accompanying text.

39. Because saving clauses are designed for universal use, they must address the norm; that is, they are designed so that one size fits all. Nevertheless, one size can never be fashioned to meet the needs of every estate plan or for every provision within the same dispositive instrument. See *infra* notes 80-87 and accompanying text. With this in mind, one should expect wills and revocable living trusts to contain saving clauses that protect usual dispositive provisions—ones that distribute the estate owner's estate. Consequently, one can anticipate saving clauses to select validating lives from those in being at the estate

In answering these questions, each lawyer must examine her own particular experience in light of the estate plans of her clients. Consequently, the answers might vary among lawyers. Nevertheless, most lawyers must draft dispositions that fall into one or more of the above categories and, therefore, do not by their own terms satisfy the common-law rule against perpetuities. The foregoing examples are drawn from well known form books and some of these illustrations parallel their most popular dispositive designs.⁴⁰ To be sure, nearly all lawyers use forms that are self produced or originate with others. In either case, their forms reflect the published literature; consequently, the foregoing illustrations should also reflect actual practice and actual dispositions. Often these form provisions do not by their own terms achieve validation under the common-law rule.⁴¹ Further, even when they do, typical, common sense variations eliminate such validation.⁴² Because these form provisions are available in the world of published and well used information, one must assume that lawyers actually adopt and draft dispositive provisions that—without more—fail to achieve preventive perpetuities compliance.

These illustrations also share a number of characteristics that confirm their prominence. They all involve class gifts that include members born after the time when the period of the rule commences.⁴³ And with few exceptions, they

owner's death—the time when the period of the rule commences as to these dispositions. Such lives, however, will not validate testamentary appointments made by the estate owner. Because the perpetuities period governing such appointment begins earlier when the power was created, lives in being selected as of the time the power is exercised at the estate owner's death will not validate interests created by the appointment. For discussion and illustration of the kinds of problems that attend saving clauses and powers of appointment, see BECKER, *supra* note 19, § 4.3.2.1.

40. For reference to and discussion and illustration of problematic dispositive designs that are drawn from published form books, see BECKER, *supra* note 19, §§ 2.3-2.5.

41. See *supra* notes 31-40 and accompanying text. See also *infra* notes 45-64 and accompanying text. Although these form provisions—and their commonplace variations—do not achieve immediate validation under the common-law rule, saving clauses within the dispositive instrument will often avoid the consequences of a violation. Nevertheless, saving clauses do not always save the interest. And even when they do, they frequently misfire prematurely or misdirect redistribution of the principal. For further discussion, see *infra* Section IV.

42. For discussion and illustration of slight deviations from form provisions that can produce perpetuities problems, see BECKER, *supra* note 19, §§ 2.1, 2.3-2.4. See also *infra* notes 45-64 and accompanying text.

43. One should observe that if the class gift is confined to people born by the time the period of the rule commences the chances for a perpetuities violation are remote. Nearly all of the conditions estate owners impose on class members involve events that can only happen during their respective lives or deaths. Because each member is necessarily a life in being, no class member can join the class beyond the period allowed by the common-law rule. Consequently, such conditions do not yield violations. This, however, cannot be said when class membership allows inclusion of people born after the period of the rule commences. Conditions involving events occurring within the lifetimes of respective members will

include conditions that require survivorship of something more than the death of a life in being. These kinds of gifts are, if not commonplace, clearly within the experience of every estate planner because they reflect the natural dispositive proclivities of clients. Class gifts are, after all, a terrific repository of ultimate gifts because of their elasticity. More specifically, they can be used to admit after-born members and to reject those who fail to meet their conditions. No one knows the future with certainty, and class gifts offer the flexibility needed to account for both the expected and unexpected. Consequently, estate owners and their lawyers repeatedly embrace them. Given their extensive use, one must carefully observe that every class gift in which the procreator is not deceased when the period of the rule commences raises great potential for perpetuities problems because it may not satisfy the common-law rule. Some elaboration of previous illustrations should make this clear.⁴⁴

Surely every estate planner has at one time or another created a *family trust*⁴⁵ that leaves principal after the death of the spouse in equal shares to surviving children and to the surviving descendants of deceased children.⁴⁶ In most instances, however, neither the children nor the descendants are entitled to receive their respective shares of principal immediately. The children must satisfy several age requirements that exceed twenty-one; until then, they are only entitled to income. If a child does not survive a particular age, his share then passes to his surviving descendants. Sometimes such a deceased child also has a special testamentary power of appointment, which can be exercised on behalf of the estate owner's descendants.⁴⁷ Ordinarily, only the children's

frequently cause a perpetuities violation. So long as such event—for example, marriage—can occur for any potential member beyond the common-law period, there will be a perpetuities violation. And this violation affects the validity of the entire class gift, including members that were actually lives in being when the period of the rule commenced.

44. See *supra* notes 31-39 and accompanying text.

45. The *family trust* is accompanied by another trust known as a *marital trust*. The primary reason for creating a *marital trust* is to qualify the trust corpus for the marital deduction available under the Internal Revenue Code. This deduction enables an estate owner to shift a portion or all of his or her estate to the estate of the surviving spouse, thereby deferring the estate tax until the surviving spouse's subsequent death. For a thorough discussion of conventional-general power of appointment marital deduction trusts and qualified terminable interest property marital deduction trusts, see 4 A. JAMES CASNER, ESTATE PLANNING §§ 13.1-13.19 (5th ed. 1988 & Supp. 1995).

46. See, e.g., THE NORTHERN TRUST COMPANY, NORTHERN TRUST COMPANY WILL AND TRUST FORMS § 201-9 (7th ed. 1992); ALBERT M. LEHRMAN, COMPLETE BOOK OF WILLS AND TRUSTS WITH CHECKLISTS AND FORMS 565 (1978); ROBERT P. WILKINS, DRAFTING WILLS AND TRUST AGREEMENTS §§ T.11.42, W.11.42 (2d ed. 1993).

47. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 46, §§ 201-11, 201-13; LEHRMAN, *supra* note 46, at 565-566; WILKINS, *supra* note 46, §§ T.11.74, W.11.74.

shares are subject to survival requirements involving age. Quite differently, the share given directly to surviving descendants of a deceased child—a child who died either prior to the spouse or prior to attainment of a specified age—vests absolutely, although frequently payment is postponed until attainment of certain ages.⁴⁸

Without more, the foregoing dispositive design does achieve preventive perpetuities compliance through immediate validation under the common-law rule.⁴⁹ Perpetuities problems can arise, however, whenever survival requirements involving age are added to the conditions imposed upon descendants of deceased children. Preventive compliance is not achieved because these descendants can include lives not in being when the perpetuities period commences at the estate owner's death.⁵⁰ Consequently, although these descendants must be born before and survive the death of a life in being (the surviving spouse—in the event a child dies before such spouse—or a child—in the event a child survives the spouse but fails to attain a specified age), it becomes possible for them to join the class beyond the period of the rule if any of these age requirements exceed twenty-one.⁵¹ Some

48. See, e.g., *THE NORTHERN TRUST COMPANY*, *supra* note 46, at 201-9; *WILKINS*, *supra* note 46, §§ T.11.80, T.13.70, W.11.80, W.13.70.

49. The children's interests present no perpetuities problems because they are lives in being at the estate owner's death and the events they must survive—the spouse and several age requirements—must happen, if at all, within their respective lifetimes. Additionally, the testamentary power of appointment children receive, in the event they fail to attain a particular age, satisfies the common-law rule because it must be exercised, if at all, upon their respective deaths—the deaths of people who are exclusively lives in being.

The interests given to descendants of deceased children present no perpetuities problems even though these descendants can include lives not yet in being at the estate owner's death. There are two circumstances in which these descendants will take a substitute gift. First, they will take in place of a child who fails to survive the estate owner's spouse. This substitute gift presents three conditions: descendants must be born; they must survive the spouse; and the estate owner's ancestral child (a child of the estate owner who is the ancestor of the qualifying descendant) must predecease the spouse. Because the spouse is a life in being at the estate owner's death and because each of these conditions must be fulfilled before or upon the spouse's death, one must conclude that the descendants' interests will vest, if at all, upon the death of a life in being. Second, descendants will also take in place of a child who survives the estate owner's spouse but fails thereafter to satisfy one or more of the age requirements. This substitute gift presents three conditions as well: descendants must be born; they must survive the estate owner's ancestral child; and such child must fail to attain a specified age. Because each ancestral child is a life in being at the estate owner's death and because each of these conditions must be fulfilled before or upon the death of such child, one must conclude that the descendants' interests will vest, if at all, upon the death of a life in being.

