

## ESTATE PLANNING AND THE REALITY OF PERPETUITIES PROBLEMS TODAY: RELIANCE UPON STATUTORY REFORM AND SAVING CLAUSES IS NOT ENOUGH

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## I. INTRODUCTION

This article is primarily about the common-law rule against perpetuities. Although this rule still prevails in the United States,<sup>1</sup> it is overlooked, if not completely ignored, by many lawyers who plan, design, and draft instruments for the transfer of estates. In their judgment, they need not concern themselves with understanding and satisfying its re-

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1. See 5 R. POWELL, *THE LAW OF REAL PROPERTY* 761 (P. Rohan rev. ed. 1982). See also *RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS* 11-12, 66 (1983).

quirements when designing and drafting specific dispositive interests.<sup>2</sup> Accordingly, they may scoff at whatever little time law schools devote to its instruction.<sup>3</sup>

Several reasons may underlie this lack of concern, even disdain, for the common-law rule. To begin with, it is widely misunderstood by both the

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2. These assertions derive from informed conjecture. While no attempt has been made to support them with a careful empirical study, the author has made informal inquiry of lawyers over a period of many years. Some lawyers simply and flatly deny any disregard of the common-law rule against perpetuities. This is no surprise; an admission of disregard could easily tarnish a reputation of expertise. A small number of lawyers explain how they always consider and satisfy the rule within the terms of each dispositive provision. Nevertheless, there are many lawyers who candidly admit that they draft without regard to the common-law rule because they do not create the kinds of interests that cause perpetuities problems and because saving clauses, which they always include, avert any unforeseen violations. Perhaps the best evidence of frequent inattention to the rule in the design of specific dispositive provisions lies in the published will and trust forms that lawyers typically use. Many provisions within these forms contain conditions which, in the absence of an effective saving clause, violate the rule. These violations can occur in many instances without any change in language, while in others they can occur with only slight changes that reflect commonplace variations in dispositive objectives. For a discussion of these standard forms and the provisions that tempt violation of the common-law rule, see *infra* §§ II.C. & II.D.

3. Indeed, the amount of time law schools devote to perpetuities instruction has been significantly reduced in recent years. This is readily confirmed by scanning law school curricula and published course books. In earlier times, the rule against perpetuities received major treatment in an extended first year property course and in a separate course on future interests. Today, the emphasis of first year courses has shifted away from the law of estates, a prerequisite to mastery of the common-law rule, and the law of future interests is usually crammed into a course on trusts and estates or into a course on estate planning. Inevitably, these courses have less time and offer less instructional material for teaching and understanding the rule. Perhaps the views of Professor Cohen best express the prevailing attitude towards current instruction on the law of estates and the rule against perpetuities:

In the history and tradition of teaching property the subject of estates in land has generally been the one to which the most attention has been devoted. . . . Today, however, attention has shifted to the modernization of the principles, and, far more importantly, to other relationships than those covered by the principles. . . . Thus, the ancient practice of developing inflexible rules for property as distinguished from the relatively flexible treatment afforded other areas of the law has become increasingly less predominant. For example, the present ramifications of the landlord/tenant relationship have complications and imports which never could even have occurred to a property instructor *circa* 1925, while the draconic common law effect of the Rule Against Perpetuities, which straitened the thinking of so many lawyers of the past, is almost certain to pass from the universe of legal problems within the next decade, as more and more states legislate more satisfactory resolution of perpetuities problems.

The examples abound; the simple fact of the matter is that the world has changed and attention has been diverted. So too in this book. As fascinating as a thorough treatment of the estates in land in the interest of eventual understanding of the Rule Against Perpetuities may be, there is little modern justification in concentrating upon it in a first year property course. The simple fact is that no longer can it truthfully be said that complete and historical understanding of estates in land is absolutely necessary to a lawyer.

E. COHEN, *MATERIALS FOR A BASIC COURSE IN PROPERTY* 114 (1978) (reprinted with the permission of West Publishing Company).

bar and the bench.<sup>4</sup> This misunderstanding undoubtedly derives from the inadequate comprehension developed in school. Most law students view the common-law rule against perpetuities as something shrouded with mystery and complexity and laden with anachronistic absurdities.<sup>5</sup>

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4. See, e.g., J. GRAY, "THE RULE AGAINST PERPETUITIES" xi (4th ed. 1942) ("few lawyers . . . have not at some time . . . fallen into the net which the Rule spreads for the unwary . . ."); Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954) ("The Rule . . . is a dangerous instrumentality in the hands of most members of the bar."); Rabin, *The Dangerous New Jersey Rule Against Perpetuities*, 8 N.J. ST. B.J. 1290 (1965) (The rule against perpetuities is "incomprehensible" to those who need to understand it, so remedial legislation should be adopted.). See also *Lucas v. Hamm*, 56 Cal. 2d 583, 592, 364 P.2d 685, 690, 15 Cal. Rptr. 821, 826 (1961) (the California Supreme Court found that an attorney who drafted a dispositive instrument that violated the common-law rule did not fail "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise"). Finally, consider these comments of Professor Fetters:

Perhaps the Supreme Court of California was correct after all. If it takes over eight hundred pages to explain a one-sentence, twenty-seven word rule, and that explanation was written by a legal scholar who devoted a lifetime of study to it, then maybe the rest of us should not be held accountable for knowing little, if anything about it. . . . There is no question that the reports are full of lawyer errors, compounded by judicial blunders, in the field of perpetuities law.

Fetters, *The Perpetuities Period in Gross and the Child En Ventre Sa Mere in Relation to the Determination of Common-Law and Wait-And-See Measuring Lives: A Minor Heresy Stated and Defended*, 62 IOWA L. REV. 309, 334-35 (1976). Nevertheless, one should note that, despite the difficulties that have existed in mastering the common-law rule by bench and bar alike, Fetters believes that it can be understood with a proper method of analysis; indeed, it is not something too difficult to grasp. *Id.* at 311, 335.

5. For example, generations of law students have been confounded by the presumed fertility of octogenarians, by the assumption that probate may never occur and, if it does, that it can be completed more than twenty-one years after the estate owner's death, and by the assumption that a gift to a named adult's unnamed surviving spouse may include someone born after the estate owner's death. (For a discussion of these applications of the common-law rule against perpetuities, see Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643-46 (1938).) Nevertheless, most students can, albeit grudgingly, grasp these assumptions and integrate them into their understanding and application of the common-law rule. Their greatest difficulty and confusion, however, lies in the life in being concept and the requirement of absolute certainty as to the time limits for vesting. (For a brief statement and discussion of the requirements of the common-law rule, see *infra* note 35 and accompanying text. 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. See, e.g., J. DUKEMINIER & S. JOHANSON, *FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES* 981 (2d ed. 1978); L. SIMES, *HANDBOOK ON THE LAW OF FUTURE INTERESTS* 370 (2d ed. 1951); Allan, *Perpetuities: Who Are the Lives in Being?*, 81 L.Q. 106, 106-07 (1965); Note, *Understanding the Measuring Life in the Rule Against Perpetuities*, 1974 WASH. U.L. Q. 265. In an effort to clarify the problem, instructive guidelines are often given to students about the validating life in being. These guidelines might include: that the life in being can be anyone or any group of people, not unreasonably large or unreasonably difficult to trace; that such person need not be the recipient of any interest within the limitation or within the dispositive instrument itself; and, further, that the life in being need not be explicitly mentioned in the dispositive instrument. See, e.g., R. MAUDSLEY, *THE MODERN LAW OF PERPE-*

Consequently, some students surrender in confusion. Nevertheless, many students eventually solve perpetuities problems, but few can fully explain the process by which they achieve their answers under the common-law rule. Perpetuities problems have solutions; specific limitations simply do or do not violate the rule.<sup>6</sup> Some students "catch on," while others do not. Invariably, those that do "catch on" achieve their solutions by a process of simple inspection rather than by one of careful method.<sup>7</sup> Indeed, these solutions rest upon a fragile technique that may

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TUITIES 42 (1979). 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 a 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.

For a discussion of these questions and the problems encountered in answering them, see Becker, *Understanding the Rule Against Perpetuities in Relation to the Lawyer's Role—To Construe or Construct*, 20 SAN DIEGO L. REV. 733 (1983).

6. See Kurtz, *The Iowa Rule Against Perpetuities: A State of Little or No Law*, 65 IOWA L. REV. 177, 179 (1979). Professor Kurtz suggests that the dearth of perpetuities cases is partly due to the fact that violations can be determined with almost mathematical certainty. To be sure, the common-law rule against perpetuities has been explained in terms of an equation (see *infra* note 35 and accompanying text); perhaps, then, solutions should exist with clarity and mathematical precision. Of course, this is true only after construction of the limitation in question is settled. It should be carefully observed that the problems that surround the application of the common-law rule against perpetuities are twofold. First, there is the matter of understanding the elements of the equation itself; for example, who is the life in being by which an interest can be validated? But then, there is the matter of construing the limitation so that it can be tested against the requirements of the rule. The common-law rule against perpetuities forbids interests that can vest beyond an allowed period of time. Of necessity, solutions as to perpetuities questions can never be reached until determinations as to vesting are made. These determinations are not always easy ones, nor are they readily made. The law of future interests abounds with litigation and complexities involving questions of vesting. See L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 571-594, 652-659 (2d ed. 1956 & Supp. 1973). Accordingly, although the answers to perpetuities problems seem clear-cut, this is never true until dispositive meaning has been firmly established and the existence and scope of conditions have been resolved.

7 The mystery that surrounds the common-law rule against perpetuities, and the difficulty encountered in mastering it, is, perhaps, a reflection of the way it is taught. The common-law rule is taught mainly by posing problems and then explaining their answers. For example, Leach's original nutshell on perpetuities, upon which generations of law students have been weaned, contains propositions about the common-law rule that are each followed by examples with explanations. See Leach, *supra* note 5. See also J. DUKEMINIER & S. JOHANSON, *supra* note 5, at 980-83; R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 42-47 (1966); L. SIMES, *supra* note 5, § 109. More specifically, his methodology is used to deal with student questions that pertain to the life in being

be lost in time through disuse. With this weak foundation, it should be no surprise that most students become lawyers who are ill at ease with the rule. Because of this, many lawyers are reluctant to address the rule directly and, accordingly, are wont to overlook it.

As a group, lawyers are disinclined to confess ignorance as to any principle of law; instead, many might admit that they avoid the practice of the common-law rule primarily because they never encounter it. They believe that the interests they create or interpret bear no potential violations. Perpetuities problems arise only when an estate owner attempts to control the devolution of his estate indefinitely, only when he uses complex future interests that reach out for generations. They believe that perpetuities problems do not arise with simple and popular dispositive plans; for example, plans that provide for a spouse, children and, perhaps, even grandchildren. Indeed, many lawyers claim that they have never seen, nor do they expect to see, a perpetuities problem. Furthermore, even if a perpetuities problem did materialize, these lawyers believe that they can still disregard the common-law rule either because it has

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concept. *See, e.g., supra* note 5. In addition to some general guidelines or pronouncements, students typically are provided examples and then instructed to follow along when given the correct answers and explanations. With experience, they are expected to "catch-on," and soon they will be able to solve these problems by simple inspection as the validating life in being somehow becomes self-evident. Indeed, this is a process that seems almost intuitive and, therefore, mysterious. *See, e.g., Allan, Perpetuities: Who are the Lives in Being?*, 81 L.Q. REV. 106, 106-07 (1965). Allan reduces the mechanics of the common-law rule to a formula and also stresses that the validating life in being is always mentioned in the limitation, expressly or impliedly. Nevertheless, he also adds that some examples would soon clarify the life in being and the proof required by the rule. *See also* R. MAUDSLEY, *supra* note 5, at 4-5, 94-101. Maudsley contends that the only lives in being recognized under the common-law rule were those that actually validate an interest, and that these lives always select themselves. Some commentators, however, are uneasy with the process of simple inspection and the notion that the life in being becomes self-evident through examples. *See, e.g., S. FETTERS & J. SMITH, SIMES' CASES ON FUTURE INTERESTS* 640-42 (3d ed. 1971); Fetters, *supra* note 4, at 309-11, 334-35. Fetters acknowledges that the common-law rule has been taught and understood in such a manner that perpetuities problems are solved largely by simple inspection. He, however, decries this practice. Fetters maintains that a better method of analysis is required, which he then develops and explains. For another attempt at a careful method for understanding the common-law rule, see Featheringill, *Understanding the Rule Against Perpetuities: A Step-By-Step Approach*, 13 CUM. L. REV. 161 (1982).

Perhaps it is possible to reduce application of the common-law rule to a precise methodology. Nevertheless, one might observe that the legal method itself is, in the main, taught experientially and without equations that lead directly to correct answers and solutions. For example, a student might ask: How do I discover the issue? The instructor might respond: Follow along while we read cases, ask questions, and discuss them; you'll understand in time.

been converted to a “wait-and-see” test in their jurisdiction<sup>8</sup> or because the dispositive instruments they draft contain saving clauses that overcome potential violations. More specifically, if the common-law rule’s requirement of certainty as to the maximum time for vesting has been abandoned in favor of the “wait-and-see” requirement of actual vesting,<sup>9</sup> a potential perpetuities problem can be disregarded either because remote vesting is extraordinarily unlikely or because many of these reform statutes allow curative action if a violation actually occurs.<sup>10</sup> And in jurisdictions where the common-law rule still obtains, lawyers observe that a saving clause can always be included, one which safeguards against perpetuities violations, usually by fixing a valid maximum time limit to vesting or possession of all interests that is not apt to be exceeded. If this time limit is exceeded, the saving clause provides for an alternate disposition of principal that is intended to approximate the estate owner’s objectives.<sup>11</sup> Because of saving clauses, many lawyers might conclude that none of the interests they create ever fails from a perpetuities violation.<sup>12</sup>

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8. For a discussion of the “wait-and-see” test and other statutes that reform the common-law rule, see *infra* § III A 1.

9. For a discussion of the “wait-and-see” requirement of actual vesting, see *infra* § III A 1. See also *supra* notes 163-64, 166, & 174 and accompanying text.

10. Under the “wait-and-see” test, there is no violation if actual vesting does not or cannot occur beyond the period of time fashioned by the statute. For example, if a violation can only arise as a result of class members born after the estate owner’s death, and if such event is remote because of the procreative incapacities of their immediate ancestors (a fact that must be disregarded in applying the common-law rule), a lawyer might safely dismiss a potential violation simply on the basis of probability. And if afterborn class members do not materialize, there is no violation. Further, some reform statutes give a court a *cy-pres* power (sometimes with and sometimes without a “wait-and-see” period) to reform an invalid dispositive provision so that it complies with the rule against perpetuities and carries out the estate owner’s general intent. For a discussion of these reformations of the common-law rule against perpetuities and for examples of their application, see *infra* notes 163-70, 174-79 and accompanying text. Finally, even if a “wait-and-see” statute does not permit curative action by a court, these lawyers might also observe that if actual vesting does not occur within the “wait-and-see” period allowed by statute, a saving clause can always be included to avoid the consequences of a violation; namely, a provision that redirects the estate in a manner that approximates the estate owner’s dispositive design. For a discussion of saving clauses and methods of redirection, see *infra* notes 227-38 and accompanying text.

11. For a description of the various kinds of saving clauses and a discussion of how they function, see *infra* § III B 2 a.

12. Indeed, one might even conclude that these saving clauses actually encourage complete ignorance of the rule in the design and drafting of particular dispositive provisions. This would be especially true of those saving clauses that terminate all trusts at a point in time within the period of the rule and then redirect principal to certain beneficiaries. See, e.g., *infra* note 244 (saving clause set out therein). Lawyers usually adopt their saving clauses from published form books, and they do so with the assumption that these saving clauses effectively avoid violations and produce satisfactory results. With this security blanket, and the belief that no interest will ever violate the rule against

Consequently, these lawyers may readily dismiss the common-law rule against perpetuities in designing and drafting specific dispositive provisions.

With these arguments, one understands indifference among lawyers and might seriously question the practical importance of the common-law rule against perpetuities today. And, generally speaking, this is the issue upon which this Article focuses. This Article maintains that the common-law rule must be carefully taught in school and thereby understood and satisfied by lawyers within each of the dispositive provisions they create. At the very least, the common-law rule deserves to be taught because the rule is a superb vehicle for instruction in legal skills and for summarizing and synthesizing important principles of the law of future interests. Even when it is not fully comprehended, it is important to teach the common-law rule because of the educational value derived from the exercise itself. In short, the rule affords an ideal pedagogic model for teaching the lawyer's craft.<sup>13</sup> Yet, there is a more important and practical reason for mastering the common-law rule against perpetuities. Contrary to the belief of the many practitioners who disregard it, the requirements of the rule should be addressed and satisfied by lawyers who plan and draft dispositive instruments today. At the least, a lawyer should design each provision separately to avoid a perpetuities violation.

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perpetuities, they might readily conclude that dispositive provisions can and should be drafted without limitation, namely with whatever future interests and conditions the estate owner desires. This disregard, perhaps even disdain, for the rule is unfortunate. These saving clauses do not always achieve desirable solutions, and, further, there are circumstances in which they may not even avoid violations of the rule. *See infra* §§ III B 2 b & III B 3 b.

13. The common-law rule against perpetuities offers an ideal opportunity for teaching the legal method. Understanding the elements of the rule itself is a very difficult intellectual exercise, one that challenges the very best students. *See supra* note 5. And yet the rule offers more. At the very least, it provides a vehicle for resolving problems that require an understanding and synthesis of the law of estates and future interests. For example, perpetuities problems cannot be solved without an understanding of the distinctions between contingent and vested interests, nor can the rule be applied without a firm grasp of the legal principles that govern class gifts. Finally, the rule affords an opportunity to consider questions of policy and legislative reform. For example, what kinds of policy considerations underscored the evolution of the common-law rule? Are these considerations relevant today? How well does the rule serve these policies, and how well does the rule function? Is reformation of the common-law rule necessary? What kinds of legislative changes should be made? What problems exist with respect to particular reformations? Nevertheless, because of the lack of modern day importance commonly attached to the rule against perpetuities and the law of estates (*see supra* note 3), the rule is often overlooked in the classroom and given little attention in instructional materials. Unfortunately, the quest among authors and teachers for relevance and modernity sometimes results in the inclusion of topics that are "hot" and have current appeal and in the rejection of some of the best training materials for lawyers.



The rule continues to be relevant because the occasion for perpetuities problems exists; indeed, the occasion arises much more frequently than most lawyers imagine. Further, given this potential for real problems, compliance with the common-law rule offers a far better solution than mere reliance upon actual vesting, if "wait-and-see" is available, or upon saving clauses generally.

The purpose of this Article, then, is to demonstrate the current relevance of the common-law rule against perpetuities; first, by illustrating the prominence of perpetuities problems, and second, by considering various planning solutions to these problems. It concentrates on these problems in relation to the lawyer's role as a planner. This creative function is the most important one in the estate transfer process because it sets the framework by which dispositive goals are to be achieved, assets are to be conserved, and disputes are to be avoided. Consequently, it is here that lawyers first and most frequently encounter perpetuities problems and the common-law rule.<sup>14</sup> It is within this context that law-

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14. This encounter with perpetuities problems is part of the general process of dispute avoidance. Lawyers perform many tasks and assume various roles. The work they perform cuts across a variety of substantive areas that can be readily classified, but their work can be differentiated in other ways as well. In terms of disputes, their roles fall into two general categories: dispute resolution and dispute avoidance. Sometimes these roles involve tasks that require the interpretation of documents or writings, and at other times they might involve tasks that require their creation. Lawyers must construe to litigate; they must also construe to avoid litigation. Lawyers must draft to resolve disputes; they must also plan and draft to avoid them. While these roles and tasks have much in common, they also have much that distinguishes them. Dispute resolution that reaches the stage of litigation usually occurs within a fixed framework, fixed in terms of events and documents that give rise to the dispute. Quite differently, dispute avoidance (that is accomplished by planning) usually occurs within a framework that needs to be created or shaped. All too often, one overlooks the fact that these different roles and tasks demand somewhat different skills and understanding.

This oversight is not unusual when it comes to understanding the common-law rule against perpetuities and its life in being concept. Typically, the rule is taught with a series of instructive guidelines or pronouncements along with illustrative problems and explanations. Among these instructive guidelines is the assertion that the validating life in being can be anyone or any group of people. See *supra* note 5. Nevertheless, students find this particular guideline misleading because it is really a pronouncement for the creation of new interests and not for the application of the rule to existing interests. The life in being by which an interest is validated cannot be anyone at all with respect to specific interests already created. Once the terms of a limitation have been cast, the lives in being that can potentially validate an interest are fixed. They cannot be anyone at all, and students find it terribly confusing to be told otherwise when they attempt to determine whether there are validating lives in being and who these lives might be. Although this guideline is usually announced within the context of the common-law rule as applied to existing limitations, it is not really a useful principle for performing this interpretive task. Instead, it is a precept for the creation of interests. Indeed, it is inaccurate to say that the validating life in being can be anyone or any group of people. It is, however, quite accurate to say that a planner can select virtually anyone as the life in being needed to create a valid interest. This pronouncement about the life in being makes little sense when constru-

yers often disregard it;<sup>15</sup> nevertheless, it is precisely here the lawyers must not shrink from addressing it.

## II. THE OCCASIONS FOR PERPETUITIES PROBLEMS TODAY

### A. *A Method of Inquiry*

One method of determining the frequency of perpetuities problems confronted by planners involves an examination of case law from appellate courts. Because the number of cases that raise perpetuities questions is small,<sup>16</sup> one might conclude that the occasion for these problems is infrequent. For several reasons, this approach is misleading. To begin with, it does not account for the special incentives to dispute settlement that arise both before and after these cases are tried. Because of wide-

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ing an existing limitation, but it is easily understood and applied when constructing or conceiving a limitation. For further discussion of the problems of understanding and applying the common-law rule within the context of interpretive and creative tasks, see Becker, *supra* note 5.

15. Often lawyers have little difficulty mastering the common-law rule against perpetuities, in particular the life in being concept, when performing creative tasks. They recognize that valid interests can be created by making certain that no interest can vest more than twenty-one years beyond the death of any life in being whom they might expressly select. And they realize that this can be accomplished with tailor-made conditions referable to the lives of beneficiaries in being or to the lives of any group of specially selected lives in being. Indeed, it would seem that the myriad of problems that exist in the interpretive application of the rule can be readily overcome in the creative process, the principal context in which lawyers must encounter the rule. Nevertheless, the problems involving the life in being concept that attend the interpretive application of the rule, and the greater understanding necessary to master them, should never be dismissed. Effective saving clauses cannot be fashioned or adopted without interpretation, namely, without interpretive application to dispositive interests simultaneously created. Further, a lawyer can only comprehensively plan if he first drafts tentative provisions that implement fully an estate owner's dispositive design. It is at this point that the creative process itself requires interpretive understanding and application of the rule; it is at this point that a lawyer must test the tentative design against the requirements of the rule. Only then can a lawyer determine whether objectives must be modified and provisions reformulated to comply with the rule. See Becker, *supra* note 5, at 743-54.

16. As to jurisdictions that adopt the common-law rule or some statutory modification of it, the number of perpetuities cases discovered by various studies is not overwhelming. Seldom does it average as much as one a year in a particular jurisdiction. See, e.g., Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 3, 9 (1960) (courts of appeal in Kentucky considered approximately one hundred cases in more than one hundred years); Kurtz, *supra* note 5, at 178 (Iowa Supreme Court considered only twenty cases in its entire history); Powell, *Perpetuities in Arizona*, 1 ARIZ. L. REV. 225, 237-242 (1959) (Arizona Supreme Court considered only twelve cases in its entire history, and five of these cases only indirectly involved the rule); Waterbury, *Montana Perpetuities Legislation—A Plea for Reform*, 16 MONT. L. REV. 17, 20-21 (1955) (Montana Supreme Court considered only five cases in its entire history, and only one of these cases involved a long-term family trust). See also Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C.L. REV. 727 (1979); McGovern, *Perpetuities Pitfalls and How Best to Avoid Them*, 6 REAL PROP., PROB. & TR. J. 155 (1971).

spread concern that the estate should not be dissipated by protracted litigation, one might reasonably expect that only a small percentage of all disputes involving estate transfers ever reach appellate courts, and that this would be especially true for those disputes that generated perpetuities problems.<sup>17</sup> More importantly, however, than a prediction for settlement of cases in these matters, one might reasonably expect that very few perpetuities problems ripen into actual disputes. Generally speaking, a dispute should not arise without the confluence of several factors. It will not arise without the seeds of family discord.<sup>18</sup> And this usually requires a dispositive scheme by the estate owner that one or more beneficiaries, actual or anticipated, deems inequitable. It also requires family members who, without the pressure of litigation, will not initiate or agree to a dispositive rearrangement that pleases all. And, of course, it also requires an estate large enough to support and make a dispute worthwhile.

These components are essential to any dispute involving an estate transfer, but even more is required of a dispute that derives from a perpetuities problem. Initially, the lawyer must perceive the perpetuities problem. This requires counsel for the party advantaged by a perpetuities violation, and such counsel must know the rule.<sup>19</sup> Furthermore, the

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17. Surely, there should be strong incentive for settlement when the estate does not have enormous value, when there are at least several claimants, and when some of the assets are not liquid. To be sure, one or more of these factors is present in a great many disputes involving the transfer of an estate. In short, estate conservation serves as a strong incentive to dispute settlement before a case reaches the appellate courts. Additionally, as to perpetuities cases, Professor Kurtz speculates: "[T]hat the dearth of cases is attributable, in part, to the fact that the presence or absence of a perpetuity violation can be determined with almost mathematical certainty, and disputes either are resolved extra-judicially, or trial court decisions, which are unreported, are not appealed." Kurtz, *supra* note 5, at 179.

18. This discord is not, of course, confined to family members. It extends to any person or institution who anticipates a share of the estate owner's bounty. Because the donative expectations of blood relatives are usually greater, the likelihood of discord and disputes among family would seem to be greater than among the estate owner's friends.

19. For the opinions of several commentators and one on the perpetuities errors of lawyers and judges, see *supra* note 4. Given these views, one might not have great expectations as to the ability of lawyers to create problem-free interests or as to the ability of courts to resolve actual perpetuities problems. And these expectations should be even less when it comes to finding lawyers who are skilled in recognizing existing perpetuities problems and, therefore, are prepared to challenge dispositive instruments on behalf of their clients. Inevitably, these challenges are made by lawyers who did not draft the instruments in question. They must know the rule and be able to apply it interpretively. This task is more difficult than applying the rule creatively; namely, drafting interests that satisfy the rule and, therefore, are valid. For a comparative discussion of the tasks of creation and interpretation in mastering and applying the rule against perpetuities, see Becker, *supra* note 5.

problem itself, and therefore the dispute, will not arise without a confluence of language and facts. For example, an interest that includes a contingency that might produce a violation will not do so when the condition is satisfied before such interest is created.<sup>20</sup> Finally, a dispute involving a perpetuities problem is not apt to arise if a lawyer includes an effective saving clause in the instrument.<sup>21</sup> In principle, such clauses are designed to prevent or circumvent violations and, accordingly, to abridge the circumstances for a perpetuities dispute. If successful, a dispute should not materialize even when a specific interest by its terms violates the common-law rule.<sup>22</sup> Ideally, saving clauses should abate the perpetuities problem by affording an alternative solution that approximates the estate owner's dispositive objectives and that is consistent with the requirements of the rule itself.

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20. For example, consider the following testamentary trust: "Income to my brother, John, for life; after his death, principal shall be distributed to his first child to attain age thirty." If John survives the estate owner and none of his living children have already attained age thirty by that time, the contingent gift of principal violates the common-law rule against perpetuities. The rule requires a test based upon possibilities, however improbable they may be; any interest that may vest beyond twenty-one years of the death of all lives in being at the estate owner's death must fail because of a violation. In this instance, there is a possibility that the first child of John to attain age thirty may do so beyond this allowed period of time. After the estate owner's death, it is possible that John's children in being at the estate owner's death will die before attaining age thirty; that John may have an additional child born after the estate owner's death; that everyone alive at the estate owner's death (including John and his children) may die before such afterborn child attains age nine; and that such afterborn child may thereafter attain age thirty. Because of these remote possibilities there is a violation. If, however, a child of John alive at the estate owner's death had already attained age thirty, the condition imposed upon the gift of principal would be satisfied immediately, and it would be vested from the time of creation even though that child had not attained age thirty when the estate owner's will was previously executed. Accordingly, there would be no violation. Similarly, if John predeceased the estate owner, there would be no violation even if John were alive when the will was previously executed and even if none of John's children attained age thirty by the time the estate owner died. In this instance, because John is dead, all of John's living children become lives in being at the estate owner's death. The condition imposed upon the gift of principal cannot be satisfied beyond the deaths of his children, beyond the deaths of lives in being. Consequently, there is no violation. In both of these situations there was a potential violation when the will was drafted and executed. It was possible for John to survive the estate owner, and it was possible for the estate owner to die before any of John's living children attained age thirty. As written, this dispositive provision was ripe for a perpetuities violation. Nevertheless, these examples illustrate that certain intervening facts can eliminate such potential violations and avoid a perpetuities problem and dispute.

21. It should be observed, however, that effective saving clauses will not always eliminate the occasion for disputes and litigation. See *infra* § III B 2 b.

22. For examples of how various kinds of saving clauses preserve gifts that would otherwise violate the common-law rule against perpetuities, see *infra* text accompanying notes 232-37 and § III B 3 b.

At this point, one might observe that the foregoing discussion seems to justify the widespread disregard for the common-law rule. Indeed, one might ask: if perpetuities litigation and perpetuities disputes are rare, what conceivable justification is there for mastering the rule and satisfying its requirements? In response, one might say that when perpetuities disputes arise, they present serious matters that can never be taken lightly. They can emasculate an entire estate plan quite apart from invalidating the interest that actually violates the rule.<sup>23</sup> Indeed, even when a dispute is settled, it is invariably accomplished with substantial cost to the estate, either in terms of its size or the dispositive scheme. Given the significance of these consequences, it would seem to be a dangerous practice for lawyers to dismiss the common-law rule based upon the improbability that a problem will ripen into a dispute and litigation. Surely, whenever a perpetuities dispute finally erupts, it does not behoove the legal profession for a lawyer to say: "I did not consider the problem because I never expected it to occur." This is especially true when, as is usually the case, the lawyer could have easily averted the problem and dispute by addressing the rule and giving it minimal attention.<sup>24</sup> Additionally, and just as importantly, even if a saving clause becomes operative and successfully avoids a dispute and litigation over a perpetuities problem that has materialized, it usually bears a cost in terms of the estate owner's dispositive plan.<sup>25</sup> And this sacrifice of objectives may be far greater than any sacrifice necessary to satisfy the common-law rule within the terms of each dispositive provision. As it will be seen later,<sup>26</sup> the solutions afforded by saving clauses are imperfect, and if the occasion for perpetuities problems is real, these saving clauses may not be the best option for resolving problems and circumventing disputes.

Once again, then, do perpetuities problems actually arise? If perpetuities cases are infrequent and perpetuities disputes are apt to be rare, what evidence is there that underlying problems actually occur? To be absolutely certain of their existence, one would have to examine provi-

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23. For a discussion of the principle of "infectious invalidity" and the circumstances in which valid interests must fail along with those that violate the common-law rule, see *infra* note 70.

24. For discussion and illustrations of how compliance with the common-law rule can be achieved, either within the terms of the dispositive provision itself or with the use of saving clauses, see *infra* text accompanying notes 232-37 and § III B 3.

25. For a discussion of the impact of saving clauses, see *infra* §§ III B 2 b & III B 3b.

26. For a comparative application of saving clauses and tailor-made methods of satisfying the common-law rule, see *infra* § III B 3 b.

sions within a substantial number of wills and trusts.<sup>27</sup> This selection would have to include an assortment of estates both large and small. But this search might prove to be an exceedingly difficult task. Perhaps the most popular estate transfer device currently used is the revocable living trust. Provisions within these living trusts, that apply to the original trust corpus and often to portions of the probate estate added by a pour-over will, ordinarily cannot be discovered. Indeed, a large part of the estate transfer process is purposely conducted with these kinds of instruments that are not available through the public records.<sup>28</sup> Furthermore, even if existing living trusts could be discovered, the trustees named in these instruments are not apt to divulge the terms of the private settlements entrusted to them.<sup>29</sup> Because of the dispositive function these

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27. For a study that attempts to identify and analyze patterns of testate succession, see Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303 (1969). Among other things, this study found that perpetuities problems were rare. *Id.* at 1338-40. Nevertheless, the parameters of this study were quite narrow. In the United States, this study was confined to the probate court records of decedent estate administration in one county for one year. It considered 187 administered estates, and in only 22 of these estates were testamentary trusts actually created. It should also be observed that the article did not maintain that these records constituted a reliable basis for determining current estate transfer practices throughout the United States. *Id.* at 1304, 1329-30.

28. There are many estate planning reasons for using a living trust, usually revocable, along with a pour-over will, that passes the probate estate to the trustee to be distributed pursuant to the terms of the existing living trust. Among these reasons is the avoidance of the publicity that accompanies formal probate. Although the transfer and insurance of title to real estate may require exposure of the substance of certain documents, the living trust does avoid full disclosure in court proceedings and public records that attend probate. See H. WEINSTOCK, *PLANNING AN ESTATE* 105, 140-42 (1977 & Supp. 1984); see also J. FARR, *AN ESTATE PLANNER'S HANDBOOK* 93 (3d ed. 1966); R. LYNN, *INTRODUCTION TO ESTATE PLANNING* 172-73 (3d ed. 1983).

29. In preparing this Article, no significant effort was made to identify perpetuities problems arising out of actual trusts used in the estate transfer process. There are several reasons why this kind of empirical study was not attempted. To begin with, any study confined to the public records of the probate court would exclude most living trusts and, therefore, eliminate the majority of trusts used currently. Indeed, the focus of any realistic study had to be upon living trusts. This could only be accomplished with the cooperation of trustees. Nevertheless, this would have been exceedingly difficult to achieve, if not nearly impossible. Even if individual trustees were inclined to cooperate, the problem of discovering their identity, in a manner that would produce a substantial and reliable sampling, was deemed insurmountable. Quite differently, the matter of discovering corporate trustees would not have been a problem. Major banking institutions serve as trustees of living trusts, especially following the death of the settlor. In all likelihood, however, it would have been fruitless, or at least inefficient, to seek their cooperation. First, there were obvious problems of confidentiality, but this could have been overcome by deletion of names. Nevertheless, this was not pursued because of the time and effort it would take for all identifying information to be deleted from a large enough number to make the study worthwhile. It was believed that trust officers would either refuse to cooperate altogether or they would provide an unreliable and inadequate sampling. Indeed, it is unlikely that a trust officer would, having to delete all identifying information, make available all

trusts and pour-over wills are ordinarily intended to serve among family members of more than one generation, one might expect that the use of the future interest is most prevalent in this context and, accordingly, so is the occasion for potential perpetuities problems.<sup>30</sup> Consequently, although an empirical study of perpetuities problems arising from revocable living trusts would be exceedingly difficult, an empirical study that excludes such trusts would be incomplete and misleading.

Despite the difficulties of empirical confirmation, one can probably gauge the existence of perpetuities problems by intelligent conjecture. Although variations in dispositive desires and conditions imposed by estate owners must be enormous, these dispositive matters do fall into categories.<sup>31</sup> More importantly, lawyers function in this manner; they pattern

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trusts created within an extended period of time. Second, it was determined that such a study would be inefficient when there was other more readily available information that could, with some imagination, produce reasonably accurate insights into current trust provisions and perpetuities problems. In preparing these trusts, lawyers invariably rely upon published forms. And when a bank is named as trustee, invariably the forms used are those prepared by the bank. Whatever the source, the dispositive provisions and perpetuities saving clauses used in instruments are generally drawn from something previously published. Although variations exist, most published forms draw upon standard provisions and designs. Accordingly, even though actual trust provisions were not readily available, the published forms from which these trust instruments have been cast were available. Therefore, it was deemed considerably more efficient to survey these published forms than it was to search for possible cooperative corporate trustees.

30. One of the major reasons for the use of a trust, whether living or testamentary, is that it enables estate owners to control the use and devolution of their estate over an extended period of time, often in the manner they would have chosen themselves had they survived. More specifically, a trust affords the opportunity to create limited interests and to defer ultimate enjoyment and control over principal, while affording throughout its duration effective management and discretionary powers that may be necessary to satisfy special dispositive needs. The trust is especially appealing when the family estate is sizable, namely, large enough to generate adequate income to meet intermediate needs and to pay costs incurred in its administration. In short, the trust device allows an estate owner extended control over the family estate, but with sufficient flexibility to deal with exigencies of the future. *See, e.g., J. FARR, supra* note 28, at 150-64. Among the trust techniques used to achieve control and flexibility are future interests, conditions, and powers of appointment, and each of these techniques can introduce significant perpetuities problems. Extended devolutionary control through limited immediate interests and conditioned future interests can, to some extent, be accomplished without a trust. Nevertheless, the trust offers greater security and ultimate flexibility. Because extended devolutionary control and flexibility can best be accomplished with a trust, and because these objectives are commonly associated with estates sizeable enough to justify a trust, one should expect that most perpetuities problems arising in the estate transfer process will involve future interests, conditions and powers contained within a trust.

31. Estate planning involves choices and objectives that can be broadly categorized. For example, it involves choices as to dispositive design, estate management, and estate conservation. Within the category of dispositive design, estate owners may be concerned with what subject matter is to pass to specific recipients; what kinds of interests and shares recipients are to receive; when distribution is to be made; and what conditions are to be imposed upon distribution. The choices made by

their planning tasks through standard forms and other devices.<sup>32</sup> In the main, they adjust these standard designs to meet the needs of a particular estate plan, but sometimes they revise an estate plan to fit within an available form. In either instance, they function within the general parameters of an acknowledged dispositive scheme. These estate design patterns appear in form books and also in materials published by corporate trustees. They reflect the dispositive priorities of many estate owners as well as current incentives for estate conservation. The provision within these standard forms do not usually violate the common-law rule against perpetuities, but the adjustments that planners make in effecting ordinary dispositive deviations can produce perpetuities problems. If one can intelligently hypothesize sensible design variations that are apt to occur, one can also speculate about occasions for perpetuities problems.<sup>33</sup> Although this methodology does not confirm the frequency of actual per-

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estate owners as to these particular matters may be varied; more often than not, however, they tend toward standardization. For example, estate owners ordinarily give their highest dispositive priorities to a spouse, children, and grandchildren. See Browder, *supra* note 27, at 1305-08. And within these groups, they ordinarily prefer those who survive and are able to enjoy and manage the estate for themselves. These preferences frequently translate into a dispositive technique that uses several trusts to leave income to the surviving spouse for life and then, subject to age requirements, to give principal to living children and the living descendants of deceased children. See *infra* § II C 1 a. This standardization might reflect economies necessary to the practice of law and the delivery of legal services, but it might also reflect objectives that estate owners hold in common as to immediate family and their desire to conserve and secure their estate. Whatever the reason, these dispositive patterns persist.

32. In designing and drafting estate plans, lawyers tend to draw from previously tested and used instruments and provisions. These instruments and provisions are a product of their own work or the efforts of others, and they are stored in a computer or separate files, or they are found in published materials. For examples of forms published by banks, see HARRIS BANK, ILLINOIS TRUST AND WILL MANUAL SERVICE (1982); NORTHERN TRUST COMPANY, WILL AND TRUST FORMS (6th ed. 1983). For an example of forms published by a continuing legal education program, see ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, DRAFTING WILLS AND TRUST AGREEMENTS (1979). For examples of form books that contain entire trusts and entire wills, or variations of provisions within them, see E. BELSHEIM, MODERN LEGAL FORMS (1963 & Supp. 1984); J. MURPHY, MURPHY'S WILL CLAUSES (1960 & Supp. 1985); R. PARELLA & J. MILLER, MODERN TRUST FORMS AND CHECKLISTS (1980 & Supp. 1985); J. RABKIN & M. JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS (1948 & Supp. 1984); R. WILKINS, DRAFTING WILLS AND TRUST AGREEMENTS—A SYSTEMS APPROACH (1980). For examples of books on estate planning that contain complete forms for wills or trusts, or portions of them, see M. FREILICHER, ESTATE PLANNING HANDBOOK WITH FORMS (2d ed. 1975); A. LEHRMAN, COMPLETE BOOK OF WILLS AND TRUSTS WITH CHECKLISTS AND FORMS (1978); G. STEPHENSON, DRAFTING WILLS AND TRUST AGREEMENTS—DISPOSITIVE PROVISIONS (1955); H. ZARITSKY & M. ZARITSKY, NEW ESTATE PLANNING HANDBOOK WITH FORMS AND TABLES (1980).

33. Indeed, Professor McGovern, in a study of perpetuities decisions over a twenty-year period of time, has observed that it is a mistake to assume that most perpetuities violations are produced by eccentric estate owners who make abnormal family arrangements. Instead, he found problems



petuities problems, it can, at the least, reveal and elaborate specific common sense variations that raise perpetuities problems. Further, one might assume that if common sense variations of standard forms present violations, actual perpetuities problems are not far behind and may not be uncommon among estate plans. Most of this section, therefore, will concern problematic variations of standard dispositive schemes.

### B. Conditions Unrelated to Specific People

Before discussing these variations, it should be observed that conditions unrelated to specific people invariably cause perpetuities problems. Suppose, for example, that A devises Blackacre: "To B in fee simple; however, if Blackacre is ever used for a purpose which is nonresidential, then to C in fee simple absolute." Ostensibly, B has a defeasible fee simple, while C has a contingent executory interest in fee simple. However, because C's interest violates the common-law rule against perpetuities, B has a fee simple absolute unless a saving clause affords another solution.<sup>34</sup> The common-law rule invalidates contingent interests that *may* vest beyond an allowable period of time: twenty-one years beyond the deaths of lives in being at the time such interest is created.<sup>35</sup> In this

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among common limitations that had reasonable objectives, violations that arose because careless draftsmen overlooked recurrent perpetuities pitfalls. McGovern, *supra* note 16.

34. Because this devise is not made in trust, most saving clauses would not apply. See *infra* text accompanying notes 219-23, 255-56. Some saving clauses, however, would apply, especially those that empower a court or corporate donee to reform the interest in a manner that approximates the estate owner's intent when an interest violates the rule against perpetuities or is challenged under it. See *infra* notes 216-18. Such discretionary power might be exercised in various ways. For example, in this illustration the executory interest might be saved by limiting the duration of the condition of defeasance to twenty-one years after the death of the survivor of B and C. The executory interest would then be valid because it cannot vest beyond twenty-one years after the deaths of two named lives in being. Accordingly, if the restriction as to use is thereafter observed for this period of time, the interest then becomes absolute in B's successors.

