NOTE

UNDERSTANDING THE MEASURING LIFE IN THE RULE AGAINST PERPETUITIES

Part of the conventional wisdom of the law of property is that the Rule Against Perpetuities[1] is a pointlessly complex and aimlessly destructive relic.[2] During the last twenty years it has been condemned and reformed more often than in all the previous years since it emerged in the late seventeenth century.[3] Now, however, the wave of reform seems to have spent itself, leaving the Rule on the books of all but a few states,[4] still in its common law form in most of them. Thus, despite its reputation for obsolescence, the Rule today figures in almost every will and trust instrument drafted and construed.

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1. For a statement of the Rule and its corollaries, see notes 39-47 *infra* and accompanying text.

2. Lucas v. Hamm, 56 Cal. 2d 583, 592, 364 P.2d 685, 690, 15 Cal. Rptr. 821, 826 (1961), *cert. denied*, 368 U.S. 987 (1962), held that a lawyer who drafted a will that violated the Rule was not negligent as a matter of law:

> The complaint . . . alleges that defendant drafted the will in such a manner that the trust was invalid because it violated the rules relating to perpetuities and restraints on alienation. These closely akin subjects have long perplexed the courts and the bar. Professor Gray, a leading authority in the field, stated: "There is something in the subject which seems to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar. . . . A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men . . . and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it." (Gray, The Rule Against Perpetuities (4th ed. 1942) p. xi; see also Leach, Perpetuities Legislation (1954) 67 Harv. L. Rev. 1349 [describing the rule as a "technicality-ridden legal nightmare" and a "dangerous instrumentality in the hands of most members of the bar"].)

See also R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 10 (1966) ("Insofar as the Rule was intended to preclude the creation of family dynasties, it has proved to be a signal failure. As a device to facilitate marketability, it is exceptionally awkward"); R. POSNER, ECONOMIC ANALYSIS OF LAW 250 (1972) ("The rule has proved impossibly complex in practice, so that its net benefits are quite probably negative"). The classic treatise on the Rule, Gray's *The Rule Against Perpetuities* (1886), has been characterized as "a dark book which, tradition states, no one has ever really read . . . ." L. FRIEDMAN, A HISTORY OF AMERICAN LAW 542 (1973).

3. *See* notes 105-29 *infra*.

4. *See* note 116 *infra*.

As the Rule remains, so do the uncertainties surrounding it. One source of uncertainty is the "measuring life"—the term that describes part of the period of the Rule. This Note will attempt to dispel this uncertainty by examining several aspects of the concept of the measuring life.[5] In order to show how and why human life was chosen as the primary measure of the period of the Rule, Part I will recount the historical development of the measuring life concept as part of the Rule. Part II will define several relevant terms in an attempt to clear up a semantic confusion that has long hindered understanding of the measuring life concept. Parts III and IV will describe the class of entities whom draftsmen may make measuring lives in distributions. Part V will suggest a framework to be used by constructionists in identifying the measuring life, if any, in distributions.[6] Part VI will discuss law revisionists' reforms of the common law Rule that effect the measuring life concept, and Part VII will forecast the concept's future in the law of property.

I. THE HISTORICAL DEVELOPMENT OF THE MEASURING LIFE CONCEPT

The need to limit property owners' dead hand[7] control over their property existed long before the Rule Against Perpetuities was devel-

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5. The term "measuring life concept" refers to the idea of measuring the permissible period of postponement of vesting of a contingent interest by the duration of a human life, and the body of rules that regulate that practice.

6. Defining the class of persons who may be measuring lives is a problem of law. Specifying the measuring life in a particular distribution is a problem of construction, one of furthering the transferor's intent. In the latter instance, it must be remembered that

> "In many cases the court is ascertaining not what the [testator] actually intended in regard to a particular matter but what he would have intended if he had thought about the matter." 2 Scott, Trusts, s. 164.1, *p.* 831. If the testatrix did not think about the matter, it is difficult to say that she had an intent with respect to it. In that case the court is looking for a black hat in a dark room; if the court locates it there at all, it will be on its own head and not because of any light left by the last will and testament.

Roberts v. Tamworth, 96 N.H. 223, 225, 73 A.2d 119, 121 (1950) (brackets original). This statement applies particularly to an area as fraught with arcane pitfalls as the Rule Against Perpetuities. *See* note 2 *supra.*

7. At this point a word of explanation should be included concerning the use of the term "dead hand" . . . . The dead hand means the hand of the person who is continuing to control the devolution of his property after he is dead, either by the terms of his will or by some other instrument which effectuates the same purpose. . . .

Historically, however, the term dead hand referred to the hand of the donee, not the donor. The dead hand was the religious or other corporation to which

oped to serve that purpose.[8] Throughout history, people have attempted to prolong and even perpetuate their ownership, often from fear of irresponsible future owners. An obvious way to do this is to determine who will be the future owners and to limit their control.

Incentives peculiar to medieval England added to the natural instincts of property owners to prolong their ownership. In 1285, Parliament passed the Statute de Donis Conditionalibus,[9] which permitted the creation of a form of future interest called the fee tail.[10] Persons who wanted to control their property posthumously often used fees tail because they were not reachable by creditors or subject to forfeiture for treason or attainder for felony.[11] Fees tail were disfavored by courts precisely because of their potentially perpetual nature.[12] The Statute of Uses (1536)[13] and the Statute of Wills (1540)[14] created new types of future interests, called executory interests, which permitted legal estates "to arise in a designated person upon the happening of a stated event . . . [or] to shift from one person to another upon the happening of an event . . . ."[15] Soon thereafter landowners attempted to

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land had been given. In England, beginning as early as the thirteenth century, there were enacted so-called mortmain statutes,—laws which prohibited the holding of land by religious corporations. . . . Lord Coke . . . said that ". . . the lands were said to come to dead hands as to their lords, for that by alienation in mortmain they lost wholly their escheats, and in effect their knight-service for the defence of the realme, wards, marriages, reliefes, and the like; and therefore was called a dead hand, for that a dead hand yieldeth no service."

L. SIMES, PUBLIC POLICY AND THE DEAD HAND 2-3 (1955) (footnotes omitted). *See also* R. LYNN, *supra* note 2, at 10; R. POSNER, *supra* note 2, at 250; *cf.* W. LEACH, PROPERTY LAW INDICTED! 92 (1967).

8. *See* note 48 *infra* and accompanying text.

9. Statute of Westminster, 13 Edw. 1, c. 1 (1285).

10. A fee tail is a transfer of property restricting ownership to the donee and his lineal descendants. W. BURBY, REAL PROPERTY § 2, at 6, § 89, at 203-04 (1965) [hereinafter cited as BURBY]; L. SIMES, LAW OF FUTURE INTERESTS § 5, at 8 (2d ed. 1966) [hereinafter cited as SIMES]. Future interests in property could be created before 1285, but they were not nearly as effective as the fee tail for tying up property into the remote future. BURBY § 89, at 203; C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 37-38 (1962) [hereinafter cited as MOYNIHAN]; SIMES § 5, at 8.

11. MOYNIHAN 39; Barry, *The Duke of Norfolk's Case*, 23 VA. L. REV. 538, 539 (1937); *cf.* BURBY § 89, at 204.

12. 2 W. BLACKSTONE, COMMENTARIES *116; BURBY § 89, at 204; MOYNIHAN 39. Almost 200 years later, it was held that a fee tail could be converted into a fee simple. Taltarum's Case, Y.B. 12 Edw. 4, Mich. term., pl. 25 (1472).

13. 27 Hen. 8, c. 10 (1536).

14. 32 Hen. 8, c. 1 (1540).

15. BURBY § 7, at 11. *See also* SIMES § 5, at 11-12.

> bring more and more land under their family settlements and to extend those settlements indefinitely into the future so that the land could never be reached by creditors or split up for more efficient use according to the needs of a growing population turning increasingly to industrial pursuits.[16]

Remedial legislation was proposed, but never adopted.[17]

During this period, courts used several standards to decide whether the vesting[18] of a future interest was unlawfully postponed: the number of contingent interests involved,[19] the nature of the contingency,[20] and the interest's "tendency to a perpetuity."[21] The most often used and reliable standard was the duration of a contingent interest, measured in terms of human lives.[22] In *Love v. Wyndham* (1670),[23] Justice Twsiden explained the human life standard as follows:

> If a tenant of a term devise it to B. for life, the remainder to C. for life, the remainder to D. for life; I have heard it questioned, whether these remainders are good or not? But it hath been held, that if all the remainder-men are living at the time of the devise, it is good: if all the candles be light at once it is good. But if you limit a remainder to a person not in being, as to the first-begotten son, &c. and the like, there would be no end if such limitations were admitted, and therefore they are void . . . .[24]

In 1682, the *Duke of Norfolk's Case*[25] reconciled the different standards for the permissible duration of a contingent interest. In an exhaustive and well-reasoned opinion, Lord Chancellor Nottingham set

16. Leach, *A Proposed Statute*, 92 T. & E. 769 (1953). *See also* Barry, *supra* note 11, at 541.

17. Holdsworth, *An Elizabethan Bill Against Perpetuities*, 35 L.Q. REV. 258 (1919).

18. The essence of the vested remainder is that, throughout its continuance, it is ready to take effect as a present interest however and whenever the preceding estate terminates. On the other hand, the contingent remainder is a remainder subject to a condition precedent. That is to say, there is a condition precedent, other than the termination of the prior estate, which must occur before it is ready to take effect as a present interest.

SIMES § 11, at 20. *See also* MOYNIHAN 123-24.

19. Massenburgh v. Ash, 23 Eng. Rep. 437 (Ch. 1684).

20. Child v. Baylie, 79 Eng. Rep. 393 (K.B. 1618).

21. Apprice v. Fowler, 86 Eng. Rep. 501 (K.B. 1661); *cf.* Pearse v. Reeve, 86 Eng. Rep. 501, 502 (K.B. 1661).

22. Love v. Wyndham, 86 Eng. Rep. 724, 726 (K.B. 1670); Goring v. Bickerstaffe, 86 Eng. Rep. 502 (K.B. 1602). *See also* Gulliver v. Wickett, 95 Eng. Rep. 517, 518 (K.B. 1745).

23. 86 Eng. Rep. 724 (K.B. 1670).

24. *Id.* at 726.

25. 22 Eng. Rep. 931 (Ch. 1682), *rev'd*, 22 Eng. Rep. 963 (C.A. 1683), *rev'd*, 22 Eng. Rep. 963 (H.L. 1685).

the period at the length of a human life plus an unspecified period of time after it.[26] The decision was affirmed by the House of Lords in 1685,[27] and has been recognized ever since as the foundation of the Rule Against Perpetuities.