50. The perpetuities period commences at the estate owner's death if the family trust is created pursuant to a will or a revocable living trust. In either case, the subject matter is not irrevocably tied up until the estate owner's death; consequently, the requirements of the common-law rule are not imposed until then.

51. For example, suppose a descendant must attain age 30 before receiving his or her share of the substitute gift of principal. The class gift to these descendants will admit all descendants of a deceased child who are born before and survive the surviving spouse's death—in the event of a child who dies before such

form provisions actually include these age requirements.⁵² Just as important, however, these added conditions seem quite natural. Requirements as to age, and the level of maturity they reflect, should have for the estate owner even greater relevance when applied to descendants younger than her own children.⁵³ Consequently, one can expect such modifications to be made by many estate planners, especially those who draft without a perpetuities consciousness.

The perpetuities trap that underlies this popular dispositive design can easily be repeated by other estate plans that essentially reenact the same format but within a different context. Any time an estate owner transposes this design by applying it to a person alive at the estate owner's death and to the family of such person, preventive compliance with the common-law rule may be lost by an ultimate gift to children—not merely to grandchildren. The transposition is accomplished as follows. The named living person is substituted for the estate owner's spouse and is, accordingly, given an income interest for life. The gift of principal, however, is exactly the same for such person's children as it was in the original format for the estate owner's children. Equal shares are established for living children and for the living descendants of deceased children. Disposition of the children's shares is

spouse—or who are born before and survive the deceased child—in the event of a child who survives the spouse but fails to attain a specified age—provided such descendants also attain age 30. With these conditions in mind, it becomes possible for a descendant to be born after the estate owner but immediately before the death of the surviving spouse in one instance or the surviving child in the other. Further, it becomes possible for everyone alive at the estate owner's death to then die before such qualifying descendant reaches age nine. Consequently, it becomes possible for such descendant to attain age 30 and join the class more than 21 years later—a point in time beyond the period allowed by the common-law rule. Therefore, the entire class gift fails to achieve perpetuities validation. For discussion and illustration of these problems, see BECKER, *supra* note 19, § 2.3.1. For a step-by-step methodology that enables one to make this kind of perpetuities determination—even without mastering the underlying logic of the solution—see *id.* §§ 7.2-7.4, 8.2-8.3.

52. For examples of published forms that contain age requirements exceeding 21 that are imposed upon groups of the estate owner's descendants who need not be lives in being when such interests are created, see 1 ROBERT E. PARELLA & JOEL E. MILLER, *MODERN TRUST FORMS AND CHECKLISTS* §§ 1.2.01, 1.2.07 (1980 & Supp. 1990). For an example of a form that leaves open the age requirement, see 9 CLARK A. NICHOLS, *NICHOLS CYCLOPEDIA LEGAL FORMS ANNOTATED* § 9-1056 (1994). As to each of these forms, in the absence of an *effective* saving clause, each of the foregoing provisions fails to satisfy the common-law rule against perpetuities.

53. Such a desire is not improbable, nor is it without good reason. Presumably, the age requirements imposed upon the separate shares of living children reflect the estate owner's concern with the ability of her children to manage their share of her estate. If they die before the time in which they can properly manage and enjoy it, she wants others to have it instead. And she makes the substitutionary choice herself because of her own preferences among alternate takers and because of her desire to minimize costs attributable to her child's death. One might reasonably expect the estate owner to have this same concern and desire with respect to descendants, especially when they constitute grandchildren and especially when the ancestral child has predeceased the estate owner or her surviving spouse.

conditioned upon their survival to specified ages, most of which exceed age twenty-one. If a child does not attain a particular age, a substitute gift is then made to such child's living descendants. Sometimes, an estate planner will take this design directly from a published form that lays out the full transposition itself.⁵⁴ Other times, however, a lawyer will develop it herself. In either circumstance, the named living person can vary. He could be one of the estate owner's children or grandchildren. He could be the estate owner's sibling or one of the sibling's descendants. Indeed, such named person could be most any relative or, perhaps, a good friend. Nevertheless, in every one of these situations the age requirements imposed on his children fail immediate validation under the common-law rule against perpetuities. Because the named person entitled to receive income is alive when the period of the rule commences, his children can include lives born thereafter who will not qualify as lives in being. To be sure, these after-born children will be born by and must survive the named person's death. Nevertheless, so long as any of their age requirements exceed twenty-one, one cannot say that all children must join the class, if at all, within the period of the rule.⁵⁵

In addition to the foregoing transposition, one should anticipate another reenactment through exercise of the special testamentary power of appointment conferred in the original dispositive design itself upon a child who dies before attaining a specified age. More specifically, such deceased child might repeat the same age requirements for his descendants that were originally imposed upon him. If so, once again there are potential perpetuities problems; however, there is a difference. With a direct gift from the estate owner to her deceased child's descendants the perpetuities determination under the common-law rule must be made as of the estate owner's death in light of facts and possibilities known and calculated at that time. To establish validity, one must demonstrate certainty of vesting or failure within the permitted period of time on the basis of all possibilities one can project as of the estate owner's death. If, however, the gift of principal from the estate owner arises through her deceased child's testamentary appointment, the common-law rule allows for a "second look." Although the period of the rule commences at the estate owner's death—the time in which the power was created and the time in which the potential pool of validating lives in being

54. See, e.g., WILKINS, *supra* note 46, §§ 13-1 to 13-41.

55. The reason why immediate validation is not achieved is essentially the same as the reason given in the preceding gift to the estate owner's deceased child's descendants. See *supra* notes 50-53 and accompanying text. For further discussion and illustration of this kind of perpetuities problem, see BECKER, *supra* note 19, § 2.4.

must be found—the rule offers a “second look” at facts and possibilities as of the time the power is exercised.⁵⁶ This “second look” may, therefore, permit validation when the child dies and exercises the power even though such compliance was not assured previously upon creation of the power itself.⁵⁷ As a practical matter, this means that the lawyer for any parent who exercises a testamentary power on behalf of such parent’s children—not merely some remote descendant—must be acutely aware of the perpetuities dangers that lurk behind age requirements. The “second look” offers fortuitous validation. Effective estate planning, however, requires more—namely, guaranteed compliance.

One should also recognize that there are other perpetuities traps within the exercise of such a power. In light of a “second look,” any condition that can be fulfilled more than twenty-one years beyond the deaths of lives in being *when the power was created—not exercised*—will not achieve preventive perpetuities compliance. For the deceased child-donee’s children, such condition might involve survivorship of an event other than age.⁵⁸ But for any generation more remote than such child’s children, the event might involve nothing more than birth. More specifically, if the estate owner’s deceased child were to make an appointment that delayed distribution of principal for

56. For full discussion of how the common-law rule against perpetuities applies to testamentary powers and to appointments made pursuant to them, see BECKER, *supra* note 19, § 2.5. For a step-by-step methodology that teaches one how to detect and solve perpetuities problems generally—and specifically those that arise in the creation and exercise of powers of appointment, see *id.* §§ 7.2.1, 7.2.3-7.2.4.

57. Suppose, for example, a child has two children (grandchildren of the estate owner) alive at the estate owner’s death who are five and six years old. Suppose such child survives the estate owner’s spouse but thereafter fails to satisfy the final age requirement. Finally, assume such child is survived by these same two children and that he appoints his share of the principal to his children (the estate owner’s grandchildren) who attain age 35. If the common-law rule did not permit a “second look” at facts known at the child’s death, the appointment would not achieve immediate perpetuities validation. At the very least, as of the estate owner’s death, it would be possible for her then living grandchildren to die immediately, for others to be born thereafter, and for such afterborn grandchildren to then attain age 35 and join the class more than 21 years after the deaths of all lives in being—including the life of her own child. Nevertheless, the common-law rule does allow for a “second look” at facts known when the appointment is made by her child at his death. Consequently, one is able to conclude that the child’s appointment satisfies the common-law rule. Because his appointment is now effectively limited to the two grandchildren who were also alive at the estate owner’s death, one now knows that the interests of all class members must vest, if at all, within the respective lifetimes of lives in being. Stated otherwise, because each grandchild must attain age 35 while still alive, no grandchild has an interest that can vest beyond his or her death. And because each grandchild is a life in being, no one can join the class beyond the death of a life in being.

