MEASURING LIVES UNDER WAIT-AND-SEE VERSIONS OF THE RULE AGAINST PERPETUITIES

I. INTRODUCTION

Since the late seventeenth century,[1] the common-law rule against perpetuities has provided that "no interest[2] is good[3] unless it must vest,[4] if at all, not later than twenty-one years[5] after a life in being[6] at

1. The modern rule against perpetuities originated in the Duke of Norfolk's Case, 22 Eng. Rep. 931 (Ch. 1682), *rev'd,* 22 Eng. Rep. 963 (Ch. App. 1683), *rev'd,* 22 Eng. Rep. 963 (H.L. 1683). On the historic development of the rule, see J. GRAY, THE RULE AGAINST PERPETUITIES §§ 123-200 (4th ed. 1942); R. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 29-35 (1979); 5 R. POWELL, THE LAW OF REAL PROPERTY §§ 759-60 (P. Rohan rev. 1980); RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 5-9 (Tent. Draft No. 2, 1979) [hereinafter cited as RESTATEMENT (SECOND)]; RESTATEMENT OF PROPERTY 2123-29 (1944) [hereinafter cited as RESTATEMENT]; L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 225-58 (2d ed. 1966); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1211-21 (2d ed. 1956); Leach & Logan, *The Common Law Rule Against Perpetuities*, in 6 AMERICAN LAW OF PROPERTY § 24.4 (A.J. Casner ed. 1952). *Cf.* Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities,* 126 U. PA. L. REV. 19 (1977) (setting forth revisionist analysis).

2. "No interest," however, does not include rights of reentry and possibilities of reverter, which were never subject to the common-law rule. *See* W. BURBY, HAND BOOK OF THE LAW OF REAL PROPERTY 420 (3d ed. 1965); J. GRAY, *supra* note 1, at §§ 299-313; 5 R. POWELL, *supra* note 1, at ¶ 769; RESTATEMENT, *supra* note 1, at § 372; L. SIMES, *supra* note 1, at 280-81; L. SIMES & A. SMITH, *supra* note 1, at §§ 1238-39; Leach & Logan, *supra* note 1, at § 24.62. *Cf.* R. MAUDSLEY, *supra* note 1, at 71 (some rights of reentry subject to rule).

> 3. The penalty for violating the Rule is, by classical doctrine, to strike down the whole interest—and often other interests as well, under the principle of infectious invalidity. The penalty is inflicted, mind you, not on the testator or settlor, but on the innocent intended beneficiaries. If the courts wish to be punitive in this matter, let them order the corpse of the testator disinterred and dishonored as in the cases of Cromwell and Stalin, but why do in the bereaved families?

Leach, *Perpetuities: What Legislatures, Court, and Practitioners Can do About the Follies of the Rule,* 13 U. KAN. L. REV. 351, 351 (1965). *See generally* L. SIMES & A. SMITH, *supra* note 1, at §§ 1256-64; Leach & Logan, *supra* note 1, at §§ 24.47-.54.

4. For a discussion of the "polysemantic" character of the term "vest" as used in the law of property, see W. LEACH & J. LOGAN, CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING 253-54 (1961); Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning,* 1974 WASH. U.L.Q. 607, 624-30.

For purposes of the rule against perpetuities, an interest is "vested" when:

a. any condition precedent attached to the interest is satisfied, and
b. the taker is ascertained, and
c. where the interest is included in a gift to a class, the exact amount or fraction to be taken is ascertained.

Leach & Logan, *supra* note 1, at § 24.18. *Accord,* J. GRAY, *supra* note 1, at §§ 99-118; L. SIMES & A. SMITH, *supra* note 1, at § 1232.

Scholars have often suggested that the rule require vesting in possession rather than vesting in interest. *See* Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?,* 56 MICH. L. REV.

the creation[7] of the interest."[8] The common-law rule embodies a possibilities test requiring that an interest be certain to vest within the period specified.[9] Any possibility, however unlikely, that an interest will vest beyond the time permitted constitutes a violation of the rule.[10]

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887 (1958); Simes, *The Policy Against Perpetuities,* 103 U. PA. L. REV. 707, 737-38 (1955); Waterbury, *Some Further Thoughts on Perpetuities Reform,* 42 MINN. L. REV. 41, 103 (1957).

5. The evolution of the permissible period under the Rule occurred during a time segment of about a century and a half, beginning late in the 17th century. The announced criteria was "convenience," that is, the courts would sustain a limitation . . . if the resultant tie-up of the subject matter of the limitation was not "inconveniently long." A series of important decisions followed this announcement, each holding the period involved in the instrument was not too long. The period was held to be permissible when measured by one life; . . . by two lives plus one year; by one life plus an actual minority; by one life plus a preceding and a following period of gestation; by nine lives plus any period of gestation involved in the situation to which the limitation applied; by twenty-eight lives plus a period in gross of twenty years. By this process of deciding each controversy as it arose, the line between limitations causing a tie-up for a period "not inconveniently long" and those causing a tie-up for an "inconveniently long" period were established.

RESTATEMENT (SECOND), *supra* note 1, at § 1.11, Explanatory Note 2 (citations omitted). The outer limit of the permissible period was finally set at "a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever." Cadell v. Palmer, 26 Eng. Rep. 956 (H.L. 1833).

For a discussion of whether to reduce the perpetuity period to correspond to the 18 year old age of majority now existing in many states, see Soled, *Effect of the Reduction of the Age of Majority on the Permissive Period of the Rule Against Perpetuities,* 34 MD. L. REV. 255 (1974). For an argument in favor of increasing this period to thirty years, see Waterbury, *supra* note 4, at 91.

6. *See generally* W. BURBY, *supra* note 2, at 414; J. GRAY, *supra* note 1, at §§ 216-19; 5 R. POWELL, *supra* note 1, at ¶ 766[2]-[5]; RESTATEMENT, *supra* note 1, at § 374, Explanatory Notes h-l; L. SIMES, *supra* note 1, at 265-67; L. SIMES & A. SMITH, *supra* note 1, at § 1223; Kiralfy, *A "Life in Being" for the Purpose of the Rule Against Perpetuities,* 6 CONVEY. (n.s.) 191 (1942); Note, *Understanding the Measuring Life in the Rule Against Perpetuities,* 1974 WASH. U.L.Q. 265.

7. For almost all future interests, the period of the rule begins to run at the time the interest is created. *See* W. BURBY, *supra* note 1, at 415; J. GRAY, *supra* note 1, at § 231; 5 R. POWELL, *supra* note 1, at ¶ 764[2]; RESTATEMENT, *supra* note 1, at § 374, Comment a; L. SIMES, *supra* note 1, at 267-68; L. SIMES & A. SMITH, *supra* note 1, at § 1226; Leach & Logan, *supra* note 1, at § 24.12. When applied to a general power of appointment exercisable by deed or will, however, the period begins to run from the exercise, not the creation, of the interest. L. SIMES & A. SMITH, *supra* note 1, at § 1271.

8. J. GRAY, *supra* note 1, at § 201 (footnotes added).

9. *See* J. GRAY, *supra* note 1, at § 2.14; R. MAUDSLEY, *supra* note 1, at 35-36; 5 R. POWELL, *supra* note 1, at ¶ 765[1]; RESTATEMENT, *supra* note 1, at § 370, Comment k; L. SIMES, *supra* note 1, at 264-65; L. SIMES & A. SMITH, *supra* note 1, at § 1228; Leach & Logan, *supra* note 1, at § 24.21; Tudor, *Absolute Certainty of Vesting Under the Rule Against Perpetuities—A Self-Discredited Relic,* 34 B.U.L. REV. 129 (1954).

10. [T]he existence of the rule [against perpetuities] in these days is usually made manifest only in cases where nothing of the kind having been desired or suspected, and where by nothing short of a miracle could a perpetuity at any time have supervened, even that possibility has, by the time of the contest, ceased to be existent. All the same in these cases the rule is fatal even to gifts so innocuous, and I cannot doubt that such a result is both mischievous and unfortunate . . . .

The requirement of initial[11] certainty of vesting operates to invalidate interests because of absurdly improbable contingencies, including the now-familiar cases of unborn widows,[12] fertile octagenarians,[13] precocious toddlers,[14] and magic gravel pits.[15] The performance of the

Ward v. Van der Loeff, [1924] A.C. 653, 679 (Blanesburgh, L.J.). *See also* R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 215 (1957).

11. *See* notes 30-33 *infra* and accompanying text.