35. The common-law rule against perpetuities, as summarized by John Chipman Gray, provides that: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of such interest." J. GRAY, *supra* note 4, at 191. It should be observed that the test described herein in the text differs in form from the one offered by Gray, the one used by most commentators in explaining the rule. This different form is used at various points within this Article to avoid a mistake commonly made even by experts. Gray's test provides that an interest is valid if it must vest, *if at all*, within the allowed time period. Unfortunately, most commentaries on the rule overlook at one point or another the *if at all* requirements in their descriptions of the test. For example, "The proper question to ask is: Can I point to some person or persons now living and say that this interest will by the very terms of its creation be vested in an identified individual within twenty-one years after the person dies?" Sparks, *Perpetuities Problems of the General Practitioner*, 8 U. FLA. L. REV. 465, 470 (1955). This oversight is critical because, without the *if at all* requirement, one can never prove that a contingent interest is certain to vest within any period

instance, the condition upon which C's interest depends is unrelated to the lives of B and C; indeed, it is unrelated to the lives of any persons in being at A's death. By the terms of the condition, it can occur at any time; it can occur generations beyond the deaths of B, C, and any other life in being. If the condition is violated after the deaths of B and C, it will divest the fee simple belonging to B's successor in favor of C's successor, neither of whom may be a life in being. And this may happen more than twenty-one years after the deaths of B, C, and any other lives in being at A's death. C's contingent executory interest does not depend upon C surviving until the time in which the restriction upon land use is violated.<sup>36</sup> B and C have interests that are transmissible at death, but their interests continue to be subject to the condition. Even though the condition can be breached, and the divestiture can occur, within the period of time allowed by the rule, it can also happen beyond twenty-one years of the deaths of all lives in being. The common-law rule is predicated upon possibilities. If it is possible for an interest to vest beyond the allowed time period, such interest is invalid even though this possibility is not probable—even though it may be extraordinarily remote.<sup>37</sup> Because the possibility exists for C's executory interest to vest beyond the allowed time period, C's interest violates the rule and is invalid at the outset.

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of time whatsoever and, therefore, all contingent interests would necessarily violate the rule. By definition, a contingent interest is never certain to vest. See J. DUKEMINIER & S. JOHANSON, *supra* note 5, at 980-82. The common-law rule against perpetuities does not require that an interest must become possessory within the allowed time period, nor does it require that it must vest within any such period. It does, however, forbid all interests that might possibly vest beyond twenty-one years after the deaths of all lives in being at the creation of such interest.

36. If C's executory interest was conditioned upon C's survival at the time in which the land use restriction was violated, the common-law rule would be satisfied and C's interest would be valid. The condition of defeasance and the vesting of C's contingent executory interest would then be limited to C's lifetime. Such interest must vest or fail by the time of C's death, by the death of a life in being when the interest is created. The condition of divestment cannot occur beyond that time, one which is within the period allowed by the rule. Accordingly, with this valid condition, if the restriction upon land use is thereafter observed throughout C's lifetime, the fee simple will then become absolute in B or B's successors.

37. Indeed, the common-law rule against perpetuities rests upon the assumption that most anything is possible. Among the fantastic possibilities that its application has produced are the assumptions that both eighty-year-old women and toddlers can bear children. Consistent with these kinds of possibilities, it is also assumed that all lives in being can die, and that conditions can be fulfilled thereafter by a world population consisting exclusively of young children. For a discussion of some of these fantastic possibilities and how the rule is applied in the light of these possibilities, see S. FETTERS & J. SMITH, *supra* note 7, at 640-41; R. LYNN, *supra* note 7, at 57-66; R. MAUDSLEY, *supra* note 5, at 45-56; L. SIMES & A. SMITH, *supra* note 6, § 1228; Leach, *supra* note 5, at 642-45.

Limitations containing conditions unrelated to specific people, at least unrelated to people who are in being—conditions that can occur without regard to particular devisees, beneficiaries, or anyone else—are a source of classic perpetuities problems. Many occur within the context of the estate transfer process; for example, “To B from and after probate of my will.”<sup>38</sup> Much has been written that forewarns of these problems and offers solutions to them.<sup>39</sup> Some of these limitations, however, involve restrictions upon land use, but they are not directly tied to the process of transferring an entire estate. Typically, these latter conditions appear in specific lifetime gifts to school districts and to other public or charitable institutions, but they have also been used in commercial transactions with deeds that are intended to confer title and to control private land development.<sup>40</sup> Often, these latter conditions do not contain a gift over

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38. See, e.g., *Johnson v. Preston*, 226 Ill. 447, 80 N.E. 1001 (1907). The gift to B within the text violates the common-law rule against perpetuities because it is contingent upon probate of the will and, further, because this contingency may be satisfied beyond twenty-one years of the death of the estate owner and beyond twenty-one years of the deaths of B and everyone else alive at the estate owner's death. Although probate may be required, it is not an event certain to happen; therefore, such condition makes the gift contingent. Furthermore, even though it is very unlikely, if not unheard of, for probate to be completed more than twenty-one years after the estate owner's death, this possibility does exist. B has been given a transmissible interest; accordingly, B's interest is not dependent upon survival of this event—completion of probate. Although such interest is created in B, it can vest in B's successors (people not alive at the estate owner's death) beyond the period allowed by the rule. If, however, a requirement of survival had been added, there would be no violation because B's interest must then vest or fail within the lifetime of someone in being at the estate owner's death, namely B. It should be noted that this requirement of survival would not save the interest if, instead of B, it had been given to a group that could consist solely of afterborn lives; for example, “to my descendants alive from and after probate of my will.” Indeed, it is possible for descendants alive at the estate owner's death to have other descendants thereafter and that these afterborn descendants could become the only ones to survive probate. Accordingly, there is a violation because the interest may vest in a group who are not lives in being more than twenty-one years after the estate owner's death and more than twenty-one years after the deaths of all lives in being at his death.

For other cases involving conditions that present these same kinds of problems, see, e.g., *Brownell v. Edmunds*, 209 F.2d 349 (4th Cir. 1953); *In re Campbell's Estate*, 28 Cal. App. 2d 102, 82 P.2d 22 (1938); *Miller v. Weston*, 67 Colo. 534, 189 P. 610 (1920); *In re Bewick*, 1 Ch. 116 (1911); *In re Wood*, 3 Ch. 381 (1894).

39. See, e.g., 6 AMERICAN LAW OF PROPERTY § 24.23 (A. Casner ed. 1952); Kales, *How Far Interests Limited to Take Effect “When Debts Are Paid” or “An Estate Settled” or “A Trust Executed and Performed” Are Void for Remoteness*, 6 ILL. L. REV. 373 (1912); Leach, *supra* note 5, at 670-71; McGovern, *supra* note 16, at 155-57.

40. From approximately 1870 to as late as the 1940s, residential developers utilized these kinds of conditions to control land use. For example, a land developer who wanted to assure residential use of an entire subdivision might accomplish this with a deed to each grantee that essentially provided: “To the [grantee] and his heirs so long as it is used exclusively for residential use; if and when it is not used for this exclusive purpose, the land and any buildings upon it shall immediately revert

to a third party—C in the previous illustration. Instead, breach of the condition terminates the grantee's interest in favor of the grantor.<sup>41</sup> Unlike C's executory interest, the possibility of reverter or right of reentry retained by the grantor is exempted from the common-law rule against perpetuities; nevertheless, local statutes sometimes circumscribe the time in which such land use can be restricted in this manner.<sup>42</sup>

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to the grantor, his heirs, or assigns." This land use technique is still discussed in some books that consider various methods of private land use control. See, e.g., A. DUNHAM, MODERN REAL ESTATE TRANSACTIONS 94-104 (2d ed. 1958); R. WRIGHT & GITELMAN, LAND USE 200-09 (3rd ed. 1982). Nevertheless, this particular method of private land use control has been largely supplanted by public controls and other private techniques, such as covenants and equitable servitudes. For a thorough discussion of the history of conditions of defeasance in the control of residential developments, of the problems they created, and of the reasons that led to their demise, see Jost, *The Defeasible Fee and the Birth of the Modern Residential Subdivision*, 49 MO. L. REV. 695 (1984). One should observe, however, that the defeasible fee simple continues to be used in some land transfers, largely donative ones to governmental and charitable institutions. In these situations, grantors impose a condition of defeasance upon the fee simple, and they retain either a possibility of reverter or a right of reentry to insure that the purpose underlying the transfer or gift will be fulfilled over an extended period of time. See *infra* notes 41 & 42. For recent cases that litigate transfers involving these kinds of conditions, see, e.g., *Springmeyer v. City of South Lake Tahoe*, 132 Cal. App. 3d 375, 183 Cal. Rptr. 43 (1982); *Cherokee Valley Farms, Inc. v. Summerville Elementary School Dist.*, 30 Cal. App. 3d 579, 106 Cal. Rptr. 467 (1973); *Mountain Brow Lodge, I.O.O.F. v. Toscano*, 257 Cal. App. 2d 22, 64 Cal. Rptr. 815 (1967); *Kelley v. City of Lakewood*, 644 P.2d 103 (Colo. App. 1982); *Mahrenholz v. Co. Bd. of School Trustees*, 93 Ill. App. 3d 366 (1981); *Trone v. Nelson*, 89 Ill. App. 3d 1000, 412 N.E.2d 172 (1980); *Roberts v. Rhodes*, 231 Kan. 74, 643 P.2d 116 (1982); *Hawthorn v. Illinois Cent. Gulf R.R.*, 374 So. 2d 813 (Miss. 1979); *DeHart v. Ritenour Consol. School Dist.*, 633 S.W.2d 332 (Mo. App. 1983); *Hagman v. Board of Educ.*, 117 N.J. Super. 446, 285 A.2d 63 (1971); *Bethlehem Township v. Emrick*, 77 Pa. Commw. 327, 465 A.2d 1085 (1983).

41. The grantor may accomplish this in the following manner: "To the grantee in fee simple for so long as Blackacre is used exclusively for school purposes; if and when Blackacre is ever used for any other purpose, the grantee's interest will terminate forthwith and Blackacre will immediately and automatically revert to the grantor, his assigns or heirs." In this instance, the grantee has a fee simple determinable while the grantor retains a possibility of reverter. Upon violation of the express condition, the grantee's interest is automatically extinguished and possession of Blackacre immediately reverts to the grantor or his successors. This objective may also be accomplished with a different kind of provision for forfeiture: "To the grantee in fee simple upon the condition that Blackacre is used exclusively for school purposes; if and when Blackacre is ever used for any other purpose, the grantor, his assigns, or heirs shall then have the power to terminate the grantee's interest and to reenter Blackacre." In this instance, the grantee has a fee simple upon a condition subsequent while the grantor retains a right of entry or, as it is sometimes called, a power of termination. Upon violation of the express condition, the grantee's interest is not terminated unless and until the grantor or his successors serves notice of termination. Thereafter, the grantee's interest is extinguished and possession of Blackacre then belongs to the grantor or his successors.

42. For a discussion of the exemption of possibilities of reverter and rights of entry from the common-law rule against perpetuities and the various kinds of statutes that limit the duration and operation of these interests, see L. SIMES & A. SMITH, *supra* note 6, at §§ 1238-39, 1994. For a listing of some of these statutes, see RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 64-65 (1983). Typically, these statutes impose a time limit upon the duration of possibilities of

Consideration of conditions unrelated to people, and the perpetuities problems they engender, should not be overlooked even though their use is limited. Nevertheless, they do not warrant much attention in this Article because they do not prove very much about the frequency of actual perpetuities problems confronted by planners. Conditions unrelated to people used in the estate transfer process are not commonplace, and when they are used, perpetuities problems are easily recognized and avoided. Further, although parties have litigated conditions imposed upon land use in recent years,<sup>43</sup> these conditions are not ordinary components of estate plans. This Article, however, is concerned principally with the occasion for realistic perpetuities problems in the estate transfer process. Nearly every lawyer plans an estate transfer; at least they draft a simple will.<sup>44</sup> And many lawyers frequently plan transfers that include future interests. If the common-law rule against perpetuities has modern day relevance because of the existence of actual perpetuities problems, it must be demonstrable within the context of those estate transfers and future interests that lawyers commonly plan and create.

### C. Conditions Related to Specific People

As described earlier, the common-law rule against perpetuities focuses upon specific conditions attached to future interests. And in the case of a

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reverter and rights of entry. After expiration of this time period, the grantee's interest becomes absolute if the condition has not been previously breached. *See, e.g.*, ILL. ANN. STAT. ch. 30, § 37e (Smith-Hurd 1969):

Neither possibilities of reverter nor rights of entry or re-entry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken, shall be valid for a longer period than 40 years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or re-entry is created to endure for a longer period than 40 years, it shall be valid for 40 years.

43. It should be observed that these cases do not ordinarily raise perpetuities problems because they concern reversionary interests that are exempted from the common-law rule. In the main, these cases involve issues as to the interpretation of conditions of defeasance; as to whether these conditions have been breached; as to whether these conditions constitute invalid restraints upon alienation; and as to the constitutionality of applicable statutes that limit the duration of possibilities of reverter and rights of entry. *See, e.g.*, *Mountain Brow Lodge, I.O.O.F. v. Toscano*, 257 Cal. App. 2d 22, 64 Cal. Rptr. 816 (1967); *De Hart v. Ritenour Consol. School Dist.*, 663 S.W.2d 332 (Mo. App. 1983); *Hiddleston v. Nebraska Jewish Educ. Soc'y*, 186 Neb. 786, 186 N.W.2d 904 (1971).

44. Perhaps it would be more accurate to say that nearly every lawyer has drafted a will that contains a simple dispositive design with simple provisions and terms. Nevertheless, the task itself may not be simple. However uncomplicated the end product may seem to be, the anticipation and elimination of potential problems and the selection of an effective design and language may be exceptionally difficult. *See* Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning—Part Two*, 1973 WASH. U.L.Q. 1; Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning—Part One*, 1972 WASH. U.L.Q. 607.

class gift, it focuses upon uncertainties that affect the actual composition of the group entitled to take.<sup>45</sup> If the dispositive provisions within standard will and trust forms reflect the priorities of estate owners, it is clear that the conditions and uncertainties used by planners nearly always relate to events performable by or involving specific people or groups of people, usually the beneficiaries of such will or trust. Accordingly, the remainder of this section concerns conditions directly related to specific people. To begin with, it focuses upon conditions and uncertainties involving immediate family; namely, the spouse, children, and other descendants. Thereafter, it concentrates on conditions and uncertainties involving other groups of people, for example, siblings and their descendants.

### 1. *Immediate Family—The Estate Owner's Spouse and Descendants*

#### a. *The Typical Family Trust*

Members of immediate family are the principal subject of dispositive provisions contained in most published form books.<sup>46</sup> Typically, after the death of the estate owner in both revocable living trusts and wills,

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45. This is a reflection of the "all or nothing" principle applicable to class gifts. *See infra* note 73. More specifically, class gifts are treated as a single entity; the entire gift must satisfy the common-law rule against perpetuities or else it must fail. The interest of each potential member of the class must vest or fail within the allowed time period; if there is any possibility that a potential class member's interest may vest beyond this time period, the entire class gift violates the rule. The actual identity of those ultimately eligible to take cannot be made beyond the allowed time. This can be illustrated with a devise in trust from A: "To B for life, then to such of B's children who attain age thirty." If B survives A, the devise to B's children violates the common-law rule even if B has a child, B-1, who has already attained age thirty at A's death. To be sure, B-1's interest is vested absolutely, but it is also subject to open. It is possible that thereafter B may have another child, B-2. Because B-2 is born before the time for first distribution (B's death), B-2 becomes a potential member of the class and will be entitled to share upon attaining age thirty. Yet, it is possible that B, B-1, and all other lives in being at A's death may then die before B-2 attains age nine. With this possibility, B-2 may attain age thirty and enter the class more than twenty-one years later, more than twenty-one years beyond the deaths of all lives in being at A's death. Because it is possible that an afterborn class member's interest may vest beyond the period of the rule, that interest violates the rule and so does the entire gift to B's children. For a discussion of the common-law rule against perpetuities as it applies to class gifts, see L. SIMES & A. SMITH, *supra* note 6, at §§ 1265-70.

46. Dispositive provisions contained within published form books typically provide for a surviving spouse, children, and descendants of children. Sometimes, however, form books also include provisions that allow for other family members, such as parents and siblings, and sometimes they include variations that allow for the selection of other named beneficiaries. *See, e.g.*, E. BELSHEIM, *supra* note 32, at §§ 10071-75, 101100-12; HARRIS BANK, *supra* note 32, at XIII-1, XIII-11-14; G. STEPHENSON, *supra* note 32, at 300-23; R. WILKINS, *supra* note 32, at §§ 12.11-12.32, 11.10A-12.32A.

these provisions create a *marital trust*<sup>47</sup> that provides income for the surviving spouse, and they also give the spouse a general or special testamentary power to appoint trust principal by will.<sup>48</sup> These provisions also create a separate *family trust* which again allows the spouse income for life.<sup>49</sup> The principal of the estate is allocated among these trusts in a manner that produces the least estate tax incidence.<sup>50</sup> If the surviving

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47. The primary reason for creating the *marital trust* is to qualify the trust corpus for the marital deduction available under the Internal Revenue Code. Prior to 1981, a terminable interest given to a spouse did not qualify for the marital deduction unless, pursuant to a trust, the spouse was given the income for life and the corpus was either subject to the spouse's general power of appointment or given directly to the spouse's estate at death. See I.R.C. §§ 2056(b)(5), 2523(e); Treas. Reg. § 20.2056(e)-2(b) (1958). For an example of a published form that illustrates the conventional-general power of appointment marital deduction trust, see R. WILKINS, *supra* note 32, §§ 9.00-9.62, 9.00W-9.62W. Since 1981, the marital deduction is also allowed for "qualified terminable interest property." I.R.C. §§ 2523(f), 2056(b)(7). Qualification of terminable interests depends upon the satisfaction of several rigid requirements. If satisfied, a trust may be created with this property, and the marital deduction will be achieved even if the spouse's income interest for life is not accompanied by a general power of appointment or by a remainder to the spouse's estate. For an example of a published form that illustrates the qualified terminable interest property marital deduction trust, see R. WILKINS, *supra* note 32, at §§ 19.00-19.63, 19.00W-19.63W. For a discussion of both kinds of marital deduction trusts, and for further illustrations of the qualified terminable interest property marital deduction trust, see Kurtz, *Marital Deduction Estate Planning Under the Economic Recovery Tax Act of 1981: Opportunities Exist, But Watch the Pitfalls*, 34 RUTGERS L. REV. 591, 637-55 (1982).

48. See *infra* note 136. A power of appointment is not, however, essential to the creation of a qualified terminable interest property marital deduction trust, and, accordingly, there are published forms that do not give the surviving spouse either a special or general power to appoint by will. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 32, at § 201-6, 202-6; R. WILKINS, *supra* note 32, at §§ 19.60, 19.61, 19.60W, 19.61W.

49. Typically the *family trust* gives the surviving spouse income for life and a limited right to principal to satisfy specified needs. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-7, 202-7, 203-5; R. WILKINS, *supra* note 32, §§ 11.11, 11.11W, 11.21, 11.21W. Alternatively, during the spouse's lifetime, or until division of the *family trust* principal into shares, the *family trust* might allow the trustee discretion to spray income, and if necessary principal, among the estate owner's spouse and children, or other descendants, according to their respective needs. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-6, 202-6, 203-4; R. WILKINS, *supra* note 32, §§ 11.10, 11.10W, 11.20, 11.20W.

50. The overall estate planning objective is to achieve important dispositive goals and priorities with the least tax incidence. More specifically, the creation of various trusts, and the allocation of the estate subject matter among them, involves a concern for getting the estate benefits in the hands of the right people under terms and conditions desired by the estate owner; it involves making full use of the federal unified tax credit available to the estate owner and to members of his family; and, finally, it involves the creative and appropriate use of the marital deduction. For a discussion of the conventional-general power of appointment marital deduction trust, the qualified terminable interest property marital deduction trust, and the family by-pass trust, and for a discussion of tax and other considerations that enter into their creation and the allocation of estate assets among them, see Horn, *Marital Deduction Planning and Drafting After ERTA*, 1982-1 THE EST., GIFT & TRUST J. 23 (1982); Katz & Blessing, *Marital Deduction Estate Planning After the Economic Recovery Tax Act of*

spouse does not exercise the testamentary power of appointment given in the *marital trust*, these provisions add the *marital trust* principal to the *family trust*.<sup>51</sup> After the spouse's death, or sometimes after the spouse's death and the time in which no living child of the estate owner is under the age of twenty-one, the principal from the *family trust* is divided into separate trust shares for children and descendants of the estate owner.<sup>52</sup>

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1981, 37 J. OF MO. BAR 503 (1981); Kurtz, *supra* note 47, at 591; Smith, *Unlimited Marital Deduction Increases Planning Flexibility and Triggers Redrafting*, 8 EST. PLAN. 336 (1981).

51. For examples of published forms that add *marital trust* principal to the *family trust* in the event the surviving spouse does not exercise a general testamentary power of appointment, see J. RABKIN & M. JOHNSON, *supra* note 32, Forms 7.221, 7.22; R. WILKINS, *supra* note 32, §§ 9.60, 9.60W. For examples of published forms that add *marital trust* principal to the *family trust* in the event the surviving spouse does not exercise a special testamentary power of appointment, see J. RABKIN & M. JOHNSON, *supra* note 32, Form. 7.16.; R. WILKINS, *supra* note 32, §§ 19.62(a), 19.62(a)W. Until 1981, a *marital trust* that gave a surviving spouse a life estate only qualified for a marital deduction when the surviving spouse was also given a general power of appointment or when the principal was to pass directly to the spouse's estate at death. Since then, a marital deduction can also be achieved with the creation of a qualified terminable interest property trust. See *supra* note 47. Such trusts also involve the creation of an income interest in the surviving spouse for life. Although these trusts sometimes give to the spouse a special testamentary power of appointment, such power is not a requisite to qualification. When this power is not included, a gift over at the spouse's death is usually made directly to the *family trust* just the same as in power of appointment trusts when there is a default in the exercise of such power. See R. WILKINS, *supra* note 32, §§ 19.60, 19.60W.

52. For an example of a family trust that divides the trust principal into separate shares for living children and the living descendants of deceased children after the deaths of both the estate owner and the spouse, see, e.g., THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-9:

SECTION 2: Upon the death of settlor's wife, or upon the death of the settlor if his wife does not survive him, the trustee shall divide the Family Trust, including any amounts added thereto from the Marital Trust, into equal shares to create one share for each then living child of the settlor and one share for the then living descendants, collectively, of each deceased child of the settlor.

See also A. LEHRMAN, *supra* note 32, at 565; THE NORTHERN TRUST COMPANY, *supra* note 32, at 202-9, 203-7; R. WILKINS, *supra* note 32, §§ 11.42, 11.42W. For examples of *family trusts* that divide the trust principal into separate shares for living children and the living descendants of deceased children after the deaths of both the estate owner and the spouse and after the youngest living child has attained a particular age, usually twenty-one or older, see THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-8, 202-8, 203-6; R. Wilkins, *supra* note 32, §§ 11.40, 11.40W. When division is delayed until after the youngest living child has attained a particular age, then, after the deaths of both the estate owner and the spouse, income, and if necessary principal, is applied at the discretion of the trustee to meet specified needs of living children and other living descendants. See, e.g., R. WILKINS, *supra* note 32, §§ 11.11(a), 11.11(b), 11.11W(a), 11.11W(b). This latter dispositive technique allows application of the entire trust income, and if necessary portions of principal, to meet the needs of children until all of them are educated and, in all probability, financially independent. It enables the estate owner to have his estate applied after death in much the same way he would have applied it if he had continued to live. And this technique also avoids the potential unfairness that might occur if, by the time both the estate owner and his spouse have died, some of their children have been educated and have become established, while some have not. If the former



At this point, these provisions begin to include conditions that, with minor variations, could cause perpetuities problems.

To begin with, the number of trust shares created and the right to become a beneficiary are usually conditioned upon survival of the time for division into trust shares. Separate and equal shares are created for each living child and collectively for the living descendants of each child who has failed to survive the time for division into trust shares.<sup>53</sup> Without more, this condition of survival does not present a perpetuities problem. As to the estate owner's children, the survivorship requirement must be satisfied, if at all, within their respective lives. These *family trust* provisions invariably appear as part of a testamentary or revocable living trust. As to these kinds of *family trusts*, because the period of the rule against perpetuities is measured from the time of the estate owner's death,<sup>54</sup> each of the living children qualifies as a life in being. Further, their interests cannot possibly vest beyond their respective deaths—beyond the death of a life in being; accordingly, their contingent interests do not violate the common-law rule. As to the living descendants of deceased children, they need not be lives in being at the death of the estate owner. A child could survive the estate owner and have descendants born thereafter while the estate owner's spouse is still alive, and then such child could die before the time for division into trust shares. Indeed, it is possible that the only descendants of the deceased child to survive the time for division are those born after the estate owner's death. Nevertheless, the descendants' interests, which are contingent upon survival of the time for division, do not violate the common-law rule. Although they may consist exclusively of lives not in being at the estate

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dispositive technique is used, and the *family trust* is divided into separate shares at the deaths of both the estate owner and his spouse, the special needs of younger children will be charged against their separate shares, while the entire family trust will have previously satisfied the special needs of older children. This should not, of course, become a problem for an exceptionally large estate. For further discussion and comparison of these different techniques for achieving dispositive objectives, see Becker, *Broad Perspectives in the Development of a Flexible Estate Plan*, 63 IOWA L. REV. 751, 817-21 (1978).

53. Becker, *supra* note 52.

54. The period of the common-law rule against perpetuities is measured from the time the property is "tied up." See L. SIMES & A. SMITH, *supra* note 6, § 1226. In most instances, this occurs at the time the dispositive instrument takes effect and the interest in question is created. Therefore, the period of the rule commences at the time of the estate owner's death as to interests created by a testamentary trust. Similarly, in the case of a revocable living trust, the period of the rule is measured from the time the settlor dies. Even though in theory interests are created at the time the trust is validly executed, the capacity to alienate and market the subject matter is not significantly affected until the power of revocation is suspended by the settlor's death.

owner's death, they are required to survive a point in time that is within the period of the rule; therefore, their interests must vest or fail within the allowed period of time. They must survive the death of the estate owner's spouse, a life in being. And if division is delayed thereafter, they must survive an event within the lifetime of a life in being (when the youngest child alive attains age twenty-one) or survive the death of a life in being (when the last child alive at the spouse's death fails to attain age twenty-one).

After these separate trusts have been established for living children and living descendants, income is generally given to the respective beneficiaries until the time for final distribution of principal.<sup>55</sup> As to the trust shares established for the estate owner's living children, payment of principal is usually apportioned and dependent upon attainment of specified ages, ones that ordinarily exceed twenty-one.<sup>56</sup> Each child receives final payment of his trust share after satisfying all of the age and survival requirements. If, however, a child does not survive a specified age, his share of trust principal which is subject to that age requirement is then given directly to his living descendants or, if none, to the estate owner's living descendants.<sup>57</sup> Some form provisions also give the child a special testamentary power of appointment over the same undistributed trust

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55. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-11, 202-11, 203-7 (6th ed. 1983); R. WILKINS, *supra* note 32, §§ 11.50, 11.50W. If division into separate shares has been delayed until after the youngest living child has attained a particular age, income is also given to living children and living descendants of deceased children after the deaths of both the estate owner and his spouse but before such division into separate shares. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-8, 202-8, 203-6; R. WILKINS, *supra* note 32, §§ 11.11(a), 11.11(b), 11.11W(a), 11.11W(b).

56. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-10 which provides:

SECTION 4: When a child reaches the age of 25 years, or upon division of the Family Trust into shares if he or she has then reached that age, the trustee shall distribute to the child  $\frac{1}{2}$  in value of the principal of his or her share then held here under; the trustee shall forthwith distribute to the child  $\frac{1}{2}$  in value of any subsequent addition to his or her share; and when a child reaches the age of 30 years, or upon division of the Family Trust into shares if he or she has then reached that age, the trustee shall distribute to the child the balance of his or her share.

SECTION 5: If a child dies before receiving his or her share in full, then upon the death of the child his or her share shall be distributed per stirpes to his or her then living descendants, or if none, then per stirpes to settlor's then living descendants, subject to postponement of possession as provided below, except that each portion otherwise distributable to a descendant of the settlor for whom a share of the Family Trust is then held hereunder shall be added to that share.

See also R. WILKINS, *supra* note 32, §§ 11.60-11.62, 11.60W-11.62W.

57. See, e.g., R. WILKINS, *supra* note 32, §§ 11.70-11.70W; THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-10 (reprinted at *supra* note 56), 202-10, 203-8; M. FREILICHER, *supra* note 32, § 110.

principal. The objects of the power often include those members of the estate owner's family (for example, descendants of both the child and the estate owner) to whom it will pass if the power is unexercised.<sup>58</sup> Quite differently, the separate share of trust principal established for the living descendants of a deceased child is usually not subject to any further conditions. Indeed, many form provisions indicate that such interest belonging to living descendants immediately vests at the time the trust share is originally created for them.<sup>59</sup> Often, however, distribution of principal, but not the right to principal itself, is deferred for each descendant until age twenty-one.<sup>60</sup>

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58. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-11, 201-13:

SECTION 5: If a child dies before receiving his or her share in full, then upon the death of the child his or her share shall be held in trust hereunder or distributed to or in trust for such appointee or appointees, with such powers and in such manner and proportions as the child may appoint by his or her will making specific reference to this power of appointment, except that any part of the child's share not subject to withdrawal prior to the death of the child may be appointed only to or for the benefit of any one or more of the child's surviving spouse, the child's descendants and their respective spouses and settlor's descendants (other than the child) and their respective spouses. For purposes of this agreement, the term "spouse" shall include a widow or widower, whether or not remarried.

SECTION 6: Upon the death of a child any part of his or her share not effectively appointed shall be distributed per stirpes to his or her then living descendants, or if none, then per stirpes to settlor's then living descendants, subject to postponement of possession as provided below, except that each portion otherwise distributable to a descendant of the settlor for whom a share of the Family Trust is then held hereunder shall be added to that share.

See also A. LEHRMAN, *supra* note 32, at 565-66; R. WILKINS, *supra* note 32, §§ 11.74, 11.74W. Sometimes there is a disparity between the objects of a special testamentary power of appointment and the takers under the gift in default; for example, the former may include spouses of children and other descendants of the estate owner, while the latter may not. It should also be observed that the special testamentary power of appointment enables children to select from the entire group of the estate owner's descendants under whatever conditions and terms they prefer, while the gift in default usually contains provisions that establish priorities among the group of alternate takers. *Id.*

59. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-9 which provides: "Each share created for the descendants of a deceased child shall be distributed per stirpes to those descendants, subject to postponement of possession as provided below." Immediate vesting is reinforced by the provision that postpones possession, which states:

Each share of the Family Trust which is distributable to a descendant who has not reached the age of 21 years shall immediately vest in the descendant, but the trustee shall . . . retain possession of the share as a separate trust, paying to . . . the descendant so much . . . of the income and principal of the share as the trustee deems necessary or advisable . . . and distributing the share to the descendant when he or she reaches the age of 21 years or to the estate of the descendant if he or she dies before receiving the share in full.

*Id.* at 201-13. See also R. WILKINS, *supra* note 32, at §§ 11.80, 11.80W, 13.70, 13.70W.

60. These provisions for postponement of possession also apply to the substitute gift to living descendants of a child, for whom a trust share was originally created, who did not satisfy all of the age requirements that would have entitled him to distribution of his full share. See, e.g., THE NORTHERN TRUST COMPANY, *supra* notes 56 & 57 (forms set out therein).

Once again, without more, these provisions that govern the trust shares created after the surviving spouse's death do not violate the common-law rule. As to the trust shares established for the estate owner's living children, the condition that they must survive a particular age is one that cannot happen beyond their respective lives. Because they are lives in being, the event by which their respective interest terminates, and another is substituted, must necessarily happen, if at all, within the period allowed by the rule. Similarly, the conditions attached to the substitute gift cannot be satisfied beyond the allowed period. These conditions require that a child, for whom a trust share has been created, must die before a prescribed age and that the substitute descendants (of the child or estate owner) must be born beforehand and survive such child's death.<sup>61</sup> Even though the alternate gift may be to a group of descendants who were not in being at the estate owner's death, all conditions to possession must be fulfilled at the death of a child of the estate owner—a life in being. Finally, as to the trust share originally created for the living descendants of a deceased child, no violation occurs because the group is fully determined when the trust share is created at the death of or within the lifetime of someone in being at the estate owner's death and because it is not subject to any further conditions or uncertainties.<sup>62</sup>

It should be clear that if these standard form provisions are to produce perpetuities problems and violations it must be as a result of language and schematic variations that introduce uncertainties with respect to beneficiaries who need not be lives in being at the estate owner's death. What might these variations consist of and why might an estate owner use them? In each instance, they would involve a contingent gift to descendants other than the estate owner's children, one that requires survival to a point in time that may occur beyond the period allowed by the rule. For example, using the standard dispositive scheme just described, suppose the estate owner wishes to impose age requirements upon the trust share originally created for living descendants of a deceased child

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61. Typically, these provisions call for distribution per stirpes to a group of descendants, either the child's or alternatively the estate owner's, who are "then living"—that is, living at the child's death. Although sometimes distribution may be deferred, both vesting and the final determination of class members are fixed at that time (the child's death) by the terms of the gift itself. See, e.g., *THE NORTHERN TRUST COMPANY*, *supra* note 32, at 201-13; *R. WILKINS*, *supra* note 32, at §§ 11.70, 11.70W. Presumably, those descendants who predecease the child are excluded and so are those born thereafter. Neither can be regarded as "living" at the child's death, the time in which the substitute gift is made.

62. See *supra* notes 59 & 60.

just the same as for the shares created for living children. Such a desire is not improbable; indeed, some form provisions extend comparable age requirements to the descendants of children.<sup>63</sup> Nor is this desire 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 his children to manage their share of his estate. If they die before the time in which they can properly manage and enjoy it, he wants others to have it instead. And he makes the substitutionary choice himself because of his own preferences among alternate takers and because of his desire to minimize costs attributable to his child's death.<sup>64</sup> One might reasonably expect the estate owner to have this same concern and desire with respect to descendants, especially when they constitute grandchildren<sup>65</sup> and especially when the ancestral child has predeceased the estate owner.

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63. For examples of forms that contain age requirements exceeding twenty-one that are imposed upon groups of the estate owner's descendants who need not be lives in being when such interests are created, see PAGE, *PAGE ON THE LAW OF WILLS*, § 62.278 (1985); R. PARELLA & J. MILLER, *supra* note 32, at §§ 1.2.01, 1.2.07; J. RABKIN & M. JOHNSON, *supra* note 32, form 8.26 (31). It should be observed that, except for the presence of a saving clause, each of these examples would violate the common-law rule against perpetuities.

64. If the estate owner had not imposed an age requirement and included a substitute gift, then once created, a child's trust share would have vested absolutely and, unless transferred, it would have remained a part of that child's estate at death. Accordingly, it would pass to whomever that child wished, and it would be subject to probate costs and death transfer taxes imposed on the child's estate. If, however, the estate owner conditions the child's interest upon attainment of particular ages, and if the estate owner provides that such interest is terminated in the event a child fails to survive these ages, then the estate owner can make a substitute choice that satisfies his own dispositive priorities. And in doing this, the estate owner will save on probate costs that would have been incurred by leaving an absolute interest to his child. For a discussion of the nature and extent of these administrative savings, see H. WEINSTOCK, *supra* note 28, at § 6.7. Further, some saving on death transfer taxes might also be accomplished with an age requirement and a substitute gift. Such trust would constitute a generation-skipping trust. And once a child's separate share was established, and once that child became entitled to income, then the termination of such child's interest at death with a substitute gift to a younger generation would constitute a taxable event which was subject to the generation-skipping transfer tax. This tax would arise in much the same way as if the trust share had been left to the child absolutely, and then the child had passed that share to his descendants. For a discussion of the generation-skipping transfer tax, and in particular the concepts of taxable distributions and terminations, see Bloom, *The Generation-Skipping Loophole: Narrowed, But Not Closed, By the Tax Reform Act of 1976*, 53 WASH. L. REV. 31, 38-60 (1977); Wren, *Estate Planning and the Generation-Skipping Transfer Tax*, 32 CASE W. RES. 105, 109-32 (1981). Nevertheless, if the substitute gift at a child's death is made to the estate owner's grandchildren, and if such substitute gift qualifies for the "grandchild exclusion," the generation-skipping transfer tax would apply only to the amount of the child's trust share that exceeds \$250,000. Accordingly, one would save some death transfer taxes with these age requirements and substitute gifts.

65. For a discussion of gifts to grandchildren conditioned upon age requirements, see McGovern, *supra* note 16, at 160-63.

If these age requirements are imposed upon the living descendants for whom a trust share is originally created,<sup>66</sup> a perpetuities problem is apt to arise.<sup>67</sup> Assume that each of the ages which must be survived, and upon which principal will be distributed, exceeds age twenty-one. If so, the potential trust shares to the living descendants of every deceased child violate the common-law rule. Because the gift is to descendants (not simply grandchildren) alive when the remainder of the *family trust* is divided at the surviving spouse's death into separate trust shares, this group of takers can consist exclusively of lives not in being at the estate owner's death. Whether or not the ancestral child has died before the estate owner is irrelevant, and so is the fact that each of a child's descendants living at the estate owner's death has already attained the prescribed ages.<sup>68</sup> Application of the common-law rule must account for all

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66. Essentially this same perpetuities problem can arise when age requirements are also imposed upon the share of living descendants substituted for the original trust share of a child who survives the estate owner and his spouse but fails to satisfy all age requirements. Although the child for whom the trust share is originally created is a life in being at the estate owner's death, his surviving descendants may be entirely afterborn. Any age requirement beyond twenty-one will, therefore, produce a perpetuities problem. It is possible that the child, and all other lives in being as well, may die more than twenty-one years before satisfaction of the age requirements imposed upon that child's surviving afterborn descendants. Because these possibilities exist at the estate owner's death, the entire substitute gift to surviving descendants of children who die before or after the time for division into trust shares violates the common-law rule against perpetuities.

67. For a caution as to latent perpetuities problems in these substitute gifts, see R. WILKINS, *supra* note 32, at §§ 11.80, 13.70, 11.80W, 13.70W. As to the share originally created for living descendants of a deceased child, Wilkins includes a provision that immediately gives principal per stirpes to these living descendants. He also includes a supplementary provision that delays distribution of principal, but not vesting, until such beneficiary attains age twenty-one or dies, whichever occurs first. However, with respect to the share created for living descendants of a deceased child, Wilkins cautions against modifications. He notes that these modifications can produce perpetuities problems which a lawyer must avoid.

68. In either case, there is a violation. The descendants, regardless of age and regardless of whether the ancestral child dies before the estate owner's surviving spouse or has died before the estate owner, must be living when the trust shares are created at the death of the surviving spouse. It is possible that descendants alive at the estate owner's death may die before the surviving spouse, but after having had other afterborn descendants. These afterborn descendants might then become the beneficiaries for whom a trust share is created. Age requirements beyond twenty-one then make it possible for their interests to vest beyond the period of the rule, beyond twenty-one years of the deaths of the surviving spouse and anyone else alive at the estate owner's death. Accordingly, there is a violation. If, however, the substitute gift is confined to only the estate owner's grandchildren, then the death of a child before the estate owner becomes relevant. The substitute gift is limited to that deceased child's living children, all of whom were necessarily in being at the estate owner's death. Regardless of the age requirements, their trust shares must vest or fail within their lifetimes, within the lifetimes of those in being when the interest is deemed created. Quite differently, however, if a child survives the estate owner but dies before the surviving spouse, the original trust share created for only the estate owner's living grandchildren would violate the common-law rule even if

possibilities, however remote they might be. It is possible that a child or his descendants alive at the estate owner's death may have other descendants thereafter and that the only members of this group of the estate owner's descendants to survive the time for creation of the trust share for living descendants of a deceased child are the afterborn descendants. It is also possible that one, or even all, of these surviving afterborn descendants could have been born immediately before this same point in time. And if, for example, the first age requirement is twenty-five, it is also possible that everyone in being at the estate owner's death could die before the surviving afterborn descendants attain age four. If this series of hypothesized possibilities materializes, the class of living descendants of a deceased child eligible to take a trust share will not be fully determined until after the period allowed by the rule.<sup>69</sup> These circumstances

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that child had children who had satisfied all age requirements at the estate owner's death. To begin with, it is possible that the child may have other afterborn children before such child's death. It is possible that these afterborn child's children may be the only ones to survive the spouse and thereafter qualify as beneficiaries under their separate trust share. And it is possible that they may qualify for shares of principal by satisfying the age requirements beyond the period of the rule. Further, even if the estate owner's grandchildren alive at the estate owner's death, who had already satisfied all age requirements, thereafter qualified by surviving the spouse, a perpetuities violation would still exist. It would still be possible for the spouse, and thereafter these grandchildren alive at the estate owner's death, to die more than twenty-one years before the afterborn grandchildren's (deceased child's children's) interest might vest. Because these afterborn grandchildren might enter the class beyond the period of the rule, beyond twenty-one years of the deaths of the spouse, the children, the grandchildren alive at the estate owner's death and all other lives in being, the entire trust share to the class of grandchildren (the deceased child's children) violates the rule.

69. In this instance, the trust share given to descendants of a deceased child is subject to two survival requirements: first, that they be alive at the death of the survivor of the estate owner and his spouse, namely, the time for creation of their trust share; and second, that they survive age twenty-five or other ages beyond twenty-five. Presumably, the class is limited to descendants born before and living when the trust share is created; those born thereafter, are excluded, and if there are none then living, such trust share is never created. The maximum membership is fixed by the express terms of the gift, namely, that the trust share is created for descendants *then living*. And the minimum membership is fixed by the two survival requirements: the attainment of particular ages and the time for creation of the trust share. For a discussion of the rules of construction that govern the composition of a class, see L. SIMES & A. SMITH, *supra* note 6, at §§ 634-59. Depending upon the particular language used, in some provisions the maximum membership might not be restricted to those living when the trust share is created. Conceivably, it might be construed to include those who are then alive along with those descendants born thereafter, but before the first descendant attains a prescribed age and, therefore, becomes entitled to a distributive share of principal. *Id.* § 644. In either case, there is a violation of the common-law rule against perpetuities. Under the rule, class gifts are treated as a single unit. If the interest of any potential member eligible to join the class may vest beyond the allowed period, the entire class gift fails, including those interests that must vest or fail in time. The interests of all class members violate the rule unless the identity of all actual members will necessarily be determined within the period of the rule. See R. MAUDSLEY, *supra* note 5, at 39-42; L. SIMES & A. SMITH, *supra* note 6, at § 1265. Given this "all or nothing" principle, the

are not probable, perhaps not even within the realm of actual experience, but they are possible. Accordingly, the common-law rule is violated and, without regard to a saving clause, the trust shares given to living descendants of each deceased child must fail.

The gifts to children who do survive, and for whom separate trust shares are created, might also fail under the common-law rule. Conceivably, a court might strike the entire trust remainder to living children and living descendants of deceased children upon a principle of "infectious invalidity."<sup>70</sup> It might readily find that saving only the trust shares of living children would produce inequality among living children and the surviving families of deceased children. Because it is clear that the estate owner intended to treat living children and the families of deceased children alike, a court might conclude that the dispositive scheme would be carried out best by invalidating the entire remainder and allowing it to pass by intestacy to the children or their descendants. It is also possible that some courts might strike the entire gift of principal because they view the remaindermen (living children and the living descendants of deceased children) as a single class, one that is subject to the same set of survivorship requirements. They may choose to do this even though di-

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gift to descendants must fail. It is possible that one or more of the descendants alive when the trust share is originally created may have been born after the estate owner's death and be less than age four. Even if one or more of the descendants then living may have been born before the estate owner's death, and even if such lives in being may have already satisfied all age requirements, the validity of their respective interests must depend upon whether the surviving afterborn descendants may join the class beyond the period of the rule. Because it is possible that all lives in being at the estate owner's death, including descendants who are class members, may die after the trust share is created but before afterborn members have attained age four, and because it is possible that one or more of these afterborn descendants may then attain age twenty-five and join the class more than twenty-one years later, the entire gift of principal to these descendants violates the rule.