58. For example, an appointment by the child to such of his surviving children who marry would not satisfy the common-law rule as long as such child is survived by one or more children who were born after the estate owner’s death and were unmarried at the time of such child’s testamentary appointment. This perpetuities problem arises because at the child’s death it is possible for one of his surviving children—who was not a life in being at the estate owner’s death—to thereafter marry and join the class more than 21 years beyond the death of all lives in being at the estate owner’s death.

one more generation by directing income to his children for life and then principal to all of his grandchildren, such appointment would fail to satisfy the common-law rule if any of the deceased child's surviving children were born after the estate owner's death. Indeed, the mere possibility that the deceased child-donee's surviving afterborn child can have a child beyond the period of the rule is enough to vitiate compliance with the common-law rule.⁵⁹

One might think that such delay in distribution of the principal to the estate owner's great-grandchildren—that is, the grandchildren of her deceased child—would ordinarily be beyond the reach of most estate designs. This, however, is not the case because current tax law has provided an enormous incentive for extending dead hand control, even to generations that are unborn at the time of the estate owner's death. The Internal Revenue Code permits a married couple to insulate up to \$2,000,000 of their combined estates from all federal estate transfer taxes—including the Generation Skipping Transfer Tax (GSTT)⁶⁰—for as many generations as the law otherwise allows. The tax savings are considerable and so are the savings of other death costs.⁶¹ This is

59. This gift of principal would not achieve validation under the common-law rule when the child dies and his testamentary appointment is made because it is possible that his surviving child, who was born after the estate owner's death, could live more than 21 years after the deaths of all lives in being at the estate owner's death. Given these circumstances, it would then become possible for such child's child to have a child who would then join the class of such child's grandchildren eligible to take principal. This would be beyond the period of time allowed by the common-law rule; consequently, the entire gift to the child's grandchildren would not achieve perpetuities validation—including the interests of grandchildren that did vest within the permitted period of time. For further explanation, see *infra* text following note 91. For a step-by-step methodology that solves perpetuities problems that involve class gifts and powers of appointment, see BECKER, *supra* note 19, §§ 7.2-7.3, 8.2.8.

60. See I.R.C. §§ 2601-2663 (1994).

61. The incentives for creation of multigenerational trusts become obvious. Such trusts avoid not only the GSTT but also estate taxes and administrative expenses that might otherwise be incurred at the deaths of children, grandchildren, and even some great-grandchildren—if, for example, the estate owner and her spouse had left the trust corpus outright to their children who then did the same for their children, etc. See *id.* § 2053 (allowing tax deductions for administrative expenses); *id.* § 2631 (allowing \$1 million tax exemption per individual). The savings in estate taxes upon the deaths of successive generations could be nearly as significant as the savings produced by the GSTT exemption, especially when one combines the estates children and grandchildren might accumulate on their own with the \$2 million left by the estate owner and her spouse. One should also observe that these incentives become even greater once the opportunities for leveraging the \$2 million are recognized and utilized. The GSTT exemption of \$2 million is the limit placed upon the original transfer; it is not an ongoing limit placed upon the value of the trust throughout its duration. *Id.* Consequently, an estate owner can create a GSTT exempt irrevocable trust during her lifetime with assets, such as life insurance, that will appreciate. By the time of her death, this trust should grow to an amount that substantially exceeds the amount of the exemption originally used upon the trust's creation. And if the trust is left intact for the estate owner's family over the full period of time allowed by the common-law rule against perpetuities—a period of over one hundred years—the value of this transfer-tax-exempt trust will be leveraged into a fantastic sum. See *infra* note 64.

especially true when a trust defers vesting and distribution of principal for the full time permitted by the common-law rule against perpetuities—a period that could easily exceed one hundred years.⁶² Indeed, an estate owner could conceivably reach even beyond great-grandchildren by creating a family trust that delivered income to children, grandchildren, great-grandchildren, and other descendants before termination and distribution of principal at the end of the allowed perpetuities time period.⁶³ One should also note the opportunity for significant appreciation of the \$2,000,000 corpus over the extended term of this trust. The increase can be extraordinary especially if income is reinvested with principal whenever it is not needed to maintain the estate owner's family.⁶⁴ With these opportunities for estate appreciation and for savings in death taxes and death costs, one must conclude that more and more estate planners will be asked to design and draft dispositive provisions that look well into the future. One thing should be very clear: these plans will not automatically achieve preventive compliance with the common-law rule

62. To stretch the time allowed under the common-law rule to a period that exceeds one hundred years, one must merely use a group of validating lives in being whereby one can anticipate that the survivor will live at least 80 years beyond the estate owner's death. For discussion of how to accomplish this with a tailor-made *saving phrase*, see *infra* notes 88-97 and accompanying text. See also BECKER, *supra* note 19, §§ 4.4, 10.3, 11.1-11.2, 12.1.

63. For discussion of the advantages of such a family trust and an illustration of how to accomplish this, see BECKER, *supra* note 19, §§ 2.3.3, 12.1.

64. Some commentators and planners have called this kind of dispositive design a "dynasty trust" or a "family bank trust." See, e.g., Lawrence Brody, *Putting a Premium on Generation-Skipping Transfer Tax Planning—The Use of Life Insurance*, 23 U. MIAMI PHILIP E. HECKERLING INST. ON EST. PLAN. 10-1, 10-3, 10-41, 10-61, 10-68 (1989). Some have styled it a "Megatrust™" and they have trademarked the term. Richard Oshins, *Megatrusts™: Representation Without Taxation*, 48 N.Y.U. INST. ON FED. TAX'N, ch.19 (1990). Whatever the label, the purposes of these trusts are fundamentally the same. They are designed to create a family resource that will appreciate and also produce income for the support of its members over several generations.

The benefits derived from this kind of family trust are staggering. Quite apart from the investment growth of the trust corpus following an estate owner's death, one can expect the trust to double in value every ten years if the income is accumulated and the fund is compounded. See Edward C. Halbach, Jr., *Living with the Generation-Skipping Transfer Tax*, 22 U. MIAMI PHILIP E. HECKERLING INST. ON EST. PLAN. 10-1, 10-54 (1988). Consequently, there are considerable economic incentives for the use of family trusts that extend well into the future. Richard Oshins, a practicing lawyer, maintains that with a Megatrust™, which makes full use of the GSTT exemption, one can save transfer taxes and compound benefits for 120 years—the period of time he believes one can reach through skillful compliance with the common-law rule against perpetuities. Oshins, *supra*, at 19-8. During this time, the trust corpus would be used as an asset pool for the benefit of descendants. Distributions of principal would be rarely made. Income, however, might be sprinkled among the beneficiaries pursuant to a standard such as need. With this kind of trust and a 6% annual growth rate after taxes, Oshins estimates that a gift of \$1 million will become \$1,088,187,748 after 120 years. *Id.* at 19-9. Quite differently, he observes that absolute transfers from generation to generation—which would subject the accumulated gift to a 50% estate tax every 30 years—would, at the same annual growth rate, reach only \$68,011,734 at the end of 120 years. *Id.*

without some kind of perpetuities consciousness and facility with its requirements.

IV. EFFICIENT METHODS FOR IMMEDIATE VALIDATION THROUGH COMPLIANCE WITH THE COMMON-LAW RULE AGAINST PERPETUITIES

It is clear that estate planners frequently draft or will draft dispositive provisions that—without more—fail to achieve immediate validation under the common-law rule. Preventive perpetuities compliance offers many advantages over doing nothing and relying strictly on “wait-and-see”—that is, over taking a chance by waiting to see whether a violation actually arises and then hoping that the consequences of a violation are not a disaster or can be overcome by judicial reformation of the provision. Indeed, preventive compliance is superior to “wait and see” and the best method for immediate validation is through the common-law rule. Therefore, this section examines the methods for achieving such preventive compliance. It also examines the efficiency of these methods and, finally, recommends a specific process for achieving such perpetuities compliance.