12. Consider a devise to the children of *A* who survive *A* and his widow. At the testator's death, *A* is 50 years old, married, and has grandchildren. *A*'s marriage could possibly end at anytime. He might marry a woman unborn at the testator's death. *A* might also have children after the testator's death. Thus, the interest might vest in a child not born at the testator's death upon the death of the widow more than 21 years after the death of everyone else alive at the testator's death. This possibility offends the common-law rule, and the children's interests are invalid. *See* Dickerson v. Union Nat'l Bank, 268 Ark. 292, 595 S.W.2d 677 (1980); Greenwich Trust Co. v. Shively, 110 Conn. 117, 197 A. 367 (1929); Shewmake v. Robinson, 148 Ga. 287, 96 S.E. 564 (1918); Momas v. Pullman Trust & Sav. Bank, 371 Ill. 577, 21 N.E.2d 89 (1939); Keefer v. McCloy, 344 Ill. 454, 176 N.E. 743 (1931); Easton v. Hall, 323 Ill. 397, 154 N.E. 216 (1926); Chenoweth v. Bullitt, 224 Ky. 698, 6 S.W.2d 1061 (1928); Perkins v. Iglehart, 183 Md. 520, 39 A.2d 672 (1944); Stryker v. Kennard, 339 Mass. 373, 159 N.E.2d 71 (1959); Gray v. Whittemore, 192 Mass. 367, 78 N.E. 422 (1906); Stones Ex'r v. Nicholson, 68 Va. (27 Gratt.) 1 (1876); Brookover v. Grimm, 118 W. Va. 227, 190 S.E. 697 (1937). *See generally* W. BURBY, *supra* note 2, at 416; J. GRAY, *supra* note 1, at § 214; 5 R. POWELL, *supra* note 1, at ¶ 764[4]; L. SIMES & A. SMITH, *supra* note 1, at § 1230; Leach, *Perpetuities in a Nutshell,* 51 HARV. L. REV. 638, 644 (1938); Leach & Logan, *supra* note 1, at § 24.21.

13. Consider an inter vivos gift by *B*, a woman aged 60, to the first of her grandchildren to attain the age of 21. At common law, this gift violated the rule because *B* was irrebutably presumed capable of having children. Therefore a child born after the gift might bear a grandchild who would attain 21 beyond the period of the rule. *See* Gettins v. Grand Rapids Trust Co., 249 Mich. 238, 228 N.W. 703 (1930); Rozell v. Rozell, 217 Mich. 324, 186 N.W. 489 (1922); Loud v. St. Louis Union Trust Co., 298 Mo. 148, 249 S.W. 629 (1923); Schumacher v. Howard Savs. Inst., 126 N.J. Eq. 325, 8 A.2d 908 (1939); McPherson v. First Citizen's Nat'l Bank, 240 N.C. 1, 81 S.E.2d 386 (1954); Turner v. Turner, 260 S.C. 439, 196 S.E.2d 498 (1973); Ward v. Van der Loeff, [1924] A.C. 653; Johnston v. Hill, 39 Ch. D. 155 (1888); Jee v. Audley, 29 Eng. Rep. 1186 (Ch. 1787).

14. The precocious toddler problem, the converse of the fertile octogenarian situation, involves a gift that is invalid because of the common-law presumption that even infants can bear children. *Cf. Re* Gaites Will Trusts, [1949] 1 All E.R. 459 (Ch.) (issue raised but avoided).

15. Assume *A* owns gravel pits which, given ordinary production, will be exhausted within four years. *A* devises the property to *B* in trust, for operation until the pits are exhausted. *A* directs the trustee to divide the pits among *A*'s living heirs once they are exhausted. The pits actually exhaust themselves in six years. However, the possibility that they might not be exhausted for 50 or 100 years is enough to invalidate the gift under the common-law rule. *In re* Wood, [1894] 3 Ch. 381. *See generally* J. GRAY, *supra* note 1, at § 509.8; L. SIMES & A. SMITH, *supra* note 1, at § 1228; Leach, *supra* note 11, at 648.

No list of problems arising under the common-law rule is complete, however, without this concern:

> Consider the bride of some future astronaut. He is a junior officer, and prudently he and his bride feel they should not have children until he gets a few promotions so that he can finance their future education. He makes his deposit in the sperm bank. Then he is

rule in these cases has produced severe criticism.[16] In spite of such criticism, the common-law rule still prevails in the majority of jurisdictions in the United States.[17]

A growing minority of jurisdictions, however, have enacted major reforms in perpetuities law. The most popular reform is adoption of a wait-and-see approach to the rule.[18] Wait-and-see replaces the com-

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incinerated in orbital flight. She is devastated. Devoted to him as she is, she wants a child by him.

Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent,* 48 A.B.A.J. 942, 943 (1962). If the astronaut's will provided a future interest for his grandchildren, the possibility of a child born after his death would cause the interest to violate the common-law rule. Leach describes this as the child *en ventre sa frigidaire* problem. Leach, *supra*, at 943 n.3.

16. *See, e.g.,* Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror,* 65 HARV. L. REV. 721 (1952); Leach, *Perpetuities, Staying the Slaughter of the Innocents,* 68 L.Q. REV. 35 (1952); Tudor, *supra* note 9; Waterbury, *supra* note 4.

17. *See* 5 R. POWELL, *supra* note 1, at ¶¶ 808-827 (surveying current perpetuities law in the United States).

18. A simple form of wait and see is in substance a variation of Gray's statement of the rule: "No interest in real or personal property is valid *unless it vests*, if at all, not later than twenty-one years after some life in being at the creation of the interest."

R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 203 (1966) (emphasis added). *See* notes 1-8 *supra* and accompanying text. *See generally* W. BURBY, *supra* note 2, at 417; R. MAUDSLEY, *supra* note 1, at 4-7; 5 R. POWELL, *supra* note 1, at ¶ 827B; L. SIMES, *supra* note 1, at 270-75; L. SIMES & A. SMITH, *supra* note 1, at § 1230; Maudsley, *Perpetuities: Reforming the Common Law Rule—How to Wait and See,* 60 CORNELL L. REV. 355 (1975).

In the United States eight jurisdictions have adopted wait-and-see. Six have done so by statute. FLA. STAT. ANN. § 689.22 (West Cum. Supp. 1982); OHIO REV. CODE ANN. § 2131.08 (Page 1946); PA. STAT. ANN. tit. 20, § 6107 (Purdon 1975); VT. STAT. ANN. tit. 27, § 501 (1975); WASH. REV. CODE ANN. § 11.98.010 (1967).

The Kentucky statute is discussed in Dukeminier, *Kentucky Perpetuities Law Restated and Reformed,* 49 KY. L.J. 3 (1960). On the Ohio statute see Lynn, *Ohio Perpetuities Reform Statute,* 34 OHIO ST. L.J. 1 (1968); Note, *The Rule Against Perpetuities—Statutory Reform,* 20 CASE W. RES. L. REV. 295 (1969); 34 OHIO ST. L.J. 433 (1973). Scholarly review of the Pennsylvania provision includes Bregy, *A Defense of Pennsylvania's Statute on Perpetuities,* 23 TEMP. L.Q. 313 (1950); Cohan, *The Pennsylvania Wait-and-See Doctrine—New Kernels from Old Nutshells,* 28 TEMP. L.Q. 321 (1955); Leach, *Perpetuities Legislation: Hail Pennsylvania!,* 108 U. PA. L. REV. 1124 (1960); Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation,* 107 U. PA. L. REV. 965 (1959); Phipps, *The Pennsylvania Experiment in Perpetuities,* 23 TEMP. L.Q. 20 (1949).

Two more states have adopted wait-and-see by judicial construction without the aid of statute. *See* Grynberg v. Amerada Hess Corp., 342 F. Supp. 1314 (D. Colo. 1972) (applying Mississippi law); Phelps v. Shropshire, 254 Miss. 777, 183 So.2d 158 (1966); Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953).

Four more states have adopted limited wait-and-see schemes. CONN. GEN. STAT. §§ 45-95 (West 1960); ME. REV. STAT. ANN. tit. 33, § 101 (1978); MD. EST. & TRUSTS CODE ANN. § 11-103 (1969); MASS. GEN. LAWS ANN. ch. 184A § 1 (West 1977). *See generally* Jones, *Reforming The Law—The Rule Against Perpetuities,* 22 MD. L. REV. 269 (1962); Leach, *Perpetuities Legislation, Massachusetts Style,* 67 HARV. L. REV. 1349 (1954); Note, *Rule Against Perpetuities—Recent Legislation in Massachusetts, Maine and Connecticut,* 54 MICH. L. REV. 723 (1956). In these jurisdic-

tions, an interest that violates the common-law rule is saved if it vests during life estates in the same property given to persons alive at the creation of the interest. The Massachusetts provision is typical:

> 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.

MASS. GEN. LAWS ANN. ch. 184A, § 1 (West 1977).

Abroad, legislatures have adopted wait-and-see in: England, Perpetuities and Accumulations Act 1964, ch. 55; New Zealand, Perpetuities Act 1964 [1964] N.Z. STAT. chs. 205-21; Northern Ireland, Perpetuities Act (N.I.) 1966; the Australian States of Queensland, Property Law Act 1974; Victoria, Perpetuities and Accumulations Act of 1968; and Western Australia, Law Reform Act (Property, Perpetuities & Succession), 1962, ch. 83; and the Canadian provinces of Alberta, [1972] ALTA. STAT. ch. 101; British Columbia, Perpetuities Act, [1975] B.C. STAT. ch. 53; and Ontario, Perpetuities Act, 1966 [1970] REV. STAT. ONT. ch. 343.

