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## A METHODOLOGY FOR SOLVING PERPETUITIES PROBLEMS UNDER THE COMMON LAW RULE: A STEP-BY-STEP PROCESS THAT CAREFULLY IDENTIFIES ALL TESTING LIVES IN BEING\*

DAVID M. BECKER\*\*

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\*\* Professor of Law, Washington University, St. Louis, Missouri. A.B., 1957, Harvard University; J.D., 1960, University of Chicago. The author wishes to acknowledge the input of Mark J. Temkin, the careful reading and comments of Professor Frank W. Miller, the suggestions and editing of Jonathan Goldstein, and the editing efforts of Sally H. Townsley.

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## I. INTRODUCTION

This article is about the common law rule against perpetuities, a rule that has been misunderstood, misapplied and too often ignored in actual practice.<sup>1</sup> Although the common law rule against perpetuities has been

1. See, e.g., J. GRAY, *THE RULE AGAINST PERPETUITIES* xi (4th ed. 1942) ("few lawyers . . . have not at some time . . . fallen into the net which the Rule spreads for the unwary . . ."); Fetters, *The Perpetuities Period in Gross and the Child En Ventre Sa Mere in Relation to the Determination of Common-Law and Wait-And-See Measuring Lives: A Minor Heresy Stated and Defended*, 62 *IOWA L. REV.* 309, 334-35 (1976) ("If it takes over eight hundred pages to explain a one-sentence, twenty-seven word rule, and that explanation was written by a legal scholar who devoted a lifetime of study to it, then maybe the rest of us should not be held accountable for knowing little, if anything about it. . . . There is no question that the reports are full of lawyer errors, compounded by judicial blunders, in the field of perpetuities law."); Leach, *Perpetuities Legislation, Massachusetts Style*, 67 *HARV. L. REV.* 1349, 1349 (1954) ("The Rule . . . is a dangerous instrumentality in the hands of most members of the bar."). See also Becker, *Estate Planning and the Reality of Perpetuities Problems Today: Reliance Upon Statutory Reform and Saving Clauses Is Not Enough*, 64 *WASH. U.L.Q.* 287 (1986).

Many scholars have tried to understand and explain why students and lawyers have great difficulty with the common law rule against perpetuities and, accordingly, why it has created a reign of terror. The best discussion and analysis, perhaps, is the most recent one. See Finan and Leyerle, *The Perp Rule Program: Computerizing the Rule Against Perpetuities*, 28 *JURIMETRICS J.* 317, 318-23 (1988). The authors conclude:

The only explanation left for the Rule's reign of terror is its complexity. Complexity baffles the intellect, but does not baffle the computer or calculator. For example, a computer has no more trouble multiplying 512 by 873 than it does multiplying 2 by 2. A human would

criticized soundly, decisional and statutory restrictions upon limitations that extend in perpetuity continue to exist.<sup>2</sup> Commentators generally agree that some kind of restriction is needed; nevertheless, most advocate reformation of the common law rule. They attack the rule because it is too complex; because it is grounded upon possibilities for vesting that often reflect events beyond human experience; because it frequently invalidates interests that actually or probably will vest within the allowed time; and because it produces very harsh consequences whenever a violation occurs.<sup>3</sup> Central to most proposals for pervasive reform has been a shift from a rule predicated upon possibilities to one focused upon actualities.<sup>4</sup> As a result, recent statutes allow for a waiting period to determine whether actual violations occur. Sometimes this "wait and see" period is measured by a life in being plus twenty-one years—a period related to the one that governs the common law rule—and sometimes it is measured by a gross period of time—for example, ninety years.<sup>5</sup> Whatever

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never use a calculator to multiply 2 by 2, but would use it for the other calculation. The same may be true with the Rule Against Perpetuities; it involves calculations whose complexity is such that a computer is helpful. The amount of complexity a student can intuit seems in large part to explain the difference between superior and average students. For the exceptional student who has no trouble intuiting the structure of the Rule Against Perpetuities, a tree diagram, flowchart or computer representation may be of little need. However, most students find that the complexity of the Rule exceeds their threshold of effective intuition. For them the computer may be helpful.

*Id.* at 322.

2. For a summary of existing perpetuities law, see 5A R. POWELL, *THE LAW OF PROPERTY* §§ 761, 808-27, 827A-H (P. Rohan rev. ed. 1982).

3. For the article which touched off a wave of criticism and commentary, see Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952). See also Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L. J. 3, 53-59 (1960); Maudsley, *Perpetuities: Reforming the Common Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355 (1975), and articles cited herein *supra* note 1.

4. For a discussion of the various reformations of the common law rule, and in particular those that shift the test from possibilities to actualities, see Becker, *supra* note 1, at 356-65.

5. Some of these "wait and see" statutes delay a determination of validity or invalidity no later than the deaths of lives in being plus twenty-one years to see whether contingent interests actually vest or fail. For an example of full "wait and see" legislation, see WASH. REV. CODE ANN. §§ 11 98.130-50 (1967). Other statutes delay a determination no later than the deaths of certain lives in being to see what possibilities then exist for remote vesting beyond the time period allowed by the common-law rule. For an example of a limited "wait and see" statute, see MASS. ANN. LAWS ch. 184A, § 1 (Law Co-op. 1977). For classification of and reference to various kinds of "wait and see" statutes (both full and limited), see RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 statutory notes 1b, 1c (1983). Additionally, there is a "wait and see" proposal that attempts to ameliorate the rule's complexity and obviate its unfairness by substituting a gross number of years (ninety) to measure the period in which one can delay a determination of whether interests have actually vested. The proposal, The Uniform Statutory Rule Against Perpetuities, has been approved by the National Conference of Commissioners on Uniform State Laws. For a thor-

the base rule, reform statutes frequently attempt to avoid the harsh consequences of perpetuities violations by empowering a court to recast invalid interests in a manner that best approximates the estate owner's intent and satisfies the requirements of the rule.<sup>6</sup> Despite these reforms and the strong support among commentators for them, the common law rule remains, at least for the moment, the most prevalent restriction against perpetuities.<sup>7</sup>

Where the common law rule has been reformed, especially if transformed into an actualities test that allows for a "wait and see" period, many lawyers are tempted to disregard perpetuities problems and especially the common law rule itself. Presumably they do so because whatever potential exists for remote vesting, actual vesting will seldom occur beyond the period sanctioned by the rule.<sup>8</sup> Yet even in those jurisdictions where the common law rule remains intact, lawyers typically ignore it. Some do so because they firmly believe lawyers create interests that do not cause perpetuities violations, especially those interests drawn from standard forms.<sup>9</sup> Most do so, however, because even if they are wrong about the interests created, they include convenient saving clauses found in these same forms as safeguards. A saving clause prevents a violation or overcomes it by redirecting the subject matter in a manner that satisfies the rule and presumably achieves the estate owner's dispositive objectives.<sup>10</sup> As a result, lawyers tend to draft specific dispositive provisions without regard for the common law rule against perpetuities.

Beyond the salutary effects of perpetuities reform and saving clauses, there is another reason why lawyers tend to overlook the common law rule when designing and drafting specific dispositive provisions. Prob-

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ough discussion of this proposal, see Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP., PROB. & TR. J. 569 (1986). It should also be observed that one jurisdiction has moderated the common law rule's complexity even though it retains a possibilities test. More specifically, it provides a gross number of years as an alternative to the life in being to fix the allowed period of time in which an interest must vest or fail. See CAL. CIV. CODE §§ 715.2, 715.6 (Deering 1971).

6. For classification of and reference to the various kinds of perpetuities statutes that offer discretionary remedial action through *cy pres* principles, see RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) 1.5 statutory note (1983).

7. See 5A R. POWELL, *supra* note 2, at 761. See also RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) introduction to Part I at 11 (1983).

8. For a discussion of the salutary effects of perpetuities reform and of the problems it creates for planners who rely exclusively upon it, see Becker, *supra* note 1, at 362-78.

9. For a review of dispositive provisions derived from standard forms that, in the absence of an effective saving clause, cause perpetuities problems, see *id.* at 307-54.