What, then, does it actually take to satisfy the common-law rule and to achieve immediate validation under it? To be sure, generations of students and lawyers have puzzled over the rule. At the heart of their confusion is the identity of the life in being—is there a validating life in being and with whom does one test in making that determination? The short answer is simply this: One must recognize the difference between interpretive and creative application of the common-law rule.⁶⁵ Although some commentators proclaim otherwise,⁶⁶ one must observe in assessing existing interests that the validating life in being cannot be anyone. Such a life in being must be a

65. For a full discussion and analysis of the difference between interpretive and creative application of the common-law rule against perpetuities, see BECKER, *supra* note 19, §§ 10.1-10.2. For discussion and illustration of the importance of interpretive application of the common-law rule in the planning and drafting of dispositive provisions that satisfy its requirements, see *id.* §§ 10.3, 11.2, 12.1-12.6.

66. One such proclamation:

The rule simply is that any living person or persons may be the life or lives in being for the purposes of any limitation; provided only that if the settlor or testator expressly selects the life in being for the purposes of a limitation, he must not select so many nor such unrecognisable [sic] persons as the lives in being that it is impracticable upon evidence available to the court to ascertain the date of the death of the last one.

MAUDSLEY, *supra* note 3, at 42. Maudsley later qualifies this broad statement by indicating that the only lives of any use are those in which vesting cannot possibly occur beyond 21 years of their deaths. *Id.* at 43. Nevertheless, it typifies the kind of broad and unqualified statement that students seize upon in their attempt to understand and apply the common-law rule against perpetuities. See also 6 AMERICAN LAW OF PROPERTY, *supra* note 3, § 24.13; Leach, *supra* note 1, at 641-42.

person about whom one can say that the contingent interest in question must vest, if at all, within twenty-one years of her death. Stated otherwise, one must prove that there is no possibility that the interest can vest beyond twenty-one years of such person's death. And logic compels one to confine his search for a validating life in being to those people whose lives are causally connected to fulfillment or breach of the condition or to the time in which such condition can occur.⁶⁷ Nevertheless, in creating a valid interest, one should carefully observe that an estate planner can select and, therefore, make virtually anyone a validating life in being. One simply needs to select lives actually in being when the interest is created, which are not unreasonably large in number or difficult to trace⁶⁸, and then to place a time limit on the condition that brings it within twenty-one years of the death of the survivor of the designated lives in being. This can easily be illustrated.

Suppose that *A* wishes to devise Blackacre as follows: "To *B* in fee simple; however, if this land is ever used for a nonresidential purpose, then to *C* in fee simple absolute." As written, *C*'s contingent executory interest violates the common-law rule against perpetuities. Breach of the condition can happen at anytime, within or without the lives of anyone in being when the interest is created and within or without twenty-one years of their deaths. Upon breach of the condition, *B*'s interest can be divested from his successors many years after his death in favor of *C*'s successors many years after her death.⁶⁹ There is no validating life in being because the condition is essentially unrestricted in time.⁷⁰ This understanding, however, may not be obvious before the foregoing explanation is actually made. Nevertheless, everyone should have an easy time revising this provision so that it clearly

67. For full discussion and explanation of the search for and selection of validating lives in being in determining whether an existing interest satisfies the common-law rule, see BECKER, *supra* note 19, §§ 6.1-6.3. For a methodology that presents a step-by-step formula for finding, selecting, and testing all potential validating lives in being, see *id.* §§ 6.4, 7.1-7.4.

68. For discussion of the requirement, see SIMES & SMITH, *supra* note 3, § 1223.

69. One must clearly observe that *C*'s interest is not subject to a requirement that she survive the time in which the condition is breached by violation of the land use restriction, and this is so even though *C*'s interest is deemed contingent. Stated differently, interests that are otherwise contingent are not subject to an additional requirement of survivorship unless such requirement is expressed or clearly implied. One should also note that the presence of such a requirement in this example would alter the perpetuities determination. If *C* had to be alive at the time the condition was breached, *C*'s interest would satisfy the common-law rule because such interest must then vest or fail within *C*'s lifetime.

70. The condition is not limited in time in any manner. It is not tied to any person's death or to any event that can be computed in time. The divestiture of *B*'s interest in favor of *C* or *C*'s successors can occur at anytime; indeed, it can occur many years beyond *B*'s death, many years beyond *C*'s death, and many years beyond the deaths of every person alive at the time *A* makes this transfer. It could occur after 50 years, but it could just as easily occur after 150 years.

achieves immediate validation through preventive compliance with the common-law rule. Once again, one simply needs to limit the duration of the condition to within twenty-one years of the death of a life in being or the death of the survivor of most any group of lives in being. In this instance, the obvious choices are the lives of *B* and *C*. And if one wishes to extend the duration of the condition, other lives can be added.⁷¹ Using the survivor of *B* and *C*, one can achieve preventive compliance with the common-law rule by making the following change: "To *B* in fee simple; however, if this land is ever used for a nonresidential purpose *within twenty-one years of the death of the survivor of B and C*, then to *C* in fee simple absolute." With this revision, the survivor of *B* and *C*—necessarily a person in being—becomes the validating life in being. And with this change, the condition can no longer last forever; indeed, it is now restricted to a time period within the common-law rule. Finally, one should observe that because of this revision the interest in *B*'s successors will become absolute and the interest in *C*'s successors will be extinguished if Blackacre is used exclusively for residential purposes during the period of time encompassed by the condition.

There are two ways for lawyers to achieve preventive compliance through immediate validation under the common-law rule against perpetuities. Most do so with a saving clause. There are many kinds of saving clauses; some, however, do not really save through immediate validation. They only avoid the consequences of a perpetuities violation by investing a court or a trustee with a power to reform the disposition.⁷² Those that do achieve immediate

71. One can add lives in being otherwise extraneous to the condition and, therefore, validate the gift. One can accomplish this with most any group of lives—preferably younger than both *B* and *C*—that are not unreasonably large in number or difficult to trace. For example, using the survivor of the enlarged group of lives in being to validate, one might provide: "To *B* in fee simple; however, if this land is ever used for a nonresidential purpose *within 21 years of the death of the survivor of B, C, X, Y, and Z*, then to *C* in fee simple absolute."

72. These saving clauses trigger reformation and redirection of the subject matter whenever an actual violation arises or in some clauses whenever a provision is challenged because of a perpetuities violation. W. Barton Leach illustrates an example of a savings clause that is triggered by an actual violation.

In any disposition in this instrument, or in any instrument exercising a power of appointment created herein, I do not intend that there shall be any violation of the Rule Against Perpetuities or any related rule. If any such violation should inadvertently occur, it is my wish that the appropriate court shall reform the gift or appointment in such a way as to approximate most closely my intent, or intent of the appointor, within the limits permissible under such Rule or related rule.

W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 986 (1965). See also 15 AM. JUR. 2D LEGAL FORMS § 201:17 (1973); EDMUND O. BELSHEIM, MODERN LEGAL FORMS § 9271.1 (Supp. 1984). For a saving clause that is triggered by a mere challenge under the common-law rule, see W. Barton Leach & James K. Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule*, 74 HARV. L. REV. 1141, 1141-44 (1961). To be sure, these kinds of saving clauses promote uncertainty of outcome as to whether a violation will be raised and if found how the provision will be reformed by a court or trustee.

validation have two important components, a supervening, actuating event and a provision for redirection. This actuating event governs all dispositive provisions within the instrument by creating a safety net time period that is within the period of the common-law rule but is also long enough to allow the objectives of each provision to be fulfilled.⁷³ Invariably, this actuating event utilizes a safety net that is measured by adding twenty-one years to the death of the survivor of a group of lives in being. And the group most frequently selected consists of beneficiaries named within the instrument who were born by the time the instrument irrevocably took effect and the period of the rule commenced.⁷⁴ The actuating event, however, is never reached and the redirection never occurs if all conditions and directions for income and principal within a particular dispositive provision are met or performed within the supervening safety net time period. Nevertheless, if a disposition is not completed within this time period, then the saving clause actuates a redirection that immediately concludes the operation of the provision. Most often, such a saving clause redirects principal to those beneficiaries who were entitled to income at the time the safety net time period expires and the actuating event occurs.⁷⁵

Given the benefits of preventive compliance through immediate validation under the common-law rule, by comparison, the costs of achieving it with a saving clause should be minimal. Therefore, a saving clause is always worth including. In fact, this is the way most estate planners practiced before reformation of the common-law rule. And they did this with a saving clause that they either drafted or took directly from a published form. All that is required is a one time adoption of a clause that properly saves and is versatile enough to solve the problems of most dispositive provisions. The costs

Nevertheless, if one elects to achieve perpetuities validation through tailor-made provision-by-provision compliance with the common-law rule—see *infra* notes 86-96 and accompanying text—this may be the best saving clause to include as a safeguard against miscalculation. See BECKER, *supra* note 19, §§ 13.2-13.3.