70. Ordinarily, interests which 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 in striking provisions because of 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 §§ 24.47-.52 (A.J. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 6, at § 1262.



vision within this single class is per stirpes and not per capita.<sup>71</sup> The common-law rule requires that if any potential class members can be admitted beyond the allowed period the entire class gift must fail.<sup>72</sup> Therefore, because living descendants of deceased children can join the class beyond the period of the rule, the shares created for children must also fail even though children must, if at all, enter the class within the rule. It should be observed that this "all or nothing" principle might cause total invalidity without regard to its desirability in terms of the estate owner's dispositive design.<sup>73</sup>

*b. Bypassing Children—A Direct Gift to Their Descendants*

These same perpetuities problems can also arise within a slightly different context. Suppose, after the death of the surviving spouse, an estate owner wishes to bypass one or more of his children, but not their families. More specifically, suppose he wants the remainder of the *family trust* to pass at the spouse's death directly to living grandchildren and to living descendants of deceased grandchildren, subject, perhaps, to a special power of appointment in these deceased grandchildren. This particular desire is not very remote,<sup>74</sup> and for good reason. It is not uncommon for an estate owner to have a falling out with a child. In this instance, he may be reluctant to make substantial gifts of trust principal

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71. For a discussion of problems pertaining to the determination of whether and when a class gift has been created, see L. SIMES & A. SMITH, *supra* note 6, at §§ 611-616, 741, 743-44.

72. Quite apart from the merits of "infectious invalidity," it would seem, at least for purposes of applying the rule against perpetuities, that the better approach would be to view the remainder as creating separate gifts, one trust share for each living child and one trust share for the living descendants of each deceased child. See *supra* note 71. The maximum number of potential trust shares will be known at the estate owner's death, while the actual number will be fixed at the surviving spouse's death. Both determinations occur within the period allowed by the rule. The theory for separation of these interests would seem analogous to the treatment of subclasses. See *infra* note 91. Accordingly, a court might elect to invalidate only those trust shares separately created for the living descendants of deceased children.

73. The "all or nothing" principle has been soundly criticized. See 6 AMERICAN LAW OF PROPERTY § 24.26 (A.J. Casner ed. 1952); Leach, *supra* note 5. Consistent with this criticism, it has been the subject of legislative reformation. See *infra* note 159. Some courts have also rejected the principle. See, e.g., Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962).

74. Although this kind of dispositive choice is not among the most common ones, neither is it an aberration. Indeed, there are perpetuities cases and published forms that reflect the use of such a design. For a discussion of actual perpetuities cases in which gifts of principal are made to grandchildren subject to age requirements, see McGovern, *supra* note 16, at 160-63. For books that include a discussion of direct gifts of principal to grandchildren or include forms that make these gifts, see, e.g., HARRIS BANK, *supra* note 32, at 3 XIII-29-31; J. MURPHY, *supra* note 32, at § 1042B; G. STEPHENSON, *supra* note 32, at 285-86, 290-91.

to this child, yet he may not want to preclude such child's family. A direct gift to the child's family instead of the child may satisfy his sense of fairness. Quite differently, an estate owner might want to bypass a child or children because of their respective financial success and lack of immediate need. As a result, he might prefer to defer the gift of principal for a generation, to a time in which his estate benefits may become needed and more meaningful. Related to this, the estate owner may wish to bypass his children to lessen the overall impact of estate transfer taxes upon his family. A bypass trust to a child's descendants can avoid a generation-skipping transfer tax at the death of that child.<sup>75</sup> This tax saving technique is not uncommon among estate planners today; separate bypass trusts are established with remainders given directly to grandchildren or other descendants, while different gifts or trusts are established for children.<sup>76</sup>

As mentioned above, the use of survival requirements of ages that exceed twenty-one causes significant perpetuities problems. If age requirements, such as twenty-five, thirty, and thirty-five, are applied to all beneficiaries, the entire gift to living grandchildren or their living descendants violates the common-law rule against perpetuities. The reasoning is essentially the same as before. Regardless of whether the estate owner's children predecease him or whether any of the grandchildren or their descendants satisfy all of the age requirements by his death, there is a violation.<sup>77</sup> The gift is presumably to descendants who survive the es-

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75. For a discussion of the generation-skipping transfer tax and planning techniques to overcome it or minimize its impact, see J. PRICE, *CONTEMPORARY ESTATE PLANNING* 82-83, 87-90 (1983); Lewis, *The Generation-Skipping Tax: From Mechanics to Planning Considerations*, 32 *OKLA. L. REV.* 742, 745 (1979); Wren, *supra* note 64, at 109-12, 151-55 (1981).

76. See Ufford & Haas, *Careful Use of "Layering" Technique Can Avoid Generation-Skipping Tax for Estates of Any Size*, 8 *EST. PLAN.* 268 (1981). For a published form that incorporates this kind of bypass trust to grandchildren, see HARRIS BANK, *supra* note 32, at XIII-29-31.

77. These age requirements, however, might not produce a violation if there was no gift to the estate owner's spouse, or if such gift failed because she had predeceased him. If, at the estate owner's death, one or more descendants had already satisfied all age requirements and, therefore, were entitled to immediate distribution, the maximum class membership would then be fixed and only those descendants then alive would become eligible to join the class. See L. SIMES & A. SMITH, *supra* note 6, at § 644. No violation of the rule would occur because the interests of all potential class members would vest or fail within the lifetime of people in being at the estate owner's death. In addition, with or without a gift to the estate owner's spouse, if the class gift is limited to grandchildren and if this group extends only to lives in being at the estate owner's death, either by express language or because the estate owner's children have predeceased him, there would be no violation. Whatever the age requirement, the interests of all potential members must vest or fail within their lifetimes, within the lifetimes of people in being at the time these interests are created.

tate owner's spouse. In terms of possibilities, children, grandchildren, and all descendants alive at the estate owner's death, can die before the spouse but after having had other descendants. Consequently, it becomes possible for the ultimate takers (living grandchildren or other living descendants) to consist exclusively of lives not in being at the estate owner's death. If the age requirements are then added, a condition is introduced that may be satisfied more than twenty-one years after the deaths of all lives in being; namely, the spouse, the children, the grandchildren, other descendants, and everyone else alive at the estate owner's death. Indeed, it is possible that the only descendants eligible to join the class are those that do so beyond the period of time allowed by the rule. Accordingly, the entire gift to living grandchildren or their living descendants fails, at least in the absence of an effective saving clause.<sup>78</sup>

*c. Successive Income Interests for Life*

Another variation of the theme that leaves principal ultimately to grandchildren might involve a trust for the surviving spouse and for two or more younger generations; for example, one in which only income interests are given to the estate owner's children, with distribution of principal deferred for the benefit of a younger generation of descendants. There may be several reasons why an estate owner would wish to do

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78. Age requirements are not the only conditions that can produce a perpetuities violation within the context of direct gifts to descendants beyond children. If the class of beneficiaries is confined to descendants alive at the estate owner's death, there will be no violation so long as they must survive the event upon which distribution of principal is conditioned. (For example—"To my descendants living at my death and living when a Democrat is elected President of the United States.") Each interest must necessarily vest or fail within the lifetime of beneficiaries who were in being when the interests were created. There would, however, be a violation if a survival requirement is omitted and if the gift of principal is conditioned upon an event that could occur beyond the period of the rule. (For example—"To my descendants alive at my death when a Democrat is elected President of the United States.") Assuming, however, that the class of beneficiaries extends to afterborn descendants, a violation will arise with any survival requirement or condition that may be fulfilled beyond the period of the rule. For example, consider a gift in trust that provides income to living descendants for thirty years, and then directs distribution of principle per stirpes to the estate owner's descendants alive thirty years after his death. This gift of principal violates the common-law rule because it is possible that descendants alive at the estate owner's death can have other afterborn descendants and then die within nine years of his death. It is also possible for all other lives in being to die within this same nine years. Finally, it is possible for one or more of the afterborn descendants to survive the thirty years and for their shares of principal to vest in them at the time fixed for distribution. Because all of these possibilities exist, the entire gift of principal must fail. For a discussion of perpetuities problems derived from gifts which are tied to a flat period of time, see McGovern, *supra* note 16, at 164.

this.<sup>79</sup> Among them might be a not uncommon quest for some kind of

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79. Before 1976 there were significant tax incentives for the creation of this kind of trust; indeed, to create successive life estates and to defer vesting and distribution of principal for as many generations as the rule against perpetuities would allow. For example, an estate owner could create a trust that gave income interests for life successively to a spouse, children and grandchildren, and finally left principal to great-grandchildren. In doing this, except for the taxes incurred at his own death and perhaps at his spouse's death, the estate owner could circumvent future death taxes and probate costs until the deaths of his great-grandchildren. This tax avoidance scheme could be accomplished even though one or more generations of life tenants were given privileges beyond a right to income (such as a right to principal pursuant to an ascertainable standard, a noncumulative annual right to a statutorily fixed amount of principal, and a special testamentary power of appointment) that taken together smacked of absolute interests. See Dodge, *Generation-Skipping Transfers After the Tax Reform Act of 1976*, U. PA. L. REV. 1265, 1265-68 (1977); Ingram, *The Estate, Gift, Generation-Skipping, and Related Income Tax Provisions of the Tax Reform Act of 1976 and Some Estate Planning Observations*, 1976 UTAH L. REV. 647, 715-17; Lewis, *supra* note 75, at 742-43; Verbit, *Annals of Tax Reform: The Generation-Skipping Transfer*, 25 UCLA L. REV. 700, 700-01 (1978).

The introduction of the generation-skipping transfer tax by the Tax Reform Act of 1976 substantially diminished these incentives. Essentially, Congress sought to eliminate the tax incentive to skip absolute interests for successive generations and to treat each younger intergenerational exchange of benefit upon the death of a life tenant the same as if an absolute interest had been created and was then left outright to the next generation. Congress did, however, preserve the incentive for trusts that created life estates in children and, thereafter, left principal to grandchildren, provided such principal would be included within the taxable estates of these grandchildren. This exception is known as the "grandchild exclusion." The amount of the grandchild exclusion is \$250,000 per deemed transferor (a child) as to certain gifts that vest in grandchildren of the estate owner. See I.R.C. §§ 2613(a)(4)(A), 2613(b)(5)(A), 2613(b)(6). Stated differently, up to \$250,000 is excluded from the amount of the corpus subject to the generation-skipping transfer tax upon the termination of a child's income interest and a gift of principal to grandchildren. For a discussion of this exclusion, see Bloom, *supra* note 64, at 54-60; Lewis, *supra* note 75, at 751-52; Wren, *supra* note 64, at 1030-32.

Subsequent proposals for Congressional tax reform suggest that the pre-1976 incentives for skipping absolute interests for successive generations may soon be restored, or at least expanded beyond the current exclusion for grandchildren. Since its adoption in 1976, commentators have criticized the generation-skipping transfer tax as much too complex. Thus far, efforts to eliminate the tax have been unsuccessful; for example, conferees on the 1984 Tax Act dismissed a Senate proposal to repeal the tax. Nevertheless, various proposals for its abolition, reform, and moderation persist. Two different bills before Congress call for a flat rate generation-skipping transfer tax that would, in most instances, diminish the impact of the tax. Both bills also introduce a significant exemption or tax credit with respect to this tax. Indeed, either bill would probably permit most estate owners to escape completely the generation-skipping transfer tax, perhaps even estate owners who have with their respective spouses a combined estate of as much as \$2,000,000. Discussion of these bills has evoked a wide range of views, including continued arguments for repeal of the tax. Little has been said on behalf of retaining the generation-skipping transfer tax in its current form; therefore, it seems clear that the prospects for some change are fairly great. Indeed, it also seems likely that for most estate owners the pre-1976 tax incentive will be revived for creating trusts that give income interests to children and defer principal for a younger generation—for example, grandchildren. For a discussion of several bills and proposals that have been presented to Congress and which concern the generation-skipping transfer tax, see 192 DAILY TAX REPORT, Oct. 3, 1984, G-2—G-4; 182 DAILY

immortality. This might reflect itself in a desire to control beyond his death both the subject matter of his estate and the lives of beneficiaries; for example, an estate owner might wish to keep his family business intact and within the family for a significant period of time. Another reason might involve simply a desire to provide directly for multiple generations, that is, for his grandchildren as well as children. Along with this objective, the estate owner may have a special desire to preserve and conserve the entire estate for a period of time, and to apply it meanwhile for the benefit of all family members with whom he is concerned. An estate owner has a choice of two related methods to accomplish these objectives. To begin with, separate trust shares might be created at the spouse's death for each living child and for the living descendants of each deceased child. Income derived from a child's trust share, as well as necessary portions of principal, would be given to the child for life. The principal would ultimately pass to living grandchildren or the living descendants of each deceased grandchild.<sup>80</sup> The principal might also be made subject to a special power of appointment given to either the child or to a deceased grandchild.<sup>81</sup> Somewhat differently, an estate owner might wish to use the entire *family trust* principal to benefit, according to need, his family while his spouse or any of his children are alive; indeed, this is probably the same approach he would have taken if he had continued to live. Consistent with this particular goal, the estate owner might also wish to benefit his grandchildren per capita; he might not want the size of their respective shares governed by how many children their respective parents had. These objectives could be accomplished by deferring any outright gift of principal until after his spouse and all of his

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TAX REPORT, Sept. 19, 1984, G-4—G-6, J-1—J-12. See also TREAS. REP. TO THE PRES., TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH v. 2 at 389-92.

80. If these gifts to grandchildren are conditioned, or if substitute beneficiaries are provided, the "grandchild exclusion" from the generation-skipping transfer tax may be diminished or lost altogether. For a discussion of apparent code requirements as to termination or distribution, see Bloom, *supra* note 64, at 59-60; Wren, *supra* note 64, at 131.

81. Conceivably, the estate owner might wish to give older generations of descendants some discretion to select among younger generations. Future circumstances may suggest dispositive choices and exigencies that the estate owner could not fully anticipate; accordingly, the estate owner may not want to lock-in an inflexible design for distribution of principal. For example, each child, as to his or her trust share, might be given a special testamentary power of appointment to apportion and condition the principal among such child's children. If the power is unexercised, the principal would pass to that child's children then living, or the living descendants of any deceased beneficiary (the estate owner's grandchildren). Alternatively, or even additionally, any deceased child's child might be given a comparable special testamentary power to appoint principal among his or her living descendants.

children have died. Until then income (and principal, if necessary) could be sprayed among his spouse, children and their descendants according to their individual needs. After the deaths of the spouse and all children, principal would be divided and distributed among surviving descendants in whatever manner the estate owner desired. The reasons, then, that underlie dispositive schemes that defer principal distribution until after the deaths of children, are not unusual, and so one might conclude that these variations are neither improbable nor uncommon.<sup>82</sup>

This basic variation which extends the duration of the trust presents the same occasion for perpetuities problems, as well as some additional ones. Without more, however, these dispositive designs do not violate the common-law rule. Even if the trust principal is ultimately given to only those descendants alive after the spouse and children have died, the rule is not violated. The class of takers, who may not be lives in being, must survive people who are necessarily in being at the estate owner's death. Therefore, their interests must fully vest or fail within the period of the rule. If, however, a requirement of survival to an age in excess of twenty-one is added, the gift of principal to grandchildren or other living descendants violates the common-law rule for exactly the same reasons as before.<sup>83</sup> As a result, the entire gift of principal must fail.<sup>84</sup>

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82. See McGovern, *supra* note 16, at 165-68. In his study of perpetuities cases over a twenty-year period of time, Professor McGovern observes that more recently trusts covering two generations, ones in which the second generation beneficiaries are capable of increasing after the estate owner's death, present the most common kind of perpetuities violation. *Id.* at 165. For examples of published forms that defer principal distribution for the benefit of descendants beyond the estate owner's children, see HARRIS BANK, *supra* note 32, at VI-8—VI-11; THE NORTHERN TRUST COMPANY, *supra* note 32, at 205-1—205-7.

83. See *supra* notes 63-73 and accompanying text. In the illustration above which creates separate trust shares for each child and his family following the death of the surviving spouse, there is a violation if either the spouse or child actually survives the estate owner. If a child has children at the estate owner's death, it is possible for this child's children (even those who have already satisfied the age requirement—for example, age thirty) to have other descendants before the time for earliest first distribution, namely, the death of the survivor of the spouse and the ancestral child. These afterborn descendants would then become potential class members if the ancestral grandchild predeceases the spouse and ancestral child. It is also possible for all lives in being at the estate owner's death, including the spouse, children, and other descendants, to die thereafter but before all of the potentially eligible ancestral child's afterborn descendants attain age nine. Therefore, it becomes possible for such afterborn descendants to attain age thirty and join the class of beneficiaries to whom principal is given more than twenty-one years later. Because this is a point in time beyond the period of the rule, there is a violation. In the illustration above which creates a single trust for the entire family until the deaths of the spouse and the last surviving child, there is a violation if either the spouse or *any* of the children survives the estate owner. The reasoning is much the same. Descendants alive at the estate owner's death can have other descendants before the earliest time for first distribution of principal, namely, the death of the survivor of the spouse and the *last child to die*.

The other ways in which this design for successive income interests can violate the rule do not depend upon age requirements. It is not a rarity for estate owners to benefit a child's spouse and, perhaps, to give the survivor of the child and spouse a special power of appointment.<sup>85</sup> If provision for a daughter-in-law or son-in-law is accomplished by interposing an income interest for them before distribution of the trust share to the child's living descendants, a perpetuities problem may easily arise. More specifically, if the spouse is not identified by name, but can be anyone to whom the child is married at that child's death, a gift of principal to *descendants alive* when the survivor of the child and the spouse dies

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These afterborn descendants then become eligible to join the class if they survive that point in time and attain age thirty, and they may do this beyond the period of the rule if all lives in being die before they attain age nine. Because this is possible, the rule is violated.

84. There are, however, circumstances in which the entire gift of principal might not fail, especially if the gift of principal is limited to grandchildren only. For example, in the illustration above which creates a single trust for the entire family until the death of the last surviving child, assume that one of the estate owner's children predeceased the estate owner, leaving children (the estate owner's grandchildren) who survived the estate owner. If the trust principal is divided per stirpes among the living grandchildren, then a court might view the gift to the children of the deceased child as a separate subclass. *See infra* note 91. Because this subclass could contain only grandchildren born by the estate owner's death, there would be no possibility that any of the members could join the class beyond the rule regardless of the survivorship and age requirements. Accordingly, without regard to the principle of "infectious invalidity," a court might elect to uphold the gift of principal created for the subclass of children of the deceased child. Similar treatment might be accorded the separate trust shares created for children and their children in the other illustration. *See supra* note 72. The ultimate remainder to living children of a child who predeceased the estate owner might not violate the rule against perpetuities. All members of this class of grandchildren would be lives in being and all survivorship conditions and age requirements must be fulfilled, if at all, within their lifetimes. Therefore, no potential interest could vest beyond the period allowed by the rule. Accordingly, separate perpetuities treatment might be accorded each separate trust share created at the death of the surviving spouse. The trust share created for the children of a child who predeceased the estate owner would be upheld, while the others would fail.

85. For a general discussion of a full range of provisions for daughters-in-law and sons-in-law, see G. STEPHENSON, *supra* note 32, at 304-10. *See also* Browder, *supra* note 27, at 1326-27. In his study, Professor Browder found a number of instances in which alternative gifts were made to surviving spouses of deceased children. He observed that the substitution of a spouse for a deceased child—someone for whom a primary gift had been intended—was a natural dispositive choice, especially when their issue were apt to be minors. It would appear, however, that many gifts to a child's spouse can be primary rather than substitutionary. For examples of published forms that allow a trustee to distribute income and principal to a child's spouse while the child is alive, and allow such child to appoint principal to his spouse at the child's death, see HARRIS BANK, *supra* note 32, at VI-8-10, XIV-20-21. For an example of a published form that gives a special testamentary power of appointment to a child who dies before receiving all distributions of principal and includes that child's spouse among the objects of such power, see NORTHERN TRUST COMPANY, *supra* note 58, (Form 201-11 set out therein).

violates the rule. This is the example of the "unborn widow."<sup>86</sup> Although the actual fact of an unborn widow may seldom arise, limitations that require the assumption of such fact do occur, and they can produce litigation.<sup>87</sup> When they arise, a violation exists even if thereafter a child never marries someone unborn at the estate owner's death and even if the child had no additional descendants after the estate owner's death—even if the ultimate recipients of principal turn out to be lives in being. Once again, the common-law rule accounts for all possibilities at the time interests are created. It is possible that a child can marry someone born after the estate owner's death and that such spouse can survive all lives in being (including the child and his descendants alive at the estate owner's death) by more than twenty-one years. It is also possible for the child to have other descendants born after the estate owner's death. Thus, it becomes possible that the child's descendants eligible to take the principal (those that actually survive the child and the spouse) consist exclusively of lives not in being at the estate owner's death. As a result, it is possible for the gift of a share of the principal to vest in a group of afterborn takers beyond the period allowed. Accordingly, with the exception of the trust shares of children who did not survive the estate owner,<sup>88</sup> there is a violation as to each share of the principle given to living descendants of children.

Although the foregoing example did not involve an age requirement, the perpetuities problem did depend upon a condition of survival until the termination of the prior income interests. It should be noted, however, that successive income interests to children and grandchildren can

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86. See Leach, *supra* note 5, at 644.

87. See Browder, *supra* note 27, at 1339-40; McGovern, *supra* note 16, at 157-60. See also *infra* text accompanying note 108. In summarizing current perpetuities pitfalls, Professor McGovern observes that this problem can arise anytime an estate owner wants to provide benefits for a relative and, thereafter, for such relative's spouse. He believes that one is apt to encounter this particular pitfall because this kind of gift arises from the normal instincts of estate owners. He notes that these perpetuities problems are litigated; however, the number of reported cases is not as great as he anticipated, perhaps because the problem is frequently overlooked.

88. Separate trust shares have been created for each child. Analogous to the treatment of subclasses, the ultimate gift to the living descendants of children might be tested separately for purposes of the common-law rule. If a child does not survive the estate owner, it is no longer possible for that child's spouse to become afterborn. Although that child's descendants in being at the estate owner's death may have other afterborn descendants who become the only ones to survive the time for distribution of principal, there would still be no violation of the common-law rule. Although the gift of the child's trust may pass entirely to an afterborn class, such group will be fully determined within the period of the rule. The gift of principal is to descendants who must be alive at the death of a life in being, namely, the survivor of the estate owner's spouse and the ancestral child's spouse.



cause a perpetuities violation with respect to an ultimate gift of principal, and that this violation may happen without the use of any age or other survival requirement. One might assume that estate owners ordinarily are reluctant to make ultimate distribution of principal to a generation of descendants they do not know at all. Therefore, it should be no surprise that standard forms do not extend a *family trust* beyond descendants (usually grandchildren) living at a child's death. Nevertheless, if an estate owner lives long enough to know great grandchildren, there may be incentives to prolong the *family trust* for another generation.<sup>89</sup> This objective might be accomplished with separate trust shares for each child, and with income interests to the child for life and then to the child's children (the estate owner's grandchildren) for their lives. Afterwards, a gift of principal is made per capita to the child's grandchildren (the estate owner's great-grandchildren), subject, perhaps, to special powers of appointment created in their parents—the child's children. This objective can also be accomplished by a single trust, with income for the benefit of the estate owner's children and grandchildren.<sup>90</sup> A gift of principal would then be made to his great-grandchildren, per capita, after the deaths of all children and grandchildren.

Both variations of this design for income interests to the estate owner's children and grandchildren, and principal to great-grandchildren, can violate the common-law rule. As to the first variation, the gift of principal violates the rule except for the separate trust shares created for the fami-

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89. Quite apart from tax incentives, if the estate owner has previously bestowed the benefits of his estate among family members according to individual needs, then after his death he may wish to have this flexible practice continue on behalf of his descendants for as long as it is practicable. This objective might be accomplished with a trust that defers ultimate distribution of principal until the deaths of all grandchildren and, until then, with a trust that confers income among descendants according to individual or family needs. By doing this, he defers principal for the benefit of a group that he knows, and meanwhile he retains the estate intact and devotes it to the needs of his entire family.

90. This technique would seem to be the best method for extending beyond the estate owner's death a lifetime dispositive design predicated upon individual need. See *supra* note 89. Perpetuities problems, however, might arise with respect to discretionary powers given to a trustee to allocate income and invade principal. If such powers are not personal to an individual trustee in being at the estate owner's death, they can be exercised beyond the period of the rule. Accordingly, these powers may be invalid, although perhaps only after twenty-one years following the death of the survivor of the estate owner's children. This particular perpetuities problem can be readily overcome, and the desired flexibility largely retained, by setting an appropriate time limit to the trustee's discretionary power or by limiting such powers to individual trustees who are in being at the estate owner's death. For a discussion of the perpetuities problems that arise with respect to the creation of these kinds of powers, see L. SIMES & A. SMITH, *supra* note 6, at § 1277.

lies of the estate owner's children who predecease him.<sup>91</sup> As to the second variation, the gift of principal violates the rule unless all of his children have predeceased the estate owner.<sup>92</sup> Once again, the rule is violated because of the "all or nothing" treatment of class gifts. More specifically, the beneficiaries of the principal—the class consisting of the estate owner's great-grandchildren—must be fully determined within the allowed period. If any potential great-grandchild can possibly be admitted beyond the allowed period, the entire class gift to them violates the rule and it must fail. In the instance of a separate trust share created for a child who actually survives the estate owner, it is possible that such child can have a child after the estate owner's death. It is also possible for such afterborn child's child to live (and enjoy the income interest) more than twenty-one years beyond the deaths of all lives in being at the estate owner's death, including the estate owner's children, grandchildren, and great-grandchildren alive at his death. Finally, it is possible for that afterborn child's child to have a child thereafter, and to add a member to the eligible class of the estate owner's great-grandchildren beyond the period of the rule. Because the maximum number of class members is not fixed until the time of distribution of principal (the deaths of all

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91. In the first dispositive variation, the shares created for each child's family should be treated separately under the rule against perpetuities. Even with a previous life estate created for the estate owner's surviving spouse, courts are apt to view each trust created thereafter as a distinct gift creating distinct subclasses. The potential number of separate trust shares will be known at the estate owner's death, while the actual number of trust shares will be known at the spouse's death. And as to each potential trust share created for a child and that child's descendants, it will be known at the estate owner's death whether it is possible for the gifts of income or principal to vest beyond the time period allowed by the rule. For a discussion of the common-law rule against perpetuities in relation to subclasses and separate fractional trust shares, see 6 AMERICAN LAW OF PROPERTY § 24.29 (A.J. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 6, at § 1267. Accordingly, as to the separate trust share created for the family of a child who predeceases the estate owner, no grandchildren (the estate owner's great-grandchildren) of the deceased child will be admitted to the subclass entitled to principal beyond the deaths of lives in being—beyond the deaths of all children (the estate owner's grandchildren) of the deceased child. Necessarily, none of these deceased child's children can be born beyond the death of the estate owner. Therefore, at the estate owner's death, with respect to this trust share, it is not possible for any deceased child's grandchild's interest to vest beyond the death of a life in being at the estate owner's death.

92. In the second dispositive variation, no distribution of principal to the estate owner's great-grandchildren can occur until the deaths of all children and grandchildren. Therefore, any great-grandchild alive at the estate owner's death or born thereafter is eligible to join the class of great-grandchildren. See L. SIMES & A. SMITH, *supra* note 6, at § 640. If all of the estate owner's children have predeceased him, then his grandchildren cannot include anyone who is afterborn. Therefore, the class of great-grandchildren will be fully determined by the death of the last to die of a group of lives in being at the estate owner's death.

such child's children),<sup>93</sup> this child's grandchild (the estate owner's great-grandchild) would be included within the class. Accordingly, it violates the rule, and the gift of principal must fail even though it is unconditionally made to each child's grandchildren.

*d. Irrevocable Trusts*

The revocable trust is a very popular form of living trust. It has many advantages;<sup>94</sup> nevertheless, there are circumstances which justify using an irrevocable living trust.<sup>95</sup> Estate owners frequently create life insurance trusts for their immediate family, and they will often make these trusts irrevocable to lessen the impact of estate transfer taxes.<sup>96</sup> Yet, by

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93. In the dispositive variation involving separate trust shares for each surviving child of the estate owner, no distribution of principal can be made to that child's grandchildren (the estate owner's great-grandchildren) until the termination of all income interests—until the death of the last to die of such child and that child's children (the estate owner's grandchildren). The rules which govern the determination of class membership would allow for the inclusion of all of such child's grandchildren alive at the estate owner's death and all grandchildren born thereafter before the time for distribution. See L. SIMES & A. SMITH, *supra* note 6, at §§ 640, 654. Because the time for distribution cannot occur until the death of the child's last surviving child, and because all potential grandchildren of such child will necessarily be born before then, all afterborn grandchildren of that child will be eligible to join the class.

94. Among other things, the funded revocable living trust offers, without loss of essential control to the estate owner, the opportunity to avoid the expense, delay, and publicity that accompanies probate. It also enables the estate owner to test the design and management of his estate while still alive and to assure uninterrupted administration of his estate in the event of his mental or physical incapacity. For a discussion of the advantages and disadvantages of revocable living trusts, see J. FARR & J. WRIGHT, *AN ESTATE PLANNER'S HANDBOOK* 75-83 (4th ed. 1979 & Supp. 1982); H. WEINSTOCK, *supra* note 28, at 117-43.

95. Typically, the irrevocable living trust is used by estate owners with considerable wealth to reduce death costs respecting property that is apt to appreciate or to shift income producing property to beneficiaries with lower income tax brackets. This can, of course, be achieved by outright gift as well. However, the irrevocable trust offers the decided advantage of security and flexibility as to management and dispositive objectives. The estate transfer tax savings are not as great as they once were prior to the Tax Reform Act of 1976; nevertheless, there is some saving. In the main, the unified tax is measured by the value of the trust at the time of its creation and not at the time of the estate owner's death, a time in which the trust corpus could have appreciated significantly. And if the irrevocable trust provides for current payment of income, the unified transfer tax burden can be reduced by the amount of the annual exclusion. Additionally, with care, the income tax burden can be shifted from the settlor-estate owner to trust beneficiaries even though some discretion exists as to distribution. For a discussion of irrevocable living trusts, including a consideration of their advantages and problems, see J. FARR & J. WRIGHT, *supra* note 94, at 84-109; G. TURNER, *IRREVOCABLE TRUSTS* §§ 1.17-1.29 (1985).

96. The full proceeds of policies of life insurance owned at his death by an insured-estate owner are includible in his gross estate even though these proceeds are payable to beneficiaries other than his estate. Additionally, if the estate owner, during his lifetime, effectively assigns all incidents of ownership outright or to an irrevocable trust, he must still pay the unified transfer tax. Nevertheless,

making it irrevocable, the trust may pose a perpetuities problem that can emasculate the dispositive design and return the insurance proceeds to the estate of the insured-estate owner. The reason for this is clear: the common-law rule is measured and applied from the time the estate owner-settlor creates the irrevocable trust and not from the date of his death. One not grounded in the rule might easily overlook this distinction in a dispositive provision and also in any saving clause that might be appended to the irrevocable trust.<sup>97</sup>

This oversight can be illustrated with a simple variation of the *family trust* commonly created for the estate owner's spouse and children. Suppose the estate owner executes an irrevocable living trust which is funded by insurance on his life. Assume further that, after the death of the surviving spouse, who is identified by name, the estate owner includes a dispositive provision that leaves principal to his living children, subject, perhaps, to a special testamentary power of appointment in each deceased child. Except for this power, there is no perpetuities violation as to the gift of principal. The children must survive the estate owner-settlor and his named spouse, and both were in being when the irrevocable trust was created. If, however, the estate owner makes the gift of principal to children contingent upon attaining age twenty-five, as well as survivorship of the settlor-estate owner and his named spouse, there is a perpetuities violation as to the interests of all children, even those in being when the settlor-estate owner created the trust. So long as the estate owner's children are identified solely by a group description that is not limited to those living when the trust is created, this violation exists, and it arises without regard to actual events that occur after the trust is created but before the estate owner's death. To explain further, accounting

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if assigned, the value of the gift for tax purposes is not the policy proceeds; it is, instead, something considerably less—the value of the policy when the gift is made during the estate owner's lifetime. For a discussion of the advantages and problems, tax and otherwise, of gifts of life insurance through irrevocable living trusts, see J. FARR & J. WRIGHT, *supra* note 94, at 94-100; G. TURNER, *supra* note 95, at §§ 12.01-12.15. For a published form that transfers life insurance policies owned by the insured-settlor to an irrevocable living trust, thereby created and established for a surviving spouse and children, see THE NORTHERN TRUST COMPANY, *supra* note 32, at 304-1—304-19.

97. Given the manner in which these instruments are drafted, this kind of oversight can easily arise. Irrevocable trusts are not all that common and neither are the forms which lawyers use to create them. Frequently, lawyers compose them through incorporation and adaptation; that is, by selecting and amending various relevant provisions from related forms. This process is always susceptible to mistakes. See *infra* § III B 1. Indeed, it would not be a surprise if many irrevocable living trusts actually contained saving clauses designed for transfers that take effect at the death of the estate owner instead of during his lifetime. This mistake has been made even by lawyers deemed expert in the field. See *Sears v. Coolidge*, 329 Mass. 340, 108 N.E.2d 563 (1952).

for all possibilities at the time of settlement, it is possible that the settlor can have additional children and that only these afterborn children constitute the living children who ultimately qualify for shares of principal. It is also possible for the settlor, his named spouse, and everyone else in being at the time of the settlement to die before these afterborn children attain age four. Even if some of the estate owner's children, alive at the time of settlement, attain age twenty-five and survive the time for creation of trust shares, it is possible that they will die thereafter, but before their afterborn siblings reach age four. Therefore, it is possible that the entire class, or a portion of it, will be determined or identified beyond the period of the rule; the entire class, or a portion of it, might include lives not in being who then satisfy a survival requirement that can happen beyond the allowed time period. Accordingly, even though the estate owner might have no children after the irrevocable trust is created—regardless of actual circumstances, the entire gift of principal to the class of children must fail.

## 2. *Other Family and Friends*

As previously mentioned,<sup>98</sup> most dispositive designs focus on immediate family, the estate owner's spouse and descendants, and, accordingly, so do the standard forms used to implement these designs.<sup>99</sup> Nevertheless, estate owners do not always have immediate family, at least descendants, to whom they can leave their estate. Often, other dispositive choices have to be made. Sometimes these choices involve charitable institutions,<sup>100</sup> but common sense also suggests that these choices fre-

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98. See *supra* note 31.

99. Presumably, the dispositive designs that favor a surviving spouse and descendants reflect estate owner perceptions of both family duty and affection. Yet they also reflect legal obligation. Almost every state has some statutory measure that secures a surviving spouse against disinheritance. See Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447, 455-470 (1976). Additionally, these dispositive proclivities regarding family members reflect various estate transfer tax incentives. For example, the unlimited marital deduction, I.R.C. § 2056, makes it possible to defer any transfer tax until the death of the surviving spouse, and, therefore, it encourages substantial gifts to such spouse. For a discussion of the marital deduction in terms of estate planning, see J. FARR & J. WRIGHT, *supra* note 94, ch. IX; J. LASSER, *ESTATE TAX TECHNIQUES* chs. 3, 4, 7 (1955 & Supp. 1983). Further, there is a tax incentive for making gifts to grandchildren; that is, for terminating the interests of children at their deaths and leaving principal ultimately to grandchildren. Indeed, there are circumstances in which the estate may be left to children and then to grandchildren without incurring a transfer tax at the death of children. See *supra* note 79.

100. Beyond benefactory motives there are strong tax incentives underlying an estate owner's election to make a charitable gift. See J. LASSER, *supra* note 99, at ch. 10; H. WEINSTOCK, *supra*

quently include other family and friends. The collection of forms on other family and friends is, however, scant, or at least incomplete.<sup>101</sup> In the absence of published literature which provides specific dispositive guidance for these groups of people, lawyers must then create their own forms or vary and adapt standard forms that are focused on members of an estate owner's immediate family. This practice is necessary, but it is also laden with potential perpetuities problems for lawyers who do not understand the common-law rule and how to satisfy its requirements. In short, within the context of other family and friends, the matter of form creation, variation, and adaptation is risky business. This happens because the uninformed lawyer is susceptible to overlooking latent perpetuities problems in any gift to a group of people who may not consist exclusively of lives in being at the estate owner's death. More specifically, a gift, whether made by a will or revocable living trust, to the estate owner's children will not violate the common-law rule against perpetuities if the conditions attached to it must occur, if at all, during their lives. A comparable gift to the children of someone alive at the estate owner's death, however, can easily violate the rule even though the conditions involved cannot occur beyond such children's lives.

For example, several plans that provide for an estate owner's brother and his brother's family illustrate the kinds of perpetuities problems that arise when lawyers must deviate from dispositive designs within existing forms. To begin with, suppose an estate owner wishes to create a trust that provides income to his brother for life and then leaves the principal to his brother's living children. This dispositive design seems very similar to a planning format described earlier—the *family trust* for a surviving spouse and children.<sup>102</sup> One might expect that many lawyers would implement this design by simple adaptation of standard forms used to create *family* or *non-marital* trusts. This adaptation could merely involve giving the brother the income interest usually created for the estate owner's surviving spouse and giving the brother's children the principal

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note 28, at 301-22. For examples of published forms that provide for charitable gifts, see E. BELSHEIM, *supra* note 32, at §§ 10021-10050; HARRIS BANK, *supra* note 32, at XIII-23-28, XIV-44-47; R. PARELLA & J. MILLER, *supra* note 32, at ch. 14.

101. *See supra* note 46. Although these forms books contain separate dispositive provisions that extend beyond immediate family, these provisions are comparatively few in number. Moreover, these form books seldom publish complete instruments devoted to such dispositive designs. For an example of an estate planning book that contains complete forms devoted only to immediate family, see A. LEHRMAN, *supra* note 32, at 528-81.

102. *See supra* § II C 1 a.

usually left to the estate owner's children. Indeed, there are form books that do this; they make the adaptation by a simple substitution of beneficiaries, specifically by individual name or group description.<sup>103</sup> Nevertheless, one should observe that this simple adaptation causes perpetuities problems that will produce a violation in the absence of an effective saving clause.<sup>104</sup> As indicated earlier, with respect to the gift to the estate owner's children within the *family trust* itself, the survival requirements beyond age twenty-one do not cause a perpetuities violation.<sup>105</sup> As to the brother's children, however, these same age requirements will cause a violation if the brother survives the estate owner. Further, even if the brother has children who have already satisfied all age requirements when the estate owner dies, there is still a violation. Assuming that the gift of principal precludes those children who predecease the brother, it is possible that the only descendants to survive the brother are children born after the estate owner's death. If the first principal distribution depends upon survival of age twenty-five, it is also possible that the brother and everyone else alive at the estate owner's death can die before these afterborn children attain age four. If these possibilities materialize, the class membership will not be fully determined or identified until after the allowed time period. Once again, although these possibilities seem remote, if not beyond human experience, the rule requires that all uncertainty as to final class membership be erased within the period of the rule—that no potential member be admitted beyond it. Accordingly, the entire class gift to the brother's children should fail. At the very least, the substitute gift over will be stricken, in which case the age requirements are negated.<sup>106</sup> Within the context of

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103. See, e.g., R. WILKINS, *supra* note 32, at 251-77.

104. Yet those who offer this kind of adaptation seldom advocate exclusive reliance upon saving clauses to avoid perpetuities violations. For example, to provide for other beneficiaries and their families, Wilkins recommends simple adaptation of provisions created for a surviving spouse and children. *Id.* Yet the commentary to his dispositive provisions frequently warns of perpetuities problems that should be avoided in drafting each provision. See, e.g., *id.* at §§ 11.74, 11.80, 11.74W, 11.80W. Further, the commentary to his saving clause implies that lawyers should make certain that each dispositive provision does not violate the rule against perpetuities and that the saving clause is probably necessary only when lawyers are concerned that their dispositive provisions may violate the rule. *Id.* §§ 15.20, 15.20W.

105. For an explanation of why no perpetuities violation occurs, see *supra* text accompanying notes 60-62.

106. Many of the perpetuities problems considered previously derive from age requirements imposed upon a class of beneficiaries that might possibly include members born after the dispositive instrument becomes effective, in most instances after the estate owner's death. See *supra* text accompanying notes 62-73, 76-78, 82-84, 97-98. It has been assumed that if such age requirements permit a

the testamentary or revocable living trust for immediate family, perpetu-

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potential member to join the class beyond the period allowed by the rule, then the rule would be violated and the entire class gift must fail along with any substitute gift to others. This result rests upon the conclusion that the age requirement makes each class member's share contingent in interest and not vested subject to divestment. It should be noted, however, that this may not always be the effect of such age requirements.

The rules of construction that govern the distinctions between contingent and vested interests are exceedingly complex and, in many respects, unclear. Commentators devote significant portions of their treatises to these distinctions. *See, e.g.*, 5 AMERICAN LAW OF PROPERTY §§ 4.25-4.36, 21.5-21.32 (A. Casner ed. 1952); J. GRAY, *supra* note 4, at 88-113; L. SIMES & A. SMITH, *supra* note 6, at §§ 131-66, 571-94. A summary and synthesis of these principles would be both difficult and very lengthy; nevertheless, some important observations can be made. Each of the illustrations involving an age requirement seems to make attainment of a particular age a precedent condition to sharing the principal. Without more, this kind of requirement renders the gift of principal contingent in interest. For example, consider the following testamentary trust: "Income to B for life, thereafter, principal in equal shares to each of B's children respectively at age twenty-five." In the main, courts have found that a gift "at" a particular age, or "if" or "when" that age is attained, creates a contingent interest; in which case the beneficiary acquires no share of the principal unless and until the beneficiary actually attains the specified age. Therefore, in this example, only those children of B who actually survive age twenty-five share the principal. If, however, the gift of principal had been to "B's children, payable at age twenty-five respectively," many courts would view the gift differently; they would find the remainder vested absolutely in each of B's children. These courts would not construe the specified age as a condition; instead, they would regard it as a direction only as to the time of payment. Accordingly, each child or such child's successor would be entitled to payment when that child actually attained or would have attained age twenty-five. In short, the effect of the "payable at" language is twofold: it gives B's children an interest transmissible at death, and it changes the characterization from contingent to vested. It should be added that many courts have reached this same result even in the absence of the phrase "payable at." If the trust gives income to B's children between B's death and their respective attainment of age twenty-five, courts are apt to find the age requirement only a direction as to the time for payment of principal and not an absolute condition to the right to payment itself. This conclusion would not be reached, however, if the income could be sprayed among B's children (perhaps, according to individual needs) until the time for distribution of principal, nor is it apt to be reached if the income could be accumulated and added to principal.

It should also be observed that an express substitute gift for those who do not satisfy the age requirement may have a profound effect on the characterization of their interest in the principal. For example, assume that the gift of principal in the original illustration was changed to: "[T]hereafter, principal in equal shares to B's children respectively at age twenty-five; if a child of B does not survive age twenty-five, then to that child's living descendants per stirpes, if none, then to B's other children who do attain age twenty-five." In this instance, many courts would view B's children as having vested interests, not absolute but subject to divestment. If a child did not attain twenty-five, his share of the principal would be divested in favor of his living descendants or others. In short, the express gift over to others alters the classification from contingent to vested, but it does not make the interest transmissible at death. Under this construction, each child of B has a vested interest. If, however, a child dies before attaining age twenty-five, his share will not become a part of his estate; instead, it will pass directly to others. Actual attainment of age twenty-five is still a precedent condition to a share of the principal—it is still an absolute requirement for each child. Nevertheless, the presence of this particular gift over may cause many courts to style the condition as subsequent and to characterize the children's interests as vested subject to divestment. This obser-



ities problems do not arise until the gift of principal to descendants beyond children; however, as to the trusts for other family and friends,

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vation is subject to an important qualification. Despite their predilection for vested interests, courts have not gone so far as to conclude that all substitute gifts over convert what would otherwise be contingent interests into ones that are vested subject to divestment. More specifically, as to conditions intended to operate as a precedent requirement to possession, courts will construe the primary and substitute gifts as alternative contingent remainders if the condition itself precedes the language creating the primary gift or is incorporated into it. For example, assume that the previous gift of principal was expressed differently, even though its operative effect remained largely the same: "[T]hereafter, as to each child who attains age twenty-five, such child will receive an equal share of the principal; if a child fails to attain age twenty-five, then the share of principal such child would have received will pass to such child's living descendants per stirpes." Although the conditions seem unchanged in this example, courts would probably construe them differently. In this instance, the condition imposed upon the children is precedent, both in terms of its operation and its language location; therefore, both the children and their living descendants have contingent remainders. These illustrations demonstrate that a different language format, even one that does not ostensibly alter the operation of the conditional language, can have a drastic effect upon the construction accorded by courts. The results, however, are not always predictable. The foregoing principles are not a litmus test; instead they are rules of construction, and these rules always give way to a context and language that call for other meanings and classifications.