Although the *Duke of Norfolk's Case* established one human life plus an unspecified length of time thereafter as the period during which the vesting of a future interest could be postponed, it left in doubt the permissible number of persons from whom the one life could be chosen. While it could be argued that *Love v. Wyndham*[28] had decided that any number could be used, the point continued to be litigated into the eighteenth century.[29] It was finally settled in *Low v. Burron* (1734),[30] where a contingent remainder after three life estates was held good on the *Love v. Wyndham* rationale:

> [H]ere can be no danger of a perpetuity; for all these estates will determine on the expiration of the three lives. So, if instead of three, there had been twenty lives, . . . all the candles lighted up at once, it would have been good; for, in effect, it is only for one life, *viz.* that which shall happen to be the survivor.[31]

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26. *Id.* at 960.

27. 22 Eng. Rep. 963 (H.L. 1685).

28. *See* text accompanying notes 22-24 *supra.*

29. Almost all subsequent cases on point are in accord with *Love v. Wyndham.* In 1697 the House of Lords upheld a contingent remainder measured by two lives, albeit with no statement of the rationale, Lloyd v. Carew, 1 Eng. Rep. 93 (H.L. 1697), while two years later there was dictum that "let the lives be never so many, there must be a survivor, and so it is but . . . that life . . . ." Scatterwood v. Edge, 91 Eng. Rep. 203 (K.B. 1699).

However, the report of a 1697 King's Bench decision has been interpreted as attributing to Chief Justice Treby the opinion that no more than one life could be used: "Treby Chief Justice . . . was of the opinion, that the time allowed for executory devises to take effect ought not to be longer than the life of one person then in esse. . . ." Luddington v. Kime, 91 Eng. Rep. 1031, 1034 (K.B. 1697). (For purposes of the Rule Against Perpetuities, executory interests are the same as contingent interests. L. SIMES & A. SMITH, LAW OF FUTURE INTERESTS § 1213, at 96-98 (2d ed. 1956) [hereinafter cited as SIMES & SMITH]). According to Professor Gray, the Chief Justice was discussing the permissible number of lives, J. GRAY, THE RULE AGAINST PERPETUITIES § 189 (4th ed. 1942) [hereinafter cited as GRAY], but the rest of the report indicates that he was merely referring to the period of the Rule. *See generally* Chilcott v. Hart, 23 Colo. 40, 54-56, 45 P. 391, 396-97 (1890).

For cases involving only one life, see Long v. Blackall, 101 Eng. Rep. 875, 877-78 (K.B. 1797) (one life and one pregnancy); Hopkins v. Hopkins, 26 Eng. Rep. 365, 375 (Ch. 1738) (one life); Stephens v. Stephens, 25 Eng. Rep. 751, 752 (Ch. 1736) (one life and twenty-one years).

30. 24 Eng. Rep. 1055 (Ch. 1734).

31. *Id.* at 1056.

The usefulness of numerous lives for prolonging the duration of a contingent interest was soon realized.[32] In 1798, in *Thellusson v. Woodford*,[33] the courts were confronted by a contingent interest whose duration was measured by nine lives, all young persons, none of whom were beneficiaries, chosen in part for their family's reputation for longevity. The House of Lords, however, saw nothing unlawful in their number:

> It appears then, that the . . . lives . . . are not confined to any definite number. But it is asked, shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? . . . [W]hen such cases occur, they will . . . be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described; and will be supported or avoided accordingly.[34]

In 1833, the House of Lords upheld a contingent interest whose duration was measured by twenty-eight lives without discussing their number.[35]

By the beginning of the nineteenth century, the permissible period for the duration of a contingent interest had been fixed at one life and twenty-one years.[36] The number and nature of contingencies involved had been rejected as measures. These results fitted well into the structure of the common law of property, which was and still is primarily on a plane of time. The duration of interests would be more predictable today if the early cases had set the period at a fixed number of

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32. On the effectiveness of this technique, see note 106 *infra*.

33. 32 Eng. Rep. 1030 (H.L. 1805), *aff'g* 31 Eng. Rep. 117 (Ch. 1798).

34. *Id.* at 1040. The suggestion that the use of extraneous lives should be forbidden was similarly rejected:

> But it is contended, that in these and other cases the persons, during whose lives the suspension was to continue, were persons immediately connected with or immediately leading to the person, in whom the property was first to vest . . . . I am unable to find any authority for considering this as a *sine qua non* in the creation of a good executory trust. . . . [T]here seems to be no ground or principle, that renders such an ingredient necessary. The principle is the avoiding of a public evil by placing property for too great a length of time out of commerce. The length of time will not be greater or less, whether the lives taken have any interest, . . . nor, whether the lives are those of persons immediately connected with or immediately leading to that person, in whom the property is first to vest . . . .

Id.

35. Cadell v. Palmer, 6 Eng. Rep. 956 (H.L. 1833).

36. The development of the twenty-one year period is described in GRAY §§ 176-85 and SIMES & SMITH § 1215.

years as do a few modern statutes.[37] This did not and probably will not occur because the objects of property owners' generosity will be other persons, whose interests are best served if the principal measure is human life.

During the remainder of the nineteenth century, the other parts of what came to be known as the Rule Against Perpetuities were formulated.[38] As stated by Professor John Chipman Gray, the common law Rule is 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 the interest.[39] The term "vest" is used in the sense of vesting in interest, not in possession.[40] Generally, the Rule applies to all contingent future interests.[41] The period of the Rule begins to run when the instrument creating the interest takes effect: on delivery in the case of a deed,[42] at the testator's death in the case of a will,[43] at the creation of a special power of appointment,[44] or (according to the majority of cases) a general power to appoint by will only,[45] and at the exercise of a general power presently exercisable.[46] If, at the time the period begins to run, there is any possibility that vesting or failure will not occur within the period of the Rule, the Rule is violated and the interest fails.[47] The Rule is one of several in the law of property that prevent dead hand control of property from continuing indefinitely.[48] Specif-

37. *See* note 115 *infra*.

38. The definitive history of the Rule's development is GRAY §§ 123-69. *See also* RESTATEMENT OF PROPERTY 2123-29 (1940) [hereinafter cited as RESTATEMENT]; Note, *Rule Against Perpetuities—Development in England*, 23 GEO. L.J. 105, 109-14 (1934).

39. BURBY § 184; GRAY §§ 279-303.3; RESTATEMENT §§ 370, 374; SIMES § 127; SIMES & SMITH § 1222.

40. BURBY § 187, at 419; SIMES § 127, at 264; SIMES & SMITH § 1223. On the different meanings of the term "vested," see W. LEACH & J. LOGAN, CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING 253-54 (1961) [hereinafter cited as LEACH & LOGAN]; Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning—Part One*, 1972 WASH. U.L.Q. 607, 624-30.

41. BURBY § 187; RESTATEMENT § 370, comment *g* at 2145; SIMES § 132; SIMES & SMITH §§ 1235-48.

42. BURBY § 185, at 415; GRAY § 231; SIMES § 127, at 267; SIMES & SMITH § 1226.

43. BURBY § 185, at 415; SIMES § 127, at 267; SIMES & SMITH § 1226.

44. BURBY § 190, at 425; GRAY § 525; SIMES § 135, at 294; SIMES & SMITH § 1251.

45. BURBY § 190, at 425; GRAY § 526; SIMES § 135, at 295; SIMES & SMITH § 1275. According to the minority view, the period of the Rule Against Perpetuities begins to run at the exercise of a general power to appoint by will only. BURBY § 190, at 425; GRAY §§ 526-26.3; SIMES § 135, at 295; SIMES & SMITH § 1275.

46. BURBY § 190, at 425; GRAY § 524; SIMES § 135, at 295; SIMES & SMITH § 1251.

47. GRAY § 214; SIMES § 127, at 264; *id.* § 133; SIMES & SMITH § 1228.

48. GRAY § 268; SIMES & SMITH § 1222, at 106 ("[I]t is conceded by all authorities

ically, it strikes down one type of unconscionable dead hand control, the creation of future interests which may vest beyond its period.[49]

When viewed in the context of its historical development, the Rule Against Perpetuities makes sense.[50] It was created out of a belief that a free society must stop property owners from controlling their property for an unreasonably long time after they have parted with ownership. Setting that limit at one human life and twenty-one years strikes a reasonable balance among the interests of the donor, the donee, and society.

II. DEFINITION OF TERMS

Previous scholarship has not distinguished between "lives in being" and "measuring lives,"[51] nor has it clearly defined either term. These omissions are surprising and unfortunate, for the distinction between

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. . . that, whatever may be the immediate objective of the rule against perpetuities, its ultimate purpose is to prevent the tying up of property") (footnote omitted).

49. GRAY § 1; SIMES § 120. The Rule is not directed at interests that last too long, at restraints on alienation, or at the suspension of the power of alienation for too long. GRAY § 2; SIMES § 120.

50. The measuring life concept and the property law of which it is part cannot be expected to make sense in a purely logical context. Justice Cardozo thought of the law of real property as the "readiest example" of

> those fields where there can be no progress without history. . . . No lawgiver meditating a code of laws conceived the system of feudal tenures. History built up the system and the law went with it. Never by a process of logical deduction from the idea of abstract ownership could we distinguish the incidents of an estate in fee simple from those of an estate for life, or those of an estate for life from those of an estate for years. Upon these points, "a page of history is worth a volume of logic" [quoting Justice Holmes in New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)] . . . . I do not mean that even in this field the method of philosophy plays no part at all. Some of the conceptions of the land law, once fixed, are pushed to their logical conclusions with inexorable severity. The point is rather that the conceptions themselves have come to us from without and not from within, that they embody the thought, not so much of the present as of the past, that separated from the past their form and meaning are unintelligible and arbitrary, and hence that their development, in order to be truly logical, must be mindful of their origins.

B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 54-55 (1921) (footnotes omitted).

51. Professors Leach and Simes use the terms interchangeably. *Compare* Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 641 (1938), *with* SIMES & SMITH § 1223. Professor Lynn prefers "measuring lives," *see* Lynn, *Reforming the Rule Against Perpetuities; Choosing the Measuring Lives*, 1965 DUKE L.J. 720, while Professor Gray and two leading Commonwealth authorities speak exclusively in terms of "lives in being." *Compare* GRAY *with* Allan, *Perpetuities: Who are the Lives in Being?*, 81 L.Q. REV. 106 (1965) and Kiralfy, *A "Life in Being" for the Purposes of the Rule Against Perpetuities*, 6 CONVEY. 191 (1942).

their meanings is crucial to an understanding of the measuring life concept.