10. For a discussion of saving clauses, including how they function and what problems they create, see *id.* at 378-416.

bly more than any other rule of law, the common law rule against perpetuities is shrouded with confusion and mystery.<sup>11</sup> For generations, it has been the nemesis of students, practitioners, judges and perhaps even teachers. The rule presents a problem for teachers because it is difficult to teach and for students because it is difficult, if not impossible, to learn.<sup>12</sup> As for those practitioners and judges able to master it, that understanding frequently diminishes or even evaporates as they lose touch with the rule. And even for those who develop expertise in the area of law in which the rule is relevant, there is always the possibility—perhaps even predilection—for miscalculation in its application.<sup>13</sup> Indeed, because so many lawyers misunderstand the common law rule, one state supreme court found that an attorney who drafted a dispositive instrument that violated the rule did not fail “to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise.”<sup>14</sup> Despite this confession of widespread misunderstanding, ignorance of the common law rule is seldom an acknowledged reason for ignoring it and is never a justification for doing so.

Although lawyers tend to ignore the common law rule in planning and drafting specific dispositive provisions, it is difficult to justify this practice even if they use saving clauses and even if the common law rule has been modified or replaced by new perpetuities legislation.<sup>15</sup> First, a lawyer cannot always guarantee that the “wait and see” test of his jurisdiction

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11 For example, generations of law students have been confounded by the presumed fertility of octogenarians, by the assumption that probate may never occur and, if it does, that it can be completed more than twenty-one years after the estate owner's death, and by the assumption that a gift to a named adult's unnamed surviving spouse may include someone born after the estate owner's death. For a discussion of these applications of the common law rule against perpetuities, see Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643-46 (1938). Nevertheless, most students can, albeit grudgingly, grasp these assumptions and integrate them into their understanding and application of the common law rule. Students' greatest difficulty and confusion, however, lies in the life in being concept and the requirement of absolute certainty for the time limits for vesting. For a discussion of the life in being concept and of the confusion and uncertainty it has engendered, see *infra* Part Two.

12. See *infra* notes 29-31 and accompanying text.

13 That I have done all my sums correctly, I do not venture to hope. 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. The study and practice of the Rule against Perpetuities is indeed a constant school of modesty. A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men, blunders which they themselves have been sometimes the first to acknowledge; . . .

J GRAY, *supra* note 1, at xi.

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

15 For a review of the perpetuities problems caused by standard dispositive provisions contained within form books and a discussion of why one should not rely exclusively upon perpetuities

will govern the interests created by the dispositive instruments he drafts<sup>16</sup>: a lawyer cannot control either the client's place of residence or the situs of real property that comprises the client's estate.

In addition, both "wait and see" rules and saving clauses make actualities critical, rather than possibilities.<sup>17</sup> "Wait and see" rules accomplish this directly, while saving clauses achieve this indirectly by setting an absolute time limit for vesting, or for a trust's duration, that falls within the common law rule.<sup>18</sup> Both delay ultimate dispositive determina-

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reform and saving clauses to avert these problems, see Becker, *supra* note 1. See also Lynn, *Perpetuities Literacy for the 21st Century*, 50 OHIO ST. L.J. 219 (1989). Professor Lynn observes:

[A]lthough reform versions of the Rule facilitate saving gifts that violate the Rule in orthodox form, as drafters of legal documents, we should make certain that the documents we draft conform to the requirements of the Rule in orthodox form. If those requirements are met, there is no need to resort to either "wait and see" or *cy pres*, and if a dispute arises and litigation ensues, a declaration of validity is appropriate. The existence of a reform version of the Rule in a jurisdiction might tempt the drafter to be less cautious than he or she otherwise would be. That temptation should be resisted. Persons owning property and executing documents change domiciles with great regularity. They own property in states other than that where they are domiciled. A document drafted in one jurisdiction might be construed and applied years later in another jurisdiction. Drafting should conform to the requirements of the Rule in its most stringent form, and careful drafting should be complemented by inclusion of a perpetuities savings clause in the document.

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We do not know whether lawyers and judges will accept the listing of measuring lives as persuasive, or whether legislatures in significant numbers will enact the Uniform Statute. What we do know as we move into the twenty-first century is that any version of the Rule that we encounter presupposes mastery of the Rule in orthodox form, and that no version of the Rule that we encounter frees us from our obligation to draft documents that conform to the Rule in orthodox form. Documents that clearly conform to the Rule in orthodox form reduce the likelihood of the dispute and litigation that disrupt families and reduce the donor's gifts by costs and fees. Promoting family harmony and keeping the donor's gifts intact are clearly in the public interest.

*Id.* at 239, 241.

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

17. For a discussion and comparison of "wait and see" perpetuities reforms and saving clauses, see Becker, *supra* note 1, at 356-407.

18. "Wait and see" rules and most saving clauses are fundamentally similar. Both set time periods beyond which interests cannot vest. The "wait and see" period either is vaguely referable to a life in being and twenty-one years or is fixed more specifically by a statutory list or formula. The saving clause period is determined by the clause itself, and the period formulated is one that satisfies the common law rule. Because "wait and see" rules expressly allow for actualities and because saving clauses insure that no interest can vest beyond the period of the common law rule, both legitimize a waiting period during which it can be seen whether interests actually vest or fail. Specifically, saving clauses create delay so that one can ascertain whether the subject matter passes to those entitled to take if the interest vests within the specified period, whether it passes to those entitled to take if it fails to vest within the specified period, or whether it passes to those who take if it neither vests nor fails within the specified period.

Nevertheless, there are important differences between "wait and see" rules and saving clauses.

tions.<sup>19</sup> If vesting or a failure to vest, or instead the distribution and possession of principal itself, does not actually occur within the permitted period of time, then either the interest fails or remedial action is directed.<sup>20</sup> Therefore, both “wait and see” rules and saving clauses invite initial uncertainty about the ultimate validity or efficacy of the provision. Consequently, they also exacerbate uncertainty about the ultimate disposition of the subject matter.<sup>21</sup> More important, they invite disputes, and

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Saving clauses nearly always provide for those who are to take if the interest neither vests nor fails within the designated time period that satisfies the common law rule. “Wait-and-see” rules often allow for a *cy pres* reformation of interests that in reality do not vest or fail within the allowed time period. Furthermore, although the waiting periods under “wait and see” rules and saving clauses both fall within a life in being and twenty-one years, they are not usually the same waiting period. For example, the waiting period allowed by saving clauses can be more restrictive than statutory formula or lists, yet there are clauses that sometimes make it more extensive. Additionally, the waiting period usually is clearly delineated under both, but sometimes it is not. Finally, “wait and see” rules require that interests vest or fail within the allowed time period. Interests that actually vest within the period are valid and are preserved. Quite differently, most saving clauses today do more than set a time limit to vesting. They terminate trusts and distribute principal when this has not happened within the prescribed time period. They thus require that interests do more than vest within the time period; they require distribution and ultimate possession of principal within a time frame that satisfies the common law rule’s requirement for vesting. For further discussion and comparison of “wait and see” rules and saving clauses, see Becker, *supra* note 1, at 356-65, 383-90.

19 “Wait and see” rules and saving clauses permit interests to vest or fail at any time within the time period allowed by the rule or prescribed by the saving clause. They create delay for a period of time to see what actually happens. Therefore, they delay the dispositive determination to see whether the subject matter will belong to those who take if the condition is fulfilled or belong to those who take if it is breached. However, if the condition is neither breached nor fulfilled within the time period allowed, these clauses and rules also delay the dispositive determination to see who should ultimately take pursuant to the direction of the rule or the saving clause. For a discussion and analysis of the problems caused by this delay, see Becker, *supra* note 1, at 365-78, 391-407.

20 Under many saving clauses currently in use, trusts created within the instrument must terminate within a specified period of time. Stated differently, if final distribution and possession of principal does not occur within twenty-one years of the death of the survivor of specified lives in being, the trust is terminated and principal is then distributed, usually to those currently entitled to income. See Becker, *supra* note 1, at 384-85 n.219. Additionally, some “wait and see” statutes do not provide for remedial action. If the interest actually neither vests nor fails within the permitted period of time, it violates the rule and is void. In the event of a violation, other “wait and see” statutes give the court a *cy pres* power to reform the limitation, within the limits of the rule, in a manner that effectuates the estate owner’s dispositive design. See *id.* at 358-62.

Saving clauses, however, necessarily incorporate remedial action. By definition a saving clause must save, and this cannot be accomplished without explicit provision for some remedial course of action. Accordingly, some clauses save by redirecting the time of vesting or distribution, usually by giving principal to those then entitled to income. Other clauses save by empowering a corporate fiduciary or a court to reform the limitation, within the limits of the common law rule, in a manner that effectuates the estate owner’s dispositive design. See *id.* at 383-87.