As to illustrations in the text involving age requirements, it has been assumed throughout this Article that such requirements made each class member's interest contingent and, therefore, subject to the common-law rule against perpetuities. Once again, it should be observed that each of these examples involves an age restriction that by its terms makes attainment of a specified age a precedent and absolute requirement to receiving a share of the principal. Nevertheless, application of the foregoing rules of construction governing vested and contingent interests suggests that there are circumstances in which a court might construe a class member's interest as vested subject to divestment in the event such member does not attain a specified age. Each of the illustrations in the text contains an express substitute gift, and almost all of these illustrations direct income to a class member for a period of time before distribution of principal. As noted previously, these factors have affected judicial construction, and the presence of both factors together might cause some courts to construe the class gift as vested subject to divestment. Although such construction is possible, in most instances, it is not likely. The age requirement is always an operational prerequisite to a share of the principal. Additionally, attainment of a specified age is almost always expressed as a precedent requirement. In short, it is a precedent condition both in terms of its operation and its language location. And an interim gift of income may not be sufficient to overcome this express condition and language configuration and avert a construction that finds contingent remainders. This result (contingent remainders) should follow when the gift of income can be sprayed among others or accumulated. See, e.g., HARRIS BANK, *supra* note 32, at VI-7—VI-11, VII-1—VII-4.

When courts find these class gifts contingent, then the common-law rule against perpetuities applies, and if any potential member may qualify beyond the allowed time period, then the entire class gift must fail. When, however, courts find the class gift vested subject to divestment in the event a member fails to attain the specified age, then the rule is averted as to the class members themselves so long as none can be born beyond the period of the rule. Nonetheless, although the primary class gift escapes the rule, the substitute gift does not. It is clearly contingent and subject to the rule. And if, because of a failure to attain a specified age, the divestiture can happen beyond the period of the rule, then the gift over fails and the age requirement is emasculated. To be sure, under either construction a perpetuities violation can occur, one which undercuts the estate owner's dispositive design.

these problems can arise with respect to the children themselves.<sup>107</sup>

Variations and adaptations of other themes involving immediate family can also cause perpetuities problems and violations. For example, if the estate owner elects to give successive income interests for life to his brother and to his brother's surviving spouse, a gift of principal to his brother's living children can violate the rule even if it is not subject to any additional age requirement. Once again, this situation presents the possibility of the "unborn widow." The problem arises here with respect to the brother's surviving spouse instead of the surviving spouse of an estate owner's child.<sup>108</sup> Unless the brother's spouse is named or restricted to someone alive at the estate owner's death, a gift of principal to children or descendants of the brother alive at her death violates the common-law rule. It is possible that the brother can marry someone born after the estate owner's death and that their afterborn children are the only ones to survive her. It is also possible that she can live more than twenty-one years beyond the lives of all who were in being at the estate owner's death. Because all of these events are possible, the gift of

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107. These perpetuities problems can arise even when the estate owner's brother is bypassed in favor of an earlier gift of principal to his children in a manner similar to the previously discussed direct gift to the estate owner's grandchildren. See *supra* § II C 1 b. For example, assume that the estate owner makes a direct gift of principal to such of his brother's children as attain age thirty, with income to be applied by the trustee as is needed to maintain them until time for distribution of principal. If the estate owner is survived by his brother and if none of the beneficiaries alive at the estate owner's death have already attained age thirty, there is a violation of the common-law rule against perpetuities. It is possible that the brother may have additional afterborn children before any of his other children attains age thirty. If so, these afterborn children would be eligible to join the class when they satisfied the age requirement. See L. SIMES & A. SMITH, *supra* note 6, at § 644. It is also possible that all lives in being at the estate owner's death, including the brother and his children, can die thereafter before any of the brother's afterborn children reach age nine. Accordingly, it becomes possible for afterborn children to join the class by attaining age thirty beyond the period of the rule, and to become members along with children alive at the estate owner's death who previously attained age thirty before they died. Consequently, the entire class gift violates the rule, and it must fail. There would be no perpetuities violation, however, if the class gift to the brother's children is confined to children alive at the estate owner's death. This might happen as a result of express language or surrounding circumstances, or it might arise as a result of the rules of construction that govern the determination of class membership. For example, if the brother predeceased the estate owner, the class would necessarily be limited to the brother's children alive at the estate owner's death. Or, if any of the brother's children alive at the estate owner's death had already attained age thirty, distribution of their share of principal would be immediate and the maximum class membership would be fixed at that time. In both instances, the class would include only members alive at the estate owner's death. Regardless of the particular age requirement, the interests of all potential members must vest or fail within the lifetimes of those in being at the estate owner's death. Accordingly, the rule would be satisfied. For a discussion of these same kinds of fact variations as applied to direct gifts to the estate owner's grandchildren, see *supra* note 77.

108. See *supra* text accompanying notes 85-88.

principal to the brother's children once again violates the rule. The gift of principal is to a class that may include lives not in being at the estate owner's death and to a class that may be identified beyond the period of the rule. Accordingly, it must fail in the absence of an effective saving clause.

Previously it was observed that successive income interests through the lives of the estate owner's grandchildren could make the gift of principal to great-grandchildren violate the rule even though the gift was unconditioned.<sup>109</sup> It should be noted, however, that within the context of a gift to other family and friends this same violation occurs with successive income interests for life through the children of a named beneficiary and a gift of principal to his grandchildren. More specifically, if the estate owner creates successive income interests for life in a surviving brother and his children, an unconditional gift of principal thereafter to his grandchildren violates the common-law rule. Once again, this violation derives from the "all or nothing" principle applicable to class gifts.<sup>110</sup> If separate shares among the brother's descendants are not created until the time for ultimate distribution of principal, the entire gift of principal to grandchildren violates the rule and it must fail, absent an effective saving clause. Even though the brother may already have grandchildren alive at the estate owner's death, and even though such lives in being have fully vested interests from inception, the class gift to all grandchildren fails. It is possible for the brother to have an afterborn child; further, it is possible for such afterborn child to live more than twenty-one years beyond all lives in being at the estate owner's death and then to have a child who would thereby join the class of the brother's grandchildren beyond the period of the rule. Because a potential class member may enter the class beyond the allowed period, the entire gift of principal to the class of grandchildren violates the rule. If, however, separate trust shares are created at the brother's death for each of his children, with principal distribution of each share thereafter to a child's children, only the separate shares created for the brother's afterborn children produce a violation as to the ultimate gift of principal. Only those shares of principal—only those sub-classes<sup>111</sup>—must fail, absent application of the principle of

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109. *See supra* text accompanying notes 88-93.

110. *See supra* notes 72 & 73 and accompanying text.

111. For a discussion of the application of the common-law rule against perpetuities to sub-classes, see L. SIMES & A. SMITH, *supra* note 5, at § 1267.

“infectious invalidity.”<sup>112</sup> In either instance, a perpetuities problem exists even without any survival requirement as to age or possession.

Each of these illustrations involving a gift to a brother and his family incorporates a dispositive design developed earlier with respect to immediate family, the estate owner's spouse and descendants.<sup>113</sup> Further, each of these illustrations raises a comparable perpetuities problem. The problems, however, are greater because they are more apt to occur. This is true because in each illustration the problems arise with an earlier generation; in each instance a gift to one generation earlier can involve lives not in being at the estate owner's death. Perpetuities problems arise with respect to age requirements imposed on the brother's children, not simply his grandchildren. The problem of the “unborn widow” can arise with respect to the surviving spouse of the brother, not simply the surviving spouses of his children. And an unconditional gift to the brother's grandchildren can cause perpetuities problems, not simply a gift to his great-grandchildren. Just as important, these problems become more likely because comprehensive standard forms do not readily exist for dispositive designs beyond immediate family. Invariably, these deviant designs require substantial innovation or adaptation. The foregoing examples demonstrate that adaptation by simple substitution of names of beneficiaries may result in unanticipated perpetuities problems. The problems that surround substantial innovation and the creation of entirely new dispositive forms should be even greater. Lawyers who are uncaring or unknowing of the rule are quite unprepared to recognize perpetuities problems endemic to strange designs. Once these lawyers draft beyond the bounds of the carefully conceived guidelines contained within standard forms, there should be no surprise when they cast interests fraught with perpetuities problems.

#### *D. Powers of Appointment*

For good reason, powers of appointment have been an enormously popular estate planning technique. They afford considerable flexibility by giving a survivor an opportunity to evaluate current circumstances and to make dispositive choices on the basis of information unavailable

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112. For a discussion of the principle of “infectious invalidity” and the circumstances in which valid interests must fail along with those that violate the common-law rule, see *supra* note 70.

113. See *supra* § II C 1 a and text accompanying notes 85-93.

to the estate owner.<sup>114</sup> Additionally, when a special testamentary power<sup>115</sup> accompanies an income interest, the estate owner can give the donee of the power many of the attributes of an absolute interest but without the same transfer tax consequences at the donee's death.<sup>116</sup>

The popularity of powers of appointment is confirmed by their fre-

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114. See 3 RESTATEMENT OF PROPERTY ch. 25, Introductory Note (1940); L. SIMES & A. SMITH, *supra* note 6, at § 861.

115. For prevailing definitions of a general power of appointment, see I.R.C. § 204(b)(1) (1954): ("The term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate . . ."); I.R.C. § 2015(c) (1954) ("[T]he term 'general power of appointment' means a power which is exercisable in favor of the individual possessing the power . . ., his estate, his creditors, or the creditors of his estate . . ."). Under the Internal Revenue Code, all other powers are deemed special powers. For another definition, see 3 RESTATEMENT OF PROPERTY § 320 (1940):

(1) A power is general, as the term is used in this Restatement, if (a) being exercisable before the death of the donee, it can be exercised wholly in favor of the donee, or, (b) being testamentary, it can be exercised wholly in favor of the estate of the donee.

(2) A power is special, as the term is used in this Restatement, if (a) it can be exercised only in favor of persons, not including the donee, who constitute a group not unreasonably large, and (b) the donor does not manifest an intent to create or reserve the power primarily for the benefit of the donee.

116. For example, if an estate owner leaves an absolute interest to a legatee or devisee, it will become a part of such person's estate. Thereafter, if this person gives away the interest during his lifetime or at death, it will be subject to the federal unified estate and gift transfer tax. However, the estate owner might be able to avoid this particular taxable event by creating in such person an income interest for life. In theory, the life tenant's interest ends at death and, therefore, does not become a part of his gross estate. Even if the estate owner gives the life tenant a special testamentary power of appointment, one that is limited but gives the donee-life tenant significant control over the subject matter after his death, the estate owner might still manage to avoid a transfer tax at the death of the donee-life tenant. Finally, this tax might be avoided even if the estate owner allows the life tenant limited access to principal, either pursuant to a prescribed legislative standard to satisfy certain needs or pursuant to a noncumulative right to draw a mandated amount or percentage of the principal. In short, the estate owner can confer upon a beneficiary most of the attributes of an absolute interest; namely, a right to income for life and a limited right to principal, along with the power to appoint by will the subject matter among a specified group of takers—often the very same group to whom the beneficiary would leave his estate if his power had been unrestricted. And despite these vestiges of absolute ownership, the exchange of possession-benefit at the life tenant's death, by exercise of the power or by a gift in default, might still escape the unified transfer tax. More specifically, if the donee-life tenant is a child of the estate owner, and if the appointees (or takers in default) are the same or an older generation than the child, the unified transfer tax should be avoided at the child's death. If, however, the appointees (or takers in default) are a younger generation than the child—for example, the child's descendants, then there will be a tax at the child's death much the same as if the child had been given an absolute interest. Nevertheless, this tax might be partly or entirely avoided if the appointment (or gift in default) is to the estate owner's grandchildren and if it qualifies for the grandchild exclusion allowed with respect to the generation-skipping transfer tax. See J. LASSER'S TAX INSTITUTE, ESTATE TAX TECHNIQUES ch. 19 (1955 & Supp. 1984); J. FARR & J. WRIGHT, *supra* note 94, at §§ 40F, 44E. For a discussion of some problems and techniques pertaining to use of special powers of appointment, see Gingiss, *Special Powers of Appointment Offer Planning Flexibility Despite Additional Tax*, 7 EST. PLAN. 338 (1980).

quent use in standard planning forms. Almost every one of the planning designs previously discussed includes, or has a variation that includes, either a general testamentary or a special testamentary power of appointment. For example, an estate owner's surviving spouse, at least as to marital trusts, is usually given some kind of power of appointment exercisable by will.<sup>117</sup> Also many form provisions that impose survival requirements with respect to age also offer an option giving a special testamentary power of appointment to the child or descendant who does not satisfy that age requirement.<sup>118</sup> Invariably, the power created, either general or special, is exercisable only by the will of the donee.

### 1. *Some General Principles*

Potential perpetuities problems involving powers of appointment concern two central questions. Is the power invalid from the time of its creation without regard to when and how it is actually exercised? If the power itself is valid, are the interests actually created by exercise of the power invalid? Before examining these two general questions, one should note that the prevailing body of law treats appointments under a general testamentary power of appointment the same as all special powers of appointment. Unlike a general power presently exercisable by deed or will, appointments under these powers are subject to a perpetuities period measured from the time the powers are created.<sup>119</sup> Because the general and special powers of appointment contained in most forms are

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117. See *infra* note 136.

118. Usually these special testamentary powers of appointment are exercisable in favor of a limited group of people, including, for example, the donee-child's spouse, the donee-child's descendants, and other descendants of the estate owner. For an illustration of a provision that offers a special testamentary power of appointment to a child who does not attain a specified age, and therefore loses the right to distribution of his share of principal, see *THE NORTHERN TRUST COMPANY*, *supra* note 58 (form 201-11 set out therein). See, e.g., *HARRIS BANK*, *supra* note 32, at VII-3; *R. WILKINS*, *supra* note 32, at §§ 11.74, 11.74W.

119. Appointments under a general power presently exercisable by deed or will are subject to a perpetuities period measured from the time the power is exercised. Because the donee has the power at any time to make the subject matter his own, alienability is not impaired after the power is created. For this reason, the perpetuities period is deferred beyond the time the power is created. Quite differently, under general testamentary powers of appointment, the subject matter is tied up until the power can be exercised at the donee's death. Until then, the donee cannot make the subject matter his own, and then it is only for the benefit of his estate. And under special powers of appointment, disposition of the subject matter is tied up throughout; the donee cannot make it his at anytime. Accordingly, special powers and general testamentary powers are subject to a perpetuities period measured from the time the power is created. For a discussion of the rule against perpetuities in relation to powers of appointment, see 6 *AMERICAN LAW OF PROPERTY* §§ 24.30-.36 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 6, at §§ 1271-77.

exercisable under the donee's will only, the perpetuities principles under consideration will be those that focus on special powers and, thus, determine the validity of appointments from the time the power is created.

General testamentary and all special powers of appointment are sometimes invalid from the time of their creation. The common-law rule against perpetuities forbids all appointments by a power exercisable beyond the allowed time period. If there is any possibility for exercise of the power beyond a life in being plus twenty-one years measured from the time the power is created, the power is immediately invalid even though its exercise is actually attempted within the allowed time and even though the interests appointed vest immediately.<sup>120</sup> If, however, this possibility for remote appointment does not exist, the common-law rule allows its application to be deferred until after the power is actually exercised. When exercised, the rule is then applied in the light of the interests created and in the light of possibilities drawn from facts known at that time.<sup>121</sup> In other situations, the common-law rule is applied with

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120. For example, consider this testamentary trust: "Income to B for life, and then income to B's oldest living child for life; thereafter, principal to whomever such oldest child appoints by will and in default of the exercise of such power, the principal shall then pass to C absolutely." Assume that B is childless at the estate owner's death—the time when the trust and power are created. Regardless of what happens thereafter, this general testamentary power of appointment is invalid. B may have an afterborn child, and it is possible that all lives in being at the estate owner's death, including B, may then die. It is also possible that such afterborn child may die more than twenty-one years later. Accordingly, exercise of this general testamentary power of appointment by such afterborn child might occur beyond the period allowed by the rule. Therefore, because of this possibility of remote exercise, the power itself is invalid. See 6 AMERICAN LAW OF PROPERTY §§ 24.31-32 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 6, at §§ 1272-73. If, however, such oldest child had been given a general power of appointment *presently exercisable by deed or will*, it would have been valid. Such general power is valid unless there is a possibility that it cannot become exercisable until after the period of the rule measured from the time such power was created. As to this general power, the rule does not require that it must, if at all, be exercised within such period; the rule only requires that it must, with absolute certainty, be capable of exercise within the time allowed by the rule. Given this variation, B's oldest child will have an exercisable general power of appointment by deed or will no later than the age in which the law allows a person to act in such capacity. Because this cannot occur more than twenty-one years after the death of B, this general power of appointment does not violate the rule, and all interests created by its exercise will be determined under the rule measured from the time such child actually exercises the power. See *supra* note 119.

121. For example, consider this testamentary trust: "Income to B for life; thereafter, principal to such of B's children, and under such conditions, as he may appoint by will, and in default of the exercise of this power of appointment, principal should then pass to B's living children in equal shares." Thereafter, assume that B exercises this special testamentary power of appointment in favor of "such of B's living children as attain age thirty." Assume, further, that B has three children alive at his death; that these are the only children he has ever had; and that these children were also alive at the estate owner's death. If the possibilities required by the rule were determined in the light of

facts known only at the time the perpetuities period begins; namely, the time in which the contingent interest is created.<sup>122</sup> Therefore, possibilities for remote vesting are hypothesized on the basis of facts then established. However, in the instance of the general testamentary and the special power of appointment, application of the rule awaits exercise of the power. Although the perpetuities period still begins with creation of the power, this delay allows consideration of interests created by the power in the light of facts known at the time the donee exercises the power. It does not, however, allow for any further delay to determine whether the interests created actually vest within the allowed time period.<sup>123</sup>

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only facts known as of the estate owner's death, there would be a violation. It is possible that B may have additional afterborn children who would then become potential members of the class to whom principal is given by exercise of the power. It is also possible that all lives in being at the estate owner's death, including B and his original three children, could then die before all of B's afterborn children attained age nine. Finally, it becomes possible for one or more of these afterborn children to attain age thirty and join the class more than twenty-one years later, a point in time beyond the rule. Accordingly, the entire appointment would fail. Nevertheless, the rule allows for consideration of facts known as of the time the power is exercised. And in this example, because B had no afterborn children alive at his death, there would be no violation. The interests of all class members must vest or fail within their respective lifetimes, and each class member is necessarily a life in being when the power was created at the estate owner's death. For a discussion of the principles which allow for this "second look" at facts and possibilities, see 6 AMERICAN LAW OF PROPERTY §§ 24.34-35 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 6, at §§ 1274-75.

122. See 6 AMERICAN LAW OF PROPERTY §§ 24.24, 24.35 (A. Casner ed. 1952). In the example contained at *supra* note 121, there would have been a perpetuities violation if the estate owner had eliminated the power of appointment and had instead given the principal to "such of B's living children as attain age thirty." This gift would have been invalid because, absent an appointment, the rule requires its application in the light of facts known only at the time the remainder to B's children was created, namely, only facts known at the estate owner's death. For an explanation of why this gift then violates the common-law rule against perpetuities, see *supra* note 121.

123. See *supra* note 121. The mere fact that a potential appointment can cause a perpetuities violation does not make all actual appointments invalid. Unlike other instances in which the common-law rule is applied, its application is delayed until the power is actually exercised—assuming the special or general testamentary power cannot be exercised beyond the period of the rule. The exercise of a power is judged by the actual appointment and not by what that appointment might have been at the time the power was created. The explanation for this deviation derives from the utility of powers. These powers do tie up property, at least until they are exercised. This dispositive device is apparently deemed important and useful enough to warrant this delay. If this delay is necessary to the functioning of powers, and if such restrictions on alienability are otherwise tolerated, there is sufficient reason for delaying application of the rule against perpetuities. Indeed, any other approach might severely undercut the flexibility and efficacy of these powers. Further, since the rule allows for delayed application until the actual appointment is made and until the interests created can then be judged, a "second look" at facts and possibilities is also allowed. The explanation for this seems to be one of common sense. Once the rule allows a delay to see what appointment is made, and once a determination (and perhaps litigation) as to validity is necessarily deferred until



Before proceeding to a discussion of specific problems, it should also be observed that the foregoing two questions—is the exercise too remote and are the interests created too remote—can also be viewed and examined in terms of the particular dispositive act or document involved. More specifically, the first question as to the validity of powers in their exercise presents a problem for lawyers who draft instruments that create these powers, while the second question as to the validity of appointed interests is primarily a problem for lawyers who draft instruments that exercise these powers.

## 2. *Perpetuities Problems That Arise in the Creation of Powers*

Perpetuities problems arising in the creation of general testamentary and special powers of appointment can occur whenever these powers might be exercised more than twenty-one years beyond the deaths of all lives in being at the time the power is donated. This situation typically presents itself whenever such power is given to a donee who is not alive when the power is created. Several dispositive designs discussed earlier contain general testamentary or special powers given to a group that might include lives not in being at the time the power is created.<sup>124</sup> Absent an effective saving clause, the powers given to such afterborn donees are invalid at the outset if exercisable beyond the period of the rule. If invalid, then, at best, they alone must fail; at worst, other interests and other powers must also fail on the basis of the principle of “infectious invalidity.”<sup>125</sup>

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then, it would be foolish to disregard facts and possibilities known at the same time. See 6 AMERICAN LAW OF PROPERTY §§ 24.34-.35 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 6, at §§ 1274-75.

124. See *supra* text accompanying notes 74-93, 97-99.

125. Presumably, if the power itself is void under the common-law rule against perpetuities, the alternative remainder cannot literally take effect as a gift in default of appointment. As a result, it may not be entitled to any “second look” at facts in determining whether there is any possibility that conditions imposed upon such remainder can occur beyond the period of the rule. See *supra* note 121; 6 AMERICAN LAW OF PROPERTY §§ 24.32, 24.36 (A. Casner ed. 1952). Therefore, the validity of the substitute interest must be determined on the basis of possibilities and facts known as of the time such interest is originally created along with the invalid power of appointment. If it is valid, a court might still choose to strike it, as well as other portions of the dispositive instrument, on the basis of “infectious invalidity.” See *supra* note 70. Nevertheless, the likelihood of a court striking valid interests would seem to be reduced when the substitute remainder independently satisfies the common-law rule. The estate owner has no assurance that any power will ever be exercised, and so he ordinarily includes a substitute gift which preserves the dispositive design. Accordingly, it becomes more difficult for a court to conclude that the estate owner would have preferred to strike other valid interests if the power itself fails because of a perpetuities violation.

More specifically, three of these dispositive designs involving immediate family risk violation of the common-law rule as to the power itself. In the two instances involving revocable living or testamentary trusts, the estate owner intended grandchildren (or descendants beyond children) to be the primary recipients of principal. One of these illustrations involved prior successive income interests for life to a surviving spouse and children,<sup>126</sup> while the other bypassed children after the surviving spouse's income interest ended at death.<sup>127</sup> The third design involved an irrevocable living trust with principal given ultimately to the settlor-estate owner's children.<sup>128</sup> Each of these examples utilized survival requirements, including ages exceeding twenty-one. Because the class of grandchildren, or more remote descendants, in the first two examples and the class of children in the third example could include afterborn members, a perpetuities problem existed.<sup>129</sup> Absent an effective saving clause, each example presented a violation of the common-law rule because it was possible for an afterborn member to enter the class by satisfying an age requirement beyond the allowed time period. It should also be noted that published forms adopting these kinds of designs frequently give class members who fail to satisfy age requirements a special or general testamentary power of appointment.<sup>130</sup> And in default of the exercise of the power, a substitute gift is usually made to such deceased member's descendants, or to other members or their descendants. Once again, under each of these designs, it is possible for the class of donees of the principal and power of appointment to include members not alive when the trust and power are created or when the period of the rule begins to run. As to these afterborn members, it is possible for them to

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126. See *supra* text accompanying notes 79-84.

127. See *supra* text accompanying notes 74-78.

128. See *supra* text accompanying notes 97-99.

129. See *supra* notes 83-84, 76-78, 97-98.

130. For an example of an irrevocable living trust for the estate owner's children (including afterborn children) that conditions principal distribution upon attainment of specified ages and also gives to those children failing to satisfy these requirements a special testamentary power of appointment, see A. LEHRMAN, *supra* note 32, at 550-51. For an example of an irrevocable living trust in which a life estate is first given to the estate owner's named daughter, with principal given thereafter to the daughter's living children subject to age requirements and a general testamentary power for each daughter's child who fails to satisfy such requirements, see ILLINOIS INSTITUTE FOR CONTINUING EDUCATION, *supra* note 32, at § 10-7. For an example of a living revocable trust that creates separate shares for each living child of the estate owner with income to each child for life and then gives principal from each share to such child's children upon attainment of a specified age, with a general testamentary power of appointment to each child's child who fails to satisfy such age requirement, see THE NORTHERN TRUST COMPANY, *supra* note 32, at § 205-5-6.

survive all lives in being by more than twenty-one years, and, thereafter, it is possible for them to die before satisfying designated age requirements that would have qualified them for distribution of principal. If given a testamentary power of appointment, it then becomes possible for them to exercise this power beyond the period of the rule measured from the power's creation. Accordingly, the power of apportionment itself violates the rule without regard to the time of actual exercise and without regard to interests thereby appointed.

Finally, it should be noted that dispositive designs involving other family and friends also risk violation of the common-law rule as to the power itself. These perpetuities problems exist for essentially the same kinds of reasons discussed as to provisions for immediate family. Previously, a dispositive design was developed for a brother and his children.<sup>131</sup> It was observed that simple adaptation of the *family trust* commonly used for immediate family could easily cause perpetuities problems.<sup>132</sup> Because a gift of principal to a surviving brother's living children could include afterborn members, age requirements exceeding twenty-one made it possible for potential class members to satisfy such requirements and enter the class beyond the allowed time period. Once again, adaptive forms sometimes give these children who fail to survive a designated age a special testamentary power of appointment, with a gift in default to descendants.<sup>133</sup> And, once again it is possible for the brother's afterborn children to survive all lives in being by more than twenty-one years, and, thereafter, it is possible for them to die before satisfying designated age requirements and qualifying for distribution of principal. If given a testamentary power of appointment, it becomes possible for the brother's afterborn children to exercise this power beyond the period of the rule measured from the power's creation. Accordingly, this power is invalid at the outset even though it is given to the brother's children and not grandchildren. It is invalid because it is posited in the children of someone alive at the time of its creation. Unless limited in some other fashion, it must fail because it can be exercised by afterborn class members beyond the period of the rule.

The foregoing examples may not appear to be commonplace; nevertheless, they are drawn from design variations that are reflected in published forms. Indeed, one might properly surmise that if these forms exist, ac-

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131. See *supra* text accompanying notes 102-03.

132. See *supra* text accompanying notes 104-07.

133. See, e.g., R. WILKINS, *supra* note 32, at §§ 11.60A, 11.61A, 11.62A, 11.74A.

tual problems are never far behind. When these perpetuities problems do arise, lawyers may blunt their gravity by utilizing saving clauses and gifts in default. Nevertheless, though the consequences of these problems may not always be dire, one can assume that lawyers intend to create only valid powers and that their clients would be justifiably displeased with powers that are invalid in their creation.

### 3. *Perpetuities Problems That Arise in the Exercise of Powers*

Until now, this Article has focused on perpetuities problems that arise out of dispositive designs and provisions directly created by estate owners. This section, however, focuses on perpetuities problems that a beneficiary generates in redirecting the estate owner's estate. The preceding section on the validity of powers concerned problems generated by the oversights of lawyers who plan the estates of those who donate or create powers of appointment; this section concerns the oversights of lawyers who plan the estates of the donees of these powers. Before describing some of the problems involved in making appointments, one should observe that lawyers who create powers for estate owners can insulate their ultimate exercise from perpetuities violations by carefully circumscribing the scope of these appointments. They can, for example, restrict appointments to unconditioned absolute interests among people in being when the power is created. Nevertheless, most estate owners do not choose to limit powers of appointment in this fashion.<sup>134</sup> Estate owners usually

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134. Indeed, instruments creating testamentary powers of appointment ordinarily give the donee an express privilege to condition the appointment among a group of people, a class that usually includes members born after the date in which the instrument creating the power becomes effective. *See supra* note 118 & *infra* note 136.

Quite apart from the creation of severely circumscribed powers of appointment, ones that forbid conditions and appointments to afterborn beneficiaries, there are other techniques that estate owners adopt in attempting to influence the effective exercise of powers they create. Some instruments contain cautionary reminders for the donee of the power about the rule against perpetuities, especially that the rule is measured from the time the donor creates the power and not from the time the donee exercises it. *See infra* note 250. Nevertheless, such cautionary observations are only instructive; they do not prevent appointments that produce perpetuities violations. Some instruments, however, go further. Although they do not avoid appointments that facially violate the rule against perpetuities, they do utilize saving clauses that redirect the appointed property consistent with the limitations of the rule. For a discussion of saving clauses generally, see *infra* § III B 2 a. More specifically, some saving clauses offer a measure of control to the donor-estate owner by providing for the termination, within the period of the rule against perpetuities, of all trusts that are created by the exercise of powers donated in the dispositive instrument. *See infra* note 248. However, it should be observed that many saving clauses do not comprehend trusts created by exercise of donated powers of appointment; instead they are limited to trusts directly created by the original dispositive instrument itself. *See infra* note 249. Finally, even among those saving clauses that do extend to

create these powers to achieve flexibility based upon knowledge and insights achieved after their death. Severe restrictions upon the objects and conditions of these appointments invariably undercut the very reason for creating the power itself. Therefore, broad appointive choices are commonplace; accordingly, compliance with the common-law rule in making the actual appointment must lie primarily with those responsible for exercising the power and not with those responsible for creating it. Indeed, appropriate flexibility in these powers necessarily carries with it the responsibility for knowing and avoiding the perpetuities problems that underlie their exercise.

Assuming the existence of this flexibility (either through a general testamentary power or through a special power that allows conditions and includes afterborn lives), perpetuities problems are apt to arise because of actual appointments to afterborn lives and because of conditions attached to these appointments. It is difficult to assess the frequency and substance of these kinds of appointments; however, one might reasonably assume that they are a function of familial priorities and proximity between the donee and the objects of the power—the people for whom it may be exercised. For example, a parent might be more apt to appoint to children, rather than grandchildren. Further, a donee might be more apt to appoint to any of his descendants, rather than his siblings or their descendants. These appointive proclivities can increase the likelihood of violations actually materializing; nevertheless, by way of general alarm it should be observed that perpetuities problems can arise in most standard situations in which valid powers are created. Because published forms focus on provisions that create powers and not on provisions that exercise them, lawyers are often left with little guidance and without ample warning as to the common-law rule.<sup>135</sup> Consequently, lawyers are prone to overlooking the rule when making appointments.

As to specific examples of problems involved in making appointments, consider the testamentary powers of appointment that an estate owner

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appointed interests, they pertain only to trusts created by exercise of the donated power. For a discussion of saving clauses and interests that are not placed in trust, see *infra* text accompanying notes 254-56.

135. Some form books contain provisions which simply direct the draftsman to insert a substantive disposition as desired. See, e.g., HARRIS BANK, *supra* note 32, at IV-1. Some form books include sample appointments with various kinds of dispositive provisions. See, e.g., J. MURPHY, *supra* note 32, at 8-28—8-51. Often, these forms contain warnings as to the rule against perpetuities. The draftsman must then understand the rule and apply it in formulating a particular appointment.

frequently gives to his surviving spouse.<sup>136</sup> Whether these testamentary powers are general or special, one might assume that when exercised they are usually on behalf of descendants, especially children. With two exceptions, a perpetuities problem should not arise if an appointment is made to their children. If the spouse's power is created by a testamentary or revocable living trust, there will be no violation so long as conditions imposed by the appointment are referable to the lives of the children themselves. If, however, a condition is imposed that can be fulfilled without regard to children while alive, or to any other lives in being, a problem can exist.<sup>137</sup> Also, if the spouse's power is created by an irrevocable living trust, their children can include afterborn lives, and, accordingly, age requirements exceeding twenty-one can cause perpetuities violations.<sup>138</sup>

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136. For examples of published forms that create conventional-general power of appointment marital deduction trusts (both living and testamentary) and give the surviving spouse a general testamentary power of appointment, see J. RABKIN & M. JOHNSON, *supra* note 32, forms 7.21, 7.22; R. WILKINS, *supra* note 32 at §§ 9.50, 9.50W. For examples of published forms that achieve a marital deduction by the creation of qualified terminable interest property trusts (both living and testamentary) and give the surviving spouse a special testamentary power of appointment, see J. RABKIN & M. JOHNSON, *supra* note 32, forms 7.16, 7.20; R. WILKINS, *supra* note 32, at §§ 19.62, 19.62W.

137. For example, consider an illustration previously used. See *supra* text accompanying note 34. Assume that the surviving spouse exercises a testamentary power with respect to a tract of land, Blackacre, and in doing so its use is restricted as follows: "To my daughter, D, in fee simple; however, if Blackacre is ever used for a nonresidential purpose, then to my son, S, in fee simple absolute." The common-law rule against perpetuities is measured from the time the power is created—the estate owner's death, but it is applied at the time it is exercised—the spouse's death. If both D and S survive the spouse, the executory interest given to S violates the rule, and D's fee simple, therefore, becomes absolute. In this example, S's interest would violate the rule even if the time period was measured from the spouse's death. For an explanation of the reasons for this violation, see *supra* text accompanying notes 34-37.

138. For example, assume that the estate owner creates an irrevocable living trust that leaves income to his wife for life. Thereafter, principal is to be divided per stirpes among their living descendants, subject to a special testamentary power given to his wife to appoint among their descendants in such shares, interests, and upon such conditions as she chooses. Assume, further, that the wife subsequently exercises this power by leaving principal to such of their living children as attain age thirty. When the power is exercised at the wife's death, if none of their surviving children have been born since the creation of the trust, there is no violation. The gift of principal must vest or fail within the lifetimes of beneficiaries in being when the power was created. Further, at the wife's death, if none of their surviving children born after the creation of the trust is under age nine, there is no violation. Herein the class will be fully determined within twenty-one years of the death of a life in being when the power was created, namely the wife. However, at the wife's death, if any of their surviving afterborn children are less than age nine, the entire gift of principal violates the common-law rule, and it must fail. Assuming some child attains age thirty by the wife's death, the minimum and maximum class numbers are established at that time. Nevertheless, the rule requires more; a violation exists if any potential member may qualify beyond the allowed time period. Indeed, this possibility exists. It is possible that all children alive when the trust was created, and all

Appointments to descendants beyond children usually present the most serious kinds of problems. Once again, the most common difficulty involves survival requirements as to ages exceeding twenty-one. For example, if a surviving spouse elects to bypass children (instead of allowing principal to pass to them under a *family trust*) by appointing the corpus directly to such of their living grandchildren as attain age twenty-five, the entire appointment may be invalid. As to these testamentary powers created by will or by a revocable living trust, the common-law rule is measured from the date of the estate owner's death, but it is applied when the power is exercised at the surviving spouse's death. In applying the rule, facts known at this later date can be considered in accounting for possibilities as to vesting. Unless the class of grandchildren has not increased after the estate owner's death and cannot physically increase thereafter (because all children have predeceased the spouse without having had afterborn children),<sup>139</sup> or unless the class membership will be fully identified within the allowed time period (because a living grandchild is already age twenty-five at the spouse's death and all others are at least age four),<sup>140</sup> there is a violation. As long as it is possible for

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other lives in being as well (including the settlor-estate owner), can die thereafter but before all afterborn children have attained age nine. And it is possible that one or more of these afterborn children may subsequently attain age thirty and qualify for admission to the class more than twenty-one years later, more than twenty-one years after the deaths of the estate owner, the wife, children alive when the trust was created, and all other lives in being. Because these possibilities exist when the power is exercised and the appointment is made, there is a violation as to the entire class gift.

139. If all of the estate owner's children predeceased his surviving spouse and if all of the eligible grandchildren alive at the spouse's death were also alive at the estate owner's death, there is no violation of the common-law rule. After accounting for these facts known only at the spouse's death—something which the rule allows—the gift to the grandchildren is valid because each potential class member is a life in being within whose lifetime an interest must vest or fail. Even if the grandchildren alive at the surviving spouse's death include grandchildren born after the estate owner's death, there would be no violation if the youngest grandchild is age four or older. Assuming, once again, that all of the estate owner's children predeceased his surviving spouse after having had one or more afterborn children (the estate owner's afterborn grandchildren), the gift to the grandchildren would still be valid because no potential class member's interest could vest beyond twenty-one years of the death of the surviving spouse. Even though the class could include grandchildren not in being at the estate owner's death, none could be born after the spouse's death and none could join the class by satisfying the age requirement more than twenty-one years later.

140. Assuming, at the spouse's death, that there is a living grandchild who has attained age twenty-five and that the youngest of the then living grandchildren is age four or older, there would be no violation of the common-law rule even if the estate owner had children who survived the spouse and were, therefore, capable of having additional children (the estate owner's grandchildren). Because a class member had qualified for distribution at the spouse's death, the maximum membership would be fixed at that time and all grandchildren born thereafter would be precluded from joining the class. See L. SIMES & A. SMITH, *supra* note 6, at § 645. Potential members would

the class of grandchildren to include someone born after the estate owner's death who can satisfy the age requirement and join the class more than twenty-one years after the deaths of all lives in being at the estate owner's death, there is a violation and the appointment fails. Further, suppose the surviving spouse has a favorite child or grandchild and for that reason elects to exercise the power rather than allow the principal to pass by default to all children under the terms of the *family trust*. If principal is appointed in trust with income to the child for life and then principal to that child's surviving children who attain twenty-five, there is a perpetuities violation if the child survives the spouse. It is possible that such child's survivors may include only grandchildren who were not in being at the estate owner's death. It is also possible that the last grandchild to enter the class by attaining twenty-five may do so more than twenty-one years beyond that child's death and the deaths of all other lives in being at the estate owner's death—the time when the power was created. If the favored child does not survive the estate owner's spouse, there is a violation if any of that child's children alive when the appointment is made at the spouse's death are then under four years of age and were born after the power was created. Absent an effective sav-

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include all grandchildren alive at the spouse's death, including those born after the estate owner's death. Nevertheless, the gift to all grandchildren would be valid because no class member could join the class more than twenty-one years later, more than twenty-one years after the death of a life in being, namely, the spouse. If, however, an afterborn grandchild was, for example, age one, the entire class gift would fail. It would be possible for all lives in being at the estate owner's death, including children and grandchildren, to die after his spouse but before such afterborn grandchild attained age four. Accordingly, it would be possible for such grandchild thereafter to attain age twenty-five and join the class more than twenty-one years beyond the deaths of all lives in being. Because this might occur beyond the period of the rule, the entire class gift must fail. Finally, if any of the estate owner's children survived the spouse, there would be a violation so long as the eldest grandchild living at the spouse's death had not yet reached age twenty-five. Even if all of the grandchildren alive at the spouse's death were also living at the estate owner's death, the entire class gift would still fail. The maximum class membership would not be fixed until the time for first distribution, until some grandchild thereafter attained age twenty-five. *Id.* Therefore, the class could include grandchildren born after the deaths of both the estate owner and his spouse. It is also possible for these afterborn grandchildren to become the only ones to attain age twenty-five and join the class. And it is possible for this to occur beyond the period of the rule. Indeed, it is possible for all lives in being at the estate owner's death to die thereafter (including children and grandchildren) but before any of the afterborn grandchildren attain age four. Accordingly, it becomes possible for these afterborn grandchildren to attain age twenty-five and qualify for class membership more than twenty-one years beyond the deaths of all lives in being. Therefore, even after accounting for all facts known at the surviving spouse's death, there are possibilities that will produce a perpetuities violation.



ing clause in either of the instruments that create or exercise the power, the appointment must fail and pass by default.

Beyond the testamentary powers given to surviving spouses, the *family trusts* delineated in many forms frequently create special testamentary powers of appointment in those children who die before satisfying particular age requirements.<sup>141</sup> These powers are usually exercisable on behalf of the child's surviving spouse, the child's living descendants, and other living descendants of the estate owner. When exercised, perpetuities problems can easily arise. Some will forms include clauses within provisions for disposition of residue that expressly preclude the exercise of powers of appointment given to a donee-testator.<sup>142</sup> If, however, a deceased child elects to exercise the power along with a dispositive design that essentially repeats the same scheme as his parent, such exercise is ripe for a perpetuities violation. Assuming creation of a *new family trust*, with income for life to the deceased donee-child's surviving spouse and, thereafter, principal to that child's living children if they attain age twenty-five, the common-law rule may be violated. It will not be violated if all of the child's surviving children were alive when the power was created at the death of the estate owner (their grandparent), nor will it be violated if the child's surviving spouse was alive when the power was created and none of the child's surviving children born after the estate owner's death is under age four when the child dies and exercises the power.<sup>143</sup> In all other situations, the rule is violated and the appointment

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141. See *supra* note 58.

142. See, e.g., ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, *supra* note 32, at 4-10; A. LEHRMAN, *supra* note 32, at 529, 535, 542, 545. Such preclusionary clauses are sometimes included to avoid the inadvertent exercise of unknown and unwanted powers of appointment.

143. Once again, the common-law rule against perpetuities allows for a "second look." In the light of facts known when the power is exercised, it allows a determination of whether there is any possibility that appointed interests can vest beyond the allowed time period measured from the date the power was created. See *supra* notes 121-23 and accompanying text. In the illustration presented in the text, if all of the donee-child's living children were also alive when the power was created at the estate owner's death, there is no violation of the common-law rule. Regardless of whether they must thereafter survive the child's spouse or any age whatsoever, these are conditions which must be satisfied, if at all, within their respective lifetimes, within the lifetimes of lives in being when the power was created. If, however, one or more of the donee-child's children was born after the power was created, there is a violation if the donee-child's surviving spouse is also afterborn. Even if all of the donee-child's children have satisfied the age requirement by his death, it is possible for that afterborn spouse to live beyond the period of the rule and for the donee-child's afterborn children to be the only ones to survive her and join the class. Further, even if the surviving spouse is not born after the power was created, there is a violation if any of the donee-child's afterborn children is under the age of four when the power is exercised at the donee-child's death. In this event, as of the exercise of the power, it is possible that all lives in being when the power was created (including the

to the child's children must fail. Further, suppose such deceased child elects instead to appoint principal to a trust with income to the child's living children for their lives and, thereafter, principal to the child's grandchildren per capita. This appointment also violates the common-law rule unless all of the child's children alive when the appointment is made at the child's death were also alive at the estate owner's death—the date the power was created.<sup>144</sup> If, however, any of the child's surviving children were born after the estate owner's death, it becomes possible for such person to live more than twenty-one years beyond the deaths of all lives in being when the power was created and then to have a child (a grandchild of the child). Such grandchild would then join the class of grandchildren entitled to principal beyond the period allowed by the rule. Accordingly, the rule is violated and the entire appointment of principal must fail, along with perhaps even those provisions within the appointment that do not violate the rule.<sup>145</sup>

Finally, it should also be noted that appointments under special powers given to other family members or friends can readily violate the common-law rule. More specifically, consider a gift in trust with income for life to a surviving brother, and a testamentary power in the brother to appoint principal to his descendants, with a gift of principal in default to the brother's children. Earlier it was noted that the common-law rule was violated if the adapted trust (in this example, the gift in default) contained survival requirements with respect to these children that exceeded age twenty-one.<sup>146</sup> If the brother exercises his testamentary power with comparable age requirement, the same violation occurs. This

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spouse and all of the donee-child's children alive at the estate owner's death) can die thereafter, but before the afterborn beneficiary attains age four. Further, it is possible, then, for that afterborn child of the donee-child to satisfy the age requirement more than twenty-one years later and, therefore, to join the class beyond the period of the rule. Accordingly, if any of the donee-child's children living at his death was born after the estate owner's death, there will be a violation unless the donee-child's surviving spouse is not afterborn and unless all of the afterborn children of the donee-child have already attained age four.