73. For a comprehensive discussion of saving clauses, their components, and the problems they present, see *supra* BECKER, note 19, §§ 4.1-4.3.

74. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 46, §§ 201-19.

75. See, e.g., *id.*; BELSHEIM, *supra* note 72, § 9271; PARELLA & MILLER, *supra* note 52, §§ 1.2.07, 1.2.12; WILKINS, *supra* note 46, §§ T.15.20, T.15.21, W.15.20, W.15.21. Redirection to income beneficiaries is not, however, the only method for redirecting principal following expiration of the safety-net. For an example of a saving clause that requires the estate owner to specify in the dispositive instrument the beneficiary who will receive the redirected principal, see JAMES F. FARR & JACKSON W. WRIGHT, JR., AN ESTATE PLANNER'S HANDBOOK 500 (4th ed. 1979). For an example of a saving clause that redirects principal to the person in whose name the trust is designated, see 3 JERE D. MCGAFFEY, LEGAL FORMS WITH TAX ANALYSIS § 15A.41 (1982). For a saving clause that redirects principal to the primary beneficiary of that trust, see 4 JACOB RABKIN & MARK H. JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS 9-1017 (1995).

attributable to the formation or selection and the inclusion of such a saving clause should be next to nothing for clients, especially when their lawyers spread these costs over many wills and trusts. At the very least, then, this is the way estate planners should be expected to practice after reformation of the common-law rule; indeed, it is exactly what proponents of reform have recommended.⁷⁶

Although inclusion of a saving clause is virtually without up front costs in the preparation of a specific client's dispositive instrument, it may not be without problems and, therefore, other kinds of costs. The foregoing safety net saving clause incorporates the method elaborated earlier for creative use of lives in being to achieve validation under the common-law rule.⁷⁷ Once again, in formulating the saving clause one selects most any group of lives in being, usually the beneficiaries named in the dispositive instrument. These lives in being are then used to validate all interests within the instrument under the common-law rule, and this is accomplished by limiting the fulfillment or failure of all requirements to within twenty-one years of the death of the survivor of this group of lives in being. If these conditions or requirements are not fulfilled or failed within the specified time period, the saving clause then redirects the subject matter—sometimes by including only those who have previously satisfied all requirements, but most often by including others who are alive but have not fully qualified within the safety net time limit.⁷⁸ The objective is to draft a universal actuating event and

76. See *supra* note 26; see also Waggoner, *supra* note 7, at 572.

77. See *supra* notes 65-71 and accompanying text.

78. These two methods of redirection can be illustrated with any gift to a class that is subject to an age requirement and can consist of members born after the time the period of the rule commences. For example, assume that an estate owner, *A*, makes the following testamentary disposition in trust: "Income to *B* for life; thereafter, principal to each of *B*'s children who attain age 30." Assume that *B* is childless at *A*'s death. The gift of principal does not satisfy the common-law rule against perpetuities. *B* may have a child born shortly before his death. Thereafter, everyone alive at *A*'s death can die before such child attains age nine. Consequently, that child can attain age 30 and join the class more than 21 years beyond the death of everyone alive at *A*'s death. A saving clause, however, might accomplish immediate validation in one of two ways. It might provide that: "All conditions imposed upon interests created under this instrument must be satisfied, if at all, within twenty-one years of the death of the survivor of all beneficiaries within this instrument who are in being at the estate owners death." With this clause, for *B*'s children to take they must attain age 30 and they must do so within 21 years of the death of the survivor of the beneficiaries in being. Another kind of saving clause might provide: "All trusts created must terminate on the last day of the twenty-first year following the death of the survivor of all beneficiaries within this instrument who are in being at the estate owner's death. If any beneficiary or beneficiaries of principal are then living and have not yet received a share of the principal, the principal shall then be distributed to them in equal shares." With this clause, *B*'s children who are then living—children necessarily under age 30—would receive principal along with those who had already shared in the principal because they had previously attained age 30. For a full discussion and illustration of saving clauses, see BECKER, *supra* note 19, § 4.3.1.

redirection so that one size fits all estate designs. But therein lies the rub. One size never fits all—at least not adequately.⁷⁹

One size can never be fashioned to meet the needs of every estate plan or, for that matter, every dispositive provision within the same estate plan. Because saving clauses are designed for universal use, they must address the norm. And if an instrument contains provisions that deviate from the norm, operation of the saving clause may produce a disaster because the actuating event misfires or the redirection misdirects. More specifically, these saving clauses frequently fail to create a safety net that extends far enough in time, so as to allow the objectives of the dispositive provision to be accomplished.⁸⁰ At worst, however, these saving clauses may not validate at all or they may cut short a provision that requires no validation because it independently satisfies the common-law rule.⁸¹

These conclusions are inevitable because it is impossible to draft a single all purpose saving clause. First, the time when the period of the common-law rule commences can vary from instrument to instrument and from provision to provision. Irrevocable trusts are treated differently from revocable trusts and testamentary trusts.⁸² A donee's appointment under a testamentary power

79. For full discussion of saving clauses, including their deficiencies and the problems they present, see *id.* §§ 4.1-4.3.

80. For illustration and discussion of this problem, see *infra* note 92 and accompanying text. For discussion of the problems presented by the actuating events contained within saving clauses—both generally and specifically as to durational limits that misfire, see BECKER, *supra* note 19, § 4.3.2.1

81. A saving clause may fail to validate because it measures the safety-net period of time with lives that were not necessarily in being when the period of the rule commenced. This oversight will most frequently occur with respect to irrevocable trusts and testamentary powers of appointment. More specifically, saving clauses that use lives in being at the settlor's death—in the case of an irrevocable trust—or lives in being at the donee's death—in the case of a testamentary power of appointment—will not save interests from violations of the common-law rule. For discussion and illustration of these problems, see BECKER, *supra* note 19, § 4.3.2.1. Quite differently, a saving clause may terminate interests that present no perpetuities problems whatsoever. This problem can occur with respect to dispositive provisions that achieve validation under the common-law rule with people who are not otherwise beneficiaries or even mentioned within the instrument itself. Saving clauses that measure the safety-net with beneficiaries only overlook these validating lives in being and, therefore, are susceptible to unnecessary termination of a trust long before its lawful purpose has been achieved. For discussion and illustration of this kind of problem, see *id.*

82. As to testamentary trusts, the rule against perpetuities commences and is applied as of the estate owner's death. As to revocable trusts, the period begins when the trust becomes irrevocable, which is usually when the estate owner dies. However, as to irrevocable trusts, the relevant time is when the trust is created and funded—a point in time that occurs before the estate owner's death. This difference has been the cause of many perpetuities problems, and the reason for these potential violations is simple enough. When the period of the rule begins at the estate owner's death, all of her children necessarily become potential validating lives in being because presumptively she cannot have children beyond her death. However, when the period commences during her lifetime, all of her children cannot be used to validate because presumptively she can have additional children after creation of the trust regardless of her age. What this means is that perpetuities violations are apt to occur one generation earlier than they would if the period of

is treated differently from other provisions within the donee's will.⁸³ Second, the beneficiaries in being within an instrument may not provide the most useful group to measure and extend the duration of the safety net.⁸⁴ Indeed, the beneficiaries may not even include all lives in being that causally affect the conditions or the time when they are to be fulfilled.⁸⁵ Third, the typical provision for redirection can present problems either because the income beneficiaries when the actuating event arrives were never intended to have such principal or because the trust did not have any income beneficiaries at that time.⁸⁶

To be sure, estate planners can always adjust their basic saving clause so that the foregoing problems do not arise. This requires one to examine carefully when the period of the rule begins for the instrument and for any powers created by it or appointments made within it.⁸⁷ It also requires one to examine each provision to determine whether a safety net measured by the

the rule began at the estate owner's death. In practical terms, perpetuities problems can arise with respect to gifts to children contingent upon attainment of any age that exceeds 21. And gifts to grandchildren may not satisfy the common-law rule even when they contain no condition beyond birth. For full discussion and illustration of perpetuities problems involving irrevocable trusts, see BECKER, *supra* note 19, §§ 2.3.4, 8.2.11, 12.5.