21 The common law rule, “wait and see” rules, and saving clauses have in common these questions and, therefore, these uncertainties. Will the subject matter belong to those who take if the condition is fulfilled, and, if so, when will this be known? Will the subject matter belong to those

possibly litigation, about when the permitted period has elapsed and what curative action can and should be taken.<sup>22</sup> Compliance with the common law rule can reduce considerably the initial uncertainty and po-

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who take if the condition is breached, and, if so, when will this be known? Will the subject matter belong to those who take if the interest presents a perpetuities violation and (sometimes), if so, when will this be known? Finally, if a violation exists, specifically to whom will the subject matter belong?

Even under the common law rule, if an interest is valid, there is a wait, and with it uncertainty, to see whether the interest actually vests or fails. And this delay may last for the full period of the common law rule. See R. MAUDSLEY, *THE MODERN LAW OF PERPETUITIES* 82-84 (1979). Nevertheless, even though these rules and clauses always present the foregoing questions, there are differences. Presumably, the common law rule requires an immediate resolution of the last two questions. It can be determined without delay whether a perpetuities violation exists and, if so, who is entitled to take the subject matter. "Wait-and-see" rules, however, can delay these determinations until the end of the permitted waiting period. Until then, it may not be known whether the subject matter belongs to those who take in the event of a violation, and specifically who should take if an interest actually neither vests nor fails in time. The same conclusions can be reached with respect to most saving clauses that introduce actualities and achieve "wait and see" indirectly. It should be emphasized, then, that the common law rule, "wait and see" rules, and saving clauses present essentially the same substantive questions and uncertainties. The common law rule, however, offers immediate resolution of some of these questions, while the others do not. For further discussion of the uncertainty engendered by "wait and see" rules and saving clauses, see Becker, *supra* note 1, at 367-71, 392-93.

22. There has been much debate about how the period under a "wait and see" test is, or should be, measured. Most of the debate concerns the uncertainty involved in determining when the time for waiting has elapsed. More specifically, it concerns the identity of the lives in being by which the waiting period can be determined. See R. MAUDSLEY, *supra* note 21, at 87-109. See also *infra* Part Two B. Many commentators maintain that, except for the statutes that include a statutory list of measuring or waiting lives, the actual duration of the waiting period is not always self-evident. Undoubtedly, most would agree that the waiting period is uncertain when the statute is completely silent on the selection of measuring lives. To be sure, if there is uncertainty, there will be litigation. The same can be said for some saving clauses. Most saving clauses used today clearly specify the lives which measure the period incorporated into the clause; therefore, these provisions should not present this kind of problem. Nevertheless, this is not true for all saving clauses, particularly those that authorize reformation by a court or corporate fiduciary under the common law rule if an interest is actually invalid or is challenged under the common law rule. In these instances, because the existence of a violation or a challenge may be unclear, there may be litigation about whether and when remedial action is authorized.

If a "wait and see" statute does not include discretionary powers of reformation (*cy pres* powers), presumably an interest that does not actually vest or fail within the permitted waiting period violates the rule. And in this situation, there should be at least the same potential for disputes and litigation concerning the consequences of a violation as under the common law rule itself. The major difference is, of course, that such litigation must be delayed until the end of the waiting period; only then can it be known whether the interest actually violates the rule. For a discussion of the consequences of a violation under the common law rule, see L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 1256-64 (2d ed. 1956 & Supp. 1973). If, however, a "wait and see" statute includes a *cy pres* power, there should be disputes about the substance of the reformation itself; more specifically, there should be disputes over what plan of disposition that complies with the rule best approximates the original estate design. As long as a court has discretion, disputes seem inevitable. This particular potential for litigation should also exist with respect to saving clauses that give the same

tential for disputes. "Wait and see" rules are satisfied by interests that comply with the common law rule. Therefore, validity is established at the outset, and in most instances with ease and without substantially impairing dispositive objectives. Likewise, saving clauses are less likely to take effect with a complying interest. By eliminating the inherent delay of "wait and see" rules and saving clauses, and the possible need for remedial action that accompanies such delay, compliance with the common law rule affords considerable clarity and secures dispositive objectives.<sup>23</sup>

Finally, quite apart from increased uncertainty, saving clauses present other problems. Many saving clauses do not always save because they do not comprehend all interests created by the instrument in which the clause appears.<sup>24</sup> Quite differently, some saving clauses can operate prematurely; that is, they can cut short a dispositive provision and redirect distribution even under circumstances in which there is no perpetuities problem and no violation of other related rules.<sup>25</sup> Furthermore, once a

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curative discretion to either a corporate fiduciary or a court. However, it should not arise under saving clauses that mandate remedial action by distributions to clearly identifiable beneficiaries.

For further discussion of uncertainties and the potential for disputes concerning when the permitted waiting period has elapsed and what curative action can and should be taken, see Becker, *supra* note 1, at 366-71, 392-93, 402-04.

23 Attempted compliance with the common law rule will diminish, but not erase, problems of initial uncertainty and the potential for disputes. If the rule is in fact satisfied, there should be no uncertainty or disputes about perpetuities violations. Nevertheless, actual compliance with the common law rule may be open to dispute and uncertainty. However, this particular uncertainty can and should be resolved at the outset. Assuming that the common law rule is satisfied and that no interest can vest beyond the permitted time period, there is always a measure of uncertainty about whether these interests will actually vest or fail. In short, there is inevitably some uncertainty whether the subject matter will belong to those who take if the condition is fulfilled or belong to those who take if it is breached.

For illustrations and a comparative discussion of perpetuities compliance through reliance upon "wait and see" statutes, upon saving clauses, and upon tailor made satisfaction of the rule for each provision, see Becker, *supra* note 1, at 371-78, 408-16.

24 There are numerous problems that arise concerning the scope of saving clauses. For example, many saving clauses extend the coverage of their safety-net waiting period to trusts directly created by the donative instrument in which the saving clause appears, but they do not do so with respect to trusts created by the exercise of powers of appointment given in the same donative instrument. If the saving clause does not comprehend trusts created by exercise of powers donated in the dispositive instrument, the estate owner always suffers the risk that the donee will lose sight of the time the perpetuities period begins and thereby appoint interests that are invalid because of a perpetuities violation. Additionally, because most saving clauses fashion a protective waiting period that applies only to trusts created by the instrument in which the clause appears, they will have no saving effect on interests created by the same dispositive instrument that are not placed in trust. For further discussion of these and other problems concerning the coverage of saving clauses, see *id.* at 393-97.

25. Clearly, saving clauses must avoid perpetuities violations, but a saving clause that adopts a

saving clause is actuated other problems can arise concerning the distribution of principal redirected by the saving clause. Discretionary methods of redirection invite disputes over the exercise of such discretion, while mandatory methods—especially when adopted from standardized forms—can redistribute the subject matter to recipients who, on the basis of the dispositive provision itself, were never intended to share in the principal.<sup>26</sup>

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safety-net approach (one that uses a protective waiting period after which redirection is required as to all interests that have not vested or become possessory) must also select measuring lives that allow ample time for the dispositive design to unfold naturally and for the estate owner's objectives to be fulfilled. Nevertheless, there are numerous instances in which saving clauses cut short dispositive designs that could otherwise be implemented within the rule. Invariably, this happens when certain lives in being critical to a trust's duration and to the fulfillment of its objective are omitted from the group of measuring lives specified in the safety-net saving clause. Additionally, when a lawyer omits these critical lives from the safety net's measuring period, it becomes possible for a saving clause to terminate a trust that contains no perpetuities violation and, further, one that cannot last longer than the period of the rule itself. For illustrations and further discussion of the premature operation of saving clauses, see *id.* at 397-400.

There are other bodies of law concerned with the same policy considerations as the rule against perpetuities, principles generally concerned with the alienability of property and the rights of the living to be free of the constraints of the dead. These other principles of property law involve restrictions on accumulations, prohibitions against direct restraints upon alienation, and restrictions upon the duration of trusts. See L. SIMES & A. SMITH, *supra* note 22, §§ 1111-71, 1391-95, 1461-68.