For commentary on the English Act, *see generally* Morris & Wade, *Perpetuities Reform at Last,* 80 L.Q. REV. 486 (1964). On the Queensland provision, see Tarlo, *Property Law Reform in Queensland,* 8 U. QUEENS L.J. 205, 233-35 (1974). The Victoria Act is discussed in Adam, *Perpetuities and Accumulations Act 1968,* 43 LAW INST. J. 445 (1969); Hogg & Ford, *Victorian Perpetuities Law in a Nutshell,* 7 MELB. U.L. REV. 155 (1969). For a discussion of the Western Australia statute, see Allen, *The Rule Against Perpetuities Restated,* 6 U.W. AUSTL. L. REV. 27 (1963); Leach, *Perpetuities Reform: London Proposes, Perth Disposes,* 6 U.W. AUSTL. L. REV. 11 (1963); Simes, *Reform of the Rule Against Perpetuities in Western Australia,* 6 U.W. AUSTL. L. REV. 21 (1963). The Ontario Act is discussed in Hogg, *Ontario's Perpetuities Law,* 2 EST. & TRUSTS Q. 19 (1975).

Reform jurisdictions have also enacted statutes mandating the use of *cy pres* to reform instruments invalidated under the rule. *Cy pres* allows reformation to produce a valid disposition that approximates the donor's intention as closely as possible. As the Court explained in Edgerly v. Barker, 66 N.H. 434, 448, 31 A. 900, 902 (1891):

> If a will cannot be conformed to law unless devised property vests sooner than the testator intended, the inquiry may be whether his intent as to the time of vesting is qualified by his intent that the devisees shall have the property and that the devise shall be carried into effect *cy pres*. The construction which gives to an estate which the testator gives to A's children is far from the intent on that subject; but if it is as near as possible, it may accord with the intent on the subject of approximation.

Id. See generally Browder, *Construction, Reformation and the Rule Against Perpetuities,* 62 MICH. L. REV. 1 (1963); Quarles, *The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation,* 21 N.Y.U. L. REV. 384 (1946); 84 HARV. L. REV. 738 (1971); 46 WASH. L. REV. 785 (1971).

In five states, two Canadian provinces, and New Zealand the judiciary uses the *cy pres* doctrine in connection with the wait-and-see doctrine. KY. REV. STAT. ANN. § 381.216 (Baldwin 1979); OHIO REV. CODE ANN. § 2131.68(c) (Page 1976); PA. STAT. ANN. tit. 20, § 6105 (Purdon 1975); VT. STAT. ANN. tit. 27, § 501 (1975); WASH. REV. CODE § 11.98.630 (1967); [1972] ATLA. STAT. ch. 101; [1975] B.C. STAT. ch. 53; [1964] N.Z. STAT. chs. 205-21. Five other states use *cy pres* in connection with the common-law rule. CAL. CIV. CODE § 714.4 (Deering 1971); IDAHO CODE § 55-111 (1979); MO. REV. STAT. § 442.555 (Vernon Supp. 1980); OKLA. STAT. ANN. ch. 60, § 74 (West Supp. 1980); TEX. CIV. CODE ANN. art. 1291(b) (Vernon Supp. 1980).

The California statute is discussed in Simes, *Perpetuities in California Since 1951,* 18 HASTINGS L.J. 247 (1967); Comment, *California Revises the Rule Against Perpetuities—Again,* 16 STAN. L.

mon-law possibilities approach with an actualities test.[19] The require-

REV. 177 (1963). For discussion of the Missouri statute, see Fratcher, *The Missouri Perpetuities Act,* 45 MO. L. REV. 240 (1980). On the Oklahoma provision, see Comment, *Perpetuities, Cy Pres Invades Oklahoma,* 25 OKLA. L. REV. 139 (1972). The Texas provision is discussed in Note, *Property-Perpetuities-Texas Enacts Cy Pres Statute,* 49 TEX. L. REV. 181 (1970). *See also* Leach, *Cy Pres on the March,* 17 VAND. L. REV. 1381 (1964).

Other reform statutes attempt to "patch-up" particular problem areas in perpetuities law. Eight states have statutes saving gifts that are invalid because they require beneficiaries in the third generation to attain an age of more than 21 years before their interest will vest. The statutes reduce the age requirement to 21 years. CONN. REV. STAT. § 45-97 (West 1960); FLA. STAT. ANN. § 689.22(4) (West Supp. 1980); ILL. STAT. ANN. ch. 30, § 194(a) (Smith-Hurd 1967); ME. REV. STAT. ANN. tit. 33, § 102 (1978); MD. EST. & TRUSTS CODE ANN. § 11-105 (1969); MASS GEN. LAWS ANN. ch. 184A, § 2 (West 1977); N.Y. EST., POWERS & TRUSTS LAW § 9-1.2 (McKinney 1967). The Illinois statute is discussed in Note, *Illinois v. The Rule Against Perpetuities,* 3 J. MAR. J. PRAC. & PROC. 386 (1970).

Some states have enacted statutes addressed to the unborn widow problem. *See* note 12 *supra* and accompanying text. The reform statutes create an irrebuttable presumption that the "widow" referred to was in being at the creation of the interest. CAL. CIV. CODE § 715.7 (Deering 1971); FLA. STAT. ANN. § 689.22(5)(b) (West Supp. 1980); ILL. ANN. STAT. ch. 30, § 194(c)(3) (Smith-Hurd 1978); N.Y. EST., POWERS & TRUSTS LAW § 9-1.3(A) (McKinney 1967).

The fertile octagenarian problem, *see* note 13 *supra* and accompanying text, is solved by statutes that presume infertility after a certain age. FLA. STAT. ANN. § 689.22(5)(d) (West Supp. 1980) (females over 55); ILL. ANN. STAT. ch. 30, § 194(c)(3) (Smith-Hurd 1978) (females over 65); N.Y. EST., POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1967) (females over 55). Other statutes allow the introduction of evidence rebutting the presumption of fertility. IDAHO CODE § 55-111 (1957); TENN. CODE ANN. § 24.5-112 (1979).

Other statutes prevent the precocious toddler, *see* note 14 *supra* and accompanying text, from causing perpetuities problems by assuming that he or she is infertile until a certain age. ILL. ANN. STAT. ch. 30, § 194(c)(3) (Smith-Hurd 1978) (infertile until age 13); N.Y. EST., POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1967) (infertile until age 14).

19. The possibility that an interest might vest too remotely is irrelevant under wait-and-see. If the interest actually vests too remotely, however, the rule will invalidate the interest. Consider the unborn widow problem, *supra* note 12, under a wait-and-see analysis.

A devises to *B* for life, then to *B*'s widow for life, remainder to their surviving children. *B* dies, survived by *B*'s widow who was not alive at *A*'s death and children, one or more of whom were born after the death of *A*. The validity of the interest is determined by waiting and seeing:

> (1) If B's widow dies survived by children of B of whom at least one is alive at A's death, the contingent remainder to the children of B is good under "wait and see" and vests at the death of the unborn widow.
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> (2) If B's widow dies within twenty-one years after the death of B and all of B's children alive at A's death, survived by a child or children of B, the contingent remainder to the children of B is good under "wait and see" and vests at the death of the unborn widow.
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> (3) If B's widow dies beyond twenty-one years after the death of B and all of B's children alive at A's death, the contingent remainder to the children of B cannot vest within the perpetuities period and is bad under "wait and see."
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> . . . .
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> (4) If B's widow dies beyond twenty-one years after the death of B and all of B's children alive at A's death, and all of B's children are dead twenty-one years after the death of B and all of B's children alive at A's death, the contingent remainder to the children of B fails by its own terms.

ment that an interest be certain to vest within the time permitted is replaced by a requirement that the interest actually vest within that period. Because highly unlikely possibilities of remote vesting are significant only if they materialize, wait-and-see would uphold otherwise void limitations that vest in fact within the permissible period.[20]

The American Law Institute is the most recent addition to those favoring reform. Over vigorous and distinguished dissent,[21] the Institute has approved a wait-and-see version of the rule as applied to donative transfers for inclusion in the *Restatement (Second) of Property*.[22] The approved draft provides for full wait-and-see,[23] using specified measuring lives[24] and *cy pres* reformation of interests that violate the

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R. LYNN, *supra* note 18, at 74-75.

20. R. MAUDSLEY, *supra* note 1, at 80-81.

21. *See* RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS, App. 127 (Tent. Draft No. 1, 1978) (commentary by ex-reporter Richard R. Powell on proposed draft); ALI, THE RULE AGAINST PERPETUITIES (1978) (transcript of discussion of Tentative Draft No. 1 at the 55th Annual Meeting of the American Law Institute).