144. Using the "second look" approach, if all of the donee-child's children alive when the power is exercised were also living when the power was created, then the class of grandchildren of the donee-child, the group to whom principal is given, will be fully determined within the period of the rule. All conditions will be fulfilled by the death of the last to die of the donee-child's children, one who is a life in being. The result is the same even if the donee-child has had afterborn children. So long as these afterborn children fail to survive the donee-child, no grandchild can join the class beyond the death of a life in being at the time the power was created.

145. For a discussion of the principle of "infectious invalidity" and the circumstances in which valid interests must fail along with those that violate the common-law rule, see *supra* note 70.

146. See *supra* text accompanying notes 102-07.

violation, as well as other perpetuities problems involving the brother and his family, are essentially the same as those arising with respect to powers given to the estate owner's children. To illustrate further, suppose the brother elects to appoint principal in trust with income to the brother's living children for their lives and, thereafter, principal to the brother's grandchildren per capita. Once again, this appointment violates the common-law rule unless all of the brother's children alive when the appointment is made at his death were also alive at the estate owner's death—the date the power was created.<sup>147</sup>

In these situations, as before, the consequences of a violation of the rule in the exercise of a general testamentary or a special power of appointment may not be terribly destructive of the donor-estate owner's dispositive design. Gifts in default and well-written saving clauses that appear in some forms can moderate the impact of these violations and preserve the donor-estate owner's overall objectives.<sup>148</sup> The same cannot

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147. If all of the brother's surviving children were also alive when the power was created at the estate owner's death, the gift of principal to the brother's grandchildren would not violate the common-law rule because all of his children would become validating lives in being. Although the gift would be to a group that could consist exclusively of lives not in being when the power was created, this class would be fully determined by the death of a life in being, namely, the last of the brother's children to die. Although the rule is measured from the estate owner's death, it is applied at the donee-brother's death in the light of facts then known—the "second look." Accordingly, one can conclude at the brother's death that no grandchild can be born beyond a point in time that exceeds the allowed period. This would not be true, of course, if the brother was survived by an afterborn child. It would be possible for that afterborn child to survive all lives in being when the power was created and then to have a child more than twenty-one years later. And because that child could then enter the class, at a time beyond the period of the rule, the entire gift of principal would fail.

148. A well-drafted substitute gift can overcome a perpetuities violation caused by the exercise of a power of appointment. As noted previously with respect to the typical *family trust*, children who do not satisfy age requirements that condition distribution of their share of the principal are frequently given special testamentary powers of appointment. For a discussion of the typical *family trust* and its dispositive components, see *supra* § II C 1 a. The objects of these powers of appointment usually include the descendants of both the deceased child and the estate owner (the donor of the power of appointment), and often they also include the spouses of these groups of descendants. Invariably, the *family trust* expressly creates a substitute gift in default of the deceased donee-child's exercise of the power of appointment or in the event an effective appointment is not made. In the main, the substitute takers parallel the group of people on behalf of whom the power could have been exercised; for example—in default, distribution is often made per stirpes to the deceased donee-child's living descendants; if none, then per stirpes to the estate owner's living descendants. See *supra* note 58. There may, however, be circumstances in which an express substitute gift in default is not made, or in which it must also fail along with the interests invalidly created by exercise of the power of appointment. Nevertheless, saving clauses may overcome or override perpetuities violations that arise in either the appointment or the gift in default. Some perpetuities saving clauses within the instrument creating the power of appointment specifically extend to trusts created by exercise of the power, while others do not. See *infra* text accompanying notes 245-50. Obviously, no

be said, however, of the donee's objectives. Saving clauses within instruments creating the power may not carry out a donee's wishes. And saving clauses within instruments that exercise these powers (ordinarily, the donee's will) are inevitably useless because they focus on the preservation of original interests created by such instrument. More specifically, they use a single time period measured by lives in being when the instrument becomes effective and the power is thereby exercised—not created.<sup>149</sup> Further, the donor-estate owner's gift in default does not safeguard the donee's dispositive design because the donee ordinarily exercises the power only when his precise objectives deviate from those of the donor. Therefore, one can only assume that a valid appointment is important to those who exercise these powers and that invalid appointments by lawyers should evoke justifiable displeasure.

To be sure, then, the dispositive consequences of an ineffective exercise can be serious. Additionally, it would be no surprise if invalid appointments constituted the most common kind of perpetuities violation. On the surface, it would seem otherwise because of the opportunity to apply the rule in the light of possibilities derived from facts known when the power is exercised rather than created. Nevertheless, sometimes powers are exercised without full knowledge of their terms. More importantly, powers are exercised without standard forms that include dispositive provisions and saving clauses geared to appointments that are governed by a different and earlier perpetuities period. Without a careful understanding of the rule and without form provisions specially tailored to save these appointed interests, the exercise of powers is a likely perpetuities pitfall.<sup>150</sup>

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effective substitute is afforded by those saving clauses that do not comprehend these trusts. However, as to those saving clauses that do extend to these trusts, the efficacy of the substitute gift created depends upon the method of redirection incorporated into such clause. For a discussion of these various methods of redirection and how they function, see *infra* text accompanying notes 228-37. For a critique of these methods of redirection, see *infra* § III B 2 b (2).

149. For a discussion of the problems which pertain to saving clauses and powers of appointment, see *infra* notes 245-54 and accompanying text.

150. See McGovern, *supra* note 16, at 168-70.

III. REFORMATION OF THE COMMON-LAW RULE AGAINST PERPETUITIES AND SAVING CLAUSES: ARE THEY A PLANNER'S SUBSTITUTE FOR COMPLIANCE WITH THE COMMON-LAW RULE WITHIN EACH DISPOSITIVE PROVISION?

Even if lawyers frequently use provisions that cause problems with the common-law rule against perpetuities, and even if contextual facts might allow these problems to ripen into actual violations, many lawyers would still contend that they can ignore the common-law rule. They might maintain that there is no need to have each dispositive provision, by its own terms, satisfy the requirements of the common-law rule. Many jurisdictions have reformed the rule; as a result, they have abated most of the perpetuities problems hypothesized, or at least the occasion for actual violations. Consequently, these lawyers would argue that in these jurisdictions there is no need for concern and compliance with a rule that is no longer applicable. Indeed, if a particular reformation focuses on actual vesting, there would seem to be no reason for creating provisions that preclude all remote possibilities for vesting. But more importantly, whether or not the common-law rule has been reformed, these lawyers might contend that perpetuities problems never develop into actual violations because they always include a standard saving clause. These saving clauses either avoid violations by fixing, as to all interests, absolute time limits that are within the allowed period of the rule or they rectify violations and save interests with automatic or discretionary remedial action. Accordingly, the existence of problematical provisions is immaterial; because of saving clauses the common-law rule is never violated, or at least it never causes interests to fail. Lawyers might conclude that both rule reform and standard saving clauses afford adequate solutions to these potential perpetuities problems; therefore, they need not be concerned generally with either understanding or satisfying the requirements of the common-law rule. At the very least, standard saving clauses exist and are readily available, and they can be effectively used without mastering the common-law rule against perpetuities. When they are included, saving clauses allow planners to draft each dispositive provision without specifically addressing the rule against perpetuities. The purpose of Part III of this Article is to respond to these arguments and, therefore, to the manner in which many lawyers deal with the rule in planning estate transfers.

A. *Reformation of the Common-Law Rule Against Perpetuities and Its Impact Upon Planning*

1. *Reformation of the Common-Law Rule Against Perpetuities—Summary and Application*

During the last several decades, the common-law rule against perpetuities has been subjected to much criticism.<sup>151</sup> Commentators have attacked the rule because it is too complex; because it is grounded upon possibilities as to vesting that often reflect events beyond human experience; 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.<sup>152</sup> In essence, these critics 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.<sup>153</sup> In response to this mounting attack, many legislative bodies within and without the United States have reformed the common-law rule. Additionally, the American Law Institute, in the Restatement of the Law Second, Property, has also approved substantial reformation. Nevertheless, even though many jurisdictions have altered the common-law rule in recent years, it is still the prevailing perpetuities rule in the United States.<sup>154</sup>

One may categorize changes in the common-law rule in a variety of ways. To begin with, there are statutes that address and provide specific solutions for recurrent and bothersome problems that arise under the

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151. For the article which touched off the wave of criticism and commentary, see Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952). See also Maudsley, *Perpetuities: Reforming the Common Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355 (1975), and articles therein cited *supra* note 1.

152. See also Dukeminier, *supra* note 16, at 53-59.

153. 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. This means that our courts in applying the Rule are not protecting the public welfare against the predatory rich but are imposing forfeitures upon some beneficiaries and awarding windfalls to others because some member of the legal profession has been inept.

Leach, *supra* note 151, at 722-23. For illustrations of the kinds of language adjustments which avoid violations, but preserve the dispositive designs, see RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 13 (1983). See also *infra* § III B 3 b.

154. See *supra* note 1.

common-law rule. These statutory changes have been described as "patch-up" reforms.<sup>155</sup> Sometimes they eliminate consideration of fantastic possibilities that have typically prevented proof of validity under the common-law rule; for example, several statutes abandon presumptions of fertility at any stage of life.<sup>156</sup> Further, these reforms often involve reconstruction of certain dispositive conditions. More specifically, several statutes assume that provisions concerning unnamed "spouses" are restricted to lives in being when the dispositive instrument becomes effective.<sup>157</sup> Additionally, some statutes restrict performance of administrative contingencies to the time period allowed by the rule;<sup>158</sup> some abandon the "all or nothing" principle for class gifts and, thereby, save valid class interests by excluding only members whose interests might vest beyond the period of the rule;<sup>159</sup> and some reduce age requirements

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155. See Maudsley, *supra* note 151, at 358-60. For classification of and references to these "patch-up" reforms, see R. MAUDSLEY, *supra* note 5, at 249-50; RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 65-6, 90 (1983). For a specific example of a "patch-up" reform, see ILL. ANN. STAT. ch. 30, §§ 191-96 (Smith-Hurd Supp. 1983). Section 194(c) of the statute provides:

(c) In determining whether an interest violates the rule against perpetuities:

(1) it shall be presumed (A) that the interest was intended to be valid, (B) in the case of an interest conditioned upon the probate of a will, the appointment of an executor, administrator or trustee, the completion of the administration of an estate, the payment of debts, the sale or distribution of property, the determination of federal or state tax liabilities or the happening of any administrative contingency, that the contingency must occur, if at all, within the period of the rule against perpetuities, and (C) where the instrument creates an interest in the "widow," "widower," or "spouse" of another person, that the maker of the instrument intended to refer to a person who was living at the date that the period of the rule against perpetuities commences to run;

(2) where any interest, but for this subparagraph (c)(2), would be invalid because it is made to depend upon any person attaining or failing to attain an age in excess of 21 years, the age specified shall be reduced to 21 years as to every person to whom the age contingency applies;

(3) if, notwithstanding the provisions of subparagraphs (c)(1) and (2) of this Section, the validity of any interest depends upon the possibility of the birth or adoption of a child, (A) no person shall be deemed capable of having a child until he has attained the age of 13 years, (B) any person who has attained the age of 65 years shall be deemed incapable of having a child, (C) evidence shall be admissible as to the incapacity of having a child by a living person who has not attained the age of 65 years, and (D) the possibility of having a child or more remote descendant by adoption shall be disregarded.

(d) Subparagraphs (a)(2), (3) and (6) and paragraph (b) of this Section shall be deemed to be declaratory of the law prevailing in this State at the effective date of this Act.

156. See, e.g., ILL. ANN. STAT. ch. 30, § 194(c)(3).

157. See, e.g., *id.* § 194(c)(1)(C).

158. See, e.g., *id.* § 194(c)(1)(B).

159. See, e.g., Perpetuities and Accumulations Act of 1964, ch. 55, §§ 4 (3), (4) (England). The statute provides:

(3) Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents the foregoing provisions of this section from operating to save a disposition from being void

to twenty-one when it avoids a violation of the rule.<sup>160</sup> Finally, some "patch-up" reforms attempt to save interests by creating a constructional preference for those dispositive interpretations that do not violate the common-law rule.<sup>161</sup>

Other changes in the common-law rule against perpetuities have been more pervasive. Some jurisdictions attempt to ameliorate its complexity by substituting a gross number of years as the measuring period.<sup>162</sup> A much larger number of jurisdictions attempt to eliminate the common-law rule's unfair result by converting their perpetuities rule from a possibilities test to one that focuses upon actual events. These statutes "wait-and-see" before applying the rule; some delay no later than the deaths of lives in being plus twenty-one years to see whether contingent interests actually vest or fail,<sup>163</sup> while others delay no later than the deaths of certain lives in being to see what possibilities then exist for remote vesting beyond the time period allowed by the common-law

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for remoteness, those persons shall thenceforth be deemed for all the purposes of the disposition to be excluded from the class, and the said provisions shall thereupon have effect accordingly.

(4) Where, in the case of a disposition to which subsection (3) above does not apply, it is apparent at the time the disposition is made or becomes apparent at a subsequent time that, apart from this subsection, the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the disposition to be treated as void for remoteness, those persons shall, unless their exclusion would exhaust the class, thenceforth be deemed for all the purposes of the disposition to be excluded from the class.

160. See, e.g., ILL. ANN. STAT. ch. 30, § 194(c)(2) (set out at *supra* note 155).

161. See, e.g., *id.* § 194(c)(1)(A).

162. See, e.g., CAL. CIV. CODE §§ 715.2, 715.6 (Deering 1971). Section 715.2 provides:

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

Section 715.6 provides:

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

163. For an example of full "wait-and-see" legislation, see WASH. REV. CODE ANN. §§ 11.98.130-50 (1967). The Washington statutes provide:

11.98.130. Violation of rule against perpetuities by instrument—Periods during which trust not invalid

If any provision of an instrument creating a trust, including the provisions of any further trust created, or any other disposition of property made pursuant to exercise of a power of appointment granted in or created through authority under such instrument violates the rule against perpetuities, neither such provision nor any other provisions of the trust, or



rule.<sup>164</sup> After the waiting period has elapsed,<sup>165</sup> these statutes either up-

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such further trust or other disposition, is thereby rendered invalid during any of the following periods:

- (1) The twenty-one years following the effective date of the instrument.
- (2) The period measured by any life or lives in being or conceived at the effective date of the instrument if by the terms of the instrument the trust is to continue for such life or lives.
- (3) The period measured by any portion of any life or lives in being or conceived at the effective date of the instrument if by the terms of the instrument the trust is to continue for such portion of such life or lives; and
- (4) The twenty-one years following the expiration of the periods specified in (2) and (3) above.

#### 11.98.140. Distribution of assets and vesting of interest during period trust not invalid

If, during any period in which an instrument creating a trust, as described in RCW 11.98.130, or any provision thereof, is not to be rendered invalid by the rule against perpetuities, any of the trust assets should by the terms of the instrument or pursuant to any further trust or other disposition resulting from exercise of the power of appointment granted in or created through authority under such instrument, become distributable or any beneficial interest in any of the trust assets should by the terms of the instrument, or such further trust or other disposition become vested, such assets shall be distributed and such beneficial interest shall validly vest in accordance with the instrument, or such further trust or other disposition.

#### 11.98.150. Distribution of assets at expiration of period

If, at the expiration of any period in which an instrument creating a trust, as described in RCW 11.98.009, or any provision thereof, is not to be rendered invalid by the rule against perpetuities, any of the trust assets have not by the terms of the trust instrument become distributable or vested, then the assets shall be distributed as the superior court having jurisdiction directs, giving effect to the general intent of the creator of the trust or person exercising a power of appointment in the case of any further trust or other disposition of property made pursuant to the exercise of a power of appointment.

For classification of and reference to various kinds of "wait-and-see" statutes (both full and limited), see RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 63-64 (1983).

164. For an example of a limited "wait-and-see" statute, see MASS. ANN. LAWS ch. 184A, § 1 (Law. Co-op. 1977):

In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this section an interest which must terminate not later than the death of one or more persons is a "life estate" even though it may terminate at an earlier time.

165. Although these perpetuities statutes allow for a waiting period during which contingent interests must actually vest or else they will fail, a determination of validity or invalidity usually can be made before such period of time has fully elapsed. These statutes ordinarily require contingent interests to vest in actuality within a life in being plus twenty-one years. Nevertheless, one can often determine validity or invalidity at the death of the life in being used to measure the waiting period. For example, suppose an estate owner devises Blackacre to "B in fee simple; however, if Blackacre is ever used for any purpose other than residential, then to C in fee simple absolute." Assuming that both B and C survive the estate owner, C's executory interest immediately violates the common-law rule against perpetuities. See *supra* text accompanying notes 34-37. The "wait-and-see" test, however, would probably allow for a delay in application until twenty-one years after the deaths of both

hold interests that have actually vested or will vest or fail in time, or they invalidate interests that cannot vest in time. Sometimes, instead of complete invalidation, they allow for remedial action by a court.<sup>166</sup> In summary, each of these "wait-and-see" statutes allows application of the rule to be delayed for some period of time and each eliminates, at least to

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B and C. If, at that time, Blackacre had not been used for another purpose, the possessory fee simple originally belonging to B would become absolute. Until that time, however, the condition would be fully enforced. Suppose, however, that the estate owner devises Blackacre in trust to "B for life, remainder in fee simple absolute to the first of B's children to attain age twenty-five." If, at the estate owner's death, B has a living child who has attained age twenty-five, a determination of validity can be made immediately under either rule. Indeed, the interest of such child is vested at the outset and there is no occasion for application of the rule against perpetuities. Further, even if B has children who have not attained age twenty-five at the estate owner's death, there will be no violation under "wait-and-see" or the common law rule if B has predeceased the estate owner. B's children are necessarily lives in being, and the remainder must vest or fail within their lifetimes. If, however, B survives the estate owner, there is an immediate violation of the common-law rule against perpetuities so long as none of B's living children have previously attained age twenty-five. It is possible that existing children can die before attaining age twenty-five and that B can have another child born after the estate owner's death. Moreover, B, his children alive at the estate owner's death, and everyone else alive at the estate owner's death can die before B's afterborn child attains age four. In the light of these eventualities, it is possible for such afterborn child's interest to vest beyond the period allowed by the common-law rule. Accordingly, there is a violation of the common-law rule at the outset. However, the result under a "wait-and-see" statute could be quite different. Once again, assume that B survives the estate owner along with two children, C and D, who are less than age twenty-five. If either C or D, or any afterborn child of B, becomes the first child to attain age twenty-five and does this during B's lifetime, the determination of validity is made immediately when such child's interest vests. If, however, none of B's children attains age twenty-five before his death, a determination of validity or invalidity might be made at B's death, especially if B is the only life in being that the "wait-and-see" statute incorporates into the waiting period. For example, if C or D, or both C and D, are the only children to survive B, there can be no perpetuities violation because the remainder must thereafter vest or fail within the lives of potential remaindermen who were in being at the estate owner's death. If, however, an afterborn child of B survives B, that child will become potentially eligible to take the remainder, and there will be no violation if such child has attained age four by the time of B's death. Such child's interest must vest or fail within twenty-one years of B's death; therefore, it does not present a perpetuities violation. If, however, such afterborn child is less than age four, there is a violation at least as to that child's interest, because it cannot actually vest within twenty-one years of B's death. In either case, the perpetuities determination can be made by the time of B's death. Nevertheless, even though a perpetuities determination of validity can be made when B dies, actual vesting or failure might not be established until a later time just the same as with any valid interest under the common-law rule. For further discussion of the time for determination of validity and invalidity under a "wait-and-see" test, see R. LYNN, *supra* note 7, at 37-39, 47-50, 113-15. See also *infra* text accompanying notes 198-201.

166. For examples of full and limited "wait-and-see" statutes that do not give courts discretionary power to reform invalid interests, see FLA. STAT. ANN. § 689.22 (West Cum. Supp. 1983); Perpetuities and Accumulations Act of 1964, ch. 55 (set out in part at *supra* note 159). For examples of "wait-and-see" statutes that do offer remedial action through *cy-pres* principles, see RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 88-89 (1983).

some degree, the initial certainty required at common law that vesting would not be remote.

The jurisdictions that adopt pervasive reforms that allow for remedial action attempt to eliminate the common-law rule's unfair results by giving courts a *cy-pres* power to make revisions of the dispositive design that will approximate the estate owner's intent whenever an interest would otherwise violate the rule against perpetuities.<sup>167</sup> *Cy-pres* involves judicial redesign. But a court will not effect a redesign unless some party applies to a court for *cy-pres*, unless a court finds a perpetuities violation, and unless a court must make a determination that redesign would better approximate the estate owner's objectives than total invalidity. Jurisdictions have adopted one of two forms of *cy-pres*. Some *cy-pres* jurisdictions retain the common-law rule but authorize a court to reform an interest when it is challenged and a violation is found.<sup>168</sup> The violation is determined in the light of possibilities hypothesized at the estate owner's death, while the redesign is presumably made upon the basis of facts known when the interest is challenged and application is made to the court. Other jurisdictions adopt *cy-pres* along with a "wait-and-see" test.<sup>169</sup> Judicial reformation focuses on existing contingent interests that do not or will not actually vest within the measuring period and only

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167. For classification of and reference to the various kinds of perpetuities statutes that adopt *cy-pres* principles, see RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 88-89 (1983).

168. See, e.g., MO. ANN. STAT. § 442.555 (Vernon Supp. 1983). The Missouri statute provides:

1. When any limitation or provision violates the rule against perpetuities or a rule or policy corollary thereto and the instrument containing the limitation or provision also contains other limitations or provisions which do not in themselves violate the rule against perpetuities or any such rule or policy, the other limitations or provisions shall be valid and effective in accordance with their terms unless the limitation or provision which violates the rule against perpetuities or such rule or policy is manifestly so essential to the dispositive scheme of the grantor, settlor or testator that it is inferable that he would not wish the limitations or provisions which do not in themselves violate the rule against perpetuities to stand alone. Doubts as to the probable wishes of the grantor, settlor or testator shall be resolved in favor of the validity of limitations and provisions.

2. When any limitation or provision violates the rule against perpetuities or a rule or policy corollary thereto and reformation would more closely approximate the primary purpose or scheme of the grantor, settlor or testator than total invalidity of the limitation or provision, upon the timely filing of a petition in a court of competent jurisdiction, by any party in interest, all parties in interest having been served by process, the limitation or provision shall be reformed, if possible, to the extent necessary to avoid violation of the rule or policy and, as so reformed, shall be valid and effective.

3. This section shall not apply to any limitation or provision as to which the period of the rule against perpetuities has begun to run prior to the first day of November in the year in which this section becomes effective.

169. For an example of a statute that adopts both a "wait-and-see" test and principles of *cy-pres*, see WASH. REV. CODE ANN. § 11.98.130-50 (1967) (set out at *supra* note 163). See also VT. STAT. ANN. tit. 27, § 501 (1975). Section 501 provides:

after that can be determined by waiting. If invalidity of these remote interests does not satisfactorily carry out the wishes of the estate owner, a court will then exercise its *cy-pres* power and revise the dispositive provisions in a manner that best approximates the estate owner's objectives. Unlike the application of *cy-pres* alone, with "wait-and-see" the court's power to redesign is exercised after some delay, after it is known that the contingent interest cannot vest within the allowed period. Consequently, the court can then make its revisions in the light of facts existing at this later time. Without "wait-and-see," courts must speculate as to which *cy-pres* revision maximizes the inclusion of everyone intended to take. However, with the delay of "wait-and-see," a court may already know who has been excluded by certain conditions. In this instance, they may know which revision is necessary and viable; accordingly, they might redesign by revising these conditions, or instead they might dispense with them altogether.<sup>170</sup>

It should be apparent that these changes in the common-law rule would abate, if not eliminate, most of the perpetuities problems previously hypothesized. For example, if an unnamed or "spouse" is deemed by statute to be a life in being, violations that depend upon the assumption of an "unborn widow" are eliminated.<sup>171</sup> Moreover, survival requirements of ages exceeding twenty-one may no longer present a serious problem, if any problem at all. More specifically, consider again the revocable or testamentary trust that left principal to the estate owner's grandchildren, or to the estate owner's brother's children, subject to such age requirements. Earlier it was observed that these age requirements caused the gift of principal to violate the common-law rule.<sup>172</sup> Nevertheless, under a "patch-up" reform that modifies the common-law presump-

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

170. See, e.g., *Estate of Foster*, 190 Kan. 498, 376 P.2d 784 (1962); *Rekdahl v. Long*, 417 S.W.2d 387 (Tex. 1967). Both of these decisions involved the common-law rule against perpetuities; furthermore, neither of these courts formally applied principles of *cy-pres*. Nevertheless, both courts made liberal use of related rules of construction that enabled them to uphold interests challenged under the rule against perpetuities. And in each instance, they saved a gift of principal by eliminating an apparent condition as to age instead of paring it down to a time within the period of the rule.

171. For a discussion and illustrations of perpetuities violations arising from the case of the "unborn widow," see *supra* notes 85-88, 108 and accompanying text.

172. For a discussion and illustrations of perpetuities violations arising from age requirements attached to these class gifts, see *supra* notes 63-73, 76-78, 83-84, 105-07 and accompanying text.

tion of fertility, this gift of principal may be valid at the outset if the estate owner's surviving children or brother are beyond the age at which they are presumed capable of having children. Accordingly, elimination of the assumption of procreative capacity at any age can sometimes validate these gifts by effectively restricting the class of ultimate takers to lives in being at the estate owner's death.<sup>173</sup> Further, even if the surviving children or brother are presumptively capable of having children, a pervasive reformation such as "wait-and-see" allows a delay in application of the rule to determine whether they actually have additional children or whether satisfaction of these age requirements can actually occur beyond the allowed time period.<sup>174</sup> Because most children attain the required ages (typically twenty-five, thirty and thirty-five) within twenty-one years of their parents' deaths, this delay and emphasis on actual vesting should be enough to save the entire gift whenever the class members' parents are lives in being. In addition, even when vesting as to some potential member can occur beyond a life in being plus twenty-one years, the common-law rule's "all or nothing" principle may not always operate to emasculate the entire class gift. One reform statute includes those members who do or will qualify in time, while it excludes those who can not satisfy all conditions within the period of the rule.<sup>175</sup> Without a "wait-and-see" test, the gift of principal instead might be saved by reduc-

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173. For example, Illinois' perpetuities statute deems anyone who has attained age sixty-five incapable of having a child. See ILL. ANN. STAT. ch. 30, § 194 (c)(3) (Smith-Hurd Supp. 1983) (set out *supra* note 155). In the previous illustration involving gifts of principal to the brother's children if they survived ages exceeding twenty-one (see *supra* text accompanying notes 105-07), a perpetuities violation arose because of the presumption that the class could include afterborn children who might satisfy the age requirements and qualify as members beyond the period of the rule. So long as the brother survived the estate owner, he was presumed capable of conceiving afterborn children. Under the Illinois statute, however, if the surviving brother is age sixty-five or older at the estate owner's death, he would be deemed incapable of having children. Accordingly, the gift to the brother's children could not include afterborn members, and all age requirements would be satisfied during the lives of class members in being at the estate owner's death.

174. See, e.g., WASH. REV. CODE ANN. § 11.98.130-40 (1967) (set out at *supra* note 163). As to the previous illustration involving gifts of principal to the brother's children when they survived ages exceeding twenty-one (see *supra* text accompanying notes 105-07), the Washington statute would seem to require waiting until twenty-one years after the deaths of the brother and his children alive at the estate owner's death to see whether distribution of trust assets has been made to class members or whether their interests have vested. During this specified waiting period, no interest is invalid because of the rule against perpetuities. Accordingly, after waiting until the brother's death, if he has not had any afterborn children, there will be no violation and the dispositive provision will be administered exactly as written.

175. See Perpetuities and Accumulations Act of 1964, ch. 55, §§ 4(3), (4) (England) (set out *supra* note 159).

ing the age requirements to twenty-one as a result of either a separate statutory provision<sup>176</sup> or a general *cy-pres* power given to courts.<sup>177</sup> Further, under a *cy-pres* power a court can immediately, or at some point within the perpetuities period if "wait-and-see" is also adopted, redesign the dispositive provision differently; that is, it may do so in any manner that produces a valid gift and implements the estate owner's ultimate objectives. For example, a court might limit the gift of principal to the estate owner's grandchildren as follows: "to those grandchildren who satisfy the age requirements within twenty-one years of the death of the last to die among the estate owner, his children and his grandchildren alive at his death, and to those grandchildren then living who have not satisfied the age requirements when this same time period expires."<sup>178</sup> Because it is highly unlikely that an afterborn grandchild might attain

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176. See, e.g., ILL. ANN. STAT. ch. 30, § 194 (c)(2) (Smith-Hurd Supp. 1983) (set out *supra* note 155). Under this provision, the excessive age requirement must be reduced to twenty-one whenever it causes a violation of the rule against perpetuities. This would apply to invalid class gifts made to the children of a life in being; for example, a gift in trust of income to a brother, with principal to such of his children who attain age twenty-five. See text accompanying *supra* notes 105-07.

177. See R. LYNN, *supra* note 7, at 119-22. This discretionary power enables courts to make changes which are consistent with an estate owner's dispositive intent and comply with the rule against perpetuities. See, e.g., MO. REV. STAT. § 442.555 (Vernon Supp. 1983) (set out *supra* note 168). If violations arise because of age requirements, a minor reduction of the mandated age usually satisfies both statutory requirements. When the procreators of a class cannot be afterborn, the least complicated change involves a flat reduction to age twenty-one. Therefore, this would seem to be the most appealing revision even though it may eventually cause principal to pass to successors of class members who neither attain the ages actually designated in the instrument nor survive the time for final distribution of principal.

178. This revision may be best suited to *cy-pres* statutes that do not include "wait-and-see," those situations in which courts are not given an opportunity to examine whether the class actually includes afterborn members and, if it does, to examine the ages of these afterborn members when all lives in being die. This revision is not the only method of reformation. Nevertheless, the essence of *cy-pres* is individualized reformation, changes that reflect the specific intent of an estate owner. See R. LYNN, *supra* note 7, at 121. In addition to reducing all age requirements to age twenty-one, under "wait-and-see" coupled with *cy-pres* a court can take account of the actual ages of afterborn class members when the lives in being who measure the waiting period die. And in the light of that information, the court can then reduce invalid age requirements so that they must be satisfied, if at all, for all class members within the allowed waiting period—within twenty-one years of the deaths of the lives in being who measure the period. For example, using the illustration of the invalid gift to the estate owner's brother's children at age twenty-five (see *supra* text accompanying notes 105-07), at the brother's death, if his youngest afterborn child is age three, a court can save the entire class gift by merely reducing the age requirement of twenty-five to twenty-four. Despite its complexity, this method of reformation might be preferred when it best approximates the apparent intention of the estate owner. Further, it might also be required. See Perpetuities and Accumulations Act of 1964, ch. 55, §§ 4 (1), (2) (England). For illustrations of the kinds of dispositive reforms courts might make pursuant to a *cy-pres* power, see R. LYNN, *supra* note 7, at 34-36, 113-15, 119-22; Browder, *supra* note 27, at 6, 24-30.

any of the required ages more than twenty-one years after this group of people had died, this revision should comprehend all of the estate owner's grandchildren while, at the same time, preserving the survival requirements and the validity of all interests created. Or quite differently, a court might use its *cy-pres* power to suspend the conditions of survival and instead convert the age requirements to only a postponement of possession.<sup>179</sup>

## 2. *Reformation Is Not a Substitute for Compliance with the Common-Law Rule—A Matter of Certainty*

What seems clear is that under comprehensive “patch-up,” “wait-and-see,” *cy-pres*, or a combination thereof, reasonable dispositions are not apt to be frustrated; instead they will be implemented exactly as intended or with only slight modification of the estate owner's objectives.<sup>180</sup> Once again, if perpetuities reform works—if it avoids devastating violations and saves interests, why should a lawyer master the task of complying with the common-law rule, a rule that may not even be applicable in the jurisdiction in which he practices? Why satisfy this rule when compliance creates unnecessary complications and can skew a dispositive scheme? To begin with, a lawyer cannot always guarantee that the

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179. See McGovern, *supra* note 16, at 177. This kind of reformation should present no surprise in view of the long-standing preference for vested interests and the exceedingly fine (and sometimes irrational) distinctions developed to distinguish contingent interests, vested interests subject to divestment, and vested interests with enjoyment postponed. For an extended discussion of this preference and these distinctions, see L. SIMES & A. SMITH, *supra* note 6, at §§ 571-94, 652-59. Conversion of age requirements to a direction for time of possession only avoids a perpetuities violation when the procreators of the class consist exclusively of lives in being. By eliminating these qualifying conditions, this kind of reformation also tends to enlarge the potential membership of the class. Some courts, however, have done just the opposite; they have preserved the qualifying condition while confining the class to those members in being when the dispositive instrument becomes effective. See, e.g., Estate of Grove, 70 Cal. App. 3d 355, 138 Cal. Rptr. 684 (1977).

180. All of the foregoing illustrations drawn from published forms (*supra* §§ II C, II D) use dispositive designs that estate owners would normally expect to be fulfilled within the period of the rule against perpetuities. When this actually happens, a “wait-and-see” test allows implementation of the full design, while other reforms achieve a comparable result with slight modifications. And if the design reaches beyond the period of the rule, most reforms enable estate owners to achieve basic objectives with the same kinds of adjustments. In the main, estate owners probably do not intend to include the “unborn widow,” nor would they be frustrated by age reductions from thirty to whatever age is necessary, even to twenty-one. Indeed, reasonable designs, if they do reach beyond the rule, are apt to produce slight excesses and, therefore, they are apt to require only minimal modifications. It should be noted, however, that dispositive designs that flout the rule can never be saved without substantial sacrifice of the design itself. Dispositive designs that are intended to reach out indefinitely cannot be upheld under these reforms without undercutting a basic planning objective—to control devolution beyond the time period allowed by the rule.

"wait-and-see" test or other reforms adopted by his jurisdiction will govern the interests created by the dispositive instruments he drafts. Although a lawyer can make some effort to select applicable law by establishing ties between the estate owner and that particular jurisdiction,<sup>181</sup> a lawyer cannot control either his client's place of residence or the situs of real property that comprises the client's estate.<sup>182</sup> In short, the law of the lawyer's jurisdiction in which the instrument is drawn may not be the law that governs the validity of interests created.

Yet, even if a lawyer could guarantee the applicable jurisdiction and its law, there are other, and more important, reasons why perpetuities reform is not a substitute for compliance with the common-law rule within each separate dispositive provision. An explanation of these reasons must begin with the criticisms that have been directed against the more pervasive reforms of "wait-and-see" and *cy-pres*. Although these reforms have gained acceptance by the American Law Institute and a minority of jurisdictions,<sup>183</sup> it has not been without a storm of controversy. Central to this controversy is a concern for certainty in the disposition of estates. Critics believe that these reforms often present uncertainty as to whether a violation will arise, uncertainty as to when that determination can be made, or uncertainty as to what consequences follow in the event a violation is found.<sup>184</sup>

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181. Although lawyers can attempt to control the law applicable to dispositive instruments and, therefore, to perpetuities questions, this is not a practice upon which they should rely exclusively. See CALIFORNIA WILL DRAFTING § 15.50 (M. Foster ed. 1965).

182. For a discussion of what perpetuities law governs, see 6 AMERICAN LAW OF PROPERTY § 24.5 A (A. Casner ed. 1952).

183. See RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 1.1-.6 (1983). See also *supra* notes 163-69.

184. For general discussions that criticize and oppose the "wait-and-see" test, see, e.g., Fetters, *Perpetuities: The Wait-and-See Disaster—A Brief Reply to Professor Maudsley, With a Few Asides to Professors Leach, Simes, Wade, Dr. Morris, et al.*, 60 CORNELL L. REV. 380 (1975); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179 (1953). Quite differently, for a discussion that defends the "wait-and-see" test, see, e.g., R. MAUDSLEY, *supra* note 5, at 79-109. For a discussion that summarizes criticisms of the American Law Institute's adoption of the "wait-and-see" test along with a postponed application of principles of *cy-pres*, see 5 R. POWELL, THE LAW OF REAL PROPERTY § 827 F(3) (P. Rohan rev. ed. 1983). Also, for Richard R. Powell's criticisms of the tentative draft presented to the American Law Institute, see RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 127-54 (Tent. Draft No. 1 1978). Although much of the criticism mounted against these pervasive reforms focuses on matters of uncertainty, it concerns other things as well. For example, the American Law Institute's formulation has been attacked because it does not reflect prevailing law in the United States. Commentators making this attack emphasize that many states that have considered revision of the common-law rule have rejected the kind of pervasive reform embraced by the ALI's position. Additionally, commentators



The common-law rule against perpetuities and the foregoing reforms have the following questions in common and, therefore, these uncertainties. Will the subject matter in actuality pass to those whose interest has been expressly conditioned and precisely who will they be? Although a maximum time limit may have been established, exactly when will this determination as to the primary takers be made? Conversely, will the subject matter in actuality pass to the substitute takers because the condition has not been satisfied? If so, when will this be known, and, specifically, who will then be entitled to take? Or, does the subject matter pass differently because of a perpetuities violation and (sometimes) when will this be known? Finally, if a violation exists, specifically to whom will the subject matter belong?<sup>185</sup> In the light of these questions, one must emphasize that the common-law rule does not obviate uncertainty. To be sure, the common-law rule is measured from the time the instrument that creates contingent interests takes effect<sup>186</sup> and, with the exception of powers of appointment, it is applied in the light of facts and possibilities existing at that same time.<sup>187</sup> The common-law rule stresses certainty;

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criticize the ALI formulation because it extends the perpetuities period and thereby allows property to be tied up for an even greater time than that allowed by the common-law rule. More specifically, by automatically allowing the use of extraneous lives to measure the permitted waiting period, the ALI sanctions a time for tying up property beyond that allowed by the common-law rule, and it encourages estates owners to make full use of it. From the standpoint of the policy that justifies a rule against perpetuities, this is regarded as highly undesirable.

185. *Cy-pres* raises considerable uncertainty as to whom the subject matter will belong in the event of a perpetuities violation. More specifically, *cy-pres* involves uncertainty as to whether a court will reform an invalid provision; it also involves uncertainty as to the substance of any reformation a court elects to make. See *infra* text accompanying notes 190-93. For a discussion of *cy-pres* and the different choices a court might have in reforming a gift that causes a perpetuities violation, see *supra* notes 167-70, 176-79 and accompanying text. Under the common-law rule and under the "wait-and-see" rule alone, there can still be a question as to the consequences of a perpetuities violation. Indeed, there is often uncertainty as to who will take the subject matter. In the event of a perpetuities violation, these rules ordinarily require that the invalid provision must be struck while the valid provisions are enforced. Nevertheless, there are circumstances in which a court might also strike valid provisions under a principle of "infectious invalidity." See *supra* note 70. The application of "infectious invalidity" does not involve a clear-cut litmus test; indeed, it reflects a court's judgment as to the estate owner's preferred intent in the light of a violation and its impact upon the dispositive design. Inevitably, there is uncertainty as to whether a court will strike valid provisions along with invalid ones. And if it will do so, there is also uncertainty as to which valid provisions it will find unenforceable.

186. For a discussion of the point in time from which the period of the common-law rule is measured, see R. LYNN, *supra* note 7, at 42; L. SIMES & A. SMITH, *supra* note 6, at § 1226.

187. Regardless of when a perpetuities question actually arises, courts apply the common-law rule in light of facts and possibilities existing at the same point in time from which the rule is measured—when the dispositive instrument that creates these interests takes effect. There is, however, an exception with respect to most powers of appointment. A "second look" is allowed, and the

for a contingent interest to be valid, it must be certain at the outset that such interest cannot vest beyond the allowed time period. Accordingly, the matter of validity can and must be determined from the time the creative instrument speaks. Although validity may be actually determined at the time an interest is challenged, the rule is measured and applied as if it were when the instrument speaks, and it is in the light of possibilities derived from facts then known. Nevertheless, at the outset there is always a question of validity, and if an interest is invalid, there is a question of to whom the subject matter should then pass. Even if such interest is valid, there is a wait, and with it uncertainty, to see whether the contingent interest actually vests or fails and, therefore, who will actually take. And this delay may last for the full period of the common-law rule.<sup>188</sup>

Although the common-law rule against perpetuities and the foregoing reforms share these questions and uncertainties, there are important dif-

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rule is applied in the light of facts and possibilities existing at the time the power is actually exercised. For a discussion of facts and possibilities that can be accounted for in applying the common-law rule, see R. LYNN, *supra* note 7, at 33-34, 125-27; L. SIMES & A. SMITH, *supra* note 6, at §§ 1228, 1274.