The measuring life concept involves three types of lives. First are all the persons in the world when the period of the Rule begins to run for a contingent interest in a distribution. They are the "lives in being." Second are those lives in being who, by the scheme of the distribution, have some causal relationship to the vesting or failure of the contingent interest. They will be referred to as the "causal lives." In almost all cases, the causal lives will be persons in the family of the holder of the interest, holders of other interests in the distribution, or persons specifically named in the distribution as the persons by whose lives the duration of the contingency is to be measured. However, the causal lives need not be mentioned in the distribution. Note also that although the causal lives relate to the vesting or failure of the interest, they do not guarantee that the vesting or failure will occur within the period of the Rule. Thus, the fact that there are causal lives for the interest does not mean that the interest does not violate the Rule. The causal lives may cause vesting or failure *beyond* the period of the Rule. In most cases, though, one of the causal lives, by the terms of the distribution, does guarantee vesting or failure within the period of the Rule. That causal life is the "measuring life" (one might say "validating life") for the contingent interest. The existence of a measuring life for the contingent interest means that the interest does not violate the Rule Against Perpetuities. Thus, the term "measuring life" refers only to that person who, by the terms of the distribution, guarantees that the contingent interest will vest or fail within twenty-one years of his death. Where there is a class of causal lives, all of whom make vesting or failure certain to occur within the period of the Rule, they will be referred to as the "measuring lives."

III. WHO MAY BE A MEASURING LIFE?

The life that measures the period of the Rule Against Perpetuities must be that of a human being.[52] While the measuring lives for all but the most unusual contingent interests will be human beings, occasional attempts are made to include other entities in the class of potential measuring lives.

52. *In re* Kelly, [1932] Ir. R. 255, 260-61 (High Ct. of Justice); SIMES & SMITH § 1223. *See also* cases cited notes 58, 61 *infra*.

Fetuses

A fetus is considered to be a life in being, and thus may be a measuring life,[53] presumably from the moment of conception and regardless of later miscarriage or stillbirth.[54] If the measuring life must be of a particular sex, as in a devise for which the measuring lives are "the sons of *A*," and the testator dies while *A* is pregnant, arguably the fetus cannot be a measuring life if its sex is not discoverable until birth. Since it is not known to be a boy when the testator dies, vesting or failure within the period of the Rule cannot be certain to occur as of the time when the period begins to run. In the only reported case on the subject, decided before pre-natal identification was possible, the court violated the requirement of initial certainty of vesting or failure and held that facts known as of the infant's birth would be referred back to the testator's death.[55] Since a boy was born, the Rule was not violated. The court could have reached the same result and spared the requirement of initial certainty of vesting or failure if, in applying the Rule, it had considered all facts, known and unknown, at the testator's death, one of which was the fetus' male sex.

Animals

Testators occasionally create trusts for the care of their pets or farm

53. Riggs Nat'l Bank v. Summerlin, 300 F. Supp. 1000, 1001 (D.D.C. 1969); Equitable Trust Co. v. McComb, 19 Del. Ch. 387, 391, 168 A. 203, 205 (1933); Marks v. Southern Trust Co., 203 Tenn. 200, 209-10, 310 S.W.2d 435, 439-40 (1958); Thellusson v. Woodford, 32 Eng. Rep. 1030, 1042-43 (H.L. 1805); *In re* Wilmer's Trusts, [1903] 1 Ch. 874, 888; Long v. Blackall, 101 Eng. Rep. 875, 877-78 (K.B. 1797). Another way of stating this is that if a pregnancy actually occurs, its duration may be added to the period of the Rule. GRAY §§ 220-22; RESTATEMENT § 374(c); SIMES & SMITH § 1224.

54. It has been proposed that the Rule should be amended to take account of the existence of sperm banks, which can indefinitely preserve sperm beyond a man's death. The proponents' theory is that a father's testamentary gift "to my children" would violate the Rule in its common law form because the father's sperm, if frozen, could be revived after twenty-one years after all persons alive at his death have died. The solution proposed is the redefinition of "the duration of a male life in being" to include "the period of his reproductive capacity, including any post-mortem period during which his sperm remains fertile." Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Descendant*, 48 A.B.A.J. 942, 944 (1962). The problem is actually not as great as it may seem. Few men have sperm frozen when they die, and the word "children" in a will does not include illegitimates, according to the majority rule of construction. *See* LEACH & LOGAN 351; Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 733-34 n.25 (1952). *See generally* Schuyler, *The New Biology and the Rule Against Perpetuities*, 15 U.C.L.A.L. REV. 420 (1968).

55. *In re* Wilmer's Trusts, [1903] 1 Ch. 874.

animals. In the only such reported case in which the pets' life estate was followed by a contingent remainder, the High Court of Justice of Ireland held that animals are not lives in being and invalidated the trust.[56] The court seemed to fear that if animals were allowed to be measuring lives the same mentality that caused testators to specify healthy babies as measuring lives would prompt them to use long-lived animals for the same purpose.[57] Other courts, when confronted with bequests to animals, have usually reached the same result[58] without considering upholding them on narrower grounds. For example, if the fund for the animal is certain to be exhausted within twenty-one years, the bequest should be unobjectionable as a perpetuity.[59] Also, the

56. *In re* Kelly, [1932] Ir. R. 255 (High Ct. of Justice), *noted in* 46 HARV. L. REV. 1036 (1933).

57. The Irish High Court of Justice stated:

> [I]f the lives of the dogs or other animals could be taken into account in reconing the maximum period of "lives in being and twenty-one years afterwards" any contingent or executory interest might be properly limited, so as only to vest within the lives of specified carp, tortoises, or other animals that might live for over a hundred years, and for twenty-one years afterwards, which, of course, is absurd. "Lives" means human lives. It was suggested that the last of the dogs could in fact not outlive the testator by more than twenty-one years. I know nothing of that. The Court does not enter into the question of a dog's expectation of life. In point of fact neighbor's dogs and cats are unpleasantly long-lived; but I have no knowledge of their precise expectation of life. Anyway the maximum period is exceeded by the lives even of specified butterflies and twenty-one years afterwards. And even, according to my decision—and, I confess, it displays this weakness on being pressed to a logical conclusion—the expiration of the life of a single butterfly, even without the twenty-one years, would be too remote, despite all the world of poetry that may be thereby destroyed.

Id. at 260-61.

58. Estate of McNeill, 230 Cal. App. 2d 449, 451, 41 Cal. Rptr. 139, 141 (1964); *In re* Howells, 145 Misc. 557, 563-65, 260 N.Y.S. 598, 604-07 (King's County Sur. Ct. 1932). In the latter case, a contingent remainder to vest on the deaths of two cats and three dogs was held to violate a statute limiting the permissible number of lives to two. In dictum, the court stated:

> It is a matter of common knowledge that such domestic animals frequently live to ages of ten or beyond, and it would be absurd to assert that any measuring life which might extend for a period of ten years beyond the death of the testator, or even for an appreciable fraction thereof, was an inconsequential limitation.

Id. at 563, 260 N.Y.S. at 605. *But see* Biscoe v. Biscoe, 19 Gill & Johns. 155, 160 (Md. 1834) (slave can be measuring life); *cf.* Williams v. Ash, 42 U.S. (1 How.) 1, 13-14 (1843) (same) (dictum) (by implication).

59. *In re* Estate of Searight, 87 Ohio App. 417, 425, 95 N.E.2d 779, 783 (1950) (alternative holding); *cf. In re* Dean, 41 Ch. D. 552, 555 (1889) (upholding without discussion of the Rule Against Perpetuities a bequest in trust for the testator's horses, ponies, and hounds for a term of up to fifty years, despite plaintiff's argument that the gift was "void, as tending to a perpetuity; it depends on the lives not of human beings,

types of animals that may be measuring lives could be limited to domestic and farm animals, which would cover all the reported cases while preventing the use of long-lived animals solely to prolong the postponement of vesting.[60] Problems in defining "domestic and farm animals" are probably not insuperable.

Corporations

In the only reported case on point, it was decided that a corporation is not a life in being and therefore cannot be a measuring life,[61] presumably because of its potentially infinite duration.

IV. How Many Measuring Lives May Be Used?

Modern courts, following the early cases,[62] place no specific limit on the number of measuring lives that may be used.[63] Interests with over forty measuring lives in the United States[64] and over 120 in England[65] have been upheld. However, the number of measuring lives must be small enough so that the lives can all be ascertained[66] at the beginning of the period of the Rule. Otherwise, it will be impossible to keep track of the lives and know when the last has died; in that case, it will be impossible to say when the twenty-one year period has begun to run and when the period of the Rule has expired. Therefore, if the measuring lives are so numerous that they cannot all be ascertained at the beginning of the period of the Rule, the interest the duration

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but of animals"). The *Dean* decision is criticized as a violation of the Rule Against Perpetuities in Gray, *Gifts for a Non-charitable Purpose*, 15 Harv. L. Rev. 509, 530 (1902).

60. *See generally* Note, *Validity of Trusts in Favor of Animals*, 42 Yale L.J. 1290 (1933).

61. Fitchie v. Brown, 211 U.S. 321, 334 (1908).

62. *See* text accompanying notes 28-35 *supra.*

63. Chicago Title & Trust Co. v. Shellaberger, 399 Ill. 320, 333, 77 N.E.2d 675, 683 (1948); Greenleaf v. Greenleaf, 332 Mo. 402, 406, 58 S.W.2d 448, 450 (1933); First-Central Trust Co. v. Claflin, 73 N.E.2d 388, 394 (Ohio C.P. 1947); Warren's Estate, 320 Pa. 112, 113, 182 A. 396, 397 (1936) (dictum); Robers v. Chisum, 238 S.W. 2d 822, 825 (Tex. Civ. App. 1951); *cf.* Van Roy v. Hoover, 96 Fla. 194, 201-02, 117 So. 887, 889 (1928). The argument that no more than one life could be used was pressed and rejected in Chilcott v. Hart, 23 Colo. 40, 54-56, 45 P. 391, 396-97 (1890).

64. Fitchie v. Brown, 211 U.S. 321, 334 (1908).

65. *In re* Villar, [1929] 1 Ch. 243 (C.A. 1928), *aff'g* [1928] Ch. 471; *Re* Leverhume, [1943] 2 All E.R. 274 (Ch.).

66. "Ascertaining" the measuring lives means identifying and locating each of them. *See* Simes § 127, at 266; Simes & Smith § 1223, at 100.

of whose contingency they measure is void for uncertainty.[67] In cases where the measuring lives have been named in the instrument in question, ascertainment has been held to be no problem, regardless of the numbers involved.[68] This result could be criticized on the ground that one of the group could become unascertainable during the period of the Rule, thus making ascertainment impossible.[69] On the other hand, this criticism might prove too much, because future unascertainability is also possible where there is only one measuring life.