22. On May 18, 1979, the American Law Institute approved *The Restatement (Second) of Property, Donative Transfers*. *See* Comment, *Rule Against Perpetuities: The Second Restatement Adopts Wait and See,* 19 SANTA CLARA L. REV. 1063, 1063 n.1 (1979).

23. RESTATEMENT (SECOND), *supra* note 1, at § 1.4 provides: "[A] donative transfer of an interest in property fails if the interest does not vest, if it ever vests, within the period of the rule against perpetuities."

24. RESTATEMENT (SECOND), *supra* note 1, at § 1.3 provides:

> (1) If an examination of the situation with respect to a donative transfer as of the time the period of the rule against perpetuities begins to run reveals a life or lives in being within 21 years after whose deaths the non-vested interest in question will necessarily vest, if it ever vests, such life or lives are the measuring lives for purposes of the rule against perpetuities so far as such non-vested interest is concerned and such non-vested interest cannot fail under the rule. A provision that terminates a non-vested interest if it has not vested within 21 years after the death of the survivor of a reasonable number of persons named in the instrument of transfer and in being when the period of the rule begins to run is within this subsection.
>
> (2) If no measuring life with respect to a donative transfer is produced under subsection 1, the measuring lives for purposes of the rule against perpetuities as applied to the non-vested interest in question are:
>
> a. The transferor if the period of the rule begins to run in the transferor's lifetime; and
>
> b. Those individuals alive when the period of the rule begins to run, if reasonable in number, who have beneficial interests vested or contingent in the property in which the non-vested interest in question exists and the parents and grandparents alive when the period of the rule begins to run of all beneficiaries of the property in which the non-vested interest exists, and
>
> c. The donee of a nonfiduciary power of appointment alive when the period of the rule begins to run if the exercise of such power could affect the non-vested interest in question.
>
> A child in gestation when the period of the rule begins to run who is later born alive is treated as a life in being at the time the period of the rule begins and, hence, may be a measuring life.

rule.[25]

The American Law Institute's endorsement of wait-and-see may spur interest in perpetuities reform in this country, and warrants a new consideration of the wait-and-see doctrine.[26] The draft's use of specified measuring lives is important in the development of the wait-and-see doctrine. Identification of appropriate measuring lives is one of the most difficult and often criticized aspects of the wait-and-see doctrine.[27]

This Note addresses the problem of defining appropriate measuring lives for the wait-and-see rule. Part II of this Note explains why the adoption of wait-and-see raises a measuring life problem not encountered under the common law. Part III addresses the policies underlying the rule against perpetuities which reformers should consider in formulating a wait-and-see measuring life concept. Finally, Part IV of this

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At its May 18, 1979 meeting, the American Law Institute deleted subsection (2)(c), which provided: "(c) Those other individuals alive when the period of the rule begins to run, if reasonable in number, who are specifically mentioned in describing the beneficiaries of the property in which the non-vested interest in question exists . . . ." *See* Comment, *supra* note 22, at 1066 n.10.

25. RESTATEMENT (SECOND), *supra* note 1, at § 1.5 provides:

> If under a donative transfer an interest in property fails because it does not vest or cannot vest within the period of the rule against perpetuities, the transferred property shall be disposed of in the manner which most closely effectuates the transferor's manifested plan of distribution, which is within the limits of the Rule Against Perpetuities.

26. An examination of the overall merits of wait-and-see is beyond the scope of this Note, but scholars have covered that ground well. *See* Bregy, *supra* note 18; Browder, *supra* note 18; Cohan, *supra* note 18; Dukeminier, *supra* note 18; Eckhardt, *Perpetuities Reform by Legislation,* 31 MO. L. REV. 56 (1966); Fetters, *Perpetuities: The Wait and See Disaster,* 60 CORNELL L. REV. 380 (1975); Jones, *supra* note 18; Leach, *supra* note 15; Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives,* 73 HARV. L. REV. 1518 (1960); Leach, *Perpetuities Legislation, Massachusetts Style, supra* note 18; Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror, supra* note 16; Leach, *supra* note 3; Leach, *Perpetuities Reform by Legislation,* 70 L.Q. REV. 478 (1954); Leach, *Perpetuities: Staying the Slaughter of the Innocents, supra* note 16; Leach, *Perpetuities Legislation: Hail Pennsylvania!, supra* note 18; Lynn, *Reforming the Common Law Rule Against Perpetuities,* 28 U. CHI. L. REV. 488 (1961); Lynn, *Perpetuities Reform: An Analysis of Developments in England and the United States,* 113 U. PA. L. REV. 508 (1965); Lynn, *Raising the Perpetuities Question: Conception, Adoption, "Wait and See" and Cy Pres,* 17 VAND. L. REV. 1391 (1964); Maudsley, *supra* note 18; Mechem, *A Brief Reply to Professor Leach,* 108 U. PA. L. REV. 1155 (1960); Mechem, *supra* note 18; Morris & Wade, *Perpetuities Reform at Last,* 80 L.Q. REV. 486 (1964); Schuyler, *Should We Abolish the Rule Against Perpetuities?,* 41 CHI. B. REC. 139 (1959); Schuyler, *supra* note 4; Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine,* 51 MICH. L. REV. 179 (1953); Simes, *supra* note 4; Tudor, *supra* note 9; Waterbury, *supra* note 4.

27. *See* Allen, *Perpetuities, Who are the Lives in Being?,* 81 L.Q. REV. 106 (1965); Jones, *Measuring Lives Under the Pennsylvania Statutory Rule Against Perpetuities,* 109 U. PA. L. REV. 54, 54-55 (1960); Simes, *supra* note 26, at 184.

Note reviews the various methods now used to resolve the measuring life problem.

II. THE PROBLEM

The rule against perpetuities allows a future interest to remain contingent for a life in being plus twenty-one years after its creation.[28] Wait-and-see retains this general statement of the rule, but substantially alters the practical meaning of "life in being." This alteration creates the measuring life problem.

A. *The Common-Law Lives*

At common law, any person alive at the creation of a future interest is a life in being for that interest.[29] Most of these lives, however, are irrelevant to perpetuities analysis. The common-law rule is concerned with possibilities.[30] A life might end at any moment. Most lives in being, then, can end the day after an interest is created without bringing the interest any closer to vesting.[31] Because an interest will not necessarily vest within twenty-one years of these lives in being, the lives do not validate the interest.[32]

The critical lives in determining an interest's validity at common law are the causal lives; those lives that play a part in the grantor's scheme of distribution.[33] Causal lives extend or shorten the time in which a future interest can possibly vest.[34] The end of each causal life brings a future interest one step closer to vesting.[35] Because causal lives define the period in which an interest can vest, identification of a causal life

28. *See* notes 1-8 *supra* and accompanying text.

29. Jones, *supra* note 27, at 59-60; Simes, *supra* note 26, at 187; Note, *supra* note 6, at 273.

30. *See* notes 9-10 *supra* and accompanying text.

31. Simes, *supra* note 26, at 187.

32. *Id.*

33. Morris & Wade, *supra* note 26, at 496-501; Note, *supra* note 6, at 281.

34. [I]t is obvious that the [common-law] lives in being select themselves without difficulty; the law allows any lives to be used, but no lives can be of the slightest use unless they somehow restrict the period of time within which the gift is to be capable of vesting according to the conditions laid down by the donor. No other lives can possibly help, since they have nothing to do with the conditions appointed by the donor for the vesting of the gift.

Morris & Wade, *supra* note 26, at 496.

35. Consider a gift to the grandchildren of *A* who attain the age of 21. The causal lives are *A*, *A*'s spouse, if any, *A*'s children and their spouses, if any, and the grandchildren. As each of these individuals dies, his or her death accelerates the time at which the full and final membership of the class of grandchildren is determined.

whose end will necessarily cause the interest to vest within twenty-one years is possible in most cases.[36] That life is the interest's validating life. The transaction does not violate the rule if a validating life is found. If no such causal life exists, the rule invalidates the interest.[37] The common-law requirement that an interest necessarily vest in time thus confines the lives that might validate an interest to the causal lives in being at the interest's creation.

B. *The Wait-And-See Lives*

Wait-and-see does not require that an interest be certain to vest within the perpetuities period.[38] The requirement of initial certainty of vesting, therefore, no longer operates to restrict the relevant lives in being to the causal lives.[39] Wait-and-see requires definition of a new class of lives, the measuring lives.[40] Wait-and-see will wait during the

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36. Consider a devise to the first grandchild of the testator to attain age 21. The children of the testator are the causal lives in being. The grandchildren will attain age 21, if at all, within 21 years of the death of the last of testator's children. Therefore, the children are validating lives and the gift is valid. *See* McArthur v. Scott, 113 U.S. 340, 383-84 (1885); Tuttle v. Sisele, 281 Ky. 218, 224-25, 135 S.W.2d 436, 439-40 (1959); Carter v. Berry, 243 Miss. 321, 361-62, 140 So.2d 843, 848 (1962); Lux v. Lux. 109 R.I. 592, 598-99, 288 A.2d 701, 705 (1972); Otterback v. Bohrer, 87 Va. 548, 552, 12 S.E. 1013, 1014 (1891). *See generally* Note, *supra* note 6, at 289.