Indeed, some of these rules use the same period of time allowed by the common law rule to control certain aspects of donative transfers. For example, although contingent equitable interests created by a trust may satisfy the common law rule against perpetuities if they must vest, if at all, within a life in being and twenty-one years, they may not satisfy another rule that, for the same period of time, imposes a time limit on the indestructibility of trusts. In short, a growing body of law disallows the continuation of a trust beyond the period of time allowed by the common law rule against perpetuities when the ascertained beneficiaries of the trust wish to terminate it. If the beneficiaries wish to do this, a trust cannot by its terms remain indestructible beyond this period of time even if its termination defeats the material purposes of the trust. *Id.*, § 1391. See also RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.1 reporter's note (1983).

As a result of these other related rules, and in particular the one that limits indestructibility of trusts, some saving clauses cast a more comprehensive and restrictive safety net, one that circumscribes the *duration* of all trusts created by the dispositive instrument. For further discussion and illustrations of saving clauses that protect against both perpetuities violations and the violation of related rules, see Becker, *supra* note 1, at 383-90.

26. Perhaps the worst feature of discretionary redirection is the inevitability of litigation once the actuating event occurs. Discretion entails choices, and with them there is always the potential for disputes. Because these perpetuities matters are never raised initially without disagreement among interested parties, it is unlikely that the parties will readily agree on a particular choice of redirection. Stated otherwise, if disagreement has forced the termination of a trust, it is unlikely that immediately thereafter the parties will reach agreement on a course of redirection. Quite differently, the major problem associated with a mandatory redirection of principal to those entitled to income immediately before the waiting period expires is that it may deliver principal to someone who, under a particular provision, was never intended to take principal. More specifically, if the ultimate takers of principal under a provision will be entitled to income at the time the actuating event is apt to

Indeed, the common law rule against perpetuities continues to be exceedingly important. To be sure, it is a rule with which conscientious lawyers involved in estate planning must reckon.<sup>27</sup> Neither "wait and see" reforms nor standard saving clauses afford the same certainty with regard to validity or result as dispositive provisions that are separately tailored to comply with the common law rule against perpetuities.<sup>28</sup> At best, lawyers should use perpetuities reform and saving clauses only as

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occur, then the redirection of principal to them should satisfy the estate owner's objectives. If, however, the actuating event can occur at a time when income is being given to beneficiaries who were never intended to take principal, then the redirection of principal to them would seem to miss the mark. For illustrations and further discussion of these problems of redirection, see Becker, *supra* note 1, at 402-07.

27. The most recent proposal for perpetuities reformation, and one which, perhaps, will take hold in the United States, is the Uniform Statutory Rule Against Perpetuities (USRAP). Much like the position taken in the RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) §§ 1.1-1.6 (1983), it adopts a "wait and see" element and allows for reformation of interests that do not actually vest in time. However, unlike the Restatement and unlike nearly all other "wait and see" statutes (see Becker, *supra* note 1, at 358-62), the USRAP does not use actual measuring lives to determine the allowable waiting period. Instead, it uses a proxy to measure this time period—a flat ninety years: "Section 1. (a) A nonvested property interest is invalid unless . . . the interest either vests or terminates within 90 years after its creation." Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP., PROB. AND TR. J. 569, 592 (1986).

One might expect that, by substituting a flat period of time and thereby simplifying perpetuities requirements, the USRAP will enable lawyers once and for all to disregard the common law rule against perpetuities. Nevertheless, it is important to observe that the USRAP does not abandon the common law rule completely. Indeed, section 1 (a)(1) validates an interest if "when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive . . ." *Id.* The Reporter for the USRAP, Professor Waggoner, maintains that this codified version of the validating side of the common law rule "is an extremely important feature of the Uniform Act because it means that no new learning is required of competent estate planners. *The practice of lawyers who competently draft trusts and other property arrangements for their clients is undisturbed.*" *Id.* at 592.

Accordingly, the Reporter himself believes that perpetuities compliance will be practiced best by compliance with the common law rule. Undoubtedly, there are reasons why this should be so, reasons beyond that of enabling competent lawyers to continue their old ways. At the very least, compliance with the common law rule by planners avoids the uncertainty engendered by all "wait and see" rules. See *supra* note 21. Lawyers will know immediately that there will be no perpetuities violation and no need for discretionary reformation, and with this compliance the occasions for disputes and litigation should be reduced. See *supra* note 22. See also Lynn, *supra* note 15, at 239, 241. Additionally, the careful selection of lives in being to comply with the common law rule should approximate more closely the estate owner's dispositive objectives and, when desired, should enable him to extend control beyond the proxy itself, ninety years. For further discussion of the advantages of compliance with the common law rule on a provision by provision basis, see Becker, *supra* note 1, at 371-78, 408-16.

28. For a discussion of the various methods for tailor-made compliance with the common law rule against perpetuities and of the advantages of this technique in comparison to straight reliance upon saving clauses and perpetuities reform, see Becker, *supra* note 1, at 408-16.

safeguards against miscalculation and not as substitutes for provision-by-provision compliance. Accordingly, lawyers engaged in the estate transfer process must understand, master, and satisfy the common law rule. Nevertheless, many lawyers have not mastered this rule, and one can imagine the number of unchallenged provisions they have drafted in violation of it. The root of this misunderstanding and mismanagement of the rule may be the misperception of its current vitality and importance. More likely, this misunderstanding results from the mysteries and complexities of the rule itself. Lawyers misunderstand and disregard the rule because they never mastered it in the first place. They may not have encountered it as students, and if they did, either they were repelled in fear or they eventually repressed whatever understanding they were able to muster.<sup>29</sup>

The purpose of this article is to explain the common law rule against perpetuities in a manner that lawyers understand so that they can apply it correctly. Typically, the rule has been taught by example. After providing a statement of the rule and a brief explanation, an instructor will usually offer several problems and their solutions.<sup>30</sup> He may encourage

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29. Today, there is a great likelihood that a law student will not encounter the rule against perpetuities by graduation. Indeed, the amount of time law schools devote to perpetuities instruction has been reduced significantly in recent years. This is readily confirmed by scanning law school curricula and published course books. In earlier times, the rule against perpetuities received major treatment in an extended first year property course and in a separate course on future interests. Today, the emphasis of first year courses has shifted away from the law of estates, a prerequisite to mastery of the common law rule, and the law of future interests is usually crammed into a course on trusts and estates or into a course on estate planning. Inevitably, these courses have less time and offer less instructional material for teaching and understanding the rule. Perhaps the views of Professor Cohen best express the prevailing attitude toward current instruction on the law of estates and the rule against perpetuities:

In the history and tradition of teaching property the subject of estates in land has generally been the one to which the most attention has been devoted. . . . Today, however, attention has shifted to the modernization of the principles, and, far more importantly, to other relationships than those covered by the principles. . . . The examples abound; the simple fact of the matter is that the world has changed and attention has been diverted. So too in this book. As fascinating as a thorough treatment of the estates in land in the interest of eventual understanding of the Rule Against Perpetuities may be, there is little modern justification in concentrating upon it in a first year property course. The simple fact is that no longer can it truthfully be said that complete and historical understanding of estate in land is absolutely necessary to a lawyer.

E. COHEN, MATERIALS FOR A BASIC COURSE IN PROPERTY 114 (1978). To be sure, however, there will always be students who study the rule against perpetuities while in law school. Nevertheless, even these students probably will not have mastered it and their understanding likely will be, at best, an uneasy one. See *supra* notes 11, 13; *infra* note 30.

30. For example, the original nutshell on perpetuities, upon which generations of law students were weaned, contains propositions about the common law rule that are each followed by examples

those who do not understand to follow along with several more problems and their solutions. Frequently, he will tell students that in time they will be able to solve problems for themselves. Some students accomplish this, but seldom can these students explain to others the understanding or method by which they consistently reach the correct result. It is as if they master the rule by osmosis and solve problems by simple inspection.<sup>31</sup> Vague explanations coupled with intuitive techniques invariably satisfy the needs of those who practice the rule correctly; yet, this kind of teaching is a great frustration to the substantial number of students unable to master the rule. Although many instructors view the process of application with great clarity and, therefore, can elaborate the rule's logic with precision and care, a thorough understanding escapes far too many students. Consequently, when these students become lawyers they shun the rule and utilize every device to avoid it.

This article develops a methodology that attempts to overcome the problems of misunderstanding, indifference, and mismanagement with respect to the common law rule against perpetuities. This article assumes that, for whatever reason, many lawyers will never truly understand the logic and process of the rule. It is only important, however, that they apply the rule correctly. In short, the methodology is one of technique—it focuses on reaching the right result. It presents a series of ordered questions one must contemplate and answer. For those who do

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with explanations. See Leach, *supra* note 11. See also J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES 980-83 (2d ed. 1978); R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 42-47 (1966); L. SIMES, SIMES ON FUTURE INTERESTS § 109 (1951).