How difficult ascertainment of a large class of lives must be for a court to hold an interest void for uncertainty is not clear. The English

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67. *In re* Villar, [1929] 1 Ch. 243, 250-51 (C.A. 1928); *Re* Leverhume, [1943] 2 All E.R. 274, 278 (Ch.); *cf.* State v. McGhee, 200 Iowa 329, 332-33, 204 N.W. 408, 409-10 (1925) (conveyance to "each and every member of the American Legion of Iowa, each and every member of the Independent Order of Odd Fellows of Iowa, each and every member of the Knights of Pythias of Iowa, and each and every attorney at law in Iowa," totalling "several hundred thousand persons" held void for uncertainty); *In re* Moore, [1901] 1 Ch. 936, 938 (trust to continue "until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death" held void for uncertainty). *But cf. In re* Vaux, [1939] Ch. 465, 475 (C.A. 1938) (dictum that testator could have made all persons alive in world measuring lives).

There is some authority for the proposition that if the measuring lives are so numerous that they cannot all be ascertained, the interest they measure fails because it violates the Rule Against Perpetuities, not because it is void for uncertainty. Thellusson v. Woodford, 32 Eng. Rep. 1030, 1034 (H.L. 1805), has been interpreted as including in the common law Rule a requirement that the measuring lives not be too numerous. *See* SIMES & SMITH § 1223, at 112. Also, according to the *Restatement, see* note 77 *infra* and accompanying text, and California's statutory version of the common law Rule, CAL. CIV. CODE § 715.2 (Deering 1971), part of the Rule is that the measuring lives must not be "so numerous . . . or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain." New York's statutory Rule Against Perpetuities, which appears to follow the common law Rule, contains almost identical language. N.Y. EST., POWERS & TRUSTS LAW § 9-1.1(b) (McKinney 1967).

However, the only cases directly on point, *Villar* and *Leverhume,* adhered to the void-for-uncertainty standard. They are definitely controlling in England, and probably in all Commonwealth jurisdictions. *See* Allan, *supra* note 51, at 107 (article by Australian authority on future interests). There being no American cases on point, it is not possible to say definitely what the law is here, but actual litigated cases, albeit foreign, should carry more weight than the *Restatement,* a secondary source of little authority. *See* W. LEACH & O. TUDOR, THE RULE AGAINST PERPETUITIES § 24.1, at 8 (1957). "As a practical matter it would seem to make little difference what view is adhered to." SIMES & SMITH § 1223, at 112.

68. Fitchie v. Brown, 211 U.S. 321 (1908) (over forty); Cadell v. Palmer, 6 Eng. Rep. 956 (H.L. 1833) (twenty-eight).

69. Easily imaginable ways for this to occur would be for one of the measuring lives to move far away, disappear, or die in obscurity. *See* text accompanying notes 72-73 *infra.*

courts seem to have followed the dictum in *Thellusson v. Woodford*[70] that ascertainment would have to be "almost, if not quite, impracticable"[71] to cause invalidity. Two leading cases applied this standard to interests measured by the lives of the lineal descendants of Queen Victoria living at the testators' deaths.[72] Both courts concluded that "[t]here was great difficulty in ascertaining the descendants," of whom there were "about 120,"[73] but nevertheless upheld the trusts.[74] In the latter of the two cases, decided in 1943, the court cautioned against the use of such a formula in contemporary interests, indicating that they

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70. 32 Eng. Rep. 1030 (H.L. 1805). *See* notes 33-34 *supra* and accompanying text.

71. 32 Eng. Rep. at 1040.

72. *In re* Villar, [1929] 1 Ch. 243 (C.A. 1928), *aff'g* [1928] Ch. 471; *Re* Leverhume, [1943] 2 All E.R. 274 (Ch.). The deaths in both cases occurred in the 1920's.

73. There was great difficulty in ascertaining the descendants . . . . It appeared, however . . . that in 1922 there were about 120 descendants who had then to be sought in England, Germany, Russia, Sweden, Denmark, Norway, Spain, Greece, Jugo-Slavia and Rumania, and many of whom had probably become scattered over the entire continent of Europe, and might even have gone much further afield. It was not certain whether any of the late Tsaritsa's children were living, and owing to the war many of the continental descendants might fall into penury and obscurity, rendering any future tracing extremely difficult, if not impossible. The expense of a strictly proved pedigree of the descendants living at the testator's death would be very heavy.

In re Villar, [1929] 1 Ch. 243, 245 (C.A. 1928). In *Re* Leverhume, [1943] 2 All E.R. 274 (Ch.), the number was estimated at 134 and there was the additional problem of the destruction of records in World War II. *Id.* at 277.

74. But it is said that the Courts ought to take into consideration the difficulty that will arise in the future when, it may be 100 years hence, their successors will be faced with the problem of finding out who is the last survivor of this body of 120 or 130 persons and when he died. That is a difficulty which may arise by reason of the vicissitudes of life, but it may not. It is possible that 120 years hence the Court may find a number of problems relating to the births, marriages and deaths of various persons; but they appear to me to be matters which we ought not to take into account. The difficulties are not insurmountable, and they may in fact never arise.

In re Villar, [1929] 1 Ch. 243, 249 (Lord Hanworth, M.R.). *See also Re* Leverhume, [1943] 2 All E.R. 274, 281 (Ch.). In Muir v. Commissioners, [1966] 1 W.L.R. 1269, 1282 (C.A.), the same rationale was used to defeat a claim that a class of beneficiaries consisting in part of the next of kin and the past, present, and future husbands and wives of the settlor's descendants who were alive at the settlement was void for uncertainty.

No reported case decides what happens if one of the measuring lives becomes unascertainable during the period of the Rule. The presumption of death that arises from prolonged, unexplained absence, *see* C. MCCORMICK, LAW OF EVIDENCE § 343, at 809 (1972); Jalet, *Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons or Absentees*, 54 IOWA L. REV. 177 (1968), would probably cause the missing measuring life to be considered dead after the period appropriate under local law.

would be held void for uncertainty.[75] In the earlier English cases on point, courts voided interests for uncertainty only when ascertainment of the measuring lives was totally impossible.[76]

There are no American cases directly on point, but the dicta and commentators would require far easier ascertainment than do the English courts. According to the *Restatement of Property* (1940)[77] and California's statutory version of the common law Rule,[78] the measuring lives should be "neither so numerous [nor] so situated that evidence of their deaths is likely to be unreasonably difficult to obtain," and the few relevant decisions are in accord.[79] In applying this standard of reasonable difficulty, the courts and commentators consider several factors:

(1) the number of measuring lives—the larger their number, the less reasonable the difficulty;[80]

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75. *Re* Leverhume, [1943] 2 All E.R. 274, 280-81 (Ch.).

76. *In re* Moore, [1901] 1 Ch. 936 (all persons alive in world at testator's death); *In re* Viscount Exmouth, 23 Ch. D. 158 (1883) (all the persons alive at Viscount Exmouth's death who later attain his title). The latter case is explained in *In re* Lanyon, [1927] 2 Ch. 264, 270:

> The want of certainty in the operation of the limitation here in question was this: The clause postponed the vesting of an absolute interest in chattels till the expiration of a term of twenty-one years to commence from the decease of all such persons as should be living at the testator's death, and should at any time after the testator's death attain the title of Exmouth. The result was that you could never tell at any time who was entitled to the chattels, because until all persons (and there were several) who were alive at the testator's death and who might succeed to the title, were actually dead, you could never say whether the term of twenty-one years had commenced to run, was still current, had expired or had not commenced to run. The matter was one of absolute impossibility.

77. RESTATEMENT § 374(a)(ii).

78. CAL. CIV. CODE § 715.2 (Deering 1971). New York's statutory Rule Against Perpetuities, which appears to follow the common law Rule, contains almost identical language. N.Y. EST., POWERS & TRUSTS LAW § 9-1.1(b) (McKinney 1967).

79. Reagh v. Kelley, 10 Cal. App. 3d 1082, 1096, 89 Cal. Rptr. 425, 435 (1970); *In re* Estate of Searight, 87 Ohio App. 417, 424, 95 N.E.2d 779, 783 (1950). Another decision discusses the English standard with approval but does not adopt it. Ministers & Missionaries Benefit Bd. v. McKay, 64 Misc. 2d 231, 253-56, 315 N.Y.S.2d 549, 572-73 (N.Y. County Sup. Ct. 1970). *Reagh* and *McKay* both concerned classes of "relatives." It is unclear whether the courts in those cases, in holding that the classes were ascertainable, meant that the classes were described clearly enough that their membership could be determined, or that, in addition, all the members of the class could be located. *See* note 66 *supra.*

80. RESTATEMENT § 374, comment *l* at 1480. The *Restatement* would void interests measured by all the persons alive in the United States at a given moment or all the persons listed in a given telephone book, but would uphold an interest measured by the lives

(2) the obscurity of some or all of the measuring lives—the greater their obscurity, the more difficult it will be to keep track of them, especially in time of war or social upheaval;[81]
(3) the relationship, if any, of the measuring lives to the donor and donee[82]—the closer the relationship, the more likely the donor and donee are to keep track of the measuring lives for family reasons;
(4) the financial interest, if any, of the measuring lives in the distribution in question—the greater their interest, the more likely they are to make their whereabouts continually known;[83]
(5) the size of the corpus out of which the costs of ascertainment must be paid—the smaller the fund, the less reasonable the difficulty of ascertainment.[84]

When the ascertainability of the measuring lives is judged by these standards, the result should allow the donor enough dead hand control to provide sensibly for the objects of his generosity, but should prevent him from abusing the Rule and unreasonably inconveniencing the courts and donees.

Finally, it should be noted that by the American standard, as by the English,[85] the possibility that future events may make ascertainment of

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of a small number of persons, no matter how difficult their ascertainment. *Id.* at 1480-81.

81. *Id.* at 1480. The *Restatement* would void an interest measured by the lives of the inhabitants of a given orphan asylum at a given moment. *Id.*

82. *Id.* at 1481-82; *cf.* Reagh v. Kelley, 10 Cal. App. 3d 1082, 1098, 89 Cal. Rptr. 425, 436 (1970) (class of beneficiaries consisting in part of "any relatives of decedent, to the third degree, 'found living on the Continents of Europe, Asia, and Africa within 20 years of the creation of this trust' " held ascertainable under statute adopting *Restatement* standard); Ministers & Missionaries Benefit Bd. v. McKay, 64 Misc. 2d 231, 256, 315 N.Y.S.2d 549, 573 (N.Y. County Sup. Ct. 1970) (dictum that class of measuring lives consisting of persons related to testatrix and her husband within tenth degree would be valid under common law Rule).

83. RESTATEMENT § 374, comment *l* at 1481. The *Restatement* would uphold an interest creating inheritable annuities to accumulate for the lives of forty named persons and to be distributed when the last of them dies. *Id.*; *cf.* Fitchie v. Brown, 211 U.S. 321 (1908).