37. If no validating life exists, the interest is not certain to vest within 21 years of a life in being at the time the interest was created. *See* notes 1-8 *supra* and accompanying text.

38. Wait-and-see requires only that an interest actually vest within the perpetuities period. Initial certainty of vesting is, therefore, irrelevant. *See* W. BURBY, *supra* note 2, at 417; R. LYNN, *supra* note 17, at 34; 5 R. POWELL, *supra* note 1, at ¶ 827-B; L. SIMES, *supra* note 1, at 270-71; L. SIMES & A. SMITH, *supra* note 1, at § 1230; Maudsley, *supra* note 18, at 363.

39. No further formulation [of common-law lives] was required. . . . The reason for this, it is suggested, is "the initial certainty rule"—the requirement . . . that an interest is valid only if it is possible to say at the date of the creation of an interest that it must necessarily vest in time, if it vests at all. This requirement immediately restricts the range of lives that one need consider for the purposes of the [common-law] rule.

. . . .

. . . Once the requirement of initial certainty is removed and a "wait-and-see" rule introduced, the problem of lives in being becomes acute.

Allen, *supra* note 27, at 107-08.

40. This is a policy decision. The introduction of the principle of wait-and-see is an attempt to avoid the invalidation of a disposition which does in fact vest within 21 years of the death of a person in being at the date of the gift. Anyone can be chosen to serve as a measuring or validating life.

. . . .

. . . The question to ask, when considering a candidate for inclusion is: if the interest vests within 21 years of that person's death, would I wish to uphold the gift? It is important to get this question right, and to get away from outdated concepts of including only lives who were "relevant" in the context of the common law Rule.

Maudsley, *supra* note 18, at 375, 377.

measuring lives, plus twenty-one years, for an interest to vest.

The common law provides little guidance in ascertaining the appropriate measuring lives. At common law, no waiting was allowed. The validity of an interest was determined with reference to facts as they stood when the interest was created.[41] Although commentators have vigorously debated the issue,[42] the common law had no reason to define an appropriate class of measuring lives.[43]

The 1962 Western Australia Perpetuities Act[44] illustrates the impossibility of ascertaining wait-and-see measuring lives from the common law. This statute provided that it did not incorporate any lives other than the common-law lives in being.[45] Although Australian courts have not yet had the opportunity to construe the measuring life provision, scholars have argued for three different constructions. Because the statute speaks of "lives in being," some scholars have argued that any common-law life in being can serve as a measuring life under the Australian statute.[46] Under this analysis, an interest is valid if it vests within twenty-one years of the death of the survivor of all persons alive at the interest's creation. A remotely vesting future interest would withstand perpetuities attack if the beneficiaries could produce a centenarian who was alive at the time the interest was created.[47]

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41. *See* W. BURBY, *supra* note 2, at 415; R. LYNN, *supra* note 17, at 33-34; 5 R. POWELL, *supra* note 1, at ¶ 7-65 [1]; RESTATEMENT, *supra* note 1, at § 370, Comment m; L. SIMES, *supra* note 1, at 267-68; L. SIMES & A. SMITH, *supra* note 1, at § 1228; Leach & Logan, *supra* note 1, at § 24.24.

42. *Compare* R. MAUDSLEY, *supra* note 1, at 106; Allen, *supra* note 27, at 108-09; Jones, *supra* note 27, at 59-60; Mechem, *supra* note 18, at 981-82 *and* Simes, *A Qualified Endorsement*, 92 TR. & EST. 770, 771-72 (1953) *with* Leach, *supra* note 18, at 1145; Cohan, *supra* note 18, at 332-36 *and* Morris & Wade, *supra* note 26, at 487-88.

43. "[A]t common law . . . the problem [of measuring lives] has no practical significance and never had to be answered directly." Allen, *supra* note 18, at 45.

44. Western Australia Law Reform Act of 1962, ch. 83 (W. Austl.).

45. The statute provided that it did not "make any person a life in being for the purpose of ascertaining the perpetuity period unless that person would have been considered a life in being if [the statute] had not been adopted." *Id.* § 7(c).

46. *See* Jones, *supra* note 27, at 60; Simes, *supra* note 26, at 187.

47. [T]here is a devise to such of testator's lineal descendants as are alive 120 years after the testator's death. . . . One can imagine, in such a case, remote lineal descendants patiently awaiting the termination of the 120 year period, not knowing after all this time whether the limitation is good or bad. And finally, at the end of the 120th year, the attorney for the descendants advertises for evidence concerning any person who died twenty years ago and who was at least one hundred years old at the time of his death. Doubtless the attorney will eventually find such a person. For in every year there must be at least a few persons who die at the age of one hundred. But what a fantastic way to determine the validity of a future interest!

Other scholars have argued that the common law implicitly adopted causal lives as the measuring lives.[48] Under this interpretation, an interest is valid only if it vests within twenty-one years of the last remaining causal life.[49] Little support exists, however, for the proposition that the common law equated causal and measuring lives.[50]

The final scholarly view is the most restrictive. Under this view, the only lives recognized by the common-law rule were those that validated an interest. The Australian statute would therefore permit only common-law validating lives[51] as measuring lives. This view has the support of the statute's author.[52] If his interpretation is ultimately adopted, Western Australia's wait-and-see provision does nothing more than reenact the common law.[53]

The Western Australia statute exemplifies the difficulty of defining wait-and-see measuring lives in terms of common-law concepts.[54] Moreover, even if such a definition were possible, it is not necessarily

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Simes, *supra* note 26, at 187.

48. How then are these principles affected by the change-over to "wait and see"? The first point to observe is that the object of the change is not to alter the length or nature of the perpetuity period, but merely to discard the certainty doctrine in favor of the "wait and see" doctrine. . . . There is nothing whatever in this change of policy to require any change in the method used for ascertaining the perpetuity period, or for ascertaining the relevant lives in being. As before, the relevant lives in being should be those which restrict the period of time within which the appointed conditions for vesting can be fulfilled, and no others.

Morris & Wade, *supra* note 26, at 497-98. *Accord,* Cohan, *supra* note 16, at 332-36; Leach, *supra* note 16.

49. *See* notes 33-37 *supra* and accompanying text.

50. *See* Allen, *supra* note 18, at 45; Fetters, *supra* note 26, at 405-06; Maudsley, *supra* note 18, at 375.

51. *See* notes 36-37 *supra* and accompanying text.

52. Allen, *supra* note 27, at 111-12.

53. "[I]f the only lives who may be used for wait-and-see are those who have already validated the gift, [under a common-law analysis] we would never wait and see at all." Maudsley, *supra* note 18, at 374 (citation omitted).

54. Unfortunately, both Queensland and Victoria have adopted very similar provisions. The Victoria Perpetuities and Accumulations Act of 1968, § 6(4) provides:

Nothing in this section makes any person a life in being for the purposes of ascertaining the perpetuity period unless the life of that person is one expressed or implied as relevant for this purpose by the terms of the disposition and would have been reckoned a life in being for such purpose if this section had not been enacted:

Provided however that in the case of a disposition to a class of persons or to one or more members of a class, any person living at the date of the disposition whose life is so expressed or implied as relevant for any member of the class may be reckoned a life in being in ascertaining the perpetuity period.

Id. See also Queensland Property Law Act of 1974.

desirable.[55] Wait-and-see statutes should look to the policies underlying the rule to define appropriate measuring lives.

III. PERPETUITIES POLICY

The heart of the rule against perpetuities is the regulation of remote vesting.[56] The wait-and-see measuring lives define the time period in which a future interest must vest. The rule invalidates only those interests that fail to vest during a time period defined by the measuring lives plus twenty-one years.[57] Because the definition of measuring lives thus affects the basic operation of the rule, the criteria for selecting measuring lives should rest on the policies that justify the rule's restriction of remote vesting.

The rule against perpetuities serves both restrictive and permissive social policies. The rule is recognized mainly as a restriction on the ability of property owners to control the devolution of property for long periods after they had passed on ownership of the property.[58] Historically, jurists viewed such a restriction as necessary to preserve the alienability of property.[59] This rationale has little merit given the nature of modern future interests. Currently almost all future interests consist of securities held in trust.[60] Trust instruments usually confer broad powers upon the trustees to sell or reinvest the trust corpus.[61] Even real property subject to contingent future interests is substantially more alienable today than it was in the eighteenth and nineteenth centuries.[62] Contingent future interests today are alienable regardless of the

55. [E]ven if it were possible to delineate a category of common law [measuring] lives . . . [t]here is no assurance that they will be the *right* lives for wait-and-see. Wait-and-see is a new concept in the law of perpetuities. There is no reason to suppose that common law lives would be appropriate in this new era. One needs to take a fresh look at the situation and ask: who ought to be a measuring life under wait-and-see?