83. As to all new interests created by the donee in her own will, the period of the rule commences at her death. This, however, is not true for appointments made pursuant to her testamentary power. Whether the testamentary power is special or general, the result is the same. Assuming that the power itself is valid, in both instances the appointment is governed by a perpetuities period that commences when the power is created. It is not measured from the time of her death when the power is exercised and the appointment made. *See id.* § 2.5.

84. This is especially true whenever an estate owner's dispositive scheme is intended to reach—and, perhaps, even stretch—the limits of the common-law rule against perpetuities. In this situation, the safety net may require something more than the named beneficiaries or any other lives in being that causally affect the conditions or the time in which they are to be fulfilled. Indeed, such an estate plan may require use of a limited number of lives in being who are otherwise totally unrelated to the dispositive scheme or any of its conditions. *See infra* note 95 and accompanying text. For discussion and illustration of this technique for validation, see BECKER, *supra* note 19, § 12.1.4.

85. This would be true when beneficiaries named elsewhere within a dispositive instrument do not include the procreators of a group of beneficiaries who receive a class gift under such instrument. The lives of these procreators will always affect some basic conditions, such as birth and attainment of particular ages, that concern a class gift. These lives in being, then, become the lives most relevant to extending the safety net so that it comprehends the fulfillment or failure of conditions imposed upon the class of beneficiaries. Without these causal lives, the saving clause can cut short perfectly valid interests or terminate a trust long before its purpose has been achieved. *See supra* note 81.

86. For illustration and discussion of the problems presented by a saving clause when it redirects principal to income beneficiaries who differ markedly from the beneficiaries ultimately intended to have principal under the dispositive provision, *see infra* note 93 and accompanying text. For full discussion of the problems presented by saving clauses that misdirect, see BECKER, *supra* note 19, § 4.3.2.2.

87. For discussion of the perpetuities law governing powers of appointment, see BECKER, *supra* note 19, § 2.5.1. For a step-by-step methodology that applies the common-law rule to powers of appointment, *see id.* §§ 7.2.1, 7.2.3-7.2.4. For discussion and illustration of a process for creation and exercise of powers that satisfy the common-law rule, *see id.* § 12.6.

lives of beneficiaries in being allows enough time for fulfillment of such provision's dispositive objectives. And, finally, such adjustment involves an evaluation of the method of redirection within the saving clause. Indeed, one must inquire how well it functions for each provision within the entire trust or will. This process of evaluation and potential adjustment takes more time. It is something lawyers must do given their use of saving clauses, and it is something lawyers can do efficiently once they understand the rudiments and simplicity of creative validation under the common-law rule. Nevertheless, the time and skill that this requires may not differ from what is needed to achieve validation through tailor-made provision-by-provision compliance.

This is the other method that lawyers use to achieve preventive compliance with the common-law rule. It draws upon the same principles of creative validation that are used in the formation of an effective saving clause. It focuses, however, the method of validation separately upon each dispositive provision and, thereby, produces when necessary, tailor-made *saving phrases* instead of a single all purpose saving clause. The objective of each *saving phrase* is to make certain that actuating events do not misfire and that redirections of principal do not misdirect. Therefore, a well conceived and crafted *saving phrase* establishes a safety net that is measured with lives in being that are most relevant to the purpose of the provision itself. And it offers a redirection—either implicit or explicit—that best carries out the estate owner's wishes in the event the reach of the dispositive provision must be cut short. A *saving phrase*, however, should never be a complete substitute for a saving clause because occasional mistakes in the process of perpetuities validation are inevitable. Under these circumstances, the kind of saving clause that one selects must be different. Instead of a secondary safety net, the actuating event should be triggered by an actual mistake that prevents immediate validation under the common-law rule. And the redirection should be accomplished by the estate owner or someone she appoints and not the court.⁸⁸

The process⁸⁹ for provision-by-provision validation under the common-

88. For discussion of whether a *saving clause* should be used to supplement a *saving phrase*, and if so what kind, see *id.* §§ 13.1-13.3.

89. Although this process can be shortened, ideally it should involve several steps. To begin with, one should draft a tentative version of the dispositive provision under consideration. Next, one should determine whether such draft already satisfies the common-law rule and, therefore, achieves preventive perpetuities compliance. If one can demonstrate validity, then there is no need to go further and introduce a *saving phrase*. The draft provision can then become finalized. If, however, one cannot accomplish validation with the tentative formulation of the provision, then one must continue the process with a third step called tailor-made revision. The procedure for tailor-made revision can, in turn, be described in terms of a three step

law rule through tailor-made *saving phrases* can easily be demonstrated using two earlier illustrations.⁹⁰ Suppose an estate owner creates a testamentary trust that provides income to her named child for life, along with a testamentary power to appoint principal thereafter to her child's descendants upon such conditions, interests, and portions as that child desires. Further, assume that this child has no descendants at the death of his mother—the point in time when the period of the rule commences. Finally, assume that the child exercises the power at his death by extending the trust with income to his children and the survivor of them for life. Thereafter, upon the death of the named child's last child to die, the principal is then appointed absolutely to his grandchildren per capita.⁹¹ As written, this gift of principal does not satisfy the common-law rule against perpetuities even though the appointment imposes no condition beyond birth. Because this is a special testamentary power, the period of the rule begins at the estate owner's death. The power itself is valid—it cannot be exercised beyond the named child's death—and so is the appointment of income to the named child's children—it vests immediately upon the named child's death. But the gift of principal to the named child's grandchildren does not achieve validation, mainly because his own children cannot be used to validate their children's interest. Although the named child has children alive at his death, they cannot become validating lives in being because they were not born before the estate owner's death. Consequently, they must be dismissed in any attempt to validate. With this in mind, one should now recognize that it becomes possible for any one of the named child's children to live beyond twenty-one years of every one who was alive at the estate owner's death. Further, it becomes possible for such named child's child then to have a child—a grandchild of the named child—who could then join the class. Because this can occur beyond the period of time allowed by the rule, this gift of principal fails the test of validation and thereby does not achieve immediate preventive perpetuities compliance.

process. First, one must identify the problematic conditions; namely, those conditions that stand in the way of immediate validation. Second, one must carefully identify and select the lives in being that will be used to validate the *saving phrase*. And third, one must achieve validation by reconstituting the problematic condition. That is to say, one must connect the selected lives in being to the condition so that no interest can vest beyond 21 years of the death of the survivor of them. Having done that, one will have created a revision that achieves immediate validation under the common-law rule. For full discussion and elaboration of this process, see *id.* §§ 10.3—11.2.

90. See *supra* notes 45-53, 56-59 and accompanying text.

91. Assuming that the value of the trust created by the estate owner at her death falls within the exemption to the Generation Skipping Transfer Tax (GSTT), this trust will avoid all death costs otherwise attributable to the deaths of the named child and each of his children. For further discussion of the GSTT and the use of tax exempt trusts, see *supra* notes 60-64 and accompanying text.