84. SIMES & SMITH § 1223, at 111; *cf.* State v. McGhee, 200 Iowa 329, 332-33, 204 N.W. 408, 409-10 (1925), in which the conveyance of a farm to several hundred thousand persons was held void:

> The expense of executing, acknowledging, and recording instruments of conveyance by the several hundred thousand persons indicated would many times exceed the value of the farm, let alone the small interest actually possessed by appellant [due to three mortgages on the farm] . . . . The deed on its face was void and conveyed no title whatever.

85. *See* note 74 *supra.*

the measuring lives unreasonably difficult or impossible is immaterial in deciding whether the interest in question is void for uncertainty.[86] The Rule Against Perpetuities' requirement of vesting or failure is likewise immaterial, because the issue is not whether the Rule itself is violated, but whether the class of measuring lives is so uncertain that the Rule cannot be applied. Only after the initial problem, if any, of uncertainty has been overcome, does the Rule itself operate.

V. How Is the Measuring Life Identified?

In operation, the Rule Against Perpetuities requires that there be some person, identifiable from the terms of the distribution in question, alive at the creation of the interest in question, within twenty-one years of whose death the interest must vest or fail. This person is the measuring life for the interest. To determine that the interest does not violate the Rule, a measuring life must be found for it.[87]

The measuring life need not be specified[88] or even mentioned in the distribution.[89] The donor need not intend any particular person to be the measuring life.[90] The measuring life need not be a relative of any taker,[91] or the holder of a previous estate[92] or of any interest in the distri-

86. Restatement § 374, comment *l* at 1481.

87. *See generally* Allan, *supra* note 51, at 106-08; Kiralfy, *supra* note 51; Leach, *supra* note 51, at 641-42.

88. For examples of wills in which measuring lives were specified, see Fitchie v. Brown, 211 U.S. 321 (1908); Burdick v. Burdick, 33 F. Supp. 921, 923 (D.D.C. 1940), *rev'd on other grounds sub nom.* Gertman v. Burdick, 123 F.2d 924 (D.C. Cir. 1941), *cert. denied*, 315 U.S. 824 (1942); Ramage v. First Farmer's & Merchant's Nat'l Bank, 249 Ala. 240, 244-46, 30 So. 2d 706, 710-11 (1947); First Camden Nat'l Bank & Trust Co. v. Collins, 114 N.J. Eq. 59, 60, 168 A. 275, 276 (1909); Marks v. Southern Trust Co., 203 Tenn. 200, 211, 310 S.W.2d 435, 440 (1958).

89. 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); Sims v. McMullan, 22 S.W.2d 313, 318 (Tex. Civ. App. 1929), *rev'd on other grounds*, 37 S.W.2d 141 (Tex. Comm'n App. 1931); Betchard v. Iverson, 35 Wash. 2d 344, 355, 212 P.2d 783, 789 (1949). *See also* cases cited note 101 *infra.*

90. Carter v. Berry, 243 Miss. 356, 362, 140 So. 2d 843, 848 (1962); *see* note 6 *supra.*

91. McArthur v. Scott, 113 U.S. 340, 383 (1885); 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); Roberts v. Chisum, 238 S.W.2d 822, 825 (Tex. Civ. App. 1951). *See also* cases cited notes 98, 99 *infra.*

92. Bach v. Pace, 305 S.W.2d 528, 529 (Ky. 1957); 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,

bution.[93] In the vast majority of interests the measuring life must be implied from the terms of the distribution in question.[94]

There is no precise formula for implying the measuring life in a distribution. The basic question is whether there is some causal life, ascertainable from the scheme of the distribution, of whom it can be said "The interest in question must vest, if at all, during his life, at his death, or within twenty-one years thereafter." If this question is asked about each causal life in the distribution, the measuring life, if any,[95] will eventually be identified. The element of trial and error in this process can be reduced by picking out the causal lives of whom one is most likely to be the measuring life. This is a skill that can be acquired only by repeated practice with specific distributions. In the following paragraphs, the Rule is phrased in a way that will point to the causal lives and ultimately to the measuring life. Examples of frequently used distributions are given and the Rule is applied to them, revealing the measuring life.[96]

(1) Is there some person during whose life the interest in question must vest or fail?

Examples: (a) in a gift or bequest to a person at some point in his own life: From *A* to *B* if *B* reaches forty; *B* is the measuring life for his own interest.[97]

362, 149 So. 2d 843, 848 (1962); Lux v. Lux, 109 R.I. 592, 598-99, 288 A.2d 701, 705 (1972); Thellusson v. Woodford, 31 Eng. Rep. 117 (Ch. 1798), *aff'd*, 32 Eng. Rep. 1030 (H.L. 1805); *cf.* Alcoma Corp. v. Ackerman, 26 Misc. 2d 678, 207 N.Y.S.2d 137 (N.Y. County Sup. Ct. 1960). *See also* cases cited notes 97, 98, 101 *infra*.

93. Chicago Title & Trust Co. v. Shellaberger, 399 Ill. 320, 333, 77 N.E.2d 675, 683 (1948); Carter v. Berry, 243 Miss. 356, 362, 140 So. 2d 843, 848 (1962); Friday's Estate, 313 Pa. 328, 333, 170 A. 123, 125 (1933); Lux v. Lux, 109 R.I. 592, 598-99, 288 A.2d 701, 705 (1972); Roberts v. Chisum, 238 S.W.2d 822, 825 (Tex. Civ. App. 1951); Thellusson v. Woodford, 31 Eng. Rep. 117 (Ch. 1798), *aff'd*, 32 Eng. Rep. 1030 (H.L. 1805); *cf. In re* Estate of Friedman, 67 Misc. 2d 304, 323 N.Y.S.2d 499 (Westchester County Sur. Ct. 1971); Alcoma Corp. v. Ackerman, 26 Misc. 2d 678, 207 N.Y.S.2d 137 (N.Y. County Sup. Ct. 1960). *See also* cases cited notes 98, 101 *infra*.

94. *See, e.g.*, Carter v. Berry, 243 Miss. 356, 362, 140 So. 2d 843, 848 (1962); *In re* Estate of Searight, 87 Ohio App. 417, 424-25, 95 N.E.2d 779, 783 (1950); Sims v. McMullan, 22 S.W.2d 313, 318 (Tex. Civ. App. 1929), *rev'd on other grounds*, 37 S.W. 2d 141 (Tex. Comm'n App. 1931); Betchard v. Iverson, 35 Wash. 2d 344, 355, 212 P.2d 783, 789 (1949).

95. If there is no measuring life for an interest, then the interest violates the Rule.

96. For a similarly structured treatment of English cases, see Kiralfy, *supra* note 51.

97. Breault v. Feigenholtz, 250 F. Supp. 551, 558 (N.D. Ill. 1965), *aff'd*, 358 F.2d

(b) in a gift or bequest to a person at some point in another person's life: From *A* to *B* if *C* reaches forty; *C* is the measuring life for *B*'s interest.[98]

(c) in a gift or bequest to a person upon the occurrence of a condition subsequent divesting another person's life estate: From *A* to *B* for life, but if *B* changes his name, then to *C*; *B* is the measuring life for *C*'s interest.[99]

(2) Is there some person at whose death the interest in question must vest or fail?

Example: (a) in a gift or bequest to a person after the termination of a life interest in another person: From *A* to *B* for life, then to *C* if he survives *B*; *B* is the measuring life for *C*'s interest.[100]

39, 45 (7th Cir. 1966) (power of appointment exercised in favor of person alive at its creation; that person is the measuring life for his own interest); Estate of Bird, 225 Cal. App. 2d 196, 199, 37 Cal. Rptr. 288, 291 (1964) (same); First-Central Trust Co. v. Claflin, 73 N.E.2d 388, 394 (Ohio C.P. 1947) (same); Sims v. McMullan, 22 S.W.2d 313, 318 (Tex. Civ. App. 1929), *rev'd on other grounds*, 37 S.W.2d 141 (Tex. Comm'n App. 1931) (*A* to *B* for life if it ever becomes necessary for his support; *B* is the measuring life for his own interest); White v. National Bank & Trust Co., 212 Va. 568, 570, 186 S.E.2d 21, 23 (1972).

98. Betchard v. Iverson, 35 Wash. 2d 344, 212 P.2d 783 (1949).

99. *See* Friday's Estate, 313 Pa. 328, 170 A. 123 (1933) (*A* to *B* when *A*'s grandchildren living at *A*'s death die; *A*'s grandchildren living at *A*'s death are the measuring lives for *B*'s interest); *cf. In re* Lanyon, [1927] 2 Ch. 264 (*A* to *B* for life, then to *B*'s children if *B* has not married a blood relation; *B* is the measuring life for *B*'s children's interests).

100. American Security & Trust Co. v. Cramer, 175 F. Supp. 367, 371 (D.D.C. 1959) (*A* to *B* for life, then to *B*'s children; *B* is the measuring life for his children's interests); Dorrance v. Dorrance, 238 F. 524, 526 (3d Cir. 1916), *aff'd on rehearing*, 238 F. 924 (3d Cir. 1917) (per curiam) (*A* to *B* for life, then to *B*'s children if there are any, and if not, then to *C*, *D*, *E*, and *F*; *B* is the measuring life for the interests of *B*'s children, *C*, *D*, *E*, and *F*); *In re* Plaut's Estate, 158 P.2d 745, 747 (Cal. App.), *aff'd*, 27 Cal. 2d 424, 164 P.2d 765 (1945) (en banc) (*A* to *B* for life, then to *B*'s children when they reach twenty-one; *B* is the measuring life for *B*'s children's interests); *In re* Estate of Harrison, 22 Cal. App. 2d 29, 34-36, 70 P.2d 522, 525-26 (1937) (same); Chilcott v. Hart, 23 Colo. 40, 50-51, 45 P. 391, 395 (1896) (same as *Cramer*); Hooker v. Hooker, 130 Conn. 41, 56, 32 A.2d 68, 75 (1943); Van Roy v. Hoover, 96 Fla. 194, 202, 117 So. 887, 889 (1928); *In re* Estate of McCune, 214 So. 2d 56, 58 (Fla. App. 1968) (*A* to *B* and *C* for life, then to their widows if they are alive then; *B* and *C* are the measuring lives for their wives' interests); Jossey v. Brown, 119 Ga. 758, 763, 47 S.E. 350, 353 (1904) (*A* to *B* for life, and if *B*'s children do not reach twenty-one, then to *B*'s husband; *B* is the measuring life for her husband's interest);

(3) Is there some person at whose death or within twenty-one years thereafter the interest in question must vest or fail?