Maudsley, *supra* note 18, at 375.

56. R. LYNN, *supra* note 17, at 9; L. SIMES, *supra* note 1, at 253; L. SIMES & A. SMITH, *supra* note 1, at § 1222; Leach & Logan, *supra* note 1, at § 24.3. *Cf.* 5 R. POWELL, *supra* note 1, at ¶ 7.62 (questioning remote vesting rationale).

57. *See* notes 38-39 *supra* and accompanying text.

58. *See* notes 59-65 *infra* and accompanying text.

59. J. GRAY, *supra* note 1, at § 2.1; R. LYNN, *supra* note 17, at 10; J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 13-15 (2d ed. 1962); 5 R. POWELL, *supra* note 1, at ¶ 762; L. SIMES, PUBLIC POLICY AND THE DEAD HAND 33-38 (1955); Simes, *supra* note 4, at 708-11; 84 HARV. L. REV. 738, 739-40 n.5 (1971).

60. Mechem, *supra* note 18, at 968-69; Simes, *supra* note 4, at 717-18.

61. *Id.*

62. L. SIMES, *supra* note 59, at 43-46; L. SIMES & A. SMITH, *supra* note 1, at §§ 1941-43.

time at which the future interests vest.[63]

The rule's restriction on remote vesting retains its viability today because modern justifications have replaced the concern for alienability. The prevention of remotely vesting interests strikes a balance between the desires of past and future generations to control the devolution of their property.[64] The restriction tends to prevent dynastic concentrations of wealth.[65] Some jurists believe that insulation from the need to participate and prove one's self in economic affairs is inconsistent with the prevailing capitalist economic viewpoint.[66] Finally, the restriction against remote vesting, by freeing assets from trust restrictions, ensures a ready supply of capital for investment in risk ventures[67] and tends to divert available assets from capital to consumer investment.[68] These considerations justify the substantially unanimous view that the restriction against remote vesting remains necessary.[69]

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63. "I believe it is no exaggeration to say that, at the present time, due to changes both in the nature of capital investments and in the law, the proposition that contingent future interests make property unproductive is rarely true in the United States and almost never true in England." Simes, *supra* note 4, at 712 (emphasis omitted).

64. J. MORRIS & W. LEACH, *supra* note 59, at 17; L. SIMES, *supra* note 59, at 59-60; Simes, *supra* note 4, at 708-09.

65. L. SIMES, *supra* note 59, at 57-58; Fetters, *supra* note 26, at 408-09; Leach, *Perpetuities Legislation: Hail Pennsylvania!, supra* note 18, at 1136; 84 HARV. L. REV. 738, 739-40 n.5 (1971). The rule, however, may provide a less effective means of controlling concentration of wealth than other methods available, such as taxes. *See* L. SIMES, *supra* note 59, at 56-57; Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror, supra* note 16, at 727.

66. The keeping of property free to answer the exigencies of its possessor was a corollary of the English stress on individualism and rested . . . upon a competitive theory. It is obvious that limitations unalterably effective over a long period of time would hamper the normal operation of the competitive struggle. Persons less fit, less keen in the social struggle, might be thereby enabled to retain property disproportionate to their skills in the competitive struggle. Hence the rule against perpetuities can be regarded as furthering the effective operation of the competitive system.

RESTATEMENT, *supra* note 1, at 2132. *See* Leach, *Perpetuities Legislation: Hail Pennsylvania!, supra* note 18, at 1137; Simes, *supra* note 4, at 722-23.

67. L. SIMES, *supra* note 59, at 60; Simes, *supra* note 4, at 724; 84 HARV. L. REV. 738, 739-40 n.5 (1971).

68. L. SIMES, *supra* note 59, at 61; Simes, *supra* note 4, at 724-25; 84 HARV. L. REV. 738, 739-40 n.5 (1971).

69. Of course there are dissenters:

It is probably pointless for me to voice my belief that if there were no Rule against Perpetuities today nobody would think of calling for one; the impact of the income tax and death duties is such as to preclude the perpetuation of great landed estates or even great personal fortunes, at which the Rule was aimed. I cite as evidence our state of Wisconsin, which has its share of wealthy men but no Rule against Perpetuities applicable to the usual testamentary or inter vivos trust. No inconvenience has appeared, for property owners simply have no inclination to tie up property for long periods, the uncertainties of life and taxes being what they are.

The permissive character of the rule, however, is more important to the wait-and-see concept. The rule allows a property owner to control assets for a life in being plus twenty-one years after relinquishing ownership.[70] The wait-and-see measuring lives, which define this period, should reflect a sensitivity to the policies that underlie this limited deference to the owner's wishes. Commentators most often explain the perpetuities period[71] of the rule as an historic anomoly, understandable only in its case-by-case development at common law.[72] Closer examination reveals that the perpetuities period is well suited for its function in both length and means of measurement.

Estate planning concerns require measurement of the perpetuities period in lives. A property owner planning his estate is understandably concerned with legal restrictions on his ability to leave property to future generations.[73] By defining the perpetuities period in terms of lives, the rule permits generational estate planning.[74]

The length of the perpetuities period allows the testator to control his estate for only so far into the future as he has good reason. The perpetuities period has its origin in the *Duke of Norfolk's Case*.[75] That case involved a testator's efforts to structure his estate around an insane son.[76] Against this background, the perpetuities period has a reasonable length. The rule allows the donor to pass judgment on the ability

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Leach, *supra* note 18, at 12.

70. *See* notes 38-39 *supra* and accompanying text.

71. This Note uses "perpetuities period" to refer to the time in which an interest is allowed to remain contingent under the rule, that is, a life in being plus twenty-one years.

72. *See* J. GRAY, *supra* note 1, at §§ 216-29; RESTATEMENT, *supra* note 1, at § 1.1, reporter's note 2; L. SIMES, supra note 1, at 257-58; L. SIMES & A. SMITH, *supra* note 1, at §§ 1214-15; Note, *supra* note 6, at 272.

73. The point is that for a rule conceived prospectively . . . the period of the rule works very well. What else could you do? What sense would a period in gross make? "Remainders must be limited so as to surely vest in fifty years."

This, I submit, is possible but not sensible. It does not fit the thinking nor the needs of a testator. What in the world, T will say to his attorney; how in the world can you provide for things in terms of fifty years? Tell me: can I leave it to my children, my grandchildren, my great grandchildren? Can I keep it from them until they are thirty? And so on.

Mechem, *supra* note 18, at 972-73. *Accord,* Waterbury, *supra* note 4, at 90, 91.

74. This is the best reason for rejecting proposals to define the perpetuities period by a set period in gross. *See* R. MAUDSLEY, *supra* note 1, at 223-24; Dick, *Editor's Note,* 4 EST. & TR. Q. 133 (1977); Dick, *Editor's Note,* 2 EST. & TR. Q. 44 (1975).

75. 22 Eng. Rep. 931 (ch. 1682), *rev'd,* 22 Eng. Rep. 963 (Ch. App. 1683), *rev'd,* 22 Eng. Rep. 963 (H.L. 1685).

76. *See* Barry, *The Duke of Norfolk's Case,* 23 VA. L. REV. 538 (1937); Haskins, *supra* note 1, at 19-20.

of the generation in being to manage his estate. The law defers to the testator's judgment as to the limitations necessary to provide for existing generations while preserving the estate for the next generation. In addition, the rule allows a donor to require the next, as yet unborn, generation to attain their majority before permitting their interests to vest.[77]

The rule does not, however, allow the testator to impose restrictions on his estate that extend beyond the minority of the first generation unborn at the testator's death.[78] Such restrictions would indicate that the testator was attempting to pass judgment, even though unfamiliar with that generation's ability to manage the estate. Therefore, the social interest in restricting remotely vesting future interests predominates over the testator's speculative efforts at control.[79]

The policies underlying the rule should control the measuring life definition. The measuring lives should define a period that allows the donor to control his estate through the existing generation and the minority of the next generation. The rule should invalidate any restrictions that last longer.

IV. CURRENT APPROACHES

Existing wait-and-see statutes have adopted one of three distinct approaches to the measuring life problem.

A. *The Pennsylvania Approach*

When the Pennsylvania legislature enacted a wait-and-see rule in 1947,[80] it failed completely to address the measuring life problem.[81] This failure ignited a scholarly debate similar to that which followed passage of the Western Australia statute.[82] Critics of the statute argued that all common-law lives in being would qualify as measuring lives,

77. Waterbury, *supra* note 4, at 90-91; Leach & Logan, *supra* note 1, at § 24.16.

78. *See* notes 1-8 *supra* and accompanying text.

79. *See* notes 59-69 *supra* and accompanying text.

80. PA. STAT. ANN. tit. 20, § 6104 (Purdon 1975).

81. The statute provided only:

> Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void.

Id.