188. For example, consider this specific bequest in trust from A: "Income to B for life, and then, five years after the death of B, the principal should be divided equally among such of B's children who are then living." The gift of principal to B's children does not violate the common-law rule against perpetuities. Although the class may consist exclusively of lives born after A's death, all shares must be fully determined five years after the death of B—a life in being at A's death. The validity of this class gift can be established immediately; nevertheless, there must be a wait, and with it uncertainty, to determine whether any of B's children survive the time of distribution. More specifically, there is a wait to see whether the gift will pass to B's children or to the residue. And if any of B's children should survive this time period, there is always the same wait to see which of B's children are entitled to share the gift of principal. To be sure, there is a delay in this example, but it is only until five years after the death of B and not for the full period of the rule—lives in being at A's death plus twenty-one years. Suppose, however, that the remainder of the trust is left instead: "(T)o B's descendants, per capita, alive twenty-one years after the death of the survivor of A, B and X, Y, and Z (infants born at the time A executes his will)." Once again, this gift of principal does not violate the common-law rule against perpetuities. The identity of the class members will be fully determined within the period of the rule. Even though the class might consist exclusively of lives born after A's death, their remainder cannot vest beyond twenty-one years of the deaths of lives born before A's death. And once again, there is a wait to determine whether the remainder will pass to B's descendants or to the residue; further, if descendants do survive the appointed time, there is the same wait to determine which descendants will share the principal. In the preceding example, the delay was only for five years following the death of B. However, in this variation, the delay will last for the full period of the rule: until twenty-one years have elapsed after the deaths of an ascertainable and reasonable number of specially selected lives in being. Indeed, the gift is valid, but it does produce a considerable delay, and with that delay there is also uncertainty as to the ultimate ownership of the principal. For a discussion of uncertainty and the need to wait under both the common-law rule and the "wait-and-see" test, see R. MAUDSLEY, *supra* note 5, at 82-84.

ferences. Presumably, the common-law rule calls for an immediate resolution of the last two sets of questions. It can and must be determined, without delay (or at least without knowledge derived from delayed application), whether a perpetuities violation exists and, if so, who is entitled to take the subject matter. "Wait-and-see" rules, however, allow these determinations to be delayed no later than the end of the perpetuities period, and the duration of this time period may not always be clear because of uncertainty as to the lives by which the period is to be measured.<sup>189</sup> Only after this delayed determination is made will it be known whether the subject matter belongs to those who take in the event of a violation, namely, those who take if a contingent interest actually neither vests nor fails within the perpetuities period. Therefore, by this delay, "wait-and-see" rules exacerbate initial uncertainty; more importantly, they invite significant problems. They invite disputes, possibly litigation, as to the actual duration of the waiting period or the permitted perpetuities period and as to what action can and should be taken if a violation occurs. Under "wait-and-see" alone, presumably an interest violates the rule if it does not or cannot actually vest or fail within the permitted waiting or perpetuities period. In this situation, there should be at least the same potential for disputes and litigation, concerning the conse-

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189. There has been much debate as to how the perpetuities period under a "wait-and-see" rule is, or should be, measured. Most of the debate concerns the uncertainty involved in determining when the time for waiting has elapsed. More specifically, the debate concerns the identity of the lives in being by which the waiting period can be measured. Some "wait-and-see" statutes specify these lives, while others do not. Some of the statutes that specify these lives do so with precise lists of acceptable lives, while others do so with "causal lives" formulae. See *infra* note 201. Many commentators maintain that, except for statutes that include a list of measuring or waiting lives, the actual duration of the waiting period is not always self-evident. Undoubtedly, most would agree that the waiting period is unclear if the statute is completely silent as to the selection of measuring lives. For example, if the statute is silent as to the measuring lives, are the measuring lives confined to those that validate an interest under the common-law rule? If so, then the "wait-and-see" rule does not reform the common-law rule; it merely reenacts it. If there are lives in being that validate, then there is no need whatsoever to wait for a determination of validity. By definition, these measuring lives are only those about whom one can say that the interest must vest, if at all, within twenty-one years of their deaths. Quite differently, does a "wait-and-see" statute, silent as to measuring lives, permit consideration of all lives in being when the dispositive instrument takes effect? Does it permit a delay until the contingency is fulfilled or violated to see whether any person can be found who was in being when the interest was created and is still living or has died within twenty-one years? Neither of these choices should be acceptable to courts in applying these statutes. If the sensible choice of measuring lives lies somewhere in between these extremes, surely one cannot expect courts to make these intermediate choices with consistency. For a discussion of problems in selecting measuring lives under a "wait-and-see" rule, see R. MAUDSLEY, *supra* note 5, at 100-09; Note, *Measuring Lives Under Wait-And-See Versions of the Rule Against Perpetuities*, 60 WASH. U.L.Q. 577 (1982).

quences of a violation, as under the common-law rule itself. The major difference is, of course, that such litigation must be delayed for a time no later than the end of the perpetuities period; only then can it be known whether the contingent interest actually violates the rule. This delay can cause serious problems. It could easily increase the number of parties involved in the dispute and, therefore, the costs incurred by litigation; it could cause estates which have been closed for many years to be re-opened with costs and taxes thereby increased; and it could, with adverse tax consequences, ultimately cause the subject matter to pass to remote relatives instead of immediate family.<sup>190</sup>

A *cy-pres* rule addresses the question of what is to be done if an interest as written presents a perpetuities violation. Because this rule allows for judicial redirection of unlawful interests, there is always the occasion for disputes and uncertainty as to the substance of the court's reformation. More specifically, there are apt to be disputes as to which revised plan of valid disposition best approximates the estate owner's wishes. As long as a court has discretion, uncertainty and disputes would seem to be inevitable. *Cy-pres* alone requires this determination to be made at the outset or whenever an interest is challenged under the rule. Although it exacerbates the common-law rule's uncertainty attending the matter of what happens when a violation occurs, it does afford a solution without significant delay. However, this does not follow when *cy-pres* is combined with "wait-and-see." In that instance, judicial reformation cannot occur without the delay needed to determine the time for actual vesting. Because redirection is delayed, the uncertainty is prolonged. Furthermore, the particular disputes concerning the substance of judicial redesign are multiplied and complicated. This delayed resolution presents its own set of substantive problems beyond those of *cy-pres* alone. Some critics maintain that delayed *cy-pres* involves more difficult problems of judicial approximation of the estate owner's intent than immediate application of the principle.<sup>191</sup> Once variables are introduced by the passage of time, the subjective element becomes more significant; consequently, courts may be inclined to completely reconstruct estate plans instead of approx-

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190. See 5 R. POWELL, THE LAW OF REAL PROPERTY § 827 F(3)(f), n.3 (P. Rohan rev. ed. 1983). For a general discussion of the case against the "wait-and-see" and postponed *cy-pres* rules adopted in the Restatement §§ 1.4-.5, see 5 R. POWELL, THE LAW OF REAL PROPERTY § 827 F(3) (P. Rohan rev. ed. 1983).

191. See, e.g., 5 R. POWELL, THE LAW OF REAL PROPERTY § 827 F(3)(h) (P. Rohan rev. ed. 1983).

inating them. Additionally, because delayed *cy-pres* defers final determination of interests for a time, one no later than the expiration of the perpetuities period, and because these deferred determinations could conceivably extinguish interests, postponed use of *cy-pres* necessarily exacerbates important problems of valuation.<sup>192</sup> At the very least, this makes it more difficult to administer estates and trusts after the death of an estate owner.<sup>193</sup> Regardless of the merits of *cy-pres* alone, its postponed use compounds uncertainty and thereby diminishes the benefits achieved from enlightened judicial redirection and the preservation of essential interests.

Despite these criticisms of pervasive reforms, it should be emphasized once again that “wait-and-see” and *cy-pres* rules invariably save reasonable dispositive designs<sup>194</sup> that make no attempt to extend dead-hand control indefinitely. When the choice is between pervasive reforms with all their deficiencies and the common-law rule which offers greater certainty but too often strikes down reasonable dispositions, one might very well opt for pervasive reform just as the American Law Institute has done. However, these are the limited choices a legislative body has, but they are not necessarily the only options available to lawyers.<sup>195</sup> In fact, lawyers may have choices that enable them to achieve certainty, to avoid disputes and litigation, and to assure the validity of reasonable dispositive designs. Indeed, if an alternative exists that enables them to secure essentially all desired objectives, this would seem to be the planning option they must exercise.

Lawyers, of course, must design estate plans that reflect the objectives of their clients. Although estate owners may have different priorities, they commonly have these objectives: they want certain subject matter passing to specific people; they want the residue passing to specific people; they want to subject the estate, or portions of it, to specific conditions or time requirements; they want to facilitate management of the

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192. *See id.* § 827 F(3)(f) n.3.

193. *See id.*

194. *See text accompanying supra notes 174-79.*

195. Furthermore, these are not the only options for reform available to legislative bodies. There is, of course, the choice of specific “patch-up.” *See supra notes 155-61 and accompanying text.* There are, however, additional choices for pervasive reform. Some jurisdictions have permitted election of a different perpetuities period—a specific number of years. *See, e.g., Perpetuities and Accumulations Act of 1964, ch. 55, § 1 (England).* For a discussion of this particular reform, see R. MAUDSLEY, *supra* note 5, at 111-15. There have also been proposals to shift the requirements of the rule against perpetuities from vesting to possession. *See, e.g., Schuyler, Should the Rule Against Perpetuities Discard Its Vest?, 56 MICH. L. REV. 887 (1958).*

estate; and they want to minimize death costs and conserve the estate.<sup>196</sup> Finally, one might assume that estate owners want their lawyers to establish plans that achieve certainty and minimize the opportunity and occasion for disputes. As seen previously, if events happen as anticipated, reliance upon a "wait-and-see" test will probably enable a lawyer to achieve most planning objectives. Nevertheless, this is not without ongoing uncertainty as to whether and when a violation will occur and, accordingly, the concomitant risk of dispute and ultimate emasculation of these objectives. Similarly, reliance upon a *cy-pres* rule can preserve most objectives, but it also introduces uncertainty as to whether a judicial reformation will carry out these objectives consistent with the estate owner's actual wishes. Indeed, judicial redirection may miss the dispositive mark altogether or, at least, settle on an unpreferred objective. Quite differently, compliance with the common-law rule as to each dispositive provision will do the job fully; it can preserve reasonable objectives and accomplish them with greater certainty. Furthermore, if any moderation of objectives is needed to satisfy the rule, a lawyer can do this consistent with the estate owner's actual wishes; unlike *cy-pres* the estate owner is alive to make his election from a full range of choices.<sup>197</sup> In short, compliance with the common-law rule bolsters certainty as to validity and the desirability and acceptability of a dispositive choice. In terms of perpetuities reform, certainty and the preservation of a reasonable dispositive design may be mutually exclusive for a legislator; however, for a lawyer both are obtainable when one is prepared to understand and satisfy the common-law rule and, if necessary, to make minimal adaptations of the estate owner's objectives.

This conclusion can be illustrated with an earlier example: a gift in trust of income for life to the estate owner's spouse and then to a named child, and, thereafter, principal is left to that child's living children who satisfy age requirements exceeding twenty-one.<sup>198</sup> As written, the gift of principal violates the common-law rule against perpetuities so long as the named child survives the estate owner. Assuming the survival requirement involves age twenty-five, it is possible that at the child's death, he may have a living child who was born after the estate owner's death and

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196. For a discussion of these planning priorities and objectives and of the process by which estate plans should be formulated, see Becker, *supra* note 52; Becker, *supra* note 44.

197. See McGovern, *supra* note 16, at 177.

198. For a discussion of this example and the perpetuities problems it causes, see *supra* text accompanying notes 80-84.

who is then less than age four. It is also possible that every other life in being at the estate owner's death could die immediately thereafter and that the afterborn child's child (the estate owner's grandchild) could eventually attain age twenty-five and enter the class more than twenty-one years later. This exceeds the period of the common-law rule; therefore, the entire class gift to these grandchildren of the estate owner must fail, including the vested interests of those members who were age twenty-five at the estate owner's death.

If reliance is placed upon an existing "wait-and-see" statute, and no dispositive revisions are made, the gift of principal to the estate owner's grandchildren may ultimately satisfy the perpetuities test. But this use of "wait-and-see" necessarily involves a waiting period and, with this delay, there is uncertainty as to validity and, therefore, result. If the estate owner's named child has no afterborn children alive at such child's death, validity can be established at that time. All of the estate owner's grandchildren are then lives in being and their interest must vest or fail within their respective lifetimes. If the estate owner's named child has surviving afterborn children who have all attained age four by such child's death, validity can also be established at that time. Each afterborn grandchild's interest must vest or fail within twenty-one years of the estate owner's child's death, namely, the death of a life in being. To be sure, there would be uncertainty in these instances, but only until the death of the estate owner's child. If, however, the estate owner's named child leaves any afterborn child under age four, there may then be a violation if the applicable "wait-and-see" statute only uses the named child to measure the period of the rule.<sup>199</sup> Certainty would be achieved, but at the cost of a violation. Some "wait-and-see" statutes, however, are not so restrictive. Consequently, there may be further delay before the validity of the gift of principal can be determined and, accordingly, more uncertainty must follow. Depending upon the exact form of the "wait-and-see" test, there may be uncertainty as to how much longer one must wait<sup>200</sup> as well as uncertainty whether the interest will thereafter vest beyond the period of the rule. If this afterborn grandchild's interest cannot vest within twenty-one years of his parent's (the estate owner's child) death, what other lives in being can be used to measure the period—for

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199. For discussion of a "wait-and-see" statute that apparently would not, in this illustration, allow for a waiting period measured by any life other than the estate owner's child, see Dukeminier, *supra* note 16, at 65.

200. See *supra* note 189.

what other lives will a court delay its determination? Does the group include all lives in being at the estate owner's death? Undoubtedly, it does not; some limit must exist on the selection of these waiting or measuring lives in being, and most statutes today attempt to define or explicate this restriction in some manner.<sup>201</sup> Once again, even if the statute is

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201. "Wait-and-see" statutes fall into three categories with respect to the determination of the lives in being by which the "wait-and-see" period is to be measured. Some statutes are silent, and as to these statutes, courts must develop principles that govern selection of the measuring lives and limit the waiting period. *See, e.g.*, FLA. STAT. ANN. § 689.22(2)(a) (West Cum. Supp. 1982); OHIO REV. CODE ANN. § 213.03(c) (Page 1975); PA. STAT. ANN. tit. 20, § 6104 (Purdon 1975); VT. STAT. ANN. tit. 27, § 501 (1975). Quite differently, other statutes attempt to specify the lives in being used to measure the waiting period. Some of these statutes do so by general formula. For an illustration of a statutory formula that relies upon a "causal relationship," see KY. REV. STAT. ANN. § 381.216 (Baldwin 1979) ("[T]he period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interests."). *See also* Ontario Perpetuities Act, REV. STAT. ONT. ch. 343, § 6 (1970) ("[N]o life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the condition for vesting of the interest may occur"). Other statutes go further in specifying and clarifying measuring lives. These statutes offer a precise list of potential lives in being that, after adding twenty-one years, enable an administrator at the outset to determine the exact perpetuities period—the maximum waiting period. *See, e.g.* Perpetuities and Accumulations Act of 1964, ch. 55, § 3(4)-(5). The statute provides:

(4) Where this section applies to a disposition and the duration of the perpetuity period is not determined by virtue of section 1 or 9(2) of this Act, it shall be determined as follows:

(a) where any persons falling within subsection (5) below are individuals in being and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within paragraph (b) or (c) of that subsection shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of death of the survivor;

(b) where there are no lives under paragraph (a) above the period shall be twenty-one years.

(5) The said persons are as follows:

(a) the person by whom the disposition was made;

(b) a person to whom or in whose favour the disposition was made, that is to say—

(i) in the case of a disposition to a class of persons, any member or potential member of the class;

(ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;

(iv) in the case of a special power of appointment exercisable in favour of one person only, that person or, where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(v) in the case of any power, option or other right, the person on whom the rights is conferred;



explicit, there is still uncertainty as to validity and result during the extended measuring period.

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- (c) a person having a child or grandchild within sub-paragraphs (i) to (iv) of paragraph (b) above, or any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent fall within those sub-paragraphs;
  - (d) any person on the failure or determination of whose prior interest the disposition is limited to take effect.

In the example elaborated in the text, it seems clear that under any of these forms of "wait-and-see" statutes courts would measure the waiting period by at least the life of the estate owner's named child—the person who receives a life interest in the income and the person whose children receive the principal subject to the age requirement. Such child's life is *causally* related to vesting in the sense that it limits the period of vesting by restricting the time in which the child's children can be born and, thereafter, attain age twenty-five. And it seems likely that courts would find this causal connection sufficient in construing statutes that do not offer either a formula or statutory list of lives. Further, such married child is ascertainable at the outset and, therefore, this child should fall within two of the categories contained within the English statutory list of measuring lives: a person having a child within the class of takers to whom the disposition is made and a person who has a prior interest upon which the disposition will take effect. Nevertheless, life tenants may not always be used to measure the waiting period. For example, suppose the intermediate income interest for life was given to the estate owner's named son while the principal was thereafter left to the children of the estate owner's named daughter when they respectively attained age twenty-five. If the "wait-and-see" statute utilizes a formula predicated upon a causal relationship to vesting or upon a relevant limitation to vesting, it would appear that the life of the estate owner's son cannot be used to measure the waiting period. The vesting of principal at age twenty-five in the daughter's children is limited or *causally* affected by her life. However, the son's life is irrelevant; it is relevant to the time for possession, but it is totally unrelated to the satisfaction or violation of the express condition imposed upon the gift of principal to the daughter's children and it is unrelated to the time in which such event can occur. Accordingly, the permitted waiting period might expire before the son's death if he lived more than twenty-one years beyond the deaths of his sister and his parents. Nevertheless, under the statutory list provided by the English statute, the son would qualify as a measuring life because he is ascertainable at the commencement of the perpetuities period and because he is a person who has a prior interest in which the disposition of principal is limited to take effect at its determination. If, however, the prior life estate had been given to the first of the estate owner's nephews to marry, instead of to the estate owner's son, then the first nephew to marry (and, therefore, the one entitled to income for life) would not necessarily qualify as a measuring life despite the fact that he turned out to be a life in being at the estate owner's death. Under the English statute, that nephew would not qualify if he had not married by the time of the estate owner's death because such nephew could not be ascertained at the commencement of the perpetuities period.

In the original example, there is still a question of whether the waiting period extends beyond twenty-one years of the estate owner's named child's lifetime. Are there any other lives that can be used to measure the time for "wait-and-see?" Lives in being that are unmentioned in the dispositive provision and that are unrelated to the child's children or unrelated to the fulfillment or breach of the condition must be disregarded under each of these statutes. Yet, what about the estate owner's named child's spouse? Suppose such child's spouse survives both the estate owner's spouse and the child (the two life tenants). Is the measuring period extended; are twenty-one years to be added to the time in which such child's spouse subsequently dies? Under a causal relationship formula, it would seem that the lifetime of the child's spouse plays just as much a part in vesting, in the time limits for vesting, and in the disposition of the property as does the lifetime of the child. Presumably, such child's spouse should qualify as a measuring life under this formula. Assuming the child's spouse is the parent of the child's children, then the child's spouse's life does restrict the time in

Quite differently, lawyers can satisfy the common-law rule at the outset. In the preceding illustration, a lawyer could immediately avert perpetuities violations by reducing the age requirement to twenty-one or by eliminating such survival requirement altogether and instead postponing distribution only. Nevertheless, a lawyer could do even more because the rule can be satisfied with most any group of lives in being.<sup>202</sup> So long as the group is reasonably ascertainable, a planner can always condition gifts within twenty-one years of the deaths of carefully selected lives in

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which the estate owner's child's children can be born and, thereafter, attain age twenty-five. Nevertheless, Professor Dukeminier, the draftsman of the Kentucky causal relationship "wait-and-see" statute, while commenting on the application of the statute to a related problem, does not include the spouse as a measuring life. See Dukeminier, *supra* note 16, at 65. The application of the statutory list contained in the English statute is also uncertain. If the estate owner's named child is married at the estate owner's death, then such child's spouse qualifies as a measuring life. The child's spouse is ascertainable when the perpetuities period commences and is a person who could have a child that is potentially a member of the class entitled to distribution of principal. If, however, the estate owner's child is unmarried when the estate owner dies, then such child's spouse could not qualify as a measuring life, even though such spouse was actually a life in being, because there is no way that person can be ascertained when the estate owner dies—the time in which the perpetuities period commences. Finally, what about the estate owner's child's children, those members or potential members of the class of takers who are alive at the estate owner's death? Do their lives, the lives of members of the class in question, extend the waiting period even further? Under a causal relationship formula, it would seem that such child's children play a part in the disposition of only their own individual interests and that their lives cannot be used to determine the validity of the interests of other class members. In this example, one cannot say that a particular child's child's life affects the vesting, or limits the time of vesting, of another class member's interest. However, a different result should be reached with the English statutory list. Such statute specifically allows for the inclusion of potential class members as measuring lives, provided they can be ascertained at the estate owner's death and provided their number is not so great as to render it impracticable to ascertain their respective dates of death. These criteria would seem to be satisfied with respect to all of the estate owner's child's children alive at the estate owner's death. Accordingly, they should qualify as measuring lives for the entire gift of principal to the child's children. It should be observed, however, that a gift of principal at age twenty-five to an expanded group of beneficiaries might not qualify because of problems of practicability in ascertaining their respective dates of death. For example, consider a gift of principal following the named child's death to "all of my grandparents' then living descendants who attain age twenty-five." Would any of the estate owner's grandparent's descendants alive at the estate owner's death qualify as measuring lives? It is conceivable that because of impracticability a court might exclude all of them from the qualifying list. Yet it is also conceivable that a court might construe the statute in such a manner as to include some portion of them as appropriate measuring lives. To be sure, the result is unclear.

For a discussion of "wait-and-see" statutes and problems of determining the lives that measure the waiting period, see R. MAUDSLEY, *supra* note 5, at 123-39; Allan, *supra* note 7; Maudsley, *supra* note 151, at 366-78; Morris & Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486, 495-508 (1964); Note, *Measuring Lives Under Wait-And-See Versions of the Rule Against Perpetuities*, 60 WASH. U.L.Q. 577 (1982).

202. For a discussion of the life in being concept in relation to a lawyer's tasks as a planner, see Becker, *supra* note 5.

being. For example, one could retain essentially the same condition with a provision which read: "each grandchild shall have a right to principal and to receive his or her share of principal when he or she attains age twenty-five or before, if he or she is alive within twenty-one years of the last to die of all beneficiaries hereunder alive at my death and . . . (included here are the names of several healthy babies born on the date the instrument is drafted)." <sup>203</sup> These conditions establish validity at the outset. Because it is extremely unlikely that any grandchild will attain age twenty-five beyond the alternate measuring period, this provision also preserves the estate owner's precise dispositive condition and objective. Compliance with the common-law rule is accomplished with certainty and without subverting the dispositive design.

In satisfying the common-law rule, the estate owner controls the planning choice to be made; however, under a *cy-pres* rule he does not. A court is obliged to approximate intent, but this must be done without counsel of the deceased estate owner. Consequently, a court might save the interest created in grandchildren by confining the gift to those grandchildren alive at the estate owner's death, by reducing the age requirement to twenty-one, or by converting the age requirement from survival to postponement of possession only. <sup>204</sup> None of these choices may in fact be the best approximation. More desirably, a court might stretch the condition further and add an alternate measuring period that uses the lives of the estate owner's other children and grandchildren alive at his death. <sup>205</sup> This would probably reach far enough to include all of the named child's children who attain age twenty-five. It is, however, unlikely that a court could or would use lives in being extraneous to the family and to the gifts themselves as used in the foregoing revision that satisfies the common-law rule. Indeed, it is unlikely that a court could or would consider the full range of choices available to a planner or secure the same dead-hand reach as might be desired by the estate owner. Although a *cy-pres* rule saves interests, exactly what a court will do is never known until it actually redesigns. <sup>206</sup> Beyond this uncertainty, and just as important, courts can never save these interests as effectively and

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203. See, e.g., L. SIMES & A. SMITH, *supra* note 6, at §§ 1296-97; Leach, *supra* note 5, at 669-70.

204. For a discussion of several possible reformations under *cy-pres*, see R. LYNN, *supra* note 7, at 114-15, 120. For illustrations of how some courts have construed instruments in attempting to overcome apparent perpetuities violations, see McGovern, *supra* note 16, at 155, 177.

205. See, e.g., R. LYNN, *supra* note 7, at 121; Browder, *Construction, Reformation and The Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963).

206. See R. LYNN, *supra* note 7, at 121.

desirably as lawyers who initially and directly satisfy the common-law rule after fully reviewing alternative methods of compliance with the estate owner.

### B. *Saving Clauses and Their Impact Upon Planning*

With some exceptions,<sup>207</sup> saving clauses do overcome most perpetuities problems caused by specific provisions. Generally, saving clauses accomplish this with a fail-safe time requirement that complies with the common-law rule against perpetuities,<sup>208</sup> or they avert the consequences of a violation with remedial action that may be mandatory or discretionary.<sup>209</sup> Their object in either case is the same: no interest created by the dispositive instrument should fail because of a perpetuities violation.

These saving clauses can be found in standard forms, and these forms invariably constitute the foundation for constructing estate plans. Most lawyers use these forms to shape their dispositive designs, and they use

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207. Saving clauses and dispositive provisions that allow trusts to last "for as long as the law allows" have caused serious problems. Sometimes they fail because of uncertainty. At the very least, they raise problems of construction, and, therefore, invite litigation. *See, e.g., Farmers Nat'l Bank of Cynthia v. McKenney*, 264 S.W.2d 881 (Ky. 1954); *In re Lee's Estate*, 49 Wash. 2d 254, 299 P.2d 1066 (1956).

208. These saving clauses are also designed to comply with other related rules that affect the duration of trusts; for example, rules that govern provisions that accumulate trust income or make the trust indestructible. For a summary and discussion of these other rules, see 6 AMERICAN LAW OF PROPERTY §§ 24.64—24.68 (A. Casner ed. 1952); L. SIMES & A. SMITH, §§ 1391-95, 1461-68. *See also* RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 104-41 (1983).

209. In the event of an actual perpetuities violation (or with one saving clause—in the event of a mere challenge of the instrument under the rule), some saving clauses direct and empower a trustee or court to reform the gift in a manner that approximates the estate owner's intent and satisfies the requirements of the rule. *See, e.g., MODERN LEGAL FORMS* § 9271.1 (Supp. 1983):

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 the intent of the appointor, within the limits permissible under such Rule or related rule.

*See also* Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 986 (1965); Leach & Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule*, 74 HARV. L. REV. 1141 (1961). Some saving clauses, however, do not give a trustee discretion under these circumstances; instead, they might direct the trustee to deliver the trust res to those persons currently entitled to income. *See, e.g., 15 AM. JUR. 2D Legal Forms* § 201:17 (1973):

If a court of competent jurisdiction, in a proceeding in which the question of the validity of this trust is in issue, holds that this trust is void for violating the rule against perpetuities, then I direct that at such time trustee shall hold the trust res in trust, to pay over and deliver the same to such person or persons as may be entitled to receive the net income thereof, and in the same proportions, absolutely and free from further trusts.

the saving clauses within them to obviate perpetuities problems—problems that they may not fully recognize or understand. If these clauses serve their purpose by actually saving interests, it would seem that a rule against perpetuities can be ignored; therefore, satisfaction of the rule within the terms of each provision becomes unnecessary. Certainly this should be true unless these clauses impose restrictions and solutions less desirable than provision by provision compliance or unless exclusive reliance upon them could cause unintended violations because of mechanical risks involved in their use.

### 1. *Mechanical Risks*

As to the latter concern, it should be recognized that lawyers typically compose final documents from lists of alternative provisions that they have created or found in form books. These lists offer alternatives with respect to the kinds of trusts created, marital deduction formulas, dispositive provisions, and administrative provisions. The actual planning process might involve a summary check list from which selections are made, and the final product then becomes a kind of paste-up which is assembled either manually or with the aid of automatic systems that organize and print out the full instrument.<sup>210</sup> Often, however, form books set out entire instruments, specific forms that include all necessary provisions. Most frequently, this occurs with respect to standard dispositive designs.<sup>211</sup> Nevertheless, every estate plan does not fall within these standard designs and new provisions must be fashioned. Accordingly, form books offer variations which do not repeat the full instrument, but only the variation itself. The remainder of the instrument is then prepared by incorporating other provisions that are either set out separately or appear in a form containing an entire dispositive instrument.<sup>212</sup> Inevitably,

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210. For a form book that utilizes this menu or checklist approach to the drafting of trusts and wills, see R. WILKINS, *supra* note 32. See also HARRIS BANK, *supra* note 32.

211. For an example of a published form that is complete with all provisions, see THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-1—201-25. Form 201 creates a revocable living trust that includes *marital* and *family trusts*. The *family trust* adopts a familiar dispositive scheme, one that, after the death of the surviving spouse, creates separate trust shares for each living child and for the living descendants of each deceased child. Principal from a living child's share is ultimately given to the child upon attainment of specified ages, with a substitute gift to others if that child does not satisfy such age requirements. For further description and discussion of this common dispositive design, see *supra* § II C 1 a.

212. See, e.g., THE NORTHERN TRUST COMPANY, *supra* note 32, at 201-1—201-25, 205-1—205-7. Form 205 leaves principal ultimately to the estate owner's living grandchildren after the death of their respective parents, after the death of each child for whom a separate trust share is created and

practicality and efficiency necessitate this custom.

This process of composing an entire instrument from a menu of alternatives makes good sense, but it is also fraught with problems. To be sure, there is always the danger of omission; there is always the risk that a key provision may be omitted or lost in the process of selection and assembly. And there is always the danger that an incorrect or contradictory provision might be mistakenly included. Of course, this could happen to any provision within any instrument; nevertheless, it should be observed that careful proofing usually averts serious problems. However, the likelihood of fatal omission or error as to a perpetuities saving clause would seem to be greater. Lawyers who do not fully comprehend the common-law rule may not perceive perpetuities problems in the dispositive provisions they adopt or formulate. Further, they may not recognize that an effective saving clause is needed to make certain dispositive provisions valid. They may view the saving clause as one of many optional boiler plate provisions, provisions that are sometimes unnecessary or redundant. Consequently, in building a final product, they may overlook or exclude a saving clause altogether.<sup>213</sup> While at other times, they

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to whom income is given while alive. Form 205 subjects each living grandchild's interest to an age requirement, and the form provides for a substitute gift if such age requirement is not satisfied. For further description and discussion of this kind of dispositive design, see § II C 1 c. Form 205, as set out, is not complete; instead, it includes a cross reference to Form 201 for the inclusion of certain kinds of provisions.

213. Indeed, the exigencies of practice, and the pressure to keep the costs of legal services within reason, may necessitate the use of forms and make this kind of oversight inevitable. See J. FARR, *supra* note 28, at 319-22 (reprinted with the permission of Little, Brown & Company). Farr states:

A chief cause of failure to contemplate likely contingencies is the tendency to use printed forms, or office forms, or "boiler-plate" material, selected from form books or articles or essays of various sorts. The author or publisher of a set of forms usually can say, with entire sincerity, that he intends his product to be used merely as a medium for comparative study. He recognizes the risk, however, if he has had experience in the pressures of practice, that the forms will *not* be made the subject of comparative study by the busy practitioner. He properly fears that what will happen will be the last minute extraction and use of the form in some inappropriate place.

An example of the "boiler-plate" writing is to be found in the form of provision widely known as the "safety clause," a grouping of language intended to safeguard against invalidity resulting from violation of the rule against perpetuities. . . . Yet one is compelled to surmise that on occasion after occasion where the contingency needs to be guarded against, a so-called "standard safety clause" is pulled out of the files, or out of another instrument, and placed in the document without any real examination of its operative effect. The draftsman is so much concerned with avoiding a threatened invalidity that he neglects entirely to consider what alternative he is providing. Under certain circumstances the invalidity would be preferable. This illustrates the grave danger of a hasty and indiscriminate use of forms which, most emphatically, should be avoided like the plague. . . .

§ 60. [The fault of unintentional omission. The check list.] There is scarcely an estate planner of any considerable experience who has not discovered, oftentimes too late, that he

might include the wrong saving clause; for example, one that uses measuring lives existing at a settlor-estate owner's death instead of those in being when the irrevocable trust was created.<sup>214</sup> Indeed, it should be no surprise that lawyers uninformed as to the rule are especially prone to oversight and error when it comes to saving clauses. Without a strong sense of relevance, omission and error are inevitable. And relevance is something that cannot be achieved by ignoring perpetuities problems; indeed, relevance can only be achieved with full understanding of the rule against perpetuities.<sup>215</sup>

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somehow has forgotten to place in an instrument a badly needed provision. The finished document may be found to lack a needed tax power or even to have neglected a vital family clause.

For an example of a form that, without an effective saving clause, raises potential perpetuities problems and, further, one that is susceptible to misuse and to the omission of a saving clause, see THE NORTHERN TRUST COMPANY, *supra* note 32, at 205-1—205-7. The form itself contains dispositive provisions that create separate trust shares for the estate owner's living children. Income is given to each child for life, and after each child's death, income is continued for that child's children (the estate owner's grandchildren) until the time for distribution of principal. In each instance, the ultimate gift of principal is conditioned upon a child's child attaining at least age twenty-five. Without more, there would seem to be a violation of the common-law rule because all afterborn children of a child become potential class members, and one or more of them may join the class beyond the allowed time period. See *supra* notes 80-84 and accompanying text. This particular form, however, does not contain a saving clause. Instead, it includes a cross-reference to various administrative provisions within another form, and among these other provisions there is an effective saving clause. Without clear warning as to the absolute necessity of this saving clause, one might expect occasional oversights. This would be especially true for the draftsman who generally views these administrative provisions as "window dressing," provisions that are desirable but not necessarily essential.

214. For examples of cases in which a perpetuities dispute arose despite the presence of a saving clause, see *Sears v. Collidge*, 329 Mass. 340, 108 N.E.2d 563 (1952); *Nelson v. Mercantile Trust Co.*, 335 S.W.2d 167 (Mo. 1960). In each of these cases the saving clause was ostensibly defective because it used measuring lives that could include people born after the time in which the period of the rule began to run.

215. All too frequently, published form books include forms with dispositive provisions that, without more, violate the common-law rule against perpetuities. Although these form books offer saving clauses within the same form itself, within other forms, or as part of a checklist of administrative or nondispositive provisions, they do not ordinarily forewarn draftsmen that particular provisions necessitate a saving clause because without one such provisions produce perpetuities violations. See *supra* note 213. See also R. WILKINS, *supra* note 32, at 251-77. Wilkins includes checklist form provisions that create a trust and distribute income to a named beneficiary for life, and, thereafter, income and principal to the named beneficiary's children, with the principal subject to several express conditions—that the child survives the estate owner and the named beneficiary and that the child attains prescribed ages, anywhere from twenty-five to forty. *Id.* at 251-61. These forms are an adaptation of other forms that provide for an estate owner's surviving spouse and children similarly. However, within the context of a gift to a named beneficiary and the named beneficiary's children, these age requirements can cause a perpetuities violation. See *supra* text accompanying notes 102-07. Although some of Wilkins' commentaries on various form provisions include discussion of possible perpetuities problems, R. WILKINS, *supra* note 32, at §§ 11.74, 11.80, 11.74W, 11.80W, the

## 2. *The Efficacy and Desirability of Solutions Achieved by Saving Clauses*

In addition to mechanical risks, there is the question of whether saving

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adaptive forms created for a named beneficiary and the named beneficiary's children do not include any special warning about the rule against perpetuities and the potential for an actual violation. Nevertheless, Wilkins does offer protection against potential perpetuities violations with respect to this adaptation and with respect to all of the other form provisions as well. He accomplishes this with a choice of perpetuities saving clauses that appear among his selection of nondispositive provisions. *Id.* at §§ 15.20, 15.21, 15.20W, 15.21W. Yet it should be observed that the commentary to these saving clauses affords no hint of the importance of such a provision in preserving the validity of certain dispositive provisions that appear elsewhere in the form book. Quite the contrary, his commentary suggests that the saving clause should be used only when there is concern that a dispositive provision might violate the rule against perpetuities. The commentary goes on to point out that if the draftsman believes there is no perpetuities problem raised by the dispositive provisions within an instrument, then such saving clause is unnecessary. It would seem, then, that Wilkins includes a saving clause with the assumption that lawyers who use these forms know the rule and can apply it. Unfortunately, there are many who either do not understand the rule or ignore it, and their response to these form provisions may be one of blind reliance. Indeed, it would not be surprising to find actual dispositive instruments that incorporate verbatim the Wilkins adaptive form for a named beneficiary and the named beneficiary's children and also omit his perpetuities saving clause. Lawyers without a facility for the rule against perpetuities might readily accept these adaptive forms and overlook or consciously ignore and omit the saving clause. They might do this because of an expectation that published form provisions, if incorporated word for word, will not produce a perpetuities violation. They might view the commentary to the saving clause as a limited warning: that the saving clause is something to be considered with respect to dispositive provisions or adaptations of their own invention.

For other examples of published forms that include a saving clause within various dispositive instruments, a saving clause that is needed to overcome potential perpetuities problems otherwise caused by dispositive provisions within such instruments, see G. BOGERT, *TRUSTS AND TRUSTEES* §§ 1038, 1091, 1100 (1969); A. LEHRMAN, *supra* note 32, at 550-56; R. PARELLA & J. MILLER, *supra* note 32, at § 1.207; J. RABKIN & M. JOHNSON, *supra* note 32, form 9.02. For a living trust form (either revocable or irrevocable) that contains a blank dispositive provision, one that allows the estate owner full discretion as to dispositive choices for income and principal, see E. BELSHEIM, *supra* note 32, at § 9141. This form appears to be complete on its face even though it contains no saving clause whatsoever. A saving clause is offered elsewhere in the formbook; *id.* at §§ 9271, 9271.1. Nevertheless, this particular form for a living trust contains no warning of potential perpetuities problems and the need for a saving clause if the estate owner incorporates certain kinds of dispositive gifts.

The most serious problem that arises in the use of published forms occurs with respect to a form that appears to comprehend an entire dispositive instrument but does not contain any saving clause even though it includes provisions that can cause perpetuities problems. *See, e.g., THE ESTATE PLANNER'S GUIDE AND WORKBOOK* 666-69 (1977). This illustrative form involves an irrevocable living trust that gives income first to the settlor's wife for life and then in equal shares to the settlor's children until the last of these children dies. Afterwards the form gives principal per stirpes to the settlor's living issue in equal shares. As written, the gift or principal can cause a violation of the common-law rule against perpetuities. *See supra* text § II C 1 d. It is possible for the settlor to have a child born after the time in which the irrevocable living trust was created. It is also possible that the settlor's living issue, who are ultimately entitled to take, will consist exclusively of descendants



clauses consistently achieve solutions that are as desirable and effective as separate provision by provision compliance with the common-law rule. To make this comparative analysis, however, one must first consider how the various kinds of saving clauses function.

Several different kinds of saving clauses have been used in published forms during recent decades. Generally, these clauses redirect vesting or the distribution of the subject matter after certain events have occurred. Accordingly, they can be distinguished on the basis of the events involved and the methods for redirection.

*a. Summary of the Components of Saving Clauses and How They Function*

The events which actuate redirection of principal distribution or vesting can be classified in various ways. First, there are saving clauses that control the consequences of an ostensible violation by providing that if an interest is challenged under the common-law rule<sup>216</sup> against perpetuities,

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born after creation of the trust. Finally, it is possible for all lives in being at the inception of the trust (including the settlor and his children born by that time) to die and for the afterborn child to continue living for more than twenty-one years. Thus, it is possible for principal to vest in a group of afterborn issue beyond the period of the rule; accordingly, it must fail. Despite this perpetuities problem, the form contains no saving clause whatsoever. More importantly, it contains no special warning or discussion of the importance of a saving clause in this situation. In short, one who uses this form is apt to encounter a perpetuities violation. *See also* M. FREILICHER, *supra* note 32, at 177-79. This form also involves an irrevocable living trust that ultimately leaves principal to the settlor's issue alive when the settlor's last child dies. As a result, the gift of principal raises essentially the same perpetuities problem and for the same reasons. Once again, this particular irrevocable living trust form purports to be complete on its face, but it does not contain a saving clause needed to overcome the perpetuities violation. The form book does, however, offer a very brief discussion of the rule against perpetuities. *See id.* at 121-23. This discussion warns that the rule is not a mere textbook phenomenon, that it should be kept in mind, and that one should be particularly careful to comply with the perpetuities rule of each of the states that might govern the dispositive instrument. Freilicher also offers a table that summarizes the measuring period of the rule in various states. Nevertheless, Freilicher's discussion offers no advice on how to comply with the rule against perpetuities; indeed, it does not even mention or include a saving clause in this summary. Finally, this discussion and its warning appear as part of the materials devoted to testamentary trusts. There is no reference to the chapter on living trusts, nor to the different measuring period used in applying the rule to irrevocable trusts. In short, even though the book itself does not entirely overlook the rule against perpetuities, it is highly likely that an unknowing draftsman will adopt "as is" the foregoing form and thereby produce an instrument that violates the rule against perpetuities.

216. *See* Leach & Logan, *supra* note 209, at 1141-42. Their article notes:

It is the purpose of this Clause to avoid violations of the Rule Against Perpetuities and related rules either in this instrument or in any instrument exercising, directly or indirectly, a power created in this instrument. The method is to give to a disinterested corporate fiduciary a power to appoint the assets which are the subject matter of any challenged

or any related rule, or if it is invalid or found invalid,<sup>217</sup> then certain discretionary or mandatory remedial action must be taken.<sup>218</sup> Other saving clauses go beyond overcoming apparent violations. These saving clauses cast a safety-net that supercedes all dispositive conditions and ultimately restricts the vesting of interests or the duration of a trust to a period of time that purportedly satisfies the common-law rule against perpetuities and, perhaps, related rules as well.<sup>219</sup> The purpose of these

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interest in such a manner as to approximate the intention of the person creating the interest within the limits permitted by the rule under which the interest is challenged.

(I) *Power created.* If any interest purported to be created in this instrument or in any instrument exercising a power created in this instrument is challenged under the Rule Against Perpetuities or any related rule, I direct the corporate donee (hereafter designated) to appoint the assets which the challenged interest purports to dispose of in such manner as will most closely approximate, within clearly permissible limits, the intention of the person who has executed the instrument purporting to create such interest.

217. See, e.g., Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 986 (1965). See also 15 AM. JUR. 2D LEGAL FORMS § 201:17 (1973); MODERN LEGAL FORMS § 9271.1 (Supp. 1983) (set out *supra* note 209).

218. See *supra* note 209. For a discussion of various methods of redirection and the problems they present, see *infra* text accompanying notes 228-31, 267-80.

219. Because the common-law rule against perpetuities imposes a direct limitation on the time period in which contingent interests can vest, there are saving clauses that cast a perpetuities safety-net that only restricts the time for vesting of all interests created by the dispositive instrument. Some of these saving clauses describe the safety-net in broad terms only—"within the period prescribed by the rule against perpetuities." See, e.g., 15 AM. JUR. 2D LEGAL FORMS § 201.20 (1973 & Supp. 1984) which provides:

Notwithstanding any other provisions contained in this will, I direct that all interests created by this will shall vest within the period prescribed by the rule against perpetuities. If any provision herein shall be construed to vest any interest later than that period, I direct that such interest shall vest on the last day permitted without violation of the rule against perpetuities.

Other saving clauses define the safety-net with greater clarity; they add twenty-one years to the survivor of named lives in being when the dispositive instrument becomes effective. See, e.g., *id.* § 201.15 which states:

Notwithstanding the foregoing, the provisions of this will shall not postpone the vesting of the trust property or any portion thereof for a period more than 21 years after the death of the last survivor of the following persons living at the time of my death: \_\_\_\_\_ [*name measuring lives*]. If not previously vested, then immediately prior to the expiration of such period, such trust property or portion thereof shall vest in and be distributed to the then income beneficiaries hereunder in the same proportions as they are then entitled to such income.

There are, however, 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 L. SIMES & A. SMITH, *supra* note 6, at §§ 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,

saving provisions is to set an absolute time limit beyond which no interest created by the instrument can vest. Safety-net clauses are intended to prevent actual violations and not simply to overcome them by escaping their consequences. Some safety-net clauses accomplish this by restricting vesting or the duration of a trust to the period of time permitted by law or to a life in being and twenty-one years, but without identifying such life or without elaborating the permitted time period.<sup>220</sup> However, most of these kinds of saving clauses are much more specific as to the time period employed by the safety-net. A majority of these form provisions attach the time limit to the duration of trusts, while some do so only as to the vesting of all interests.<sup>221</sup> In both instances, the maximum time period is limited either to a designated person or persons' deaths or to within twenty-one years of their deaths.<sup>222</sup> The persons involved are identified individually or referred to by a group designation, but in either case they are always people born before the instrument becomes effective

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within a life in being and twenty-one years, they may not satisfy another rule that, for the same period of time, imposes a time limit on the indestructibility of the trusts. In short, there is a growing body of law that disallows the continuation of a trust beyond the period of time allowed by the common-law rule against perpetuities when the ascertained beneficiaries of 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. *Id.* § 1391. *See also* RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 104-17 (1983).