Examples: (a) in a bequest to a person's grandchildren when they reach twenty-one: From *A* to *A*'s grandchildren when they reach twenty-one; *A*'s children are the measuring lives for *A*'s grandchildren's interests.[101]

(b) in a gift or bequest to the person chosen by the donee of a special power of appointment or a general power to appoint by will: *A* exercises a general power to appoint by will in favor of *B*; *A* is the measuring life for *B*'s interest.[102]

(c) in a gift or bequest to named persons for their lives, then to their children "for as long as the

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Chism v. Reese, 190 Md. 311, 323, 58 A.2d 643, 648 (1948) (*A* to *B* for life, and if *B* dies without children, then to the children of *C*; *B* is the measuring life for *C*'s children's interests); Gray v. Whittemore, 192 Mass. 367, 378, 78 N.E. 422, 427 (1906); *In re* Dingler's Estate, 319 Mich. 189, 193, 29 N.W.2d 108, 110 (1947) (same as *Cramer*); Paton v. Langley, 50 Mich. 428, 433, 15 N.W. 537, 539 (1883) (*A* to *B* for life, then to *C* for life, then to *B*'s heirs living at his death; *B* and *C* are the measuring lives for *B*'s heirs' interests); Peterson v. Peterson, 222 Minn. 208, 209-10, 23 N.W.2d 580, 581 (1946) (*A* to *B* for life, then to *C* for life, then to their children then alive who have refrained from drinking liquor for five years; *B* and *C* are the measuring lives for their children's interests); Malone v. Herndon, 197 Okla. 26, 31, 168 P.2d 272, 277 (1945) (*A* to *B* for life, and if he is survived by issue, then to them; *B* is the measuring life for his issue's interests); *In re* Walker's Estate, 179 Okla. 442, 448-49, 66 P.2d 88, 95-96 (1937) (same as *Malone*); Roberts v. Chisum, 238 S.W.2d 822 (Tex. Civ. App. 1951) (*A* to *B* for life, and if *B* dies without heirs, then to the heirs of *C*; *B* is the measuring life for *C*'s heirs' interests).

101. McArthur v. Scott, 113 U.S. 340 (1885); Bates v. Spooner, 75 Conn. 501, 505-06, 54 A. 305, 307 (1903) (*A* to *A*'s grandchildren if necessary for their college education (assuming that college education ends at age twenty-one); *A*'s children are the measuring lives for *A*'s grandchildren's interests); Bach v. Pace, 305 S.W.2d 528, 529 (Ky. 1957) (dictum); Tuttle v. Steele, 281 Ky. 218, 224, 135 S.W.2d 436, 439 (1939) (dictum); Second Bank-State Street Trust Co. v. Second Bank-State Street Trust Co., 335 Mass. 407, 412, 140 N.E.2d 201, 206 (1957); Carter v. Berry, 243 Miss. 356, 140 So. 2d 843 (1962); Lux v. Lux, 109 R.I. 592, 288 A.2d 701 (1972); Otterback v. Bohrer, 87 Va. 548, 552, 12 S.E. 1013, 1014 (1891); Woodruff v. Pleasants, 81 Va. 37, 42 (1885).

102. Second Nat'l Bank v. Harris Trust & Sav. Bank, 29 Conn. Supp. 275, 283 A.2d 226 (Super. Ct. 1971); West v. Storm, 71 Ill. App. 2d 245, 253, 217 N.E.2d 825, 828 (1966); Murphy v. Mercantile-Safe Deposit & Trust Co., 236 Md. 282, 289, 203 A.2d 889, 893 (1964); Dollar Savings & Trust Co. v. First Nat'l Bank, 32 Ohio Misc. 81, 285 N.E.2d 768 (Mahoning County C.P. 1972); Warren's Estate, 320 Pa. 112, 120, 182 A. 396, 399 (1936); *In re* Estate of Lawrence, 136 Pa. 354, 364, 20 A. 521, 522 (1890); *In re* Paul, [1921] 2 Ch. 1, 6.

Rule Against Perpetuities allows": From *A* to *B* and *C* for life, then to their children for as long as the Rule Against Perpetuities allows; *B* and *C* are the measuring lives for their children's interests.[103]

(d) in a gift or bequest to the person chosen by the donee of a general power to appoint by will, who was alive at the creation of the power but was unknown to the donee at that time: *A*, donee of a general power to appoint by will, exercises the power in favor of *B*, his wife, for her life, then to their surviving children; *B* was alive at the creation of the power, but did not know *A*; *B* is the measuring life for their children's interests.[104]

VI. The Effect of Reforms of the Common Law Rule Upon the Concept of the Measuring Life

The Rule Against Perpetuities has been criticized for allowing the use of extraneous measuring lives, often in large numbers, for the sole purpose of prolonging the postponement of vesting.[105] The fact that the longest-lived of a group of fifty persons is not likely to live longer than the longest-lived of a group of ten[106] has not stopped testators

103. Fitchie v. Brown, 211 U.S. 321, 331 (1908); Stellings v. Autry, 257 N.C. 303, 324, 126 S.E.2d 140, 156-57 (1962); *In re* Vaux, [1939] Ch. 465, 468, 475-76 (C.A. 1938); *In re* Moore, [1901] 1 Ch. 936, 937 (dictum); Pownall v. Graham, 55 Eng. Rep. 360, 362 (R.C. 1863). *Contra*, Farmers Nat'l Bank v. McKenney, 264 S.W.2d 881, 882 (Ky. 1954) (alternative holding).

104. Reed's Estate, 342 Pa. 54, 59, 19 A.2d 365, 367 (1941). *Contra, In re* Harvey, 39 Ch. D. 289, 297-98 (C.A. 1888) (remainders held void on possibility that *A* will remarry to a woman not born at creation of power who will survive *A*, *B*, and all *A*'s and *B*'s children). One court, faced with the same problem, construed the children's remainders as vested at the death of *A* and *B*, with enjoyment postponed. Gray v. Whittemore, 192 Mass. 367, 378, 78 N.E. 422, 427 (1906).

105. W. Leach & O. Tudor, *supra* note 67, at 52-53; 3 W. Walsh, Commentaries on the Law of Real Property 430-31 (1947); Leach, *Perpetuities Reform by Legislation*, 70 L.Q. Rev. 478, 490 (1954).

106. The longer lived of two persons chosen at random at age five has a life expectancy of 89 years; for the longest lived of five, the life expectancy is 92; for ten, it is 94; for twenty, 97; for fifty, 100; for 100, 102. These figures are based on 1971 Group Annuity Mortality Tables and the following calculations. The data used was from 10,000 people alive at age five. Set n_i = the number of people in the population alive at age i. In this data $n_{110} = 0$. Then for $5 \leqq i \leqq 110$, $10{,}000 - n_i$ = the number of

from choosing numerous lives in the hope of controlling their property as long as possible.[107] As a result, legislation has been proposed to restrict the number of lives that may be used or to require that the lives be somehow related to the interest they measure.[108] Requiring the measuring lives to have some stake in the distribution sounds like a perfect solution, but can be evaded by giving the extraneous lives some slight bequest to vest at the death of the survivor.[109] A set limit on the number of lives that may be used invalidates distributions inadvertently drawn with more beneficiaries than permissible lives. New York's century-long experience with such a rule has been called "an enduring monument to the dangers of intemperate modification."[110] Some recent perpetuities statutes specify in prodigious detail who may and who may not be measuring lives, in an attempt to narrow the common law concept just far enough to prevent the use of extraneous

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people who die before age i; and $P_i = \frac{10{,}000 - n_i}{10{,}000}$ is the (empirical probability that a randomly selected individual will die before age i. Thus $(P_i)^m$ is the probability that m (independently selected) individuals will all die before age i. Thus, $(P_i)^m - (P_{i-1})^m$ is the probability that all m will die before age i, but at least one will live to age i—1; that is, the probability that the longest living member of the group will die between ages i—1 and i. In this case we take his age at death to be i—½. Therefore, the average age at death (or life expectancy) of the longest living member of a randomly selected group of m people (all alive at age five) is

$$\sum_{i=6}^{110} (i-½)\ [(P_i)^m - (P_{i-1})m].$$

This calculation was made for the values m = 2, 5, 10, 20, 50, and 100. *See also* Russell, *Proposed Changes in the New York Rule Against Perpetuities*, 6 ST. JOHN'S L. REV. 50, 59-60 (1931).

107. *See* notes 68-73 *supra* and accompanying text. The "royal lives" clauses upheld in *In re* Villar, [1929] 1 Ch. 243 (C.A. 1928), and *Re* Leverhume, [1943] 2 All E.R. 274 (Ch.), were standard practice in England until recently. SIMES & SMITH § 1223, at 111 & n.86.

108. *See* authorities cited note 105 *supra*.

109. Morris & Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486, 488 (1964).

110. R. LYNN, *supra* note 2, at 181. The New York statute, codified at REV. STAT. N.Y., Pt. II, ch. I, tit. 2, art. 1, § 15 (real property), ch. IV, tit. 4, § 2 (personal property) (1830), *repealed*, chs. 152, 153 [1958] N.Y. Laws 169, 171, limited the permissible number of measuring lives to two and was said to cause

> uncertainty, technicality, destruction of wills by the hundred which in fairness and justice should have been enforced . . . as well as the perplexity of bench and bar alike . . . .

W. WALSH, *supra* note 105, at 432. New York has since returned to what appears to be the common law Rule. N.Y. EST., POWERS & TRUSTS LAW § 9-1.1 (McKinney 1967).

lives.[111] Inevitably, such codifications are either overbroad,[112] unreasonably narrow,[113] or vague[114] in parts. The most satisfactory solution yet devised is to offer a long period of years, usually eighty, as an alternative measure of the period of the Rule. Adopted in several jurisdictions,[115] it will hopefully wean draftsmen away from "royal lives" clauses and other complicated classes of measuring lives.

The measuring life concept has also been affected by the adoption in nine states of the wait-and-see doctrine.[116] Born out of dissatisfaction with the Rule's requirement of initial certainty of vesting or failure,[117] the doctrine provides that the Rule's period be measured by what actually happens rather than by what is possible when the interest in question is created. For example, a devise from *A* to *B* for life, then to *B*'s children when the youngest reaches twenty-five is void at common law because *B* might die leaving a child under four, which would postpone vesting more than twenty-one years after the death of

111. Perpetuities and Accumulations Act 1964, c. 55, § 3 (4, 5); New Zealand Perpetuities Act 1964, [1964] N.Z. Stat. c. 47, § 8 (4, 5); Ontario Perpetuities Act 1966, [1966] Ont. Stat. c. 113, §§ 3-6.

112. Morris & Wade, *supra* note 109, at 502-05.

113. *Id.* at 505-06.