82. *See* notes 44-55 *supra* and accompanying text.

the "centenarian" approach.[83] Supporters expressed confidence that the courts would allow the use of only common-law causal lives.[84]

The first decision construing the Pennsylvania statute, *In re Pearson's Estate*,[85] surprised both camps. In *Pearson* the testator established a trust to pay income to his brothers and sisters during their lives.[86] Upon the death of one of the testator's siblings, that share was to descend *per stirpes*[87] to the deceased sibling's children, and so on *ad infinitum*, until the line of testator's collective heirs was extinguished.[88] The *Pearson* court addressed the appropriate measuring lives problem in terms of classes. The validity of the gift to the testator's nieces and nephews thus depended on the validity of the class of brothers and sisters as measuring lives.[89] The court concluded that a class was valid and would contain measuring lives only if no members of the class were born after the testator's death.[90] Because the testator's parents were deceased, the testator would not have more brothers and sisters. The gift to the testator's nieces and nephews was therefore valid.[91] The class of nieces and nephews, however, would contain valid measuring lives only if no more nieces and nephews were born, thus joining the class after the testator's death. The validity of the gift to grandnieces and grandnephews depend on this contingency.[92]

The result in *Pearson* is inconsistent with the policies underlying the rule's perpetuity period.[93] The testator chose not to entrust full possession of his estate to his existing siblings or his nephews and nieces.[94] The court's holding frustrated the testator's decision and would arbi-

83. *See, e.g.*, Jones, *supra* note 27, at 59-60; Mechem, *supra* note 18, at 981-82.

84. *See, e.g.*, Cohan, *supra* note 18, at 332-36.

85. 442 Pa. 172, 275 A.2d 336 (1971).

86. *Id.* at 177-78, 275 A.2d at 337-38.

87. This term, derived from the civil law . . . denotes that method of dividing an intestate estate where a class or group of distributees take the share which their deceased would have been entitled to, taking this by their right of representing such ancestor, and not as so many individuals.

BLACK'S LAW DICTIONARY 1030 (5th ed. 1979).

88. 442 Pa. at 177-78, 275 A.2d at 337-38.

89. *Id.* at 189-91, 275 A.2d at 344.

90. *Id.*

91. *Id.*

92. *Id.*

93. *See* notes 56-79 *supra* and accompanying text.

94. The testator intended to deny full possession to the entire line of his collateral heirs. Although his intention is clearly an effort to exceed the limits of the rule, it is not a justification for invalidating interests that vest within the permissible period.

trarily vest an absolute interest in the existing nieces and nephews, if another niece or nephew was born.[95] The *Pearson* court confused waiting as to the time of vesting with waiting as to measuring lives.[96]

If the result in *Pearson* is unacceptable, the responsibility rests with the Pennsylvania legislature. A legislature attempting a wait-and-see approach can not ignore the importance of the measuring life problem. Unfortunately, the wait-and-see provisions of Ohio,[97] Vermont[98] and Florida[99] are also silent on the measuring life problem. The judicial development of the measuring life concept in these jurisdictions may conclusively demonstrate the need for a statutory definition of wait-and-see measuring lives.[100]

B. *Statutory Lists*

The simplest method for defining the measuring lives permitted by a wait-and-see rule is to enact a list of permissible lives. England[101] and the commonwealth nations have taken this approach.[102] The American Law Institute's wait-and-see provision also incorporates the statutory list scheme.[103]

These statutes retain the common-law rule. Those instruments that

95. Thus if an additional niece or nephew was born after the testator's death, the nieces and nephews, as a class, would not qualify as measuring lives. 442 Pa. at 191, 275 A.2d at 344. The interest would vest, under Pennsylvania law, in the last valid income beneficiaries; in this case, the siblings, nephews and nieces. *Id.* at 191-92, 275 A.2d at 344-45. The testator had judged these very people undeserving of an unrestricted interest.

96. Maudsley, *supra* note 18, at 369.

97. OHIO REV. CODE ANN. § 213.03(c) (Page 1975) provides:

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

98. VT. STAT. ANN. tit. 27, § 501 (1975). The Vermont provision is virtually identical to the Ohio statute. *See* note 97 *supra*.

99. FLA. STAT. ANN. § 689.22(2)(a) (West Cum. Supp. 1982) provides: "[I]n determining whether an interest violates the rule against perpetuities, the validity of the interest is determined on the basis of facts existing at the end of the lives in being used to measure the permissible period or, if no life in being is used, the facts existing at the end of the 21-year period.

100. Allen, *supra* note 18, at 110.

101. Perpetuities and Accumulations Act, 1964, c.55.

102. The measuring life provisions of the wait-and-see statutes of Northern Ireland, Alberta, British Columbia and New Zealand are virtually identical to the measuring life provisions of the English Act. *See* note 18 *supra*. Professor Maudsley has proposed a similar statutory list measuring life approach. *See* R. MAUDSLEY, *supra* note 1, at 259-61.

103. *See* note 24 *supra*.

the common-law rule would invalidate are subject to redemption under the wait-and-see provisions.[104] The statutes allow only measuring lives that are ascertainable at the creation of the interest.[105] The measuring lives must not consist of individuals who are part of an unreasonably large class.[106] Finally, the statutes limit the measuring lives to members of defined groups, typically including: the donor; the beneficiaries; persons receiving powers of appointment or options affecting the property in question; and parents or grandparents of the beneficiaries.[107]

The statutory list has the advantage of clarity and ease of administration. Because the statute specifies permissible classes of measuring lives, the ones appropriate to a particular disposition can be easily identified at the outset.[108] To ascertain the perpetuities period, then, the administrator need only add twenty-one years to the date of the last surviving measuring life.[109]

The statutory list approach may, however, achieve administrative ef-

104. Perpetuities and Accumulations Act of 1964, ch. 55, § 3(1) provides:

> Where . . . a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the rule . . . .

See also RESTATEMENT (SECOND), *supra* note 21, at § 1.3(1).

105. Perpetuities and Accumulations Act, 1965, ch. 55, § 3(4).

106. *Id.*

107. *Id.* § 3(5) provides:

> 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 right is conferred;
> (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.

108. Maudsley, *supra* note 18, at 377.

109. *Id.* at 379.

ficiency at the expense of the best choice of measuring lives. In some cases, the statutory list may allow the use of inappropriate measuring lives.[110] Under the English Act, for example, the "person by whom the disposition is made" is always considered a measuring life.[111] Use of the transferor as a measuring life is clearly appropriate if the transferor retains some interest in the property or transfers the property to future generations of his or her family.[112]

In some situations, however, the grantor is an inappropriate measuring life. Consider an *inter vivos* gift by *A* to *B* for life and then to the children of *B* who attain age thirty. In terms of policy, the rule should invalidate *A*'s restrictions if they extend beyond the life of *B* and twenty-one years thereafter.[113] This period allows *A* to restrict the control given the generation that he is familiar with and to ensure that the next generation attains their majority before gaining control of the property. In the hypothetical, by contrast, the interest might not vest until thirty years after *B*'s death. Under the English statutory list, if *A* outlives *B* by nine years, the interest is nevertheless valid.[114] The use of the donor as a measuring life in this situation produces an arbitrary result at odds with the policies underlying the rule. The practical effect of the mandatory inclusion of extraneous measuring lives[115] is an extension of the perpetuities period in a random group of cases.[116]

In other cases statutory lists exclude appropriate measuring lives. Consider a devise to the children of *A* alive at the death of *A* and any woman who *A* may marry.[117] If *A* is unmarried at the time of the gift, his eventual spouse is not "ascertainable at the commencement of the perpetuities period."[118] Even if *A*'s spouse is alive at the time of the

110. This Note will use the term "extraneous" measuring lives to refer to those lives that should not qualify as measuring lives.

111. Perpetuities and Accumulations Act, 1964, ch. 55, § 3(5)(a).

112. Morris & Wade, *supra* note 26, at 500-02.

113. *See* notes 56-79 *supra* and accompanying text.

114. If *A* outlives *B* by nine years, the children of *B* will attain the age of thirty exactly twenty-one years after *A*'s death. Because *A*, as the donor, is a measuring life, the interest is valid.

115. *See* note 110 *supra*.

116. [T]he statute casts its net so widely in order to cover every conceivable case that many quite inappropriate lives are included whose continuance have no relevance to the vesting whatsoever. The result is to extend the "wait-and-see" period beyond what anyone contemplated and beyond what wise policy would seem to dictate.

Morris & Wade, *supra* note 26, at 502.

117. *Id.* at 505.

118. Perpetuities and Accumulations Act, 1964, ch. 55, § 3(4).

gift, she could not qualify as a measuring life.[119] If the mother outlived the proper measuring lives by twenty-one years, the English statute would invalidate the gift.[120]

The hypothetical testator was only trying to restrict the estate during lives in being at the time of the gift. The statutory list approach thus invalidates a gift that would vest within the perpetuities period because of the administrative burden of recognizing the spouse as a measuring life.[121]

Statutory lists provide a simple, efficient solution to the measuring life problem. In a small number of cases, however, this approach will provide inappropriate results.