Before illustrating actual creation of a tailor-made *saving phrase* that achieves immediate validation, it would be useful to examine how a typical saving clause might affect administration of such appointment in the absence of any *saving phrase*. Often the saving clause included by the estate owner—the donor of the power—fails to cover interests created by the donee’s appointment. And all too often the saving clause included by the named child—the donee of the power—fails to save because it overlooks the time when the period of the rule commences as to interests created by his appointment. Assuming, however, that the applicable saving clause included in the named child’s will uses a safety net measured from the estate owner’s death, the actuating event will terminate the extended trust no later than twenty-one years after the death of the survivor of the beneficiaries within the named child’s will who were alive when the estate owner previously died. Indeed, there may be no beneficiary who qualifies. Certainly this would be true if the named child survived his wife and left his estate entirely to his descendants—none of whom were born before the estate owner’s death. Conceivably, the supervening saving clause might terminate the trust immediately after the appointment is made. This would happen if the named child died more than twenty-one years after the estate owner’s death.⁹² If, however, the estate owner included a saving clause that covered the donee’s appointment or if the named child included a saving clause for his appointment that used lives in being who were beneficiaries under the estate owner’s will, then there might be some people still living at the named child’s death whose lives would extend the duration of the safety net. Nevertheless, the reach of the safety net—and with it delay of the actuating event and redirection—might not be adequate to accommodate the purpose of the named child’s appointment. This would depend upon the identity of the other

92. For a complete discussion and illustration of saving clauses, their components, and the problems they present, see BECKER, *supra* note 19, §§ 4.2-4.3. The most popular form of saving clause terminates all trusts within the dispositive instrument 21 years after the death of the survivor of the estate owner and all beneficiaries in being at the estate owner’s death. If the saving clause included in the named child’s will provides for termination of the trust created by his testamentary appointment upon the death of the survivor of the estate owner and all beneficiaries within the named child’s will who were living at the estate owner’s death, then such appointed trust may terminate immediately upon creation if the named child has died more than 21 years after the estate owner’s death. This result arises because the named child is not a beneficiary within his own will and because all of the people who become beneficiaries under his will were not in being at the estate owner’s death. If, however, the saving clause also includes other beneficiaries named within the estate owner’s will, then the named child does qualify as a validating life in being. Consequently, the appointed trust created by the named child will last another 21 years. It could last even longer if other beneficiaries within the estate owner’s will who were alive at her death are also alive at the named child’s death.

beneficiaries within the estate owner's will. Very likely they were of the same generation as the named child, perhaps even an older generation such as the estate owner's husband or siblings. Consequently, one must conclude that the actuating event is apt to arise within or somewhat beyond twenty-one years of the named child's death, and that the appointed trust could easily terminate before its purpose had been fulfilled. More specifically, such trust could be forcibly ended before the named child's children had died and even before the last of the named child's grandchildren had been born.

If the appointed trust is prematurely terminated by the actuating event, who would be entitled to take under the typical saving clause? The usual redirection of principal is to those entitled to income immediately before the time for termination. Because the termination derives from the saving clause and not the appointment itself, one or more of the named child's children are necessarily alive and have been the recipients of income immediately before the actuating event is triggered. Children and not grandchildren would then be entitled to principal. Worst of all, this could produce unintended inequality by eliminating completely the families of the named child's deceased children. This would occur if less than all of the named child's children were alive when the trust is forcibly terminated and the provision for redirection is triggered. This problem arises because the saving clause redirects principal on the basis of income and because the appointment concludes each child's right to income upon death by ultimately giving all to the survivor of them. Even if the appointment continued income for the named child's deceased children until the death of their survivor, this kind of redirection could still present serious problems because distribution of principal to recipients predicated upon income might not match-up with either the generational scheme or the method of division intended by the original appointment.⁹³

93. If the appointment continued income for the benefit of each of the named child's deceased children until the death of the survivor of the named child's children, then redirection upon termination of the trust would deliver principal to the surviving children of the named child and to those who take the estates of the named child's deceased children. The latter group might include grandchildren of the named child, but it might not. It would depend entirely upon the provisions of the named child's deceased child's will. If, however, the appointment continued income solely for the benefit of a deceased child's children, then redirection upon termination of the trust would deliver principal to the surviving children of the named child and the children of his deceased children. In this instance, principal would not pass exclusively to the named child's grandchildren as originally planned under his appointment; nevertheless, it would be redirected to his descendants only. One should also observe that distribution under the named child's appointment calls for per capita division of principal among grandchildren. Redirection of principal under the saving clause, however, would divide principal on the same basis as income. This would mean that grandchildren would not take equally; instead, they would divide the principal on the basis of equal shares among their parents—the named child's children.

What, then, can an estate planner accomplish with a *saving phrase* that is better than a saving clause and is certainly superior to doing nothing at all? The answer lies in the process of creation itself. In light of the conditions involved, one should select the most appropriate lives in being to measure the safety net—namely lives that assure immediate validation but still extend the safety net for a period of time long enough to achieve the appointment's objectives. And in the event the safety net does not permit full administration of the dispositive design, one must redirect in light of the purpose of the provision and the ultimate gift of principal contained within it. A tailor-made *saving phrase* requires nothing more than a specially fitted safety net and a specially fitted redirection. That's all there is to it!

This can be illustrated with a *saving phrase* designed for the foregoing appointment. The problematic condition presented by the named child's appointment of principal involves merely the birth of his grandchildren. Consequently, in tailor-making an effective *saving phrase* one must construct a safety net that will, in all likelihood, allow enough time for all of the named child's grandchildren to be born. One can gain twenty-one years beyond the named child's death—the time when his appointment takes effect—by making him a validating life. Because such named child had no children alive at the estate owner's death, there are no other lives in being who are connected directly to the fulfillment of the condition or to the time in which it can occur.⁹⁴ Nevertheless, one can probably reach well beyond twenty-one years by using other people to validate, preferably those who are of the same generation as the named child or his children. This group might include the named child's wife, his siblings, and descendants of his siblings who were alive when the power was originally created at the estate owner's death.⁹⁵

94. As of the named child's death and the exercise of his testamentary power, it becomes clear which lives are causally connected to the ultimate appointment of principal. The only condition attached to the named child's appointment to his grandchildren is birth. Consequently, procreation is the only relevant event. The only lives affecting procreation of grandchildren are the named child, who must conceive his own children, and the named child's children, who must conceive their own children—that is, the named child's grandchildren. The named child was alive when the period of the rule commenced at the estate owner's death; consequently, he qualifies as a life in being and his life can be used to validate. However, all of the named child's children were born after the estate owner's death; therefore, they do not qualify as lives in being and cannot be incorporated into a validating safety-net *saving phrase*.

95. If necessary, one could reach even further with specially selected lives in being that were otherwise totally extraneous to the dispositive scheme. For example, one might select several healthy children born on the day the dispositive instrument was executed. See, e.g., WILLIAM SCHWARTZ, FUTURE INTERESTS AND ESTATE PLANNING § 6.32 (1965 & Supp. 1985). Nevertheless, in selecting "extraneous lives," one must remember that the common-law rule requires that the validating lives in being must not be unreasonable in number or recognizability so that it becomes exceptionally difficult and impractical to trace the life and death of each of them. See *supra* note 68. To extend the durational reach of the trusts they create, many lawyers

Having selected the validating group of lives, one must next consider redirection. Although other rules may affect and limit the duration of trusts,⁹⁶ validation under the common-law rule can be achieved by making certain that vesting cannot occur beyond the allowed time period. In this instance, therefore, one can secure preventive perpetuities compliance by merely limiting the time when grandchildren can join the class. In doing so, however, one need not terminate the trust and cut short the gift of income to the named child's children. Consequently, one might redirect only the principal, and this can be accomplished by reconstituting the condition so that grandchildren born beyond the safety net are excluded. With this in mind, the *saving phrase* within the named child's appointment would read: ". . . After the death of all of my children the trustee shall terminate this trust and distribute the principal in equal shares to each of my grandchildren absolutely *who were born within twenty-one years of the death of the survivor of myself, my wife, my siblings, and the descendants of my siblings who were alive at my mother's death.*" Once again, that's all there is to it!⁹⁷

will now include among their validating lives the living descendants of prominent people who would otherwise lie totally beyond the scope of the estate owner's dispositive design. For examples of saving clauses that use the living descendants of Joseph Kennedy or Brigham Young, see Oshins, *supra* note 64, § 19.06 n.16. To be sure, these provisions rest on shaky ground. Indeed, a *saving phrase* must always save; consequently, its list of validating lives in being should never test the limits of reasonability.

96. There are other bodies of law concerned with the same policy considerations as the rule against perpetuities; principles generally concerned with the alienability of property and the rights of the living to be free of the constraints of the dead. These other principles of property law involve restrictions on accumulations, prohibitions against direct restraints upon alienation, and restrictions upon the duration of trusts. See SIMES & SMITH, *supra* note 3, §§ 1111-71, 1391-95, 1461-68. Indeed, some of these rules use the same period of time allowed by the common-law rule to control certain aspects of donative transfers. For example, although contingent equitable interests created by a trust may satisfy the common-law rule against perpetuities if they must vest, if at all, within a life in being and 21 years, they may not satisfy another rule that, for the same period of time, imposes a limit on the indestructibility of trusts. In short, there is a growing body of law that disallows continuation of a trust beyond the period of time allowed by the common-law rule against perpetuities when the ascertained beneficiaries to the trust wish to terminate it. If the beneficiaries wish to do this, a trust cannot by its terms remain indestructible beyond this period of time even if its termination defeats the material purposes of the trust. See *id.* § 1391; see also RESTATEMENT (SECOND) OF PROPERTY, *supra* note 6, § 2.1. As a result of these other rules, and in particular the one that limits the indestructibility of trusts, there are saving clauses that cast a more comprehensive and restrictive safety net, one that circumscribes the *duration* of all trusts created by the dispositive instrument. See *infra* note 97.