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. Most of these saving clauses define the safety-net by adding twenty-one years to the survivor of named individuals or to the survivor of a described group of people who are in being when the dispositive instrument becomes effective. *See infra* note 223. Some of these saving clauses do not reach quite this far; instead, they cast a safety-net that limits the duration of trusts to the time of death of the survivor of a described group of lives in being when the dispositive instrument becomes effective. *See, e.g.,* J. RABKIN & M. JOHNSON, *supra* note 32, form 8.26(31)(c), which provides:

(c) None of the trusts herein created shall extend beyond, but unless sooner terminated they shall in any event terminate at, the death of the last survivor of my children and my descendants living at the time of my death. Upon termination the entire principal of the trust estate, together with any undistributed income therefrom, shall be distributed to the persons entitled to take under the provisions hereinabove set forth, regardless of the age which any distributee otherwise entitled has attained.

220. For a saving clause that creates a safety-net measured by an unidentified "life in being and twenty-one years," see R. NEUHOFF, *STANDARD CLAUSES FOR WILLS* § 27.13 (3d ed. 1962). For saving clauses that create a safety-net measured by an unelaborated "period of time permitted by law," see, e.g., 15 *AM. JUR. 2D LEGAL FORMS* §§ 201:18, 201:20 (1973 & Supp. 1984); W. NOSAMAN & J. WYATT, *TRUST ADMINISTRATION AND TAXATION* § 6.09(4)(3) (1985); J. RABKIN & M. JOHNSON, *supra* note 32, form 8.26(30).

221. *See supra* note 219 & *infra* note 223.

222. *See supra* note 219 & *infra* note 223.

and they are usually beneficiaries under some provision.<sup>223</sup> It should be observed that the safety-net time limit employed by many saving clauses does not expressly extend to interests created by powers of appointment donated by the dispositive instrument in which the saving clause appears.<sup>224</sup> Nevertheless, some clauses within instruments that donate powers specifically place a safety-net time limit upon interests created by these powers.<sup>225</sup> Few, however, expressly impose these same time limits upon the exercise of the power itself.<sup>226</sup>

If the vesting of all interests or the termination of trusts does not actually occur before the specified time period, most safety-net clauses then redirect vesting or distribution of principal. Nevertheless, some of these clauses simply superimpose such time period without any provision for redirection in the event vesting or the termination of the trust does not,

223. For an example of a saving clause that creates a safety-net measured by lives in being described as a group, typically beneficiaries, see *THE NORTHERN TRUST COMPANY*, *supra* note 32, at 201-19, which provides:

SECTION 8: . . . . The trustee shall terminate and forthwith distribute any trust created hereby, or by exercise of a power of appointment hereunder, and still held 21 years after the death of the last to die of the settlor and the beneficiaries in being at the death of the settlor. Distribution under this section shall be made to the persons then entitled to receive or have the benefit of the income from the trust in the proportions in which they are entitled thereto, or if their interests are indefinite, then in equal shares.

For an example of a saving clause that creates a safety-net measured with a list of named lives in being, usually beneficiaries, see A. CASNER, *A PROPOSED ESTATE PLAN FOR MR. AND MRS. RICHARD HARRY BLACK III* 255-59 (1979) (set out at *infra* note 274). Some saving clauses, however, create a safety-net measured by named lives in being who are not beneficiaries, typically several healthy infants born on the day the instrument is executed. See, e.g., W. SCHWARTZ, *FUTURE INTERESTS AND ESTATE PLANNING* 6.32 (1965 & Supp. 1972).

224. See, e.g., *MODERN LEGAL FORMS* § 9271 (1968 & Supp. 1983), which provides:

Anything herein to the contrary notwithstanding, the trusts hereby created shall terminate not later than twenty-one (21) years after the death of the last survivor of the Trustor and all natural persons who are beneficiaries hereunder living at the date hereof, and if any trust hereby created has not sooner terminated, the Trustee shall at said time pay over, convey and deliver the trust estate then in its possession to the persons then entitled to receive the income therefrom, in the same shares or portions in which such income is then being paid to them.

See also R. WILKINS, *supra* note 32, at §§ 15.20, 15.21, 15.20W, 15.21W.

225. See, e.g., *THE NORTHERN TRUST COMPANY*, *supra* note 32, at 201-19 (set out at *supra* note 223). See also *CALIFORNIA WILL DRAFTING* §§ 15.63, 15.69 (M. Foster, Jr. ed. 1965).

226. For an example of a saving clause that directly limits the time for exercise of powers of appointment created by the dispositive instruments in which these clauses appear, see 15 AM. JUR. 2D *LEGAL FORMS* § 201:19 (1973 & Supp. 1984), which provides:

Each power of appointment created by this \_\_\_\_\_ [will or trust agreement] shall be exercisable by the designated donee if, and only if, the power is exercised prior to 21 years after the death of the last to die of \_\_\_\_\_ [name measuring lives, such as: my children in being at the time of \_\_\_\_\_ (my death or execution of this agreement)].

See also A. CASNER, *infra* note 274, at 255-59.

by its original terms, occur before the time period expires.<sup>227</sup> As to the saving clauses which do redirect in the event of a violation or at the expiration of the safety-net time period, there are two principal kinds of redirection, discretionary and mandatory. Some discretionary saving clauses empower a court to reform the dispositive provision in a manner that most closely approximates the estate owner's intent and satisfies the requirements of the common-law rule against perpetuities and other related rules.<sup>228</sup> Another kind of discretionary clause invests in a corporate donee the power to appoint assets comprehended by the dispositive provision in a manner that most closely approximates the estate owner's intent and that is within the limits of governing rules of law.<sup>229</sup> However, most forms today contain saving clauses that mandate to whom the subject matter must pass. Some are obscure; they simply provide that all interests shall vest on the last day permitted by the rule against perpetuities.<sup>230</sup> The most popular form of mandatory saving clause, however, provides that upon termination of the trust, distribution of principal should be made to specific beneficiaries, often those entitled to income immediately before termination of the trust.<sup>231</sup>

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227 See, e.g., 7 PAGE ON THE LAW OF WILLS § 62.371 (1984):

Each trust, if not sooner terminated pursuant to other provisions hereof, shall terminate twenty-one (21) years after the death of the survivor of my \_\_\_\_\_ and all issue of mine who are living at the date of my death.

See also W. NOSSAMAN & J. WYATT, *supra* note 222, at § 6.09[4](1), (3).

228. For a saving clause that empowers a court to reform a dispositive provision that violates the rule against perpetuities, see Leach, *supra* note 217, at 986. See also MODERN LEGAL FORMS, *supra* note 209, at § 9271.1 (set out therein).

229. For a saving clause that empowers and directs a corporate donee to reform a dispositive provision that is challenged under the rule against perpetuities, see Leach & Logan, *supra* note 216 (set out in part therein).

230. See, e.g., 15 AM. JUR. 2D LEGAL FORMS, *supra* note 219, at § 201:20 (set out therein).

231. For an example of a saving clause that redirects trust principal to income beneficiaries, see THE NORTHERN TRUST COMPANY, *supra* note 223, at 201-19 (set out therein). See also, e.g., 15 AM. JUR. 2D LEGAL FORMS §§ 201:15-:18 (1973); CALIFORNIA WILL DRAFTING § 15.65-67 (M. Foster, Jr. ed. 1965); MODERN LEGAL FORMS § 9271 (1968 & Supp. 1983); W. NOSSAMAN & J. WYATT, *supra* note 220, at § 6.09[4](2); R. PARELLA & J. MILLER, *supra* note 32, at §§ 1.2.07, 1 2.12; J. RABKIN & M. JOHNSON, *supra* note 32, form 8.26(30); R. WILKINS, *supra* note 32, at 15.20, 15.21, 15.20W, 15.21W. There are, however, other variations of mandatory methods for redirection of trust principal. 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 J. FARR & J. WRIGHT, *supra* note 94. For an example of a saving clause that redirects principal to the person in whose name the trust is designated, see J. MCGAFFEY, TAX ANALYSIS AND FORMS § 15A.41, which provides:

(F) Notwithstanding any other provision of this will with respect to the time of the termination of any trust created by this will, if upon the expiration of the period of twenty (20) years and eleven (11) months immediately following the death of the last survivor of my-

The salutary effect of these saving clauses can be illustrated with a previous example: a testamentary gift in trust of income for life to the estate owner's spouse and then to a named child; thereafter, income to that child's living children (the estate owner's grandchildren), with principal distributed in equal shares to those who attain age twenty-five.<sup>232</sup> As written, the gift of principal violates the common-law rule so long as the named child survives the estate owner.<sup>233</sup> Accordingly, under an "all or nothing" principle, the entire class gift to grandchildren—the named child's children (including those alive at the estate owner's death)—must fail. An effective saving clause can, however, avoid this result. Some clauses might save this invalid gift with a discretionary power to reform the gift of principal,<sup>234</sup> one which might, for example, be exercised by

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self, my wife and my issue living on the day preceding the date of my death, any trust created by this will, or any part of any such trust, shall then remain in existence, then such trust or part thereof shall thereupon terminate, and the principal or part thereof shall forthwith be paid and distributed to the person with whose name such trust is designated.

For an example of a saving clause that redirects principal to the lineal descendants then living of the person for whom the trust was established, see 7 PAGE ON THE LAW OF WILLS § 62.373 (1984) which states:

Notwithstanding the directions heretofore given my corporate trustee as to the distribution of income and principal, every trust established by this will shall terminate, if it has not previously terminated, twenty-one (21) years after the death of the last survivor of my wife, my children, and any grandchildren of mine in being at the date of my death.

Upon such termination my trustees shall immediately transfer, convey and pay over the principal of each of the trusts to the lineal descendants then living of the particular child of mine on whose account or on whose issue's account the particular trust was established, per stirpes, and if none, to my lineal descendants then living, per stirpes, and if none, to the regents of the University of \_\_\_\_\_.

For an example of a saving clause that redirects principal to the primary beneficiary of that trust, see J. RABKIN & M. JOHNSON, *supra* note 32, form 9.02, that states:

13. *Perpetuities.* Notwithstanding anything contained to the contrary, no trust created by this Agreement shall continue for more than 21 years after the death of the last survivor of the Grantor, his wife Mary Barker, and the descendants of the Grantor as are in being at the date of this Agreement, and if at the expiration of the period any property is still held in trust then the property in each separate trust shall immediately be distributed to the primary beneficiary of that trust.

For an example of a saving clause that redirects principal simply to the beneficiary of that trust, see ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, *supra* note 32, at 4.19, which provides:

(5) Notwithstanding any prior provision hereof, at the end of twenty-one (21) years after the death of the last to die of my wife and all of my descendants living at my death, the trustee shall distribute each trust then held hereunder or created by the exercise of any power of appointment to the beneficiary thereof.

See also HARRIS BANK, *supra* note 32 at VII-4.

232. See *supra* text accompanying notes 80-84, 198.

233. For an explanation of why this gift of principal violates the rule against perpetuities, see *supra* text accompanying note 198.

234. See *supra* notes 216-17.

changing the age requirement to twenty-one. However, the saving clause that prevails in form books today would overcome the perpetuities problem differently.<sup>235</sup> This kind of saving clause uses the aforementioned safety-net approach, one that terminates the trust within twenty-one years of the deaths of a specified group of people, often beneficiaries, who are alive at the estate owner's death. And, if the trust has not by its terms ended earlier, these safety-net saving clauses typically mandate a redirection of principal to the living beneficiaries entitled to income immediately before the safety-net time period expires. Applying this time limit to the example, and assuming this is the only dispositive provision within the instrument, the trust will terminate within twenty-one years of the last to die of the beneficiaries alive at the estate owner's death. This group potentially includes the spouse, the named child, and the child's children born before the estate owner's death. In all probability, this safety-net time limit, which prevents any interest from vesting beyond the common-law rule, will reach well beyond the period of time needed to administer the terms of the trust. Stated otherwise, the trust will probably terminate before the safety-net time period expires because it is highly probable that none of the estate owner's grandchildren will attain age twenty-five beyond twenty-one years of the deaths of all beneficiaries alive at his death. This is especially probable if the named child already has children alive at the estate owner's death. Nevertheless, even if the trust does not, by its own terms, terminate before the safety-net time period expires, the saving clause seems to mandate a satisfactory result. Because the safety-net time period necessarily extends to the named child's death, all deceased grandchildren who survived the child and attained age twenty-five and all grandchildren alive when the saving clause terminates the trust would be entitled to principal,<sup>236</sup> either because they

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235. See *supra* notes 219, 223-26, 231.

236. The estate owner's grandchildren who survive their parent—the named child—and attain age twenty-five will share in the principal even though they may not be alive when the saving clause terminates the trust. Presumably, the provision for distribution of trust principal imposes three express conditions of survivorship: survivorship of the estate owner's spouse and named child and attainment of age twenty-five. A fourth condition would be implied, one which precludes any grandchild who predeceased the estate owner. Accordingly, after the deaths of the estate owner, his spouse, and the named child, each living grandchild would be entitled to his or her share of principal immediately, if already age twenty-five, or thereafter upon attainment of age twenty-five. Once they respectively satisfy these requirements, they are entitled to receive their share. If the trust terminates thereafter because of the time limit imposed by the saving clause, the gift of principal they already received is in no way affected. At the time of termination, the remaining principal would then be distributed to the income beneficiaries. These beneficiaries would be grandchildren then living and,

had already attained age twenty-five or because they had become income beneficiaries and, therefore, were entitled to principal when the trust was forcibly terminated. The only deviation that might occur from the estate owner's original objectives is if any of the grandchildren entitled to income, and consequently principal, thereafter fails to attain age twenty-five. Under the dispositive provision alone, these grandchildren would be excluded, but with the superimposed saving clause they are included.

It should be noted in passing that safety-net saving clauses function in much the same manner as a "wait-and-see" test.<sup>237</sup> Under a "wait-and-see" reformation of the common-law rule, a trustee for a trust creating future interests is entitled to delay perpetuities determinations and, therefore, continue the trust for a period of time within the rule. Sometimes this waiting period is clearly delineated, but often it is not.<sup>238</sup> If the interests created under the trust actually vest (or if it becomes clear that they must vest or fail) within this waiting period, they are valid and enforced as written. When, however, it becomes clear that they cannot vest or fail within the prescribed waiting period, then they violate the rule. Accordingly, they must be stricken or reformed by a court, depending upon whether "wait-and-see" is accompanied by *cy-pres* as well. The safety-net clause superimposes its own "waiting period" by creating a time limit that is usually clearly delineated and is always within the rule and, further, is usually long enough for the trust provisions to be implemented fully. If the trust is fully administered and ends within the safety-net time period, it has been enforced as written. If, however, all distributions of principal do not actually occur within this safety-net waiting period, an immediate and concrete solution is imposed when the safety-net technique is coupled with mandatory redirection. Unlike the "wait-and-see" test alone, the interests do not fail; they are automatically reformed. And unlike the *cy-pres* variation, the preordained redirection is most frequently specified and delineated as to substance. Further, unlike *cy-pres*, this mandatory redirection should reflect the actual substitutionary choice of the estate owner and not the speculative reformation of a court.

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necessarily, none of these income beneficiaries would be grandchildren who had already attained age twenty-five.

237. For further discussion of the similarities and differences between the safety-net saving clause approach and the "wait-and-see" test, see Becker, *supra* note 5, at 755-58; CALIFORNIA WILL DRAFTING § 15.57 (M. Foster, Jr. ed. 1965).

238. See *supra* notes 189 & 201.



*b. Specific Application of Saving Clauses—Some Important Defects and Inadequacies*

It should be apparent, then, that effective saving clauses protect interests and estate plans from devastation arising out of violations of the common-law rule against perpetuities. Saving clauses can avoid actual violations (or the consequences of actual violations) while redirecting devolution of the subject matter consistent with the wishes of the estate owner. Nevertheless, the fact that saving clauses are usually successful at preserving interests, and effective at carrying out an estate owner's intent, does not mean that they afford the best solution, or even an adequate one, for satisfying the common-law rule against perpetuities and other related rules. Once again, a lawyer's task is to achieve, to the extent possible, the objectives and dispositive design of his client, and to do so clearly, effectively, and with certainty in administration and as to result.<sup>239</sup> This must be accomplished with each provision all of the time and not with some provisions most of the time. When a lawyer uses saving clauses as a substitute for provision-by-provision compliance with perpetuities rules, these clauses must consistently save and secure objectives. If saving clauses do not uniformly succeed in achieving these objectives, then their use as a substitute should be reconsidered, and attention must be given to mastering the rule and satisfying it within the terms of each provision. The remainder of this section, therefore, focuses on problems of efficacy, certainty and clarity with respect to saving clauses generally and with respect to saving clauses specifically as they apply to particular provisions. It explores the defects within these saving clauses when they are used as a substitute for provision-by-provision compliance; it assesses the problems generated by saving clauses when they are not used to safeguard against miscalculations that arise in any attempt to satisfy the rule within the terms of each provision.<sup>240</sup> The

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239. For a discussion of these planning objectives and a comparison of how well they are fulfilled under a "wait-and-see" test and a *cy-pres* rule or by carefully drafting the dispositive provision to comply with the common-law rule, see *supra* text accompanying notes 196-206.

240. Sections III B 2 b(1) and (2), *infra*, and sections III B 3 a and b, *infra*, discuss the defects of saving clauses. These sections also compare the use of saving clauses with methods of tailor-made compliance. This analysis presumes the use of saving clauses as a substitute for meticulous compliance with the common-law rule within the terms of each dispositive provision. It assumes that dispositive provisions are drafted or adopted without regard for the common-law rule against perpetuities and that a saving clause is then added to prevent or overcome violations of the rule. This approach may be widely practiced, but it is not recommended by the authors of these saving clauses. See, e.g., CALIFORNIA WILL DRAFTING § 15.54 (M. Foster, Jr. ed. 1965). Nevertheless, if a lawyer uses a saving clause as a substitute for tailor-made compliance within the terms of each provision,

purpose of this review is to underscore some of the inadequacies of saving clauses and to catalogue the instances in which they misfire dispositive objectives. As before, these saving clauses will be analyzed first as to actuating events and then as to methods for redirection.

(1) *As to Actuating Events*

Saving clauses that initiate solutions designed to overcome actual perpetuities violations invariably raise serious problems of uncertainty.<sup>241</sup> Typically, they invest a power of reformation in a court or corporate donee if an interest is invalid, sometimes if it is found invalid, or sometimes even if it is only challenged. Each of these actuating events or conditions produces considerable uncertainty as to whether and when

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the question arises as to which kind of saving clause is the best choice. Saving clauses that are actuated by a perpetuities violation and that afford discretionary redirection by a corporate donee or court would seem to suffer from uncertainty. See *infra* § III B 2 b(1)-(2). However, saving clauses that use a clearly defined safety-net approach and mandated methods of redirection overcome much of this uncertainty. Although they may undercut valid dispositive provisions or misdirect principal, see *infra* § III B 2 b(1)-(2), they can be carefully drafted to produce results that approximate the overall wishes of an estate owner and thereby affect a disposition that is preferable to the consequences of a perpetuities violation.

If, however, a lawyer drafts each dispositive provision to comply by its own terms with the common-law rule, two questions arise. Should a saving clause be added as a safeguard against miscalculation? If so, which kind of saving clause is best at protecting against violations and preserving dispositive objectives? Some commentators maintain that a lawyer should draft each provision to comply with the common-law rule, and if this is done a saving clause need not be added (and perhaps—should not). See, e.g., L. SIMES & A. SMITH, *supra* note 6, at § 1295; R. WILKINS, *supra* note 32, at §§ 15.20, 15.20W. In the main, they seem concerned with the results caused by safety-net saving clauses that use mandated methods of redirection. These saving clauses can produce modified dispositions that are unnecessary and unintended and sometimes inconsistent with the presumed intent of the estate owner. See *infra* § III B 2 b(1)-(2). They provide a specific time for termination of all trusts and they redirect principal to specific beneficiaries. In doing so, these saving clauses sometimes undercut valid interests; they also often redirect particular interests to beneficiaries that the estate owner might not prefer under the circumstances. Accordingly, these commentators recommend provision-by-provision compliance without any saving clause. Nevertheless, lawyers make mistakes, even those who specialize in estate planning. See Leach, *supra* note 217, at 985. Because occasional miscalculation is inevitable, some safeguard would seem preferable to the results that follow when an interest, perhaps even an entire dispositive scheme, is stricken because of a violation. In this situation, it would seem best to select a safeguard that does not alter valid interests, one that is not actuated unless there is a violation. When a violation arises, the method of redirection can be made mandatory or discretionary. Although this kind of saving clause suffers from the uncertainty previously discussed, it should be included with the expectation that its application would be unnecessary. And the uncertainty it would cause would never be greater than the uncertainty that would exist without it, the uncertainty of violations that lurk within any instrument and the uncertainty that attends judicial resolution of these problems.

241. See *supra* notes 209, 216-17.

this determination will be made. And the first of these conditions is shrouded with additional uncertainty as to the substance of the actuating determination: what constitutes invalidity and, apart from a court, who makes this determination. The result is that these saving clauses leave executors, trustees, and beneficiaries with considerable doubt that affects matters of administration, ownership, and marketability. To be sure, these clauses afford protective solutions, but they may also necessitate precautionary litigation just to determine whether a solution should be invoked.

Comparable uncertainty can also arise with some saving clauses that use a safety-net waiting period. Unelaborated and undefined actuating events, such as the period of time permitted by law or an unspecified life in being and twenty-one years, raise serious questions of when that waiting period expires. Uncertainty arises as to the parameters of the permitted period of time; more specifically, who are the lives in being by which the safety-net period of time is to be measured? Do they include anyone alive at the estate owner's death? Or is this group restricted to only lives in being mentioned in the instrument, to only beneficiaries of the instrument, or to only those causally related to the conditions themselves? It should be observed that these problems are comparable to those caused by "wait-and-see" statutes which contain no explication of the lives that govern the waiting period.<sup>242</sup> The uncertainty bred by these safety-net saving clauses surely undercuts their feasibility and efficacy. Furthermore, such uncertainty may raise problems so substantial as to cause a court to find these saving clauses unenforceable.<sup>243</sup>

Saving clauses that carefully define and measure their safety-net time period avoid uncertainty as to when the waiting period expires; nevertheless, they are not without serious kinds of problems respecting the actuating event. For purposes of analysis, consider once again a popular form of safety-net saving clause; one that terminates all *trusts* created by the dispositive instrument within twenty-one years of the death of the survivor of *all beneficiaries* in being at the estate owner's death, and thereafter redirects principal to those entitled to income under the trust immediately before its termination.<sup>244</sup> Generally two kinds of problems arise:

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242. See *supra* notes 189-90 and accompanying text.

243. See *supra* note 207. See also McGovern, *supra* note 16, at 175-76.

244. See, e.g., L. SIMES & A. SMITH, *supra* note 6, at § 1295, which provides:

(A testamentary trust) The trust hereby created shall terminate in any event not later than twenty-one years after the death of the last survivor of all beneficiaries of this trust who are in being at the time of my death, and unless sooner terminated by the terms hereof, the

those which concern the scope of the saving clause and those which concern the duration of the safety-net waiting period.

The saving clause problems concerning powers of appointment involve matters of both scope and duration. As indicated previously, powers of appointment present two sorts of perpetuities problems: first, with respect to the time within which the power can be exercised; and second, with respect to future interests created by exercise of the power.<sup>245</sup> The donor-estate owner can easily and safely eliminate the first problem with respect to "fresh" assets of his estate, assets not governed by a power previously created. This can be accomplished with a time limitation specifically placed upon exercise of the power itself.<sup>246</sup> It might also be accomplished with a more conventional saving clause that merely terminates, within the time period required by the rule, the trust which contains the power itself.<sup>247</sup> The foregoing saving clause would seem to control the time of exercise because presumably the power cannot survive a trust that is the source of the power itself. The donor can solve the second problem with a saving clause that expressly extends the safety-net waiting period to trusts directly created by the donative instrument and to trusts created by an exercise of powers given in such instrument. Some saving clauses contain this extended restriction,<sup>248</sup> but many do not.<sup>249</sup> In addition, those which contain this extended restriction sometimes include a cautionary reminder to the donee about exercise of the power.<sup>250</sup> It would seem, then, that the foregoing saving clause would suffice if it expressly covered trusts created by exercise of powers donated in the dispositive instrument. This assumes, however, that the powers created extend only to "fresh" assets and not to "aged" assets that are the subject matter of a previously created power. Indeed, in some in-

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trustee shall, at the termination of such period, make distribution to the persons then entitled to the income of this trust, and in the same shares and proportions as they are so entitled.

245. See *supra* § II D. For a discussion of perpetuities problems and solutions regarding the creation and exercise of powers of appointment, see CALIFORNIA WILL DRAFTING §§ 15.22-27, 15.38-47, 15.63, 15.69 (M. Foster, Jr. ed. 1965).

246. See *supra* note 226.

247. See *supra* note 224.

248. See *supra* note 225. These saving clauses, however, limit the safety-net restriction to the duration of trusts created by either the donative instrument or powers of appointment given by such instrument. They do not expressly comprehend interests, created by either the instrument or the power, which do not involve a trust. For a discussion of this particular defect within saving clauses, see *infra* text accompanying notes 255-56.

249. See *supra* note 224.

250. See, e.g., CALIFORNIA WILL DRAFTING § 15.45 (M. Foster, Jr. ed. 1965).

stances, the donor of a power is also a donee who may be exercising a power previously created. Sometimes, lawyers advise donee-estate owners to exercise these powers separate from the “fresh” trusts they create and to use their powers to make outright gifts without future interests.<sup>251</sup> However, if the donee-estate owner chooses to create a new trust with “aged” assets, it should be clear that the foregoing saving clause will not suffice. It is inappropriate because the safety-net cast by the saving clause is too long; it uses lives in being at the donee-donor-estate owner’s death when the period of the rule applicable to the “aged” assets is measured from the date of the original donor’s death—or earlier if created under an irrevocable living trust.<sup>252</sup> In short, a single saving clause with a single safety-net cannot resolve this problem. Unless the original donor has a comprehensive saving clause limiting trusts created by exercise of powers donated<sup>253</sup> or unless the donee-donor-estate owner carefully and specially limits interests created by exercise of his power,<sup>254</sup> the donee-donor-estate owner’s exercise of the power and secondary creation of in-

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251. See, e.g., *id.* at 15.42, 15.46.

252 The period of the rule against perpetuities begins to run with the trust or principal (the “aged” assets) subject to the donee-donor’s power of appointment from the date in which such principal is “tied up.” In the case of a deed, this occurs at the time of delivery by the grantor. For a revocable living trust or a will, this occurs at the original donor’s death. And in the case of an irrevocable living trust, it happens at the time the trust is executed and takes effect. See L. SIMES & A. SMITH, *supra* note 6 at § 1226. The illustrative saving clause, *supra* note 244, uses beneficiaries in being at the date of the donee-donor-testator’s death to measure the safety-net it creates. This may include lives that were not yet in being when the donee-donor’s power of appointment was originally created; namely, the time from which the rule is measured with respect to the power given to the donee-donor-testator. Accordingly, the donee-donor’s use of the illustrative saving clause will not safeguard interests created by his exercise of the original power. And this is true whether the donee-testator in turn creates a new power or simply creates other contingent interests. In either instance, the safety-net used to control the “aged” assets includes a group of lives irrelevant to the perpetuities determination that governs the trust principal subject to the donee-testator’s power.

253. See *supra* note 225.

254. To be sure, this can be accomplished with a secondary safety-net saving clause that comprehends interests and new powers created by the donee-donor’s exercise of his power, one that uses a safety-net that involves lives in being at the time the original power was created and given to the donee-donor. In doing this, one might be tempted to add a saving clause that modifies the primary saving clause; for example, one that changes “beneficiaries of this trust who are in being at the time of my death” to “beneficiaries of this trust who are in being at the time (of the original donor’s death).” This secondary clause would avoid a perpetuities violation, but it might not reach far enough to satisfy the donee-donor’s objectives in exercising the power. The donee-donor’s estate plan may focus on a generation of family members that were, in the main, not born by the time the original power was created. If this particular kind of safety-net measurement is to be employed, it would be better to use beneficiaries under the original donor’s dispositive instrument. Best of all, the group of safety-net lives in being can and should be specially selected. The rule against perpetuities allows a “second look” at facts as of the time powers are exercised. See *supra* § II D 3. Accord-

terests and new powers is ripe for violation of the common-law rule. Form books sometimes contain commentary that alerts lawyers to this pitfall; nevertheless, they seldom prescribe secondary saving clauses that avert the problem.

Another problem involving the scope of these safety-net clauses concerns the creation of interests not placed in trust. The foregoing saving clause focuses exclusively on the termination of trusts created by the dispositive instrument. Nevertheless, some living trusts and nearly all wills contain provisions that make gifts without a trust. A trust might be rejected because the value or nature of the subject matter does not justify it or because of entanglements the estate owner wishes to avoid. Usually these gifts are outright and absolute, but sometimes they are not. Recognizing this fact, form books sometimes contain provisions, especially as to real property, for the creation of legal life estates and future interests.<sup>255</sup> Generally, the future interests appearing in these forms do not have conditions operable beyond the life tenant's death; nevertheless, within a particular dispositive design, these conditions might cause a perpetuities violation.

Consider, for example, a devise of a family farm by an unmarried and childless estate owner: "To my brother, John, for life then to his wife for life; after the deaths of both my brother and his wife, the farm shall then pass in fee simple absolute to such of their children then living." If John survives the estate owner and the gift to his wife includes anyone he might marry, the future interest given to John's children violates the common-law rule against perpetuities. Once again, a violation arises be-

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ingly, the safety-net can be fashioned specially with most any group of young people who were born by the time the original power was created.

This "second look" at facts offers the donee-donor another method of compliance, one that does not involve a secondary saving clause. Consider, for example, a special testamentary power that can be exercised in favor of the original donor's grandchildren. Such a power, whether given to the donor's spouse or children, can produce a perpetuities violation when the appointment imposes age requirements that exceed twenty-one. See *supra* text accompanying notes 66-73, 76-78, 83, 138-45. The "second look," however, enables the donee-donor to tailor-make conditions in the light of facts known since the time that the original donor created the power. For example, the donee-donor can impose any age requirement upon grandchildren alive when the power was created. And for afterborn grandchildren, assuming the donee-donor is a life in being when the original power was created, he can impose specific age requirements that must be fulfilled no later than twenty-one years of his death.

255. See, e.g., ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, *supra* note 32, at 12.8-10; J. MURPHY, *supra* note 32, at §§ 6.35, 6.36, 6.36A, 6.37, 6.38, 6.39, 6.40, 6.42, 6.45B, 6.47, 6.9A, 6.10, 6.11, 6.12; H. TWEED & W. PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING 114 (8th ed. 1978).

cause of the possibility of an "unborn widow."<sup>256</sup> Even if John is married and has living children at the estate owner's death, it is possible that John's current wife may die; that John's children may also die; that John may remarry someone born after the estate owner's death; that, thereafter, they may have children; that John may then die; that John's afterborn wife may live more than twenty-one years beyond the deaths of all lives in being at the estate owner's death; and that one or more of their afterborn children may survive her. Accordingly, the gift may vest in children born after the estate owner's death beyond the period of the rule. Unless this devise is narrowly construed to limit the gift to John's current wife and their children, the gift to the children violates the rule against perpetuities. The foregoing possibilities are improbable; nevertheless, they must be accounted for in applying the common-law rule. Consequently, there is a violation regardless of what actually happens, and the remainder to the children must fail because it falls beyond the scope of safety-net clauses that apply exclusively to the duration of trusts.

In addition to the foregoing problems, the delineated safety-net clause presents other durational problems. If such a saving clause is to function effectively, the lawyer must cast the safety-net with a duration that allows the estate owner's objectives to be accomplished. Occasionally the waiting time period may be too uncertain for a court to administer; for example, when the group which measures the safety-net time period includes many "descendants" or "heirs" whose lives are difficult to trace, it may be deemed unreasonably large.<sup>257</sup> More frequently, however, the converse problem arises; namely, when the sweep of the safety-net falls

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256. For other examples and explanations of perpetuities violations involving an "unborn widow," see *supra* text accompanying notes 85-88, 108. Other kinds of violations can arise with the use of successive legal life estates, and these violations can occur even in the absence of an express requirement of survivorship; for example—"To my brother, John, for life, then to his children for their lives; after the deaths of my brother and all of his children, the farm shall then pass in fee simple absolute to his grandchildren." If the secondary life estate is created in a group that can include lives not in being at the estate owner's death, then the gift of the future interest to their children violates the common-law rule against perpetuities. A violation arises because the ultimate remainder to the class of grandchildren in fee simple absolute can include members born beyond the period of the rule to children-life tenants not in being at the estate owner's death. Further, a violation exists even though these possibilities do not materialize and even though the ultimate class of takers includes members alive at the estate owner's death. For other examples and explanations of this kind of perpetuities violation, see *supra* text accompanying notes 89-93, 109-12.

257. See, e.g., CALIFORNIA WILL DRAFTING §§ 15.11, 15.62 (M. Foster, Jr. ed. 1965). This problem can arise with a saving clause that uses a safety-net measured with "beneficiaries" in being under the instrument. If any of the dispositive provisions within the instrument includes gifts to

significantly short of the estate owner's dispositive objectives. To be sure, a saving clause must avoid perpetuities violations, but a saving clause using the safety-net approach must also select measuring lives that allow ample time for the dispositive design to unfold naturally and for the estate owner's objectives to be fulfilled. Nevertheless, there are numerous instances in which saving clauses cut short dispositive designs that could otherwise be implemented within the rule. Invariably, this happens when certain lives critical to a trust's duration and to the fulfillment of its objectives are omitted from the group of measuring lives specified in the safety-net saving clause. Two examples illustrate this problem.

First, consider this variation of an estate design previously developed, one that bypasses children.<sup>258</sup> In trust (testamentary or revocable): "Income to my wife for life, and then, after her death, to my grandchildren such income as is needed to maintain them until they respectively attain age thirty; with principal in equal shares to such of my grandchildren as respectively attain age thirty." Assuming attainment of age thirty constitutes a requirement of survivorship and not merely a postponement of principal distribution,<sup>259</sup> this gift of principal violates the common-law rule. If the estate owner's children survive him, the class gift to grandchildren allows for the inclusion of a grandchild, born after the estate owner's death, more than twenty-one years after the death of the estate owner's wife, his children, and anyone else alive at his death. Even if the estate owner has grandchildren who are age thirty at his death, there is still a violation. A child could have a child (a grandchild of the estate owner) after the estate owner's death but before the estate owner's

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someone's "heirs" or "descendants," this group immediately falls within the safety-net beneficiaries and may, therefore, make the safety-net too vague and broad to administer.

258. See *supra* § II C 1 b.

259. Age requirements introduced by the words "at," "when," "if," "provided," or "in case" tend to support a condition to possession whereby the recipient must actually survive the specified age. This presumption can be overcome by other language and provisions. The phrase "to be paid at" is frequently construed to create a vested interest without any condition as to age; instead the requirement becomes a direction for time of payment when the recipient actually attains the specified age or would have attained it. A gift of intermediate income to the recipient is frequently found to produce the same result. However, the presumed condition of survivorship is not ordinarily overcome when the gift of principal and intermediate income is in trust to a class and the trustee has the power to spray interim income, that is, the trustee has the power to give it all to some and none to others. A gift of income "as is needed to maintain" members of a class falls within this latter rule of construction. Accordingly, the example in the text would seem, as to the gift of principal, to create a contingent interest in each grandchild, one that is conditioned upon actual survivorship of age thirty. For a discussion of these principles of construction, see L. SIMES & A. SMITH, *supra* note 6, at §§ 586, 588.



wife dies. Because this grandchild is born before first distribution of principal, the grandchild would then become eligible to join the class upon attaining age thirty. Because everyone else in being at the estate owner's death can then die before this grandchild reaches age nine, it is possible for the grandchild to join the class beyond the period of the rule. Accordingly, the entire class gift must fail. Additionally, the trustee's power to spray income may also violate the rule.<sup>260</sup> The illustrative safety-net clause<sup>261</sup> would, however, avoid any violations. It would terminate the trust within twenty-one years of the deaths of all beneficiaries alive at the estate owner's death. If his children are not beneficiaries elsewhere under the instrument, their lives cannot be used to measure the safety-net waiting period. Furthermore, if his wife and grandchildren are the only beneficiaries under the instrument and if none of the estate owner's grandchildren have been born by or are alive at his death, the only person under the saving clause available to measure the safety-net time period is his surviving wife. The saving clause will then terminate the trust within twenty-one years of her death; this is surely within the period of the rule, but it may also be within the lives of their children (lives in being at the estate owner's death). These children might, thereafter, have children, but such additional grandchildren would be completely excluded from both income and principal because the saving clause had previously ended the trust. Indeed, the trust could be terminated within the lives of the procreators of the class, even though none of these procreators could possibly be afterborn. This problem arises because the safety-net time period is measured only with beneficiaries, and these beneficiaries may not include all lives in being that are relevant or critical to elaboration and fulfillment of the estate design.

Additionally, when a lawyer omits these critical lives from the safety-net's measuring period, it becomes possible for a saving clause to terminate a trust that contains no perpetuities violation and, further, one that

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260. With some exceptions, discretionary powers given to a trustee to allocate income will violate the rule against perpetuities if the trustee can exercise them beyond the permitted time period. Herein, the trustee's discretionary power to spray income can be exercised beyond the period of the rule. It can be exercised in favor of grandchildren not in being at the estate owner's death until they attain age thirty. Therefore, assuming the power is not personal to a particular trustee, this discretionary allocation may continue beyond twenty-one years after the deaths of all lives in being when the trustee's power was created, including the estate owner's wife, children, and other grandchildren. For a discussion of discretionary powers and the rule against perpetuities, see 6 AMERICAN LAW OF PROPERTY § 24.32 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 6, at § 1277.

261. See *supra* note 244.

cannot last longer than the period of the rule itself. For example, suppose in the previous illustration that the age requirement is reduced to twenty-one. As written, the gift of income and principal present no problems whatsoever with the common-law rule against perpetuities or any related rule. The estate owner's surviving children are all lives in being at his death; they are not afterborn for purposes of the rule. Even if all grandchildren are afterborn, no grandchild can attain age twenty-one more than twenty-one years (and a period of gestation) beyond a parent's death. Accordingly, no grandchild can enter the class more than twenty-one years beyond the death of a life in being, a child of the estate owner. Furthermore, the trust cannot by its terms last longer than this same period of time. The common-law rule allows a proof of validity to be made with lives in being that are not mentioned in the dispositive instrument; it allows for the use of any lives that are connected to the fulfillment or failure of conditions.<sup>262</sup> However, the saving clause only allows the specified lives to measure the safety-net's waiting period. Assuming, as before, that his wife and grandchildren are the only beneficiaries under the dispositive instrument, the estate owner's children have been omitted from the lives that govern the waiting period. Once again, if the estate owner has no grandchildren alive at his death, the trust must terminate within twenty-one years of his wife's death. This might occur before all children die and *before all grandchildren have been born*; indeed, it might occur before a valid trust has fulfilled all of the estate owner's legitimate objectives.

One might conclude that this kind of problem can easily be averted with a larger list of lives to measure the safety-net period. To be sure, this is so, and many safety-net saving clauses within published forms offer expanded choices.<sup>263</sup> Nevertheless, these expanded choices must be

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262. The common-law rule against perpetuities requires a proof of validity: that an interest cannot vest beyond the permitted time period. In applying the rule to an existing provision, any life in being that allows such a proof, whether mentioned in the instrument or not, will suffice. Lives in being that are unrelated to the fulfillment or failure of a condition are obviously irrelevant. The rule requires a proof; that with absolute certainty the interest must vest or fail within a life in being and twenty-one years. This assertion can never be made with respect to disconnected lives in being. Quite differently, all lives in being related to the conditions are relevant. And validity can be established with respect to any such life, mentioned or not, about whom one can say: the interest cannot vest beyond twenty-one years of his or her death. If this proof cannot be made with respect to any of these related or connected lives, and if the interest can vest beyond twenty-one years of its creation, such interest is invalid. See 6 AMERICAN LAW OF PROPERTY § 24.13 (A. Casner ed. 1952); J. DUKEMINIER & S. JOHANSON, *supra* note 5, at 980-83; Becker, *supra* note 5.

263. These expanded choices might include anyone in being when the instrument becomes effec-

specific and feasible. A designation of "implied lives" or "ancestors and any of their descendants" may be sufficiently vague or unreasonable as to render the saving clause unenforceable. One might also wonder whether the perpetuities skills needed to identify appropriate saving clause measuring lives require any less effort, care, and knowledge than those needed to make certain each provision, by its own terms, satisfies the rule. More importantly, however, there are instances in which even an expanded list of lives (one focused on lives that might in some way be connected to conditions or fulfillment of the estate design) will not reach far enough to carry out the estate owner's objectives. This can be illustrated.

Consider a previous example in which an estate owner wished to extend control after his death and, therefore, to delay distribution of principal for a considerable period of time. This might involve a testamentary trust which gave income for life to his wife, then to his children, and then per capita to his grandchildren. Principal would finally be left to such of his great-grandchildren per capita as attain age twenty-five. This gift to great-grandchildren, however, could not take effect because it violates the common-law rule. Even in the absence of an age requirement imposed upon the great-grandchildren, there is a violation if any of the estate owner's children survive him.<sup>264</sup> It is possible that one or more great-grandchildren may be born to an afterborn grandchild more than twenty-one years after the death of all lives in being at the estate owner's death. Accordingly, the gift must fail. As to the effect of the saving clause, assume the estate owner has several children and a few grandchildren living at his death. Further, assume that the saving clause's safety-net time period is measured by an expanded group that includes all beneficiaries and their connected relatives, for example, parents and descendants. If the estate owner's oldest and youngest child are anywhere from

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tive; for example, a list of measuring lives might include people unrelated to the dispositive design, or all descendants of the estate owner, or all descendants of the estate owner's parents. See, e.g., CALIFORNIA WILL DRAFTING §§ 15.62-63 (M. Foster, Jr. ed. 1965); HARRIS BANK *supra* note 32, at VII-4, IV-26.

264. See *supra* text accompanying notes 89-93 (for a previous example of this problem and an explanation of the perpetuities violation). Moreover, the age requirement imposed upon the gift of principal to great-grandchildren causes a perpetuities violation even if the estate owner's children do not survive him. It is possible that grandchildren, who are necessarily lives in being, may have children after the estate owner's death; that these afterborn great-grandchildren may eventually attain age twenty-five and join the class; and that these afterborn great-grandchildren may satisfy this age requirement more than twenty-one years after the deaths of all lives in being, including grandchildren and great-grandchildren alive at the estate owner's death.

ten to twenty years apart in age, it might not be unusual for some of his great-grandchildren to be born, let alone attain age twenty-five, more than twenty-one years after the deaths of all beneficiaries or connected relatives alive at his death (namely, his wife and several children and grandchildren).<sup>265</sup> In short, the expanded group of lives specified in the saving clause might not reach far enough. Although the use of these lives avoids a violation, it might not allow enough time to include all great-grandchildren and satisfy major objectives. This kind of problem does not ordinarily occur with reasonable dispositions that will, in all probability, be fulfilled within the period of the rule. Instead, it arises when estate owners attempt to stretch their dispositive designs to the limits of the rule and even beyond it. In these situations, something more is needed than the usual safety-net waiting period, something more than even an expanded list of connected relatives. What is usually required to maximize the possibility of design fulfillment is a list of specially selected lives otherwise extraneous to the dispositive scheme; for example, the use of several healthy children, born on the day the instrument is executed.<sup>266</sup> Nevertheless, though useful and sometimes essential, this selection of "extraneous" measuring lives does not commonly appear in published safety-net saving clauses.