C. *Causal Lives Formulae*

The wait-and-see provisions of Ontario,[122] Kentucky,[123] and Washington[124] define the measuring lives by specific formulae. These statutes attempt to restrict the permissible measuring lives to those that would have qualified as causal lives at common law.

The Washington statute, applicable only to trusts, defines the perpetuities period as twenty-one years added to those lives for which, by the terms of the indenture, the trust is to continue.[125] If the trust instrument's terms provide that the trust is to continue only for a portion of a life in being, only that portion is included in the perpetuities period.[126]

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119. Morris & Wade, *supra* note 26, at 505.

120. The requirement that the beneficiaries survive the mother renders their interest contingent until the death of the mother. Therefore, if the mother does not die within 21 years of the proper measuring life, the interests will actually vest beyond the time permitted.

121. *But see In re* Frank, 480 Pa. 116, 389 A.2d 536 (1978). In *Frank* the testator created a trust that was to terminate upon the death or remarriage of the testator's daughter-in-law. One Mary K. Frank married into the family after the execution of the trust. The court found no perpetuities violation:

> Under the actual events test, Mary K. Frank was a life in being when testator created the trust. No interest can vest later than twenty-one years past her life because the last interests to vest do so upon either her death or remarriage. Thus, construction of the trust's termination clause to include Mary K. Frank as a "daughter in law" presents no violation of the rule against perpetuities.

Id. at 125, 389 A.2d at 541.

122. Ontario Perpetuities Act, 1966, [1970] REV. STAT. ONT. ch. 343.

123. KY. REV. STAT. ANN. § 381.216 (Baldwin 1979).

124. WASH. REV. CODE ANN. § 11.98.010 (1967).

125. The statute provides for a perpetuities period of twenty-one years plus "[t]he 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." *Id.* § 11.98.010(2).

126. *Id.* § 11.98.010(3).

Construed literally, this provision is far too narrow. Even the common law did not require that the validating lives be mentioned in the instrument which created the future interest.[127] By adding this requirement, the Washington statute precludes appropriate measuring lives. Consider a devise to the testator's grandchildren who attain the age of twenty-five. If the trust instrument fails to expressly provide that the trust is to continue during the lives of the testator's children, then those children are not measuring lives. The Washington statute thus exalts draftsmanship over substance.

The Kentucky statute provides that the perpetuities period may include only lives having a causal relationship to the vesting or failing of the interest.[128] The statute's author has argued that in almost all cases, the provision will limit the permissible measuring lives to preceding life tenants, beneficiaries, parents of beneficiaries, explicitly designated measuring lives, or others whose activities or death will affect the vesting.[129]

The Kentucky statute attempts to limit the wait-and-see measuring lives to those which would have qualified as causal lives at common law and is therefore consistent with the policies underlying the perpetuities period.[130] If the courts construe it properly, the statute will allow the donor control only through the existing generation and the minority of the succeeding generations. Commentators, however, have criticized the Kentucky provision for its ambiguity. They have expressed dissatisfaction with the test of a "causal relationship to vesting."[131] In a gift to the first child of *A* to become a member of the bar, are the members

127. *See* B.M.C. Durfee Trust Co. v. Taylor, 325 Mass. 201, 205, 89 N.E.2d 777, 779 (1950); Carter v. Berry, 243 Miss. 356, 362, 140 So.2d 843, 848 (1962); Lux v. Lux, 109 R.I. 592, 598-99, 288 A.2d 701, 705 (1972). *See generally* W. BURBY, *supra* note 2, at 414; J. GRAY, *supra* note 1, at § 219.2 n.2; R. LYNN, *supra* note 18, at 43; 5 R. POWELL, *supra* note 1, at ¶ 766[4]; L. SIMES, *supra* note 1, at § 1223; Leach & Logan, *supra* note 1, at § 24.13.

128. The Kentucky provision provides that: "[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 interest." KY. REV. STAT. ANN. § 381.216 (Baldwin 1979).

129. In practically all cases the measuring lives will be one or more of the following as fits the particular facts: (a) the preceding life tenant, (b) the taker of the interest, (c) parents of the takers of the interest, (d) a person designated as a measuring life in the instrument, or (e) some other person whose action or death can expressly or by implication cause the interest to vest or fail.

Dukeminier, *supra* note 18, at 63.

130. *See* notes 56-79 *supra* and accompanying text.

131. *See* Allen, *supra* note 27, at 112-14; Maudsley, *supra* note 18, at 375-76; Note, *Perpetuities Reform, Approaches and Reproaches,* 49 NOTRE DAME LAW. 611, 616-18 (1974).

of the Board of Bar Examiners sufficiently related?[132] They have a direct relationship to the vesting contingency; a child's passing the bar. Whose lives are causally related to a gift to *A*, postponed until the probate of the testator's will?[133]

The Kentucky statute may also exclude appropriate measuring lives. Consider a devise to the testator's first grandchild to marry.[134] The rule should validate this gift if the grandchild marries before the age of twenty-one.[135] The testator's children, however, are only tangentially related to the vesting condition of the grandchild's marriage.[136] If the statute excludes the testator's children as measuring lives, the gift will probably fail, regardless of when the grandchild marries.[137]

The Ontario formula approach[138] may avoid the ambiguity of the Kentucky statute. The Ontario formula allows as measuring lives those lives that, at the time the interest is created, limit or are relevant in limiting the period in which the interest may vest.[139] Prior commentaries have treated the Ontario and Kentucky statutes as interchangeable; viewing the Ontario provision as subject to the same criticisms as the Kentucky statute.[140] The focus of the Ontario statute, however, is on the relevance of a particular life to a limitation on vesting, rather than vesting itself.[141] This change provides for greater clarity in identifying the appropriate measuring lives. Thus, in a gift to the first child of *A* to become a member of the bar,[142] the bar examiners are clearly not measuring lives. Their lives do not limit the time in which the interest

132. *See* Allen, *supra* note 27, at 113.

133. *Id.*

134. *Id.* at 112-13.

135. If the grandchild does marry before the age of 21, the testator will only have postponed vesting through the generation with which he is familiar and the minority of the succeeding generation.

136. Allen, *supra* note 27, at 114.

137. If the children are not measuring lives, the marriage would have to take place within 21 years of the death of some other valid measuring life, probably the testator's.

138. Ontario Perpetuities Act, 1966, [1970] REV. STAT. ONT. ch. 343.

139. The statute provides: "[N]o life shall be included [as a measuring life] 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 conditions for vesting of the interest may occur." *Id.* at § 6.

140. *See* Allen, *supra* note 27, at 112-14; Maudsley, *supra* note 18, at 375-76. *See also* Oosterhoff & Cudmore, *Problems in Ascertaining Lives in Being Under Ontario's Perpetuities Act (on limiting lives and relevant factors),* 4 EST. & TR. Q. 119 (1978).

141. *See* note 139 *supra* and accompanying text.

142. *See* note 132 *supra* and accompanying text.

could vest. Similarly, in the devise to the testator's first grandchild to marry,[143] the testator's children are measuring lives. They limit the time in which the testator's grandchildren can be born, and therefore the time in which the vesting contingency, the grandchild's marriage, can occur.

The formula approach adopted by Kentucky and Ontario provides measuring lives consistent with the policies underlying the rule's perpetuities period.[144] If the Kentucky statute is overly ambiguous, the Ontario provision is not. The formula approach, however, may not provide the clarity and administrative efficiency of the statutory list approach.[145]

V. CONCLUSION

Any legislature attempting to formulate a wait-and-see version of the rule against perpetuities should pay careful attention to the measuring life problem. Wait-and-see alters the basic structure of the rule. The system of lives that operated at common law will not suffice under wait-and-see.[146]

The statutes incorporating wait-and-see should address directly the measuring life problem. The measuring life selection goes to the heart of the rule's restriction on remote vesting.[147] Moreover, judicial construction of the measuring life concept has proven inadequate.[148]

The legislature should choose the measuring lives with sensitivity to the policies underlying the rule's restriction on remote vesting. The measuring lives selected should allow the donor to control the property through the existing generation and the minority of the next generation.[149]

The legislature should choose a statutory list if clarity and administrative efficiency are the paramount concerns. This approach, however, may produce undesirable results in a small number of cases.[150]

A well drafted causal lives formula is potentially the best method of

143. *See* note 134 *supra* and accompanying text.
144. *See* notes 56-78 & 128-43 *supra* and accompanying text.
145. *See* notes 108-09 *supra* and accompanying text.
146. *See* notes 28-55 *supra* and accompanying text.
147. *See* notes 56-57 *supra* and accompanying text.
148. *See* notes 85-96 *supra* and accompanying text.
149. *See* notes 56-79 *supra* and accompanying text.
150. *See* notes 110-21 *supra* and accompanying text.

identifying appropriate measuring lives. Although more complex than the statutory list, the formula approach consistently provides measuring lives that are appropriate in light of the policy of regulating remotely vesting interests embodied in the rule against perpetuities.

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