97. There is, however, another kind of *saving phrase* that many lawyers will prefer. It is one that terminates the trust and redirects the principal upon expiration of the safety net, and it is patterned after the most popular kind of saving clauses.

There are two reasons for using this other method of tailor-made compliance. First, it satisfies the common-law rule against perpetuities and other related rules that reflect the same policy considerations. See *supra* note 96. Second, this method offers an opportunity to benefit class members who have not satisfied all conditions by the time the safety-net expires. This becomes a viable solution only when requirements for entry into the class include conditions beyond birth. Consequently, it would not enlarge the pool of eligible grandchildren in the illustration used in the text. It would, however, accomplish this if an age requirement

As to the other illustration, suppose an estate owner creates a family trust that divides principal upon the death of her spouse into equal shares, with one share for each of her then living children and one share for the living descendants of each of her deceased children. Assume also that the estate owner is very concerned with the ability of the beneficiaries to manage and use their respective shares wisely. As a result, she conditions distribution of principal upon attainment of age thirty-five; until then, each beneficiary is entitled to income only. This applies to children and to their descendants as well. Finally, the estate owner makes a substitute gift to the descendants of any child or descendant who does not attain thirty-five.

This trust—one that is very familiar to all estate planners—fails to satisfy the common-law rule as to the substitute gifts to descendants of any child who predeceases the surviving spouse or fails to attain the required age. The descendants, unlike children, are not restricted to lives in being at the estate owner's death. Consequently, it is possible that all lives in being—including the spouse and children—will die before an afterborn descendant reaches age fourteen. With this eventuality, it becomes possible for a descendant to attain age thirty-five and join the class entitled to a substitute gift beyond the period allowed under the common-law rule.

Before considering tailor-made compliance, one might again examine the effect of a typical saving clause that creates a safety net measured by the lives of beneficiaries in being at the estate owner's death and redirects principal to income beneficiaries upon expiration of the safety net and termination of the trust. And to make the deficiencies of this saving clause more graphic, assume that the estate owner wishes to disinherit her son—who is the youngest child—because of their serious conflicts. Nevertheless, she does not want to exclude any children he may have; consequently, she plans to create a trust share for them. This unfortunate circumstance is certainly within the experience of many estate planners.

What effect, then, might the typical saving clause have? First, it will terminate these trusts within twenty-one years of the death of the survivor of beneficiaries in being. This group, however, does not include her youngest

had been imposed along with the fact of birth. Grandchildren who were born and attained the required age within the safety-net time period would receive distributions pursuant to the directions of the basic dispositive provision. Additionally, grandchildren who were living at the expiration of the safety-net but had not yet satisfied the age requirement would receive a share of the principal as a result of the redirection incorporated into the *saving phrase*. For further discussion and illustration of saving clauses that use this same method of preventive perpetuities compliance, see *supra* note 78. For a discussion and illustration of a *saving phrase* that uses this method of tailor-made compliance, see BECKER, *supra* note 19, § 11.2.4.

child—the person most directly connected to the conditions affecting his own children and, therefore, the measuring life most likely to generate an adequate safety net. In short, because her son is not a measuring life, this saving clause may terminate the share set aside for her estranged son's children long before they attain age thirty-five or perhaps even before all are born. Upon expiration of the safety net, principal of each trust share will pass to the income beneficiaries. The recipients inevitably will be some of her children's living descendants, namely those who have not yet reached thirty-five. And they will immediately receive principal without regard to whether they subsequently satisfy this age requirement.

To be sure, one can always adjust the safety net and redirection provisions within a saving clause to meet the needs of a particular estate plan. This kind of fine tuning, however, is the essence of tailor-made compliance. It forces one to fit the saving mechanism like a glove. It identifies choices and makes them in light of the particular needs of a dispositive provision or an entire instrument. More specifically, tailor-made compliance requires a safety net that provides enough time to fulfill the estate owner's dispositive objectives. At the very least, then, this safety net must be measured with lives in being who are most relevant to conditions and time requirements. In the foregoing illustration, it means that the estranged son must be included as a measuring life even though he is not a beneficiary. One could accomplish this, and undoubtedly gain more than enough time to see the age requirement fully enforced, by saying “. . . *twenty-one years after the death of the survivor of my descendants alive at my death.*”

Redirection of income and principal after the safety net expires also presents choices. For example, the estate owner could give some person or entity—such as the trustee—discretion as to how principal should be apportioned and when distribution should be made. This redirection could be appealing if the trustee also has discretion over apportionment of the income throughout the trust's duration. Quite differently, the estate owner could restrict eligible descendants to only those who attained age thirty-five within the safety net time period. Or the estate owner might vary this and distribute principal that remained at the end of the safety net to only those descendants who were then living and had already received a share because they previously attained thirty-five. Or the estate owner could borrow from the typical saving clause by making immediate distribution of remaining principal to income beneficiaries and, therefore, only living descendants who had not already attained thirty-five. Alternatively, instead of terminating the trust at the end of the safety net, one could satisfy the common-law rule by vesting principal in these income beneficiaries immediately and deferring

distribution of principal until a beneficiary attained or would have attained age thirty-five. For example, an estate owner might provide: “*Unless this trust is sooner terminated, then on the last day of the twenty-first year following the death of the survivor of my descendants alive at my death, all remaining principal shall vest in my living descendants in the same proportions as they are then entitled to income. Distribution, however, shall be deferred for each descendant until he or she attains or would have attained age thirty-five.*” This redirection would make certain that no descendant received his share of principal during his lifetime before actually attaining thirty-five.

These are some of the choices an estate owner would have through tailor-made provision-by-provision compliance. Some may be more appealing than others. This would, of course, depend upon an estate owner’s objectives and her commitment to them. Consequently, each of these opportunities must be considered and evaluated so that an appropriate safety net and method of redirection can be fashioned.

V. CONCLUSION

Preventive perpetuities compliance is far superior to “wait-and-see”—waiting to determine whether an actual violation occurs and then seeing what the consequences of a violation will be or what revision a court will make. Professional competence requires preventive compliance and, therefore, it becomes the responsible thing to do. Because preventive perpetuities compliance is best achieved through immediate validation under the common-law rule, every lawyer must know the rule rather than ignore it. This is not an overwhelming task. Estate planners can easily satisfy the requirements of the common-law rule and achieve immediate validation efficiently and with virtually no cost to the client.

Saving clauses will accomplish such validation. Whatever time one takes to adopt or compose a saving clause is next to nothing when spread out over the many documents in which such saving clause appears. But *saving phrases* are even better than saving clauses. They tailor-make each validation so that a particular *saving phrase* fits perfectly the provision it protects. What does this involve? Find some lives in being—virtually anyone at all—that can be used to measure and cast a safety net time period that should be long enough to permit fulfillment of the conditions contained within a dispositive provision. Then validate with these lives in being by reconstituting the problematic conditions so that they cannot be fulfilled beyond twenty-one years of the death of the survivor of the selected group of lives. Finally, provide for redirection in a manner that best reflects the estate owner’s objectives if the

foregoing conditions have not been satisfied within the safety net time period. And that's all there is to it! What additional time does this take? With very little preparation and review,⁹⁸ this might take five minutes for each provision. Ten minutes? Perhaps this might take at most an hour for each dispositive instrument. The costs of doing so are not going to be significant. Preventive compliance through validation under the common-law rule must become the way lawyers practice estate planning. It is, after all, a matter of competence and professional responsibility.

98. For discussion of the full process for tailor-made compliance and the appropriate use of *saving phrases*, see *supra* note 89. For a discussion that illustrates the application of this process to a series of dispositive plans, see BECKER, *supra* note 19, §§ 12.1-12.6.