## (2) *As to Methods for Redirection*

The various methods for redirection of principal or vesting also pres-

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265. This can be illustrated. Assume that the estate owner, T, dies in 1930 and that he is survived by two children, A and B, born twenty years apart. A, who was born in 1900, has two children, A-1 and A-2, born in 1922 and 1925 respectively. After T's death A-1 has a child (T's great-grandchild), A-1-1, who was born in 1942, while A-2 has a child (T's great-grandchild), A-2-1, who was born in 1945. B, T's other child, was born in 1920. B's only child, B-1, was born in 1960 thirty years after the death of T, his grandparent. Also assume that B-1 has a child (T's last great-grandchild), B-1-1, who is born in the year 2000. If the saving clause uses an expanded list of measuring lives that includes beneficiaries and all descendants of the parents of T, assume that A-2 is the youngest member of this group alive at T's death. With these facts, it should be observed that B-1-1 is born seventy-five years after the birth of A-2 and that B-1-1 cannot attain age twenty-five until one hundred years after A-2's birth. Unless A-2 lives beyond age fifty-four, or unless older members of the group of measuring lives attain a greater age, the saving clause will terminate the trust before the birth of B-1-1 (T's only great-grandchild through B). Further, depending on the precise terms of redirection under the saving clause, unless A-2 lives beyond age seventy-nine, or unless older members of the group of measuring lives attain a greater age, B-1-1 will probably be excluded from the redirected principal as well.

266. This can be accomplished with an appropriate saving clause. See, e.g., W. SCHWARTZ, *supra* note 223, at § 6.32. Better yet, it can be accomplished by a tailor-made *saving phrase* within the terms of the dispositive provision itself. See *infra* text accompanying note 291.

ent significant problems. To begin with, there are recurrent problems of uncertainty. Some saving clauses offer no redirection; instead, they simply ordain that no interest shall violate the rule or vest beyond it, or, without more, they terminate the trust upon a particular actuating event. To be sure, it is unclear what will happen if interests do not actually vest in time or if the trust does not naturally end before the actuating event. This uncertainty breeds all of the problems previously discussed with respect to both "wait-and-see" reforms and various actuating events.<sup>267</sup> The absence of a redirection is also apt to induce litigation, perhaps many years after the estate owner's death. Discretionary methods<sup>268</sup> for redirection also present serious problems of uncertainty. Both discretionary and mandatory methods<sup>269</sup> involve uncertainty as to whether and when the actuating event will occur. However, much like *cy-pres* reformation of the common-law rule, discretionary methods evoke additional uncertainty as to which dispositive redesign a court or corporate donee will adopt.<sup>270</sup> Perhaps the worst feature of discretionary redirection is the inevitability of litigation once the actuating event occurs. Discretion entails choices, and with them there is always the potential for disputes. Because these perpetuities matters are never raised in the first place without disagreement among interested parties, it is unlikely that they will readily agree on a particular choice of redirection. Stated otherwise, if disagreement has forced the termination of a trust, it is unlikely that immediately thereafter the parties will suddenly reach agreement as to a course of redirection.

At this point it might seem that saving clauses which actuate discretionary redirection whenever a perpetuities violation occurs<sup>271</sup> are least desirable because of the uncertainty and consequential problems they engender. Surely this is true for the lawyer who ignores the common-law rule while drafting each provision and who relies exclusively upon saving clauses for compliance. Here the risk of violation is greater and, therefore, so is the occasion for actuation of the saving clause. Accordingly, there is considerable uncertainty surrounding the saving clause's applica-

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267. See *supra* text accompanying notes 183-90, 242.

268. See *supra* notes 228-29.

269. See *supra* note 231.

270. The problems of uncertainty and potential litigation raised by saving clauses that use discretionary methods of redirection are comparable to those created by reformations of the common-law rule involving *cy-pres* alone and *cy-pres* combined with "wait-and-see." For a discussion of these problems, see *supra* text accompanying notes 190-93.

271. See *supra* notes 228-29.

tion and redirective solution. However, for the lawyer who knows the rule and satisfies it as to each provision, the saving clause becomes a safeguard against fallibility. In this instance, a lawyer should want a saving clause activated only in the event of improbable miscalculation, and when this occurs, he may prefer the best solution that can be created at that moment in time. Under these circumstances, a lawyer should not want a saving clause that risks premature and unnecessary termination or includes a mandatory redirection which does not take advantage of the hindsight offered by discretionary techniques. Indeed, discretionary saving clauses actuated by perpetuities violations would seem to be the best choice for the lawyer who carefully satisfies the rule within the terms of each provision.<sup>272</sup>

The illustrative saving clause, appearing throughout the previous analysis of carefully defined safety-net time periods, utilized a mandatory method of redirection.<sup>273</sup> It gave principal to those entitled to income immediately before the waiting period expired, before the saving clause terminated the trust. Most mandatory methods for redirection use this same technique, or some variation of it. In one way or another, a right to income is usually tied to the primary and substitute redirections of principal.<sup>274</sup> For this reason, the analysis of mandatory redirection will use the same illustrative saving clause, one that appears in many forms to-

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272. For further discussion concerning the use and selection of an appropriate saving clause, see *supra* note 240.

273. See *supra* note 244.

274. See, e.g., A. CASNER, A PROPOSED ESTATE PLAN FOR MR. AND MRS. RICHARD HARRY BLACK III 255-59 (1979):

*NINTH:* Notwithstanding the directions heretofore given to the trustees acting together and to the disinterested trustee acting alone as to the distribution of income and principal under the terms of this instrument, any trust established by this instrument shall terminate, if it has not previously terminated, twenty-one (21) years after the death of the survivor of the following named persons living on the date this instrument is executed: . . . . and the trustees of such trust shall pay the then remaining principal and undistributed income of such trust to that child of the settlor to whom payments under such trust could be made in the discretion of the disinterested trustee immediately prior to its termination under this Article Ninth; and if income payments could not be made to a child of the settlor under such trust immediately prior to its termination under this Article Ninth, the trustees of such trust shall pay the then remaining principal and undistributed income of such trust to the child of the deceased child of the settlor to whom the income was payable under such trust immediately prior to its termination under this Article Ninth; and if income payments could not be made to a child of the settlor under such trust immediately prior to its termination under this Article Ninth, the trustees of such trust shall pay the then remaining principal and undistributed income of such to the issue of that deceased child of a deceased child of the settlor to whom income payments could be made in the discretion of the disinterested trustee under such trust immediately prior to its termination under this Article Ninth, such issue to take per stirpes . . . .

day. The major problem associated with this particular kind of required redirection is that it may deliver principal to someone who, under a particular provision, was never intended to take principal. More specifically, if the ultimate takers of principal under a provision will be entitled to income at the time the actuating event is apt to occur, then the redirection of principal to them should satisfy the estate owner's objectives. If, however, the actuating event can occur at a time when income is being given to beneficiaries who were never intended to take principal, then the redirection of principal to them would seem to miss the mark. This can be illustrated.

First, consider a slight variation of a previous example that, without a saving clause, would violate the common-law rule: a testamentary gift in trust of income to the estate owner's spouse for life and then to a named child for life; thereafter, income to that child's living children (the estate owner's grandchildren), with principal distributed in equal shares to those who attain age thirty.<sup>275</sup> If the safety-net time provision specifies all beneficiaries in being as measuring lives, it should be clear that the trust cannot possibly terminate until after the deaths of both the spouse and named child. If it is to terminate as a result of the saving clause, this can only happen after all children of the named child have been born. It will terminate only if some living afterborn grandchild has not attained age thirty within twenty-one years of the deaths of all beneficiaries alive at the estate owner's death. Mandatory redirection under this saving clause leaves the principal with those originally intended—the grandchildren. Essentially, the estate owner's objectives will be served; the redirection, however, gives principal to a living afterborn grandchild who may, thereafter, fail to attain age thirty while denying a share to other grandchildren who die before attaining thirty, but prior to the termination of the trust.

This example should be contrasted with two other related illustrations.<sup>276</sup> Suppose the estate owner wishes to extend the testamentary trust by giving only income to the named child's children (the estate owner's grandchildren) for their respective lives, and then, at the death of the survivor of them, he leaves principal per capita to the named child's grandchildren (the estate owner's great-grandchildren) then living, and if

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275. See *supra* text accompanying note 232. The only change involves the age requirement, from twenty-five to thirty. For further discussion concerning the application of this kind of saving clause to the illustration herein, see *supra* text accompanying notes 232-37.

276. See *supra* text accompanying notes 264-66.

none, then to a particular charity. As before, the gifts to the spouse and named child do not violate the common-law rule, nor will the safety-net saving clause terminate the trust before they die. The gift of income to grandchildren does not violate the common-law rule because all class members will be fully identified by the named child's death. However, the gift of principal violates the common-law rule because the estate owner's great-grandchildren may be born and join the class beyond the period of the rule and because the condition of survival is one that can also occur beyond the required time period.<sup>277</sup> Nevertheless, the safety-net saving clause will circumvent this violation. In doing so, it may terminate the trust before all of the estate owner's grandchildren die because an afterborn grandchild might live more than twenty-one years beyond the deaths of all beneficiaries alive at the estate owner's death. If this happens, the principal will be redirected to only the estate owner's grandchildren then entitled to income, and this means not all grandchildren, but just those who are afterborn, living, and drawing income.<sup>278</sup> As between his afterborn living grandchildren and his living great-grandchildren, the estate owner may prefer the latter and, therefore, wish to accelerate the ultimate gift of principal to living great-grandchild-

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277. The requirement of survivorship imposed upon great-grandchildren causes a violation of the common-law rule. Even if the estate owner has great-grandchildren alive at his death, they may die before the time for distribution of principal. Other great-grandchildren may be born thereafter; indeed, the class of great-grandchildren may ultimately consist of only those born after the estate owner's death. If the named child survives the estate owner, he can have additional children (the estate owner's grandchildren). One or more of this child's afterborn children can live more than twenty-one years beyond the deaths of all lives in being at the estate owner's death, and this is the point in time that the great-grandchildren must survive. Accordingly, there is a violation with this gift to a potentially afterborn group which must survive a time that may be well beyond the period of the rule. Moreover, a violation exists even without any requirement of survival. The common-law rule requires that the entire class membership must be fully identified within the allowed time period. Herein, distribution of principal to the estate owner's great-grandchildren is not allowed until the deaths of all grandchildren. Accordingly, the maximum class membership will not be determined until then. Once again, if the named child survives the estate owner, he can have additional children thereafter. It is possible that one or more of this child's afterborn children (the estate owner's afterborn grandchildren) can live more than twenty-one years beyond the deaths of all lives in being at the estate owner's death and then have a child or children. Such great-grandchildren would then be entitled to enter the class of great-grandchildren eligible to take the gift of principal. However, because they would enter the class beyond the period of the rule, the entire gift of principal to great-grandchildren violates the common-law rule against perpetuities.

278. Accordingly, the descendants and families of all deceased grandchildren would be precluded from sharing in the gift of principal. This would affect the older grandchildren, including those alive at the estate owner's death. Indeed, the families of those grandchildren whom the estate owner knew, and might prefer under these circumstances, would not be entitled to share in the principal as a result of the redirection required by this saving clause.



dren.<sup>279</sup> Or he may prefer that the redirection of principal include both afterborn living grandchildren and the living children of deceased grandchildren.<sup>280</sup> Once again, however, the saving clause redirects principal to this limited group of grandchildren only.

To vary the example further, suppose that after the gift of income to the estate owner's grandchildren, the trust omits his great-grandchildren altogether and provides for distribution of principal to the charity. In this instance, the gift to charity is more than a substitutional safeguard if the estate owner's great-grandchildren become extinct; instead it is paramount. After the estate owner has fulfilled his commitment to family, he wants his estate to belong to his favorite charity. This particular gift of principal does not violate the common-law rule against perpetuities. Even though it may become possessory beyond the period of the rule, it is vested from the beginning and, therefore, is beyond the scope of the rule. Nevertheless, because of possible related rules, the safety-net saving clause might terminate the trust during the lives of afterborn grandchildren, and, once again, under this mandatory method of redirection favoring income beneficiaries, those surviving afterborn grandchildren would be entitled to take the principal to the exclusion of the charity. Indeed, this would not seem to be the estate owner's preferred choice had his attention been specifically directed to the problem.

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279. Redirection of principal predicated upon income will usually cause problems when the beneficiaries of income and principal are not identical. See J. FARR, *supra* note 28, at 320. For other illustrations of mandatory methods of redirection, see *supra* note 231. These variations also present serious problems of misdirection. For example, a termination in favor of the person for whom the estate owner named the trust might redirect principal to the beneficiaries under the named child's will (perhaps his spouse) instead of guaranteeing distribution to the estate owner's descendants. Or a termination in favor of the estate owner's living lineal descendants might redirect principal to descendants from all of his children instead of just those of the named child. Therefore, it should be apparent that misdirection of principal is not peculiar to saving clauses that terminate trusts in favor of income beneficiaries. Instead, this problem reflects the inherent difficulties in attempting to draft a universal saving clause, one that provides a single mechanism for redirecting principal for all trusts under all circumstances. See *infra* § III B 3.

280. This result might be accomplished by a change in the terms of the saving clause, one which incorporates this disposition in the mandatory redirection. It might also be accomplished by altering the dispositive provision itself. As designed, each grandchild is entitled to income for only his or her life, with the surviving grandchild ultimately entitled to all of the income. Instead, assume that each grandchild's share of income was to pass at death to his or her living children until the time for distribution of principal (the death of the last surviving grandchild). Upon termination of the trust by the saving clause, principal would belong to those beneficiaries entitled to income. This would include both afterborn living grandchildren and surviving afterborn great-grandchildren as well—namely, children of deceased grandchildren.

### 3. *The Case for Tailor-Made Compliance*

The foregoing discussion has raised some of the problems surrounding the actuating events and methods of redirection used by contemporary saving clauses. An effective saving clause must obviate perpetuities problems, and it must do this with clarity and without jeopardizing important dispositive goals, for all provisions all of the time. But herein lies the rub. To be sure, many of the problems previously discussed could be moderated or avoided with adjustments to the lives that specify the safety-net waiting period or to the mandatory redirections of principal. Safety-net measuring lives can be expanded and alternative redirections added. Nevertheless, this may be too much to attempt with a comprehensive saving clause. Dispositive instruments ordinarily contain one saving clause that is general in nature and is drafted to comprehend all provisions within the instrument. It must be a single design for all occasions. Yet it may be impossible to do this effectively for all provisions all of the time. It may be impossible to carve out the right combination of actuating events and redirections for all provisions. Or, at least it may be impossible to accomplish this without complete understanding of the rule and without significant effort and complexity; indeed, it may require far more technique to do this than it would to satisfy the common-law rule within the terms of each provision. Stated otherwise, it may be much easier and considerably more effective to satisfy the rule by tailor-making the terms of each dispositive provision. Saving clauses offer no guarantees against perpetuities litigation.<sup>281</sup> Perhaps the best protection against perpetuities problems and disputes lies in dispositive provisions that do not flout the rule or tempt violations. For these reasons, many commentators recommend tailor-made compliance; they believe that dispositive provisions should be originally written to satisfy the common-law rule against perpetuities and all related rules and that saving clauses should be used only as a safeguard against miscalculation.<sup>282</sup>

#### a. *Methods of Tailor-Made Compliance*

Before illustrating the process of tailor-made compliance, it should be observed that there are two fundamental methods for accomplishing this.

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281. See CALIFORNIA WILL DRAFTING § 15.54 (M. Foster, Jr. ed. 1965).

282. See, e.g., *id.* at § 15.54; R. LYNN, *supra* note 7, at 151-53; Leach & Logan, *supra* note 209, at 1144. See also L. SIMES & A. SMITH, *supra* note 6, at § 1295. Although this treatise includes a saving clause, it recommends tailor-made compliance with the rule. It even suggests that a saving clause might not be used because of the undesirable results these clauses sometimes cause.

First, there is the *foolproof* method, one which creates only those conditions and interests which cannot possibly vest or even last beyond the period of the rule. This method expressly confines survival and age requirements to points in time necessarily within the rule, or it may eliminate them altogether. It also restricts the exercise and use of powers of appointment and limits the membership of class gifts that might otherwise include lives not in being when the dispositive instrument becomes effective. It is a method that involves many cautionary guidelines and restrictions.<sup>283</sup> *Foolproof* tailor-made compliance offers the decided advantage of certainty; certainty that violations are avoided and greater certainty as to vesting and to the identity of ultimate beneficiaries.<sup>284</sup> Nevertheless, it often incurs the disadvantage of scaling down dispositive objectives and diminishing the dead-hand control desired by estate owners.

The second method of tailor-made compliance draws upon the safety-

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283. See, e.g., 6 AMERICAN LAW OF PROPERTY § 24.7 (A. Casner ed. 1952); CALIFORNIA WILL DRAFTING §§ 15.31-.53 (M. Foster, Jr. ed. 1965); R. LYNN, *supra* note 7, at 152-53; L. SIMES & A. SMITH, *supra* note 6, at § 12.93. Among the cautionary guidelines and restrictions provided by these commentators are: describe beneficiaries individually by name wherever possible; avoid or be careful with age requirements that exceed twenty-one; avoid administrative contingencies; avoid gifts conditioned upon survival of the "spouse" of a named person; be wary of gifts to the estate owner's great-grandchildren or to the grandchildren of a living person; do not create general testamentary or special powers of appointment in an unborn beneficiary; and be careful with the exercise of general testamentary or special powers of appointment, especially with an appointment that creates contingent interests or makes gifts to beneficiaries unborn when the power was originally created.

284. Consider, for example, a testamentary trust that leaves income to a named child for life; thereafter, principal is left to that child's living children (the estate owner's grandchildren) respectively, one-third at age thirty, one-third at age forty, and one-third at age fifty, and until the time for final distribution of principal, trust income is to be used to maintain the child's surviving children. As written, the contingent gifts of principal and discretionary income violate the common-law rule against perpetuities because they involve a class of potentially afterborn grandchildren with conditions and discretion that can occur beyond the period of the rule. In this instance, a lawyer could achieve *fool-proof* compliance by converting the age requirements into merely directions as to the various times for distribution of principal. By eliminating these conditions as to the attainment of particular ages, the gift of principal to the named child's living children necessarily vests at the death of the named child. Even though actual distribution may be deferred beyond such child's death, the ownership of transmissible vested remainders will be determined by that time. And with that earlier vesting and determination of absolute ownership, greater certainty will be achieved. *Fool-proof* compliance might also be achieved without completely abandoning age requirements; indeed, it is commonly accomplished by reducing them to ages that are twenty-one or less. Inevitably, even this scaling down of age requirements achieves greater certainty because it increases the likelihood that conditions will be satisfied and that principal distribution will be made to primary beneficiaries. *Saving phrases* often extend the reach of conditions to the limits of the rule, and with that they necessarily extend the uncertainty of fulfillment or failure which is endemic to the use of any conditions prolonged over time.

net approach used in many saving clauses. More specifically, it creates tailor-made *saving phrases* by using a safety-net and redirection specialized for each dispositive provision.<sup>285</sup> When necessary, it develops a carefully defined safety-net waiting period that is custom-designed to meet the separate scope and durational requirements of each dispositive provision. And, if vesting or dispositive objectives are not fulfilled within the specially designed waiting period, this tailor-made method attempts to make the best mandatory redirection for that specific provision. Although *saving phrases* may not achieve the same measure of certainty as *foolproof* compliance, they do maximize the opportunity to achieve all dispositive objectives.

These two tailor-made methods can be used in the same instrument; sometimes they are used separately, but sometimes they are used in combination. Two examples will illustrate the use of these methods and demonstrate the advantages they offer in comparison to a single multi-purpose saving clause.

*b. The Advantages of Tailor-Made Compliance—Some Illustrations and Comparisons*

Suppose an estate owner, who has a spouse but no descendants, contemplates leaving a substantial gift to his deceased friend's grandchildren. Such a gift might provide in a testamentary trust: "Income to my wife for life and then to my deceased friend John Black's grandchildren so much of the income as is needed to maintain them until they respectively attain age thirty; principal in equal shares when and as soon as each grandchild respectively attains age thirty." Also assume that John Black has left several children, but no grandchildren, alive at the time the instrument is drafted. Without more, if the estate owner were to die immediately, this gift of principal and the power to spray income violate the common-law rule, and they must fail. The class of afterborn grandchildren may not be fully identified until more than twenty-one years beyond the deaths of all lives (including John Black's children) in being at the

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285. See, e.g., HARRIS BANK, *supra* note 231, at XIII—29-31. The dispositive provision therein involves a trust in which gifts of income are made to the living descendants of the estate owner's child until the time for distribution of principal. This distribution of principal is made to the estate owner's living descendants per stirpes when no living grandchild from the group of descendants is under a particular age. The editors of the form book observe that a lawyer can use any age without violating the rule against perpetuities because of a cutoff clause within the same dispositive provision; namely, a *saving phrase* that superimposes a safety-net, a time for distribution that may occur earlier but will always be within the period of the rule.

estate owner's death. And the trustee's power to spray income also violates the rule because it can be exercised beyond the same permitted period of time.

Consider, however, the impact of a popular form of saving clause, one which uses a safety-net approach with an actuating event measured by the lives of beneficiaries in being at the estate owner's death and one which redirects principal to income beneficiaries. Assuming no grandchildren are born before the estate owner's death, this saving clause would terminate the trust within twenty-one years of the deaths of his wife and other beneficiaries in being appearing elsewhere in the instrument. This might happen before all or any of John Black's afterborn grandchildren have attained age thirty or even before all or any of his grandchildren have been born. Upon redirection, those under age thirty receiving income will take a share of principal, and all grandchildren born thereafter will be excluded.<sup>286</sup> This could have significance; at the time of termination and redirection, there may be only a few infant grandchildren, with most grandchildren being born thereafter. This problem of premature termination arises because John Black's children are not beneficiaries and are not included in the safety-net's measuring period; nevertheless, they are critical to the formation of the class and to the time when the age condition might be satisfied. To be sure, the measuring lives within the saving clause could be expanded to include them. However, recognizing that this must be done, and how to do it, requires at least the same expertise and effort as tailor-made compliance. Furthermore, most saving clauses are designed in standard form, simply to be plugged into the instrument as written. To draft a multi-purpose saving clause that covers this situation, and all others, is exceedingly diffi-

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286 If, however, there are no grandchildren alive and entitled to income when the saving clause is actuated and the trust terminated, absent an alternate redirection, the gift of principal would fail and pass through the estate owner's residue, or if this is a gift of the residue, it would pass by intestacy.

Some grandchildren may be precluded from sharing in the principal quite apart from the operation of the saving clause. The rules of construction which govern the composition of a class gift require that the maximum membership be fixed at the time of first distribution of principal. All potential members born after the time for first distribution are excluded from the class. Accordingly, after the estate owner's wife dies, if any grandchild of John Black attains age thirty before the safety-net time period within the saving clause has elapsed, the maximum class membership will be fixed in order to make distribution of principal to that grandchild. And all grandchildren born thereafter will be excluded from this gift of principal. Accordingly, there may be circumstances in which the safety-net time period expires and the saving clause redirects principal to a group of income beneficiaries that does not include all grandchildren who are then alive and under age thirty. For a discussion of these rules of construction, see L. SIMES & A. SMITH, *supra* note 6, at §§ 634-51.

cult. For example, if beneficiaries alone will not suffice, how might one generally expand the list of lives that measure the saving clause's safety-net? Use of the estate owner's relatives will not work because they do not comprehend the critical group of lives, namely, John Black's children. One might include all lives in being who are beneficiaries, who are mentioned or implied within the instrument, or who are ancestors or descendants of these groups of people. This expanded list of safety-net lives may, however, introduce a group too vague and too large to be feasible and to be enforced by a court.

Quite differently, tailor-made compliance with the common-law rule can be accomplished simply and directly. For example, *foolproof* compliance can be achieved by simply reducing the age requirement to twenty-one. This will satisfy the common-law rule because, once again, any proof of validity under the rule can be made with connected lives in being, even those not mentioned in the instrument. Indeed, with this scaled down age requirement, no grandchild can receive income or share in the principal beyond twenty-one years of the death of the survivor of John Black's children. And none of his children can be afterborn because John Black is already dead when the estate owner executes the dispositive instrument. Nor can the trust continue beyond the period of the rule because the last distribution of principal again must occur within twenty-one years of the deaths of John Black's children. The age objective has been amended; nevertheless, absent a supervening saving clause, none of John Black's grandchildren will be excluded unless they fail to attain age twenty-one or unless they are born after some grandchild attains age twenty-one and takes his share of principal.<sup>287</sup>

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287. Grandchildren will not be excluded as such by the *fool-proof* change that produces compliance with the common-law rule. They can, however, be excluded by rules of construction that govern the composition of a class gift. For a discussion of these rules, see *id.* at §§ 634-51. See also *supra* note 286. More specifically, these rules require that the maximum class membership must be fixed at the time of first distribution of principal. The testamentary trust, as modified, directs distribution to each grandchild of John Black who actually attains age twenty-one. First distribution of principal will occur at the estate owner's surviving wife's death if a grandchild (who has not predeceased the estate owner) has previously satisfied the age requirement. If this has not previously happened, first distribution will occur thereafter when the first grandchild attains age twenty-one. In either instance, if another grandchild is born after such time for distribution, that grandchild will not be entitled to share in the gift of principal.

Therefore, additional revision of this dispositive provision is required to insure inclusion of all of John Black's grandchildren. This is not a simple matter; indeed, careful planning and drafting is required to overcome these rules of construction. For example, without more, a clear direction that *all of John Black's grandchildren ever to be born* will not suffice. Ordinarily, courts will close the class at first distribution regardless of this mandate. Something more is needed, something that

A lawyer, however, might also preserve the original age requirement through the use of a *saving phrase*. This technique would retain the dispositive provision as written, but it would also add something more. It would include a tailor-made safety-net: "This trust must terminate within twenty-one years of the death of the last to die of my wife, John Black's children living at my death, (and all beneficiaries under this instrument living at my death). . . ." This waiting time period satisfies all perpetuities requirements, and, in all probability, it will endure until the time all grandchildren ever born attain age thirty. Nevertheless, in the event the trust terminates before its provisions have been fulfilled, mandatory redirection may then be made with the customary distribution of principal to those entitled to income immediately before termination, herein, to living grandchildren under age thirty. But the redirection might also be altered. Grandchildren then under age thirty may thereafter fail to attain that age. Nevertheless, they would retain their share of the principal, while the estates of those who did not attain age thirty before termination of the trust would be excluded. Upon reconsideration of this possibility, the estate owner may wish to make some adjustment.<sup>288</sup>

The other example involves a slight variation of one used previously to illustrate redirection problems under saving clauses.<sup>289</sup> Suppose an estate owner wishes to devote substantially all of his estate to the benefit of his wife and descendants for several generations, but that ultimately he

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overcomes the administrative inconvenience of making a distribution and then having to recover a portion of it to make payment to class members born thereafter. This might be accomplished in many ways. For example, a lawyer might achieve this goal with a provision that holds back a portion of each distributive share to account for afterborn class members. Or, he might accomplish it by delaying first distribution of principal until no more grandchildren can be born. More specifically, a lawyer could achieve this goal by prolonging the gift of income to John Black's grandchildren until the deaths of all of his children, with principal distributed thereafter to those grandchildren who attain age twenty-one.

288. These adjustments would, of course, depend upon the estate owner's reconsideration of dispositive priorities and objectives. If equal treatment of grandchildren and their families is not a high priority, the estate owner might favor the simplicity of just redirecting principal to living grandchildren under age thirty. Or, he might prefer to bypass living grandchildren altogether and redirect principal to someone else. This might be acceptable if other beneficiaries have a more prominent place in the estate owner's dispositive scheme. If, however, equity among grandchildren and their families is important to the estate owner, he may wish to make some adjustment in favor of living members of the families of grandchildren who had previously failed to attain age thirty. For example, disposition of principal upon termination of the trust might then be made to living grandchildren under age thirty and per stirpes to the living descendants of grandchildren who had failed to attain age thirty.

289. See *supra* text accompanying notes 276-80.

wants the principal to belong to his favorite charity. He might accomplish this by creating a testamentary trust that leaves all income first to his wife for life and then to his only child for life. Thereafter, he might leave income to his living grandchildren, or their living descendants per stirpes, until the last of his grandchildren has died. And then he might provide the same income interest to his living great-grandchildren per capita, or their living descendants per stirpes. After the last of these great-grandchildren has died, he would then terminate the trust and make distribution of principal to the named charity.

This ultimate gift of principal does not violate the common-law rule against perpetuities; although it may become possessory beyond the period of the rule, it is vested from the time of its creation. Nevertheless, the gifts of income to descendants other than his wife, children, and grandchildren, can violate the common-law rule. These descendants (great-grandchildren and their living descendants) have interests contingent at least upon birth, and they may be born, and thereby join the class, more than twenty-one years after the deaths of all alive at the estate owner's death, including his wife, children, and any other descendants in being. Accordingly, these income interests must fail, and, perhaps, so might the entire trust fail on the basis of "infectious invalidity."<sup>290</sup> However, the previously considered saving clause would avoid a violation and complete failure. Once again, its safety-net waiting period uses all beneficiaries alive at the estate owner's death. Because the estate owner has attempted to stretch this design to, and perhaps beyond, the limits of the rule, the waiting period could very well expire, and the trust terminate, during the lives of great-grandchildren or even grandchildren. This might be likely if none of the estate owner's grandchildren had been born before he died. If this happened, surely there would be great potential for the waiting period to expire during the lives of afterborn grandchildren and great-grandchildren and to expire even before all great-grandchildren were born. Upon such termination before all trust provisions had been fulfilled, principal would be redirected by the saving clause to income beneficiaries. This would necessarily divert principal to living descendants instead of the charity. And this result might be very unacceptable to the estate owner.

Quite differently, these perpetuities problems can also be averted with

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290. For a discussion of the principle of "infectious invalidity" and the circumstances upon which valid interests must fail along with those that violate the common-law rule, see *supra* note 70.



tailor-made techniques. *Fool-proof* compliance can be achieved only if the estate owner is willing to compromise his objectives and reduce his dead-hand control. For example, after the deaths of his wife and child, tailor-made *fool-proof* compliance can be accomplished with a gift of income to the estate owner's living descendants per stirpes for the next twenty-one years. Afterwards, the trust would terminate and distribution of principal made to whomever the estate owner wished and, therefore, directed in his will. Adoption of this *fool-proof* technique should encourage careful reconsideration of his priorities. As a result, the estate owner might change his mind and prefer his living descendants over the charity, especially if his grandchildren are still alive when the trust terminates.<sup>291</sup>

A tailor-made *saving-phrase* would not require as much of a compromise and, therefore, might be more appealing to the estate owner. This technique would retain the same dispositive provision, but it would also add a familiar safety net: that the trust must terminate within twenty-one years of the last to die of all beneficiaries alive at his death. And to extend and customize the *saving phrase's* safety-net waiting period further, it should include as additional measuring lives several infants born on the day the instrument is executed and who come from families known for their longevity. In the event this *saving phrase* terminates the trust before all great-grandchildren have died and before all trust provisions have been fulfilled, redirection could be made to whomever the estate owner wished and specified in his will. Because of the extended duration of this trust, he might very well prefer the charity over his descendants living when the trust terminates.

Saving clauses work, and usually they work very effectively. Indeed, the preceding catalogue of perpetuities problems applied to saving clauses derives from either dispositive designs or events that are not ordinary. Nevertheless, saving clauses can never achieve the same overall success as tailor-made compliance. To be sure, tailor-made compliance

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291. Upon careful examination of dispositive objectives, the estate owner may determine that while any grandchildren are alive, a substantial gift to descendants has a higher priority than a gift to the particular charity. Accordingly, upon termination of the trust, he might have principal distributed per stirpes to his living descendants if any grandchild is then living; if no grandchild is then living, he might direct that principal should be distributed to the named charity. Or, upon termination of the trust, the estate owner might prefer to divide principal between his living descendants and the named charity. He might prefer to do this if he has any living descendants at such time. Or he might wish to do this only if he has any living grandchildren or living great-grandchildren, with principal left entirely to the charity if there are none.

bulks up dispositive instruments, and it also requires more effort and greater knowledge of perpetuities law than does the indiscriminate use of standard saving clauses. Nevertheless, tailor-made compliance is inevitably superior. It reflects provision-by-provision examination of dispositive objectives and the practical and legal limits that exist for these objectives. It exacts compromises and solutions that focus carefully and exclusively on the needs and priorities of each provision. To function effectively, saving clauses must afford a general solution that best fits all provisions. Yet saving clauses, much the same as any other broad governing principle, can never be quite as effective as techniques that focus squarely on individuated problems. Lawyers can never assume ordinary designs or rely entirely upon anticipated events.<sup>292</sup> The generalized safety-net within saving clauses can never be fully synchronized with the waiting periods needed to fulfill dispositive designs within particular provisions. Inevitably, some saving clauses will cut short what might otherwise be accomplished, while others will misdirect redistribution of principal. Consequently, perpetuities compliance should commence with tailor-made techniques. Saving clauses function best as a safeguard against oversight and miscalculation. Indeed, saving clauses do serve an important objective; ideally they should afford discretionary reformation in the event of a violation—only in the event tailor-made compliance has gone awry.<sup>293</sup>

#### IV. CONCLUSION

If perpetuities problems do arise and if separate compliance with the common-law rule for each dispositive provision is superior to reliance upon local perpetuities reform and the use of saving clauses, then why do so many lawyers reject the tailor-made approach? Perhaps it is because they have not been convinced that these problems do arise, nor persuaded that saving clauses often raise serious problems which tailor-made techniques can avoid. Yet even with this awareness, many lawyers might not function differently. Preparation of comprehensive and complicated wills and trusts takes time, something for which many clients are unable or unwilling to pay.<sup>294</sup> Saving clauses, and the forms in which

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292. See Becker, *supra* note 52, at 761-77.

293. For further discussion concerning the use and selection of an appropriate saving clause, see *supra* note 240 and *supra* text accompanying notes 271-72.

294. In the main, the fees that experienced lawyers charge for estate planning are determined on an hourly basis. Depending on the size of the estate, lawyers will sometimes function with a maxi-

they appear, may save on time and, therefore, on fees. Alteration of form provisions and tailor-made compliance with the common-law rule against perpetuities increase the time needed to prepare wills and trusts, and this may produce costs that cannot be passed on to the client. As a result there is a strong economic disincentive to varying standard practices. Yet there is another reason why lawyers might not function differently. The Supreme Court of California has recognized that an understanding of the rule against perpetuities is beyond the "ordinary skill and capacity commonly exercised" by lawyers.<sup>295</sup> The effect of this is circular and reinforcing: lawyers are not required to satisfy the rule because they do not understand it; and they will not understand it and satisfy it until courts require them to do so. But, perhaps, this is only at the root of a more serious problem of attitude.

Beginning with law school itself, lawyers are often led to believe that

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num (and also a minimum) fee in mind. Implicitly, they may recognize that the traffic will bear no more than a certain amount for these kinds of services. The existence of a maximum fee is a reflection of a variety of factors. Among them may be the recognition that the lawyer-estate planner is apt to earn other fees at a later time from the estate transfer process. But there might be another more important factor operating to limit the fees lawyers charge for estate planning. Individuals whose personal liberty is at stake because they are charged with serious crimes should be quite willing to pay for legal services. Further, clients who seek compensation for personal injuries are ordinarily willing to divide whatever they recover with their attorneys on the basis of a contingent fee. Finally, there are clients who are willing to pay sizable fees that are necessary to carry out important business transactions. Each of these situations involves a matter that the client deems to be of very great or immediate importance, often a situation in which the lawyer's efforts will produce new funds that directly benefit the client and from which fees can be paid, or an instance in which the fees can be fully deducted for income tax purposes. Estate owners, however, might perceive the benefits they receive from estate planning quite differently. Although the skillful arrangement and disposition of an estate can avoid protracted and bitter family disputes and save thousands of dollars in taxes and fees, the immediacy and importance of this accomplishment is frequently underestimated, if not overlooked. All too often, estate owners view these matters as problems for the next generation, ones that arise only after they have died. They might wonder whether it is wise to pay substantial fees out of an existing estate (not out of new funds generated by a lawyer's services) when it is the next generation that will truly benefit from these services. Although these estate owners may be reconciled to leaving what they have earned to others, they may be unwilling or unable to forego in fees the lifetime benefits of their estate so that they might maximize gifts inevitably to be made at death. Whatever the reason, lawyers recognize that there are practical limits on the fees they can charge for estate planning. Whether estate owners are unwilling or unable to pay for estate planning services, lawyers know that they must limit their fees. Unless they are willing to provide these services at a significant loss, lawyers must plan estates within acknowledged fee structures by conserving the hours they devote to these tasks. Consequently, the pressure to use standard forms, and to minimize occasions for deviation from or adjustment of these forms, is significant. Inevitably, many lawyers find it necessary to reshape dispositive desires to fit these forms or to ignore the efficacy and desirability of particular language or provisions within these forms.

295. See *Lucas v. Hamm*, 56 Cal. 2d 583, 592, 364 P.2d 685, 690, 15 Cal. Rptr. 821, 826 (1961).

every graduate is prepared to draft a trust or will, certainly one that is simple.<sup>296</sup> Today, both law schools and the bar recognize the need for expertise in a variety of areas and the need for training in applied lawyer skills.<sup>297</sup> Although planning and drafting courses have become commonplace in law school curricula, neither their number nor enrollment is as great as courses or clinical programs devoted to litigation skills.<sup>298</sup> The

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296. Nevertheless, because the existence of these kinds of simple tasks may be a myth, most lawyers may not be adequately trained to plan and implement estate transfers. See Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning—Part One*, 1972 WASH. U.L.Q. 607; Becker, *Future Interests and The Myth of the Simple Will: An Approach to Estate Planning—Part Two*, 1973 WASH. U.L.Q. 1.

297. Commentators often criticize American law schools for their irrelevance to the real world. More specifically, critics observe that most students are unprepared to practice law upon graduation; often, they do not have adequate training in either essential subject areas or in applied skills to enable them to satisfy their professional responsibilities. Perhaps the foremost critic in recent years of graduate unpreparedness has been Chief Justice Warren E. Burger. Among other things, he has commented on the lack of adequate training in trial advocacy. See Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973). Other critics have maintained that graduates are not only unprepared to litigate, but also unprepared to carry out other duties expected of practicing lawyers. These attacks have produced several different kinds of proposals to remedy graduate unpreparedness, and during the last decade many of these proposals have been adopted in one form or another by law schools or the bar. Chief Justice Burger has proposed a system for training and certification of trial advocates, while others have extended this certification plan to additional specialties. These new proposals and programs have also included law school courses that introduce applied skill training through classroom simulations and clinical experiences involving real lawyer-client relationships. Further, a few states have introduced new bar admission requirements; among them has been a requirement of successful completion of courses in specified subjects. Finally, to assure ongoing lawyer competency, there have been proposals for both voluntary and mandatory continuing legal education. For a discussion and review of these criticisms of legal education and of the proposals that this has generated, as well as the responses of law schools and the bar, see Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 4 B.Y.U. L. REV. 695, 707-18, 877-923 (1977).

298. The 1984-85 course offerings of the Washington University School of Law (St. Louis, Mo.) can be used to illustrate generally the growth and direction of law school curricula devoted to applied lawyer skills. The Washington University School of Law offers four planning courses, and only one of these courses focuses on the drafting of documents used in estate planning. Two of these courses, Estate and Gift Tax Planning and Future Interests—Estate Planning, have no significant drafting requirements and no special limitations upon enrollment. The other two courses have requirements as to drafting and maximum enrollments. Business Planning and Drafting is offered in two sections, with a maximum enrollment of twenty-four in each, while Estate Planning and Drafting has one section limited to only twenty students. The Law School also offers five different courses that are concerned with applied litigation skills. Although these courses have classes with maximum enrollments, they are offered in multiple sections and, accordingly, they service a much larger number of students than do the planning and drafting courses. To begin with, the curriculum includes two simulation courses. Pretrial Practice and Procedure is offered in four sections that collectively accommodate a maximum of ninety students. Trial Practice and Procedure has three sections that collectively accommodate a maximum of one hundred twenty-eight students. The applied liti-

drafting of wills and trusts is taken for granted; it often gets lost in the shuffle in favor of pretrial practice, trial practice, appellate practice, or even corporate and tax planning. Inevitably, this reflects itself in the attitude students and practitioners have towards estate planning; namely, it is something that does not require much time or expertise. Nevertheless, the competent planning and drafting of dispositive instruments requires an acute sense of responsibility; indeed, estate planning necessitates an attitude of *scrupulous professionalism*. The task is never easy; it demands thorough and exhaustive analysis and meticulous and precise exposition, sometimes without regard for the lawyer's time and cost. Indeed, it is not, and cannot be, something for everyone all of the time.

This attitude of *scrupulous professionalism* does not seem to prevail today among lawyers who prepare wills and trusts; certainly it does not reflect itself in their attitude towards the common-law rule against perpetuities.<sup>299</sup> Of course, this can be changed. Redirection of professional

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gation skills curriculum also includes three practicum courses. The Introductory Lawyering Practice Clinic is offered to forty-four students, and the Advanced Lawyering Practice Clinic serves a maximum of sixteen students. These clinics are conducted with placements at the offices of Legal Services of Eastern Missouri, the United States Attorney, and the Public Defender. The third practicum course devoted to applied litigation skills is the Judicial Clerkship. This course involves placements with local state and federal trial and appellate judges, and it accommodates a maximum of forty-eight students. (It should be noted that the curriculum also includes a Congressional Clinic, but this practicum course focuses on the legislative process.)

In 1973, the Washington University School of Law had essentially the same enrollment as it did for the academic year 1984-85. Nevertheless, its curriculum contained only two of the previously mentioned courses, Estate and Gift Tax Planning and Future Interests—Estate Planning. The entire curriculum devoted to applied litigation skills has been added during this period of time. Although the estate planning and drafting course was added in 1983-84, litigation courses have dominated the emerging applied lawyer skills curriculum. This direction and emphasis might be attributed to a variety of factors, such as state bar requirements, intense and repeated criticisms of legal education regarding the preparedness of graduates to litigate, and the allure of courtroom drama. Nevertheless, it might also be attributed to the cavalier attitude that lawyers and educators often display towards will drafting and the complexities involved in performing that kind of task.

299. Indeed, less and less attention is being devoted to the rule against perpetuities and its instruction, especially in first-year required courses on property. See *supra* note 3. If not dismissed entirely in teaching materials or class discussion, the rule is passed over quickly. Underlying this inattention to the rule may be a much too casual attitude toward the importance of and complexity involved in drafting wills and trusts in practice. Nevertheless, experts in this area profess a quite different attitude towards the common-law rule against perpetuities; namely, they believe that the rule is something that should never be overlooked. Despite saving clauses and local reformations of the rule, experts advise that each dispositive provision should be drafted to comply separately with the common-law rule against perpetuities. See, e.g., CALIFORNIA WILL DRAFTING § 15.54 (M. Foster, Jr. ed. 1965); R. LYNN, *supra* note 7, at 151-53. Obviously, this can never be accomplished without attention, time and comprehension, something that must begin with instruction in law school.

attitude must begin in law school. And as an aside, it can begin with greater attention to the common-law rule against perpetuities and with better explanations of it.<sup>300</sup>

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300. Greater attention to the common-law rule against perpetuities will not assure better explanations of it. For a discussion of some of the problems that exist with respect to understanding and applying the common-law rule against perpetuities, see *supra* notes 5-7. Although the rule is often summarized in terms of a simple equation, its full explanation has not lent itself to a precise litmus test or even to methodologies that can readily be understood and applied by most law students. The prevailing instructive technique has focused on specific problems and explanations of the solutions to these problems. The expectation among commentators and teachers is that students will eventually achieve correct solutions for themselves, perhaps with or without a clear understanding of the rule and the process of application. Scholars with significant reputations have attempted explanations of the common-law rule; in the end, most have settled upon this technique. To be sure, something more is needed.