31. When first exposed to the study of algebra, I just couldn't get the hang of it. . . . I finally asked my grandfather for help. He too was very bright. . . . His instructions always were the same:

"Son, you can solve these problems by inspection," which he proceeded to do. And his answers always were correct. But his insights were not imparted to me. My reaction was a complete mental block to algebra:

"Who needs algebra? . . ."

I . . . now devote my energies to solving trusts, estates and future interests problems.

The heart of modern future interests law is the Rule Against Perpetuities. The very bright people who understand this stuff are able to solve most perpetuities problems, like my grandfather, by inspection. And, like my grandfather, they explain their solutions in the same way. They talk and write like one teacher talks and writes to another, assuming that everyone else who listens and reads is getting the hang of it. As they talk and write, the rest of us build our protective barriers against the whole silly thing.

"Who needs to understand it?"

The answer, unfortunately, is, "We do."

Fetters, *The Perpetuities Period in Gross and the Child En Ventre Sa Mere in Relation to the Determination of Common-Law and Wait-And-See Measuring Lives: A Minor Heresy Stated and Defended*, 62 IOWA L.REV. 309 (1976)

not understand the logic of the rule and the process by which to apply it, the methodology requires an act of faith and adherence much the same as for those of us who had to learn the rules of arithmetic before the advent of the "new math."

## II. THE COMMON LAW RULE AGAINST PERPETUITIES AND ITS REQUISITE LIFE IN BEING CONCEPT

The common law rule against perpetuities provides: "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."<sup>32</sup> This often quoted statement is John Chipman Gray's shorthand summary of his monumental synthesis of the common law of perpetuities as it had developed over several centuries. Stated in this fashion, the common law rule has an appealing simplicity. Yet beneath this simplicity lies a rule that has bedeviled generations of law students. Inevitably, students ask: "Who is this life in being by which one determines the validity of an interest?" They ask this question because the identity of the validating life in being is usually the major concern of students trying to comprehend the common law rule and apply it to specific examples.<sup>33</sup>

Teachers invariably answer with some explanation and instructive guidelines about the life in being. Soon, however, instruction focuses on examples, solutions, and explanations relevant to these examples. Ultimately, the student must "catch on." Instructive guidelines teachers most frequently use are that the validating life in being can be anyone or any group of people, not unreasonably large or unreasonably difficult to trace; that the person need not be the recipient of any interest within the limitation or within the dispositive instrument itself; and that the life in

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32. J. GRAY, *supra* note 1, at 191.

33. See, e.g., J. DUKEMINIER & S. JOHANSON, *supra* note 30; L. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 365 (2d ed. 1951); Allan, *Perpetuities: Who Are the Lives in Being?*, 81 L.Q. REV. 106, 106-07 (1965); Note, *Understanding the Measuring Life in the Rule Against Perpetuities*, 1974 WASH. U.L.Q. 265.

Students have other concerns as well. Beyond the life in being concept they frequently preoccupy themselves with the application of the common law rule to class gifts, powers of appointment, options, charitable gifts, revocable trusts, rights of entry, and possibilities of reverter, and also with the assumed possibilities that the rule requires. Each of these areas of concern is discussed adequately in articles and treatises, especially in the classic treatment of the rule by Leach. See Leach, *supra* note 11. Although students may scoff at the presumption of fertility that the rule indulges and at the cases of the "unborn widow" or the "administrative contingency," they have little difficulty grasping them and integrating them into their understanding and application of the common law rule.

being need not be mentioned explicitly in the dispositive instrument.<sup>34</sup> Typically, students find these guidelines confusing when asked to construe and interpret a given limitation and to determine its validity. They often respond: "If the life in being can be anyone, even someone not mentioned in the instrument, then why isn't the life in being anyone who was actually alive and why can't anyone be used to validate the interest?" Although the answers seem obvious to one who has mastered the common law rule, they are neither apparent nor easily understood by most students.<sup>35</sup> Consequently, any methodology designed to facilitate application of the common law rule must, first and foremost, address the life in being concept and the confusion it engenders.

*A. The Importance of Applying the Common Law Rule Correctly in the Interpretation of Interests Already Created or Designed—Anyone Cannot Be the Validating Life in Being*

Any attempt to diminish this confusion must begin with a distinction between selecting the life in being in the planning and drafting of interests and finding the validating life in being for interests previously created and currently in existence. Stated differently, in applying the

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

R. MAUDSLEY, *supra* note 21, at 42.

Maudsley later qualifies this broad statement by indicating that the only lives of any use are those in which vesting cannot possibly occur beyond twenty-one years of their deaths. *Id.* at 43. Nevertheless, it typifies the kind of broad and unqualified statement that students seize upon in their attempt to understand and apply the common law rule. *See also* 6 AMERICAN LAW OF PROPERTY § 24.13 (A. J. Casner ed. 1952); Leach, *supra* note 11, at 641-42. *Cf.* R. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 43 (1966).

35. The answer to these questions comes in two parts. First, these guidelines are misleading. They are primarily precepts for the creation of valid interests. Virtually anyone or any group of people can be used to create a valid interest under the common law rule. However, this statement does not apply to interests already created which must then be tested in terms of the rule. These pronouncements are really precepts for the creation of interests and not interpretation of existing interests, and a student has good reason to be confused if he is attempting to apply them to an existing limitation for the purpose of determining its validity. *See infra* Part Two A. *See also* Becker, *Understanding the Rule Against Perpetuities in Relation to the Lawyer's Role—To Construe or Construct*, 20 SAN DIEGO L. REV. 733 (1983). Second, because the common law rule is a possibilities test, it is absolutely clear to those who understand the rule that, when it comes to interpretive application, the validating life in being cannot be anyone and that the proof required by the common law rule immediately limits the potential pool of lives in being that might be used to validate. *See infra* Part Two B.

common law rule, one must distinguish between the creation and the interpretation of interests. To explain, the common law rule presents a test of possibilities: an interest is valid *if there is no possibility* that it might vest beyond the period of the rule—a life in being plus twenty-one years.<sup>36</sup> More specifically, an interest is necessarily valid if it cannot possibly vest beyond twenty-one years of its creation. If this is not proven, then the interest is valid only if one can identify some person in being when the interest is created and prove that there is no possibility whatsoever that the interest can vest beyond twenty-one years of that person's death.

Consider this devise of Blackacre by A: "To B in fee simple; however, if Blackacre is ever used for any purpose other than residential, then to C in fee simple absolute." The executory interest created in C is contingent and it violates the common law rule. With this conclusion in mind, students often ask: "Who is the life in being, and why aren't B and C appropriate lives in being?" A reply might begin that the condition of defeasance, by its terms, allows for divestiture at any time in the future, at any time B or his successors devotes the land to a deviant use. Further, although C's executory interest is contingent, it is transmissible at C's death; no requirement exists that C must survive the time of divestiture.<sup>37</sup> Accordingly, it is possible that the divestiture can occur genera-

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36. This statement of the common law rule differs in form from the test offered by Gray, and the one used by most exponents of the rule. *See supra* text accompanying note 32. Nevertheless, this different form is used at various points within this article to avoid a mistake commonly made even by experts. Gray's test is that an interest is valid if it must vest, *if at all*, within the allowed time period. Unfortunately, most commentaries on the rule overlook at one point or another the "if at all" requirement in their descriptions of the test. For example, "The proper question to ask is: Can I point to some person or persons now living and say that this interest will by the very terms of its creation be vested in an identified individual within twenty-one years after that person dies?" Sparks, *Perpetuities Problems of the General Practitioner*, 8 U. FLA. L. REV. 465, 470 (1955). This oversight is critical because, without the "if at all" requirement, one could never prove that a contingent interest must vest within any period and, therefore, all contingent interests would violate the rule. By definition, a contingent interest is not certain to vest. *See* J. DUKEMINIER & S. JOHANSON, *supra* note 30, at 980-82. The common law rule does not require that an interest must become possessory within the allowed time period, nor does it require that the interest must vest within such period. It does, however, forbid all interests that might possibly vest beyond twenty-one years after the deaths of all lives in being at the creation of such interest.

37. Courts sometimes find contingent interests, especially those created in a class, to be subject to a requirement of survivorship even in situations in which such requirement is neither expressed nor clearly implied. *See infra* note 247. In this example, C has an executory interest that is expressly contingent upon a breach of the restriction upon land use, and there is no additional condition requiring C to survive the time for divestiture. Accordingly, C's interest violates the common law rule. *See infra* Part Four B-1. Nevertheless, if a court were to infer that for C's interest to vest he

tions beyond the deaths of both B and C; therefore, one cannot use their lives to validate C's interest. Nor can one use any other life in being at the death of A. One can look to the current President of the United States or to anyone else and fall short of a proof of validity.<sup>38</sup> Unless a life in being has some relevance to the time for vesting, it is useless, and it cannot support a valid proof.<sup>39</sup> In this example, then, no validating life in being exists because no life whatsoever limits the time for vesting.<sup>40</sup> By way of emphasis, in interpreting existing interests, anyone cannot be the life in being; rather, the limitation itself governs and circumscribes the potential pool of people in which a validating life may be found.

Although students may have a difficult time with the previous example and explanation, they seldom have difficulty redrafting A's devise in a manner that avoids a violation. They readily observe, as planners and draftsmen, that they have choices when asked to construct a limitation that does not violate the common law rule. They understand that the validating lives in being can be any reasonable number of people, even those not included as beneficiaries in the limitation, so long as one explicitly requires that vesting must occur, if at all, by the time these people die

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must survive the time in which the land is used for a purpose other than residential, then there would be no violation of the common law rule against perpetuities. For further discussion, see *infra* note 436

38 For example, if one uses the President of the United States to test the validity of C's contingent executory interest, one must conclude that George Bush's life will not establish a valid proof. In applying the critical test embodied in the common law rule, it is necessary to ask: Must C's interest vest, if at all, in C or C's successors within twenty-one years of the death of George Bush? In light of all possibilities for vesting, the answer is, of course, NO. For example, George Bush might die immediately after the death of A, the time when the devise is made to B. It is also possible that B will continue to use Blackacre exclusively for residential purposes for the next thirty years and, thereafter, that he will use the land for industrial purposes. When this happens, the condition attached to B's interest is violated and B's interest is thereby immediately divested in favor of C. Accordingly, because of this possibility for vesting more than twenty-one years after the President's death, George Bush's life fails to validate the interest of C.

39. See *infra* notes 59-89 and accompanying text.

40 After having concluded that there is no life in being that validates C's contingent interest, one next determines whether the divestiture must happen, if at all, within twenty-one years of A's death—the time when the devise takes effect and the interests of B and C are created. Obviously, it can occur beyond twenty-one years of A's death. Surely, B or his successors might continue using Blackacre exclusively for residential purposes for the next thirty years following the death of A. Thereafter, B or his successors might divert the use of Blackacre to industrial purposes. This would breach the condition of defeasance and, thereby, divest B's interest in favor of C or his successors. Given this possibility for divestiture, one must conclude that C's interest can vest beyond twenty-one years of A's death and beyond twenty-one years of the death of all lives in being at A's death. Accordingly, C's interest violates the common law rule against perpetuities.

or within twenty-one years after their deaths.<sup>41</sup> Even if students do not understand fully why C's executory interest violates the common law rule, they usually can rewrite the limitation and make C's interest valid. For example, they seldom have difficulty curing the violation by relating the condition of divestment to the life of B or C, or both.<sup>42</sup> Further, students readily observe that by using specially selected lives in being that are extraneous to the particular gifts, they can extend even further the probable period of years in which the condition operates. A lawyer can accomplish this merely by using these specially selected lives to govern the latest time for vesting.<sup>43</sup> Accordingly, although it is inaccurate to say that the validating life in being can be anyone or any group of people with respect to specific interests already created, it is quite accurate to say that a lawyer can select virtually anyone as the life in being needed to create a valid interest. This pronouncement about anyone becoming the life in being makes little sense when interpreting or construing an existing limitation, but it is easily understood and applied when constructing a limitation.

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41. The common law rule does contain an obvious limitation on the validating lives in being used to govern the time of vesting. The number of lives cannot be unreasonably large or unreasonably difficult to trace for purposes of determining the time of their respective deaths. See L. SIMES & A. SMITH, *supra* note 22, § 1223.

42. This can be accomplished by either of these revisions: ". . . however, if Blackacre is ever used during the life of B or within twenty-one years after his death (is ever used during the life of C or within twenty-one years after his death) (is ever used during the life of the survivor of B and C or within twenty-one years after the survivor's death) for any purpose other than residential . . . ." None of these variations violates the common law rule. In the first variation, B's interest cannot be divested beyond twenty-one years of the death of a life in being—B; if the condition is not breached within that period of time, B's interest becomes absolute in his successors. In the second variation, B's interest cannot be divested beyond twenty-one years of the death of a life in being—C; if the condition is not breached within that period of time, B's interest becomes absolute in B or his successors. In the third variation, B's interest cannot be divested beyond twenty-one years of the death of the survivor of two lives in being—B and C; if the condition is not breached within that time period, B's interest becomes absolute in his successors.

43. For example, consider this revision: ". . . however, if Blackacre is ever used during the life of the survivor of B, C, M, N, or O or within twenty-one years after the survivor's death for. . . ." For an illustration of this technique, see W. SCHWARTZ, *FUTURE INTERESTS AND ESTATE PLANNING* § 6.32 (1965 & Supp. 1972). Assuming that M, N, and O are three healthy babies born just before A executes his will, the period of the condition is, in all probability, extended several decades without violating the common law rule. At least one of the specially selected lives, each of whom is necessarily younger than B and C, likely will live longer than both B and C. Nevertheless, this revision does not violate the common law rule. Presumably, this group of validating lives in being is not unreasonably large or unreasonably difficult to trace for purposes of determining the time of their respective deaths. Therefore, B's interest cannot be divested beyond twenty-one years of the death of the survivor of five acceptable lives in being—B, C, M, N, and O. If the condition is not breached within that period of time, B's interest becomes absolute in his successors.

Because the common law rule and its life in being concept cause little difficulty for lawyers who plan and draft dispositive instruments, and because this creative function is the most important one in the estate transfer process<sup>44</sup> and the most frequent occasion in which lawyers encounter the rule, one might assume that any methodology for coping with the rule ought to focus on the selection of a life in being in the creation of interests. Further, one might assume that the formulation of this methodology ought to be an easy task and, perhaps, even unnecessary. However, estate owners do not normally conceive and elaborate future interests and their attendant conditions in terms of the common law rule's constraints.<sup>45</sup> Whatever underlying dispositive objectives estate owners may have,<sup>46</sup> these goals do not naturally lend themselves to time

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44 This creative function, planning for the disposition of estates and drafting instruments that fulfill such plans, is the most important one in the estate transfer process because it sets the framework by which dispositive goals are to be achieved, assets are to be conserved, and disputes are to be avoided.

45. There are, as well, other more obvious replies to this conclusion which suggest that a methodology for applying the rule to interpret existing interests is unnecessary in the actual practice of law. First, something can always be said on behalf of learning a whole rule and not just a portion of it. Something seems inherently wrong in concluding that lawyers need not master the entire fabric of the common law rule either because of its complexity or because of its comparative disuse in certain aspects of the practice. Second, even if the creative function of planning and drafting is the prevailing context for applying—and, therefore, understanding—the common law rule, lawyers cannot always control the situations in which they encounter the rule. In every interpretive dispute there are at least two sides. Usually one side is represented by lawyers who participated in drafting the dispositive instrument—those who first faced the common law rule in performing this creative function and could limit the conditions in accordance with the rule's requirements. Yet the other side is usually new to the instrument and enters the case only at the stage of interpretation and dispute resolution. Lawyers frequently decline future interest litigation. It does not behoove the profession for these interpretive causes to go begging to the few who revel in the common law rule or to pass by default to those who lack the integrity or the wisdom to forgo what is beyond them. In short, something seems radically wrong with predicating the breadth of one's understanding upon expectations of selective practice and representation.

46 Future interests and trusts are used for a variety of reasons. They are used, for example, to provide intermediate benefits for particular beneficiaries; to facilitate the management and retention of the estate generally, or with respect to specific beneficiaries; to encumber alienability; to assure appropriate division among family members or units within the family; and to extend dead hand control indefinitely. For example, suppose that A, an estate owner, wanted to make certain that his estate was first used to meet the needs of his wife and children, and that he expected the needs of some might be negligible, while the needs of others might be substantial. Suppose, further, that his estate was sizable and that he was concerned with the ability of some to manage and conserve any immediate distributions of principal. Finally, assume that because of these concerns with need, conservation, and management, he wanted to defer ultimate distribution of shares of principal for a considerable period of time—at least until his wife and children had died. With respect to this distribution of principal, further assume that he wanted it to belong to his descendants without regard to family unit. With these objectives in mind, A's lawyer might then devise a plan that

limitations upon vesting other than those needed to fulfill the objective that underlies the use of a particular future interest.<sup>47</sup> Accordingly, most planning and drafting exercises initially require the formulation of a design that incorporates those conditions and time factors that best implement the estate owner's particular dispositive goals. If estate owners naturally think first in terms of these factors and criteria, so should the lawyers who plan their estates. Because the common law rule may require some moderation of objectives, lawyers should only consider it after formulation of a design that fully accomplishes dispositive goals. Intelligent and effective alteration of the design—and if necessary its underlying objectives—cannot, and should not, be done until one determines which parts of the design violate the common law rule. This technique requires interpretive use and application of the common law rule and the life in being concept. Obviously, it makes no sense to modify a dispositive design until it is clear that such modification is needed. Further, it is just as senseless to attempt rectification without a firm grasp of the precise problem and reason for the violation.<sup>48</sup>

In short, although the common law rule and its life in being concept are easily mastered by a planner and draftsman, the creative function itself seldom should proceed to a final product without prior interpretive use and application of the rule. The common law rule should not come into play in the planning process until some preliminary design has been sketched. Then the rule is applied within an interpretive context in which the validating life in being cannot be anyone. Thereafter, when necessary, it is applied within a creative context in which anyone may be

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involved a trust and future interests. More specifically, he might create a testamentary trust that would provide income, and principal if necessary, to A's wife and children. The trustee might be given limited discretion with respect to the income and principal to satisfy any special needs of these beneficiaries. And at the deaths of A's wife and children, the trust might then provide for distribution of principal in equal shares to living descendants per capita. This kind of dispositive scheme would serve A's objective generally. Elaboration of other priorities, such as saving death taxes, would require an adjustment of these priorities and of the plan itself.

47. For example, estate owners who wish to defer control of principal until respective recipients are capable of enjoying and managing it naturally think in terms of the criteria and conditions relevant to those objectives. These future interests themselves are not ordinarily designed and developed with the time frame of the common law rule squarely in mind. If time is a factor at all in determining capacity for enjoyment and management, the foremost planning consideration should be the time when particular beneficiaries are most apt to demonstrate these attributes. This time period may or may not fall within the period of the common law rule.

48. For further discussion and illustration of the importance of interpretive application of the common law rule against perpetuities and the life in being concept in the planning process, see Becker, *supra* note 35, at 746-54.

made a validating life in being. Therefore, lawyers, even when they function as planners, must master the interpretive application of the common law rule.<sup>49</sup> Accordingly, a methodology designed to facilitate correct use of the rule must focus primarily upon its interpretive application.

*B. Interpretive Application of the Common Law Rule and Identification of Testing and Validating Lives in Being—Some Explanations*

Who is the life in being? Once again, this is the question students always ask and the one teachers have difficulty answering. Surprisingly, until recently, commentators on the common law rule have not focused their explanations of the rule on this question.<sup>50</sup> Indeed, even W. Barton Leach, in his famous article *Perpetuities in a Nutshell*, did not address

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49 For a full discussion of the use and application of the common law rule against perpetuities in the planning process, see *id.* at 733.

50. For recent explanations and discussions of the life in being concept, see Becker, *supra* note 35 at 736-54; Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1868-76 (1986); Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1649-54 (1985); Featheringill, *Understanding the Rule Against Perpetuities: A Step-By-Step Approach*, 13 CUMB. L. REV. 161 (1982); Waggoner, *Perpetuities: A Perspective On Wait-And-See*, 85 COLUM. L. REV. 1714, 1714-17 (1985).

Quite differently, other scholars, especially in earlier commentaries, have given less attention to and detailed explanation of the life in being concept. Although they frequently acknowledge that application of the common law rule involves the use of lives in being that are relevant to vesting, they believe that the only lives that ultimately matter are those that validate. See, e.g., R. MAUDSLEY, *supra* note 21, at 94-100; Allan, *supra* note 33, at 107-12. And according to Professor Maudsley, these validating lives in being somehow select or evidence themselves. See R. MAUDSLEY, *supra*, at 4-5, 100-01. Indeed, Lewis M. Simes, the eminent scholar on future interests, has reached a similar conclusion:

Then what is the test of determining who are the lives in being? In my opinion there is no satisfactory test other than to keep trying different lives until you find one which was in being at the inception of the instrument and which is bound to be in being also when the contingency happens or twenty-one years before the contingency happens. In other words, a life in being is one that can be used to show that the limitation is good. *If the limitation is bad under the Rule, that is because no lives in being can be found.*

Simes, *Reform of the Rule Against Perpetuities in Western Australia*, 6 U. WESTERN AUSTRAL. L. REV. 21, 23-24 (1963) (emphasis in original).

In his famous hornbook on future interests, Simes offers little more in terms of a definitive methodology for determining whether there are lives in being that will sustain a valid proof. He does observe where validating lives are apt to be found, stating that they are commonly mentioned in the dispositive instrument, that they are often donees, and that sometimes they can be determined by implication. See L. SIMES, *supra* note 30, at 370-71. Nevertheless, this is insufficient guidance if one is to search efficiently and exhaustively for a validating life in being. "[P]ointing out what lives ought to be tested, not exhorting the searcher to keep looking, is what is needed for this search." Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1650 (1985).

this question in a significant manner.<sup>51</sup> Explanations of the rule have mostly concentrated on its application to class gifts, powers of appointment, options, charitable gifts, revocable trusts, rights of reentry and possibilities of reverter, and with the cases of the "administrative contingency," the "unborn widow," and the "fertile octogenarian."<sup>52</sup> With respect to the life in being concept, students have had to fend for themselves with various explanations and examples. Teachers explain that the common law rule involves a test of possibilities. For an interest to be valid, one must find a life in being about whom one can say that such interest must vest, if at all, within twenty-one years of his death; failing that, one must be able to say that such interest must vest, if at all, within twenty-one years of the time of its creation. Yet, even with such brief explanation and additional examples of its application, seldom has this been enough for students to solve and master the common law rule.

Strangely, the impetus for further elaboration of the life in being concept eventually derived from discussions concerned with reformation of the common law rule.<sup>53</sup> Most prominent among these reforms have been the various "wait and see" rules.<sup>54</sup> These reforms dispense with the common law rule's test of possibilities; validity is, therefore, determined on the basis of actual events. In essence, they all derive from a slight variation of Gray's summary of the common law rule: "No interest . . . is valid unless it vests, if at all, not later than twenty-one years after some life in being at the creation of the interest."<sup>55</sup> It should be clear, there-

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51. See Leach, *supra* note 11. Yet Leach was not the only perpetuities scholar who failed to give adequate explanation to the process by which one could understand and apply the concept of the common law life in being. Professor Lewis Simes was another. See *supra* note 50.

52. See, e.g., Leach, *supra* note 11. See also 6 AMERICAN LAW OF PROPERTY §§ 24.17, 24.22-.23, 24.26-.42, 24.56-57, 24.59, 24.62 (A. J. Casner ed. 1952); R. LYNN, *supra* note 34, at 57-131; L. SIMES & A. SMITH, *supra* note 22, §§ 1229, 1238-39, 1243-45, 1251-52, 1265-87.

53. See, e.g., Allan, *supra* note 33, at 106-12; Dukeminier, *supra* note 3, at 12-14, 62-63; Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1649-54 (1985); Maudsley, *supra* note 3, at 373-78; Morris & Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486, 495-501 (1964); Waggoner, *supra* note 50, at 1714-17; Note, *supra* note 33 at 285-86; Note, *Measuring Lives Under Wait-And-See Versions of the Rule Against Perpetuities*, 1982 WASH. U.L.Q. 577, 579-80 (1982).

54. See, e.g., FLA. STAT. ANN. § 689.22 (West Cum. Supp. 1983); MASS. ANN. LAWS ch. 184A, § 1 (Law. Co-op. 1977); VT. STAT. ANN. tit. 27, § 501 (1975); WASH. REV. CODE ANN. §§ 11.98.130-50 (1967); Perpetuities and Accumulations Act, 1964, ch. 55 (England).

For classification of and reference to various kinds of "wait and see" statutes, see RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 statutory note 1b, 1c; § 1.5 statutory note (1983).

55. R. LYNN, *supra* note 34, at 203.

fore, that under this kind of rule—one that relies upon actual and not possible vesting—a precise definition of the life in being is imperative because it governs the duration of the waiting period that is needed to apply the rule. Once a perpetuities rule requires that determinations of validity be delayed for a period of time, the precise contours of this period of time become absolutely essential to the application of the new rule. For most commentators and legislatures, neither everyone alive nor only those that validate under the common law rule makes sense as the new waiting period lives.<sup>56</sup> The former does too much by way of reformation, while the latter does nothing at all. For many, however, a compromise waiting period exists. For some it lies in a statutory list comprised of lives similar to those found in saving clauses.<sup>57</sup> For others, it lies in the lives in being said to be found in the antecedent common law rule itself—namely, that group of lives “causally connected” or “relevant” to vesting.<sup>58</sup>

The debate that has been waged in defense of both of these “wait and see” positions has, therefore, required complete understanding of the common law rule and, of necessity, the process by which it is applied and by which the life in being is determined. Those who support a “wait and see” rule measured by “causal lives” invariably select terminology with great care to explain their process of understanding and applying the common law rule. Generally, they decry the indiscriminate use of the phrase “life in being” or “measuring life.” They observe that, factually

56 See, e.g., R. MAUDSLEY, *supra* note 21, at 100-03; Simes, *Is The Rule Against Perpetuities Doomed? The “Wait and See” Doctrine*, 52 MICH. L. REV. 179, 187 (1953); Note, *supra* note 53, at 586-89

57 See, e.g., Iowa, IOWA CODE ANN. § 558.68(2) (West Supp. 1986); Alberta, ALTA. REV. STAT. ch. P-4 (1980); British Columbia, B.C. REV. STAT. ch. 321 (1979); England, Perpetuities and Accumulations Act, 1964, ch. 55, § 3(4)-(5); New Zealand, Perpetuities Act, 1964, N.Z. STAT. chs. 205-21; Northern Ireland, Perpetuities Act, 1966. See also the position taken by the American Law Institute, RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) §§ 1.3-1.4 (1983). Many commentators have argued in favor of “wait and see” reform accomplished with a statutory list of measuring lives. Ronald Maudsley was, perhaps, the foremost of these proponents. See R. MAUDSLEY, *supra* note 21, at 107-08, 123-39, 259-61; Maudsley, *Perpetuities: Reforming the Common-Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355, 366-78 (1975).

58 See, e.g., Alaska, ALASKA STAT. § 34.27.010 (Supp. 1984); Kentucky, KY. REV. STAT. ANN. § 381.216 (Baldwin 1979); Nevada, NEV. REV. STAT. § 111.103 (1983); New Mexico, N.M. STAT. ANN. § 47-1-17.1 (Supp. 1983); Rhode Island, R.I. GEN. LAWS § 34-11-38 (1984); Washington, WASH. REV. CODE ANN. § 11.98.010 (1967); Ontario, Ontario Perpetuities Act, 1966, [1970] ONT. REV. STAT. ch. 374. Many commentators have argued in favor of “wait and see” reform accomplished with this kind of formula, one that is based upon relevance to vesting. See, e.g., Dukeminier, *supra* note 3, at 62-64; Dukeminier, *Perpetuities: The Measuring Lives*, *supra* note 50, at 1654-74; Morris & Wade, *supra* note 53, at 496-501.

speaking, all persons alive when the interest under consideration is created are lives in being. Further, they note that to avoid a violation one must make a proof with one of these people, often referred to as a "validating life in being."<sup>59</sup> How does one discover whether such a validating life exists? Is this accomplished by attempting the proof with all known lives in being? Professor Jesse Dukeminier, the foremost proponent of the causal life process of application,<sup>60</sup> would reply that the common law rule implicitly acknowledges the existence of another limited group of lives in being, a pool of relevant lives from which a proof might be made and a validating life possibly discovered.<sup>61</sup> All lives that do not in some manner affect vesting are irrelevant and consideration of them is, therefore, a wasteful effort and an uneconomical use of time.<sup>62</sup>

As a result, application of the common law rule involves a three-step process.<sup>63</sup> First, one assembles a group of relevant lives in being, namely,

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59. See, e.g., J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 785 (3rd ed. 1984); Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985). Even among those who do not support a "wait and see" rule measured by causal lives, there are some who believe that "validating life" is a better term to describe the life by which a positive proof can be made under the common law rule. See, e.g., Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1722 (1983); Waggoner, *supra* note 50, at 1715.

60. Professor Dukeminier has drafted the perpetuities statutes adopted in Kentucky, Alaska, Nevada, New Mexico, and Rhode Island. See *supra* note 58. Each of these statutes adopts a "wait and see" test that expressly incorporates the causal relationship principle into the allowed waiting period. Professor Dukeminier's advocacy on behalf of this particular form of "wait and see" has been highly intelligent, articulate and frequent. Early on, it was marked by his article that explained and defended the Kentucky statute. See Dukeminier, *supra* note 3. And it continues in full measure to this day. See Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1880-87 (1986); Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985); Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 U.C.L.A. L. REV. 1023, (1987). Nevertheless, in the end, a sense of resignation and realism may have forced him to accept *cy pres* alone as the most acceptable reform. See Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 U.C.L.A. L. REV. at 1077-80 (1987).

61. For an elaboration of Dukeminier's views about causal lives under the common law rule and their application to "wait and see" reform, see Dukeminier, *supra* note 59, at 1649-54, 1659-74; Dukeminier, *A Response By Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985); Dukeminier, *A Final Comment By Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985).

62. See Dukeminier, *A Response By Professor Dukeminier*, 85 COLUM. L. REV. 1730, 1730-32 (1985).

63. Professor Dukeminier views application of the common law rule as a two-step process. These two steps focus on the selection of a pool of lives in being and the testing of members within this group. Dukeminier, *supra* note 59, at 1650. These are the first two steps of the three-step process described in the text herein. Dukeminier, however, adds the test contained within the third step, but he does not classify it as a separate step:

If we find a person in the pool by whom the necessary proof can be made, we have found the validating life. If, on the other hand, we cannot make the required proof by reference

only those who have some causal connection to the vesting of the interest under consideration. Second, with each member of this group, one determines whether such contingent interest cannot vest beyond twenty-one years of the respective member's death. If a single member exists for whom this proof can be made, the interest is valid and one need proceed no further. Third, if this proof cannot be made as to all members within the group, one determines whether such contingent interest cannot vest beyond twenty-one years of the time of its creation. If this proof can be made, the interest is valid; if not, then it violates the common law rule. Some commentators may rearrange or constitute this process differently.<sup>64</sup> Nevertheless, central to the thesis of all who invoke the causal life approach is the recognition of a body of relevant lives who affect or postpone vesting and, therefore, are absolutely critical to any proof of validity.<sup>65</sup> These lives in being are an inherent part of the common law rule's process of application; thus, proponents argue that one can easily make them a formal component of "wait and see" reformation.<sup>66</sup>

Some of the opponents of this "causal life wait and see" approach maintain that the only lives formally a part of the common law rule are those that demonstrate the validity of an interest. All others are totally irrelevant to the process of applying the common law rule.<sup>67</sup> In short, whenever an interest violates the common law rule, it is because there is no life in being to be found. Consequently, other than the lives that validate interests, the common law rule does not offer a group of lives which can be incorporated into a waiting period in order to make a perpetuities determination predicated upon actualities.<sup>68</sup> In answer to the question of how a perpetuities determination is to be made under the common law

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to any person in the pool, there is no life that validates the gift; the gift is void unless it must vest or fail within twenty-one years.

*Id*

64. *See, e.g.*, Featheringill, *supra* note 50.

65. I would place myself among this group who understand the common law rule in terms of causal lives or relevant lives, and I have used this process in explaining and teaching the rule. Nevertheless, after twenty-five years of experience, I am firmly convinced that it does not work for the mainstream of students and lawyers. In short, they do not "catch on."

66. *See, e.g.*, Dukeminier, *supra* note