114. Prichard, *Two Petty Perpetuities Puzzles*, 1969 CAMB. L.J. 284.

115. CAL. CIV. CODE § 715.6 (Deering 1971) (sixty years); Perpetuities and Accumulations Act 1964, c. 55 § 1(2); New Zealand Perpetuities Act 1964, [1964] N.Z. Stat. c. 47, § 6; Victoria Perpetuities and Accumulations Act 1968 § 5(1); Western Australia Law Reform Act (Property, Perpetuities & Succession), 1962, c. 83, § 5. *See also* Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965, 982 (1959).

116. The wait-and-see doctrine has been adopted by statute in eight states, CONN. GEN. STAT. ANN. § 45-95 (1973); KY. REV. STAT. ANN. § 381.216 (1969); ME. REV. STAT. ANN. tit. 33, § 101 (1964); MD. ANN. CODE art. 93, § 11-103(a) (1969); MASS. ANN. LAWS ch. 184A, § 1 (1969); OHIO REV. CODE ANN. § 2131.08(c) (Anderson 1968); PA. STAT. ANN. tit. 20, § 6104(b) (1972); VT. STAT. ANN. tit. 27, § 501 (1967); and by decision in one state, Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 231-32, 97 A.2d 207, 212 (1953). Massachusetts was moving towards judicial adoption of wait-and-see, Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952) (wait-and-see alternative holding), but the legislature mooted the question by passing a wait-and-see statute at its next session, [1954] Mass. Acts 637. Florida appeared to have adopted wait-and-see judicially, Story v. First Nat'l Bank & Trust Co., 115 Fla. 436, 156 So. 101 (1934), but then reaffirmed the common law Rule, Cartinhour v. Houser, 66 So. 2d 686, 687 (Fla. 1953).

American perpetuities statutes in force on April 1, 1967, are compiled in 2 REAL PROPERTY, PROBATE & TRUST J. 205-10 (1967). This compilation is updated in the Journal's annual surveys of real property and trust and estate legislation. *See* 3 *id.* 75, 178 (1968); 5 *id.* 241, 333 (1970).

117. *See* Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); Tudor, *Absolute Certainty of Vesting Under the Rule Against Perpetuities—A Self-Discredited Rule*, 34 B.U.L. REV. 129 (1954).

B, the measuring life.[118] Under the wait-and-see doctrine, however, the interest would not be declared void *ab initio*. Rather, the courts and interested parties would wait and see if, when *B* dies, he actually has a child under four. If he does, *A*'s limitation would be held to violate the Rule; if he doesn't, the remainders to *B*'s children actually would vest within a life in being and twenty-one years, and the Rule would not be violated. Wait-and-see's proponents would argue that since the children's interests did vest within the period, they should be just as acceptable as interests that were always certain to vest within the period.

The effect of the wait-and-see doctrine on the measuring life concept has been fiercely debated for twenty years. According to one interpretation of the doctrine by its opponents, if actual events are to be considered, all the persons alive in the world at an interest's creation and within twenty-one years of whose deaths the interest actually vests are its measuring lives.[119] This argument is supported by the cases upholding trusts that are "to continue for as long as the law allows" by implying measuring lives for them.[120] It is said that these cases show courts' willingness to imply measuring lives in broadly worded distributions. Wait-and-see's proponents answer that this interpretation of the doctrine is patently ridiculous and represents the kind of absurdly remorseless consistency that wait-and-see is supposed to prevent.[121] They say that the all-inclusive theory would produce absurd results[122]

118. Bach v. Pace, 305 S.W.2d 528, 530 (Ky. 1957); *In re* Lattouf's Will, 87 N.J. Super. 137, 208 A.2d 411 (Super. Ct. 1965); Appeal of Coggins, 124 Pa. 10, 16 A. 579 (1889).

119. Allan, *supra* note 51, at 108-09; Allan, *The Rule Against Perpetuities Restated*, 6 U.W. AUSTL. L. REV. 27, 43-44 (1963); Jones, *Measuring Lives Under the Pennsylvania Statutory Rule Against Perpetuities*, 109 U. PA. L. REV. 54, 59-60 (1960); Mechem, *supra* note 115, at 981-82; Simes, *Is the Rule Against Perpetuities Doomed?*, 52 MICH. L. REV. 179, 187 (1953); Simes, *A Qualified Endorsement*, 92 T. & E. 770, 771-72 (1953); Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 MINN. L. REV. 41, 65-66 (1957).

120. *See* note 103 *supra* and accompanying text.

121. Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 3, 62-63 (1960); Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124, 1143 (1960).

122. Jones, *supra* note 119, at 60. By the all-inclusive theory, the measuring lives for an interest are all the persons in the world who are alive at the creation of the interest and within twenty-one years of whose deaths the interest actually vests. In the case of an interest of short duration, there would be millions, if not billions, of measuring lives. Such a class would be so large that the interest in question would be void for uncertainty. *See* notes 62-67 *supra*. However, an interest of extremely long duration

and that it changes the common law Rule so much that the legislatures cannot be assumed to have intended it without saying so, which they have not.[123]

The proponents of wait-and-see argue that the legislature's discarding of the requirement of initial certainty of vesting or failure does not necessarily indicate any change in the common law method of choosing the measuring lives, and that necessary implication from the terms of the distribution remains the guiding principle.[124] Retaining the common law method causes a reasonable result. If the vesting contingency does occur within the period of the Rule, the distribution is not objectionable as a perpetuity.[125] Against this interpretation it is said that abandoning the requirement of initial certainty of vesting or failure is so great a departure from the common law Rule that the legislatures must have intended to change the measuring life concept, too.[126] There is another, far more fundamental objection to the theory that measuring lives under wait-and-see are the same as under the common law Rule. At common law, to be a measuring life a person must validate the distribution *ab initio*. If wait-and-see does not change the class of measuring lives, then under wait-and-see, as at common law, every distribution must be valid or void *ab initio*. Thus, under wait-and-see, there is never any need to wait and see.[127] Of course, this argument is valid only if common law measuring lives are restricted to those lives in being who will validate the distribution *ab initio*. Whether or not this assumption is correct will probably never be settled, because "at common law it does not seem to matter how one puts it and therefore the problem has no practical significance and has never

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would be saved by locating some previously unnoticed centenarian. These results would not only frustrate the purposes of the common law Rule, they would promote opposite purposes.

123. Leach, *supra* note 121, at 1144-45.

124. *Id.* *See also* Cohan, *The Pennsylvania Wait-and-See Perpetuity Statute—New Kernels from Old Nutshells*, 28 TEMP. L.Q. 321, 332-36 (1955).

125. Morris & Wade, *supra* note 109, at 497-501.

126. Jones, *supra* note 119, at 63; 48 MICH. L. REV. 1158, 1167-69 (1950).

127. Maudsley, *Measuring Lives Under a System of Wait and See*, 86 L.Q. REV. 357, 360-63 (1970). This circle of self-destruction is required by the plain language of Western Australia Law Reform Act (Property, Perpetuities & Succession), 1962, c. 83, § 7(3):

> Nothing in this section makes any person a life in being . . . unless that person would have been . . . a life in being . . . if this section had not been enacted.

See Allan, *supra* note 51, at 109-10; Allan, *supra* note 119, at 45 & n.52. Professor Allan drafted the Western Australia statute.

had to be answered directly."[128]

As a middle course between the narrow common law definition of measuring lives and the overbroad all-inclusive theory, some supporters of wait-and-see read into the doctrine a requirement that the measuring lives have a causal connection to the vesting of the interest in question.[129] By this standard, it is said:

> In practically all cases the measuring lives will be one or more of the following . . . : (a) the preceding life tenant, (b) the taker(s) of the interest, (c) a parent of the takers of the interest, (d) a person designated as a measuring life in the instrument, or (e) some other person whose actions or death can expressly or by implication cause the interest to vest or fail.[130]

The causal connection theory does not make the common law causal lives into wait-and-see measuring lives. Rather, it restricts the persons about whom we are to wait and see to the common law causal lives.

Pearson Estate,[131] the only reported case which concerns measuring lives decided under the wait-and-see doctrine appears to have followed the causal connection theory, perhaps unconsciously, without encountering any of the problems foreseen by the theory's opponents. The testator, a childless widower whose parents were dead, died survived by six brothers and sisters, thirteen nephews and nieces, and twenty-nine grand-nephews and grand-nieces. His will created a trust[132] for his brothers and sisters for their lives, then to his nephews and nieces

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128. Allan, *supra* note 119, at 45. *See also* note 51 *supra* and accompanying text. Part II of this Note states that the measuring life must validate the distribution in question *ab initio*, while the lives in being and causal lives need not do so. Part II is not intended to be declaratory of the common law Rule as originally formulated. *See* text accompanying note 39 *supra*. Rather, it is intended to distinguish between previously ambiguous terms in order to clarify the common law Rule and facilitate understanding of its operation.

129. Allan, *supra* note 51, at 109-10; Maudsley, *supra* note 127, at 364-65.

130. Dukeminier, *supra* note 121, at 63. Opponents of this theory warn that introducing the problems of causation into the Rule Against Perpetuities will complicate an already intricate field of law. Does the lawyer who drafts the instrument in question or the judge who construes it have a causal connection to the vesting of the interest? For a debate on this issue, see Mechem, *supra* note 115, at 981-82; Leach, *supra* note 121, at 1143-44; Mechem, *A Brief Reply to Professor Leach*, 108 U. PA. L. REV. 1155, 1156 (1960).

131. 48 D. & C.2d 607 (Orphan's Ct. 1968), *vacated and remanded*, 442 Pa. 172, 275 A.2d 336 (1971). The court was applying Pennsylvania's wait-and-see statute, PA. STAT. ANN. tit. 20, § 6104(b) (1972).

132. 442 Pa. at 179-80, 275 A.2d at 338-39.

for their lives, then to their surviving heirs *ad infinitum*, with the provision that when there were no more heirs, the trust was to be continued for various charities.[133] The trial court held that the policies of the wait-and-see doctrine were outweighted by the need to decide, for estate tax purposes, the validity of the gift over to the charities.[134] It proceeded to apply the common law Rule Against Perpetuities, holding that the gifts to descendants after the nephews and nieces were void, as were the gifts to the charities.[135] The state supreme court reversed, acknowledging

> the necessity, occasioned by the federal estate and state inheritance tax laws, for a prompt determination of questions concerning future interests; however, owing to the ever-increasing extent of estate tax liability, to recognize this principle would emasculate the "wait and see" rule.[136]

Applying the wait-and-see doctrine, the court held that the brothers' and sisters' interests were valid because their parents' deaths made any increase in their number impossible; thus, their class was closed.[137] The interests of the nieces and nephews were also valid because their interests would vest no later than the death of the last brother or sister (a life in being when the testator died).[138] The court noted that at common law the nephews and nieces would not be measuring lives because the brothers' wives and the sisters could still give birth to more of them.[139] At this point, the court decided to wait and see:

> In our view, three possible situations could occur by waiting and seeing.
>
> First, if no additional nephews and nieces are born, not only do the brothers and sisters qualify as measuring lives *but also* the six nephews and nieces. Thus, the interest given to the grandnephews and grandnieces must necessarily vest within twenty-one years following the death of the last surviving nephew or niece since membership in the class of grandnephews and grandnieces could not, thereafter, increase. The gift to the charities, if contingent, however, would be valid only if all the grandnephews and grandnieces should produce no offspring.
>
> Secondly, if no additional nephews and nieces *and* grandnephews and grandnieces are born, not only do the brothers and sisters *and* nieces

133. *Id.* at 184-85, 275 A.2d at 340-41.
134. 48 D. & C.2d at 610.
135. *Id.* at 617.
136. 442 Pa. at 187, 275 A.2d at 342-44 (footnote omitted).
137. *Id.* at 189, 275 A.2d at 344.
138. *Id.* at 189-90, 275 A.2d at 344.
139. *Id.* at 190, 275 A.2d at 344.

and nephews qualify as measuring lives *but also* the twenty-nine grandnephews and grandnieces. In this situation, the interest to great-grandnephews and great-grandnieces would be valid since that interest must necessarily vest within twenty-one years after the death of the last surviving grandnephew or grandniece. As before, the gift to charities, if contingent, would be invalidated if any of the great-grandnephews or great-grandnieces should produce offspring.

Thirdly, if any of the brothers and sisters should prove to be "fertile octogenarians," then the common law's stress on *possibilities* coincides with the statute's emphasis on *actualities* and our earlier discussion of the opinion of the court below controls.

Since which of the three situations will eventuate is unpredictable, it is necessary that the "wait and see" rule be applied.[140]

Clearly, the *Pearson* court did not believe that the measuring lives under wait-and-see were the same as at common law. In considering the possibility that generations beyond the brothers and sisters could be measuring lives, it seems to have followed the causal connection theory, since the nieces and nephews would have a causal connection to the vesting of the interests of their children.[141] Thus, in its first reported application, the wait-and-see doctrine seems to have worked well, choosing the measuring lives by the causal connection theory and reaching a reasonable result. The case contained none of the problems foreseen by the causal connection theory's opponents,[142] and the vast majority of wait-and-see cases will probably be similarly uncomplicated.

Nevertheless, the general objections to the wait-and-see doctrine remain unanswered by the *Pearson* case. The nephews, nieces, their children, the charities, and tax officials must now wait for years before the validity of their interests is decided. It is unclear from the decision whether the contingent remaindermen will have standing to enforce the trustees' fiduciary duties. Nor did the court state from whom the tax officials will collect once the estate's tax liability is determined. Such uncertainty is particularly undesirable in a field of law whose value lies in the predictability of the rights and obligations it creates.[143] Moreover, although the wait-and-see doctrine seems not to have immediately disordered the law of future interests in the *Pearson* case, it may cause

140. *Id.* at 190-91, 275 A.2d at 344 (emphasis original).

141. Perhaps because the causal connection theory resolved the case, the court did not consider the all-inclusive theory.

142. *See* note 130 *supra.*

143. Jones, *supra* note 119, at 65; Waterbury, *supra* note 119, at 43 n.16.

major damage in the future. If, when the time for decision finally arrives, one or more of the future interests is declared void, then the alienability of the trust property, one of the primary policies of the law of future interests, will have been completely frustrated for however long the wait-and-see period has lasted.[144]

By comparison, the common law Rule and its measuring life concept seem to have worked satisfactorily on balance. "Even those technical aspects of the Rule often referred to as producing unfortunate results have caused surprisingly little difficulty,"[145] and can be remedied by legislation and case law development.[146] "For every case serving as a reminder that the Rule needs improvement there are many showing that it works fairly well when handled intelligently by counsel and court."[147] For the careful draftsman and his client, the common law Rule provides certainty, which the wait-and-see doctrine does not. If the policies of the Rule have any contemporary validity, they are better promoted by retaining the Rule in its common law form.

VII. THE FUTURE OF THE MEASURING LIFE CONCEPT

Since the adoption of the wait-and-see doctrine in nine jurisdictions, no new developments in perpetuities law affecting the measuring life concept have occurred. The wait-and-see movement itself has lost momentum as scholarly thinking and the *Pearson* case have shown it not to be a cure-all for the deficiencies of the Rule.[148] It seems to have been recognized that

144. Simes, *Is the Rule Against Perpetuities Doomed?*, 52 MICH. L. REV. 179, 188 (1953); Sparks, *A Decade of Transition in Future Interests*, 45 VA. L. REV. 493, 495-97 (1959). The danger that the wait-and-see doctrine will frustrate important policies of the law of future interests gives modern validity to the famous statement of Justice Blackstone in Perrin v. Blake, 96 Eng. Rep. 392, 393 (Ex. 1772), reported in full in 1 F. HARGRAVE, TRACTS RELATIVE TO THE LAW OF ENGLAND 489, 498 (1787):

> The law of real property in this country . . . is now formed into a fine artificial system, full of unseen connexions and nice dependencies; and he that breaks one link of the chain, endangers the dissolution of the whole.

145. Sparks, *supra* note 144, at 500.

146. Leach, *supra* note 117, at 745-49; Lynn, *Reforming the Common Law Rule Against Perpetuities*, 28 U. CHI. L. REV. 488, 500-01 (1961). *See also* L. SIMES, *supra* note 7, at 74-80; R. LYNN, *supra* note 2, at 57-88 (chapter entitled "The Decline and Fall of Fantastic Possibilities").

147. Lynn, *supra* note 146, at 501.

148. The first wait-and-see statute was enacted in 1947. No. 39, § 4(b), [1947] Pa. Laws 104 (codified at PA. STAT. ANN. tit. 20, § 6104(b) (1972)). During the 1950's, five more states adopted the wait-and-see doctrine. Merchants Nat'l Bank v. Curtis, 98

> [p]erpetuities do not furnish a kernel which invites a statutory envelope. The effort . . . to confine this body of law in a few sentences has been made in enough different states during past centuries and with sufficiently bad results to justify much hesitance in another attempt at its statutory embodiment . . . . [T]he subject matter of perpetuities has so many facets . . . and has so large an ingredient of policy, that the effort to put it into a nutshell of any type is of necessity doomed to failure. Any formulation of this body of law is likely to lack utility almost in direct proportion as it increases its stress upon brevity.[149]

At the same time that the wait-and-see doctrine has ceased to be considered preferable to the common law Rule, the need for any Rule Against Perpetuities at all has been questioned.[150] It is said that the removal of property from commerce, the ultimate social evil at which the Rule is directed,[151] is no longer a problem. Almost all trusts created today include a power, if not a duty, in the trustee to invade the corpus, alter the investment portfolio, and even terminate the trust in some situations.[152] Unlike the static seventeenth century land trusts that sparked the creation of the Rule Against Perpetuities, almost all modern trusts are composed of marketable securities and thus are in the stream of commerce.[153] As for the few land trusts that remain, modern developments in property law have greatly increased their alienability regardless of unascertained contingent remaindermen.[154]

N.H. 225, 231-32, 97 A.2d 207, 212 (1953); No. 233, § 1, [1955] Conn. Acts 210; ch. 244, [1955] Maine Laws 200; ch. 641, § 1, [1954] Mass. Acts 637; No. 177, § 1, [1957] Vt. Laws 139. Only three states adopted wait-and-see in the 1960's. Ch. 166, § 2, [1960] Ky. Acts 697; ch. 44, § 1, [1960] Md. Laws 157 (codified at MD. CODE ANN. art. 93, § 11-103(a) (1969 Replacement Volume)); Act of July 25, 1967, [1967] Ohio Laws 913 (codified at OHIO REV. CODE ANN. § 2131.08(c) (Anderson 1968)). Since 1967, no state has adopted the doctrine, and the scholarly controversy has died down. *See* 2 REAL PROPERTY, PROBATE & TRUST J. 179, 182 (1967).

149. Powell, *Nutshells and Perpetuities*, 7 U. CHI L. REV. 489, 495 (1940).

150. For an excellent summary of the policies said to support the Rule, see 84 HARV. L. REV. 738, 739-40 n.5 (1971). Also note the statement of Lord Nottingham in the Duke of Norfolk's Case, 22 Eng. Rep. 931, 949 (Ch. 1682), *rev'd*, 22 Eng. Rep. 963 (C.A. 1683), *rev'd*, 22 Eng. Rep. 963 (H.L. 1685):

> [Perpetuities] do fight against God, for they pretend to such a Stability in human Affairs, as the Nature of them admits not of, and . . . are . . . therefore not to be endured.

151. *See* note 48 *supra*.

152. L. SIMES, *supra* note 7, at 41-42; Brégy, *A Defense of Pennsylvania's Statute on Perpetuities*, 23 TEMP. L.Q. 313, 323 (1950); RESTATEMENT (SECOND) OF TRUSTS § 167 (1, 3) (1959).

153. L. SIMES, *supra* note 7, at 40-42.

154. *Id.* at 43-46; SIMES & SMITH §§ 1941, 1943.

Finally, it is said that income and estate taxes have made it sheer folly for testators to attempt to control their property far into the future.[155]

Supporters of the Rule Against Perpetuities reply that large fortunes and restraints on alienation are not what the Rule is directed against,[156] and that despite taxes, testators, usually out of a disbelief in their children's ability to manage money, continue to stretch the Rule to its limit in their estate plans. While the original rationale for the Rule may have ended in the industrial revolution, continued justifications for it are found in the need to balance the desire of the present generation to distribute its assets as it wishes against the identical desire of future generations,[157] and in the social policy that the wealth of the world be controlled by living persons.[158] These considerations apply to the Rule generally and not specifically to the measuring life concept. Therefore, the continued use of the measuring life concept is connected to the future of the Rule itself. The decision on the Rule's contemporary validity will determine what role the measuring life concept will play in the law of future interests.

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155. Leach, *Perpetuities Reform: London Proposes, Perth Disposes*, 6 U.W. AUSTL. L. REV. 11, 12 (1963) (footnote omitted):

> 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.

Contra, Waterbury, *supra* note 119, at 45-46 & n.28.

156. L. SIMES, *supra* note 7, at 56-58; Waterbury, *supra* note 119, at 48-53.

157. L. SIMES, *supra* note 7, at 58-59; Brégy, *supra* note 152, at 323; Tudor, *The Impact of Recent Statutory Adoption of the "Wait and See" Principle on the Common Law Rule Against Perpetuities*, 38 B.U.L. REV. 540, 541 (1958).

158. L. SIMES, *supra* note 7, at 59-60; Allan, *supra* note 119, at 31-33; Sparks, *supra* note 144, at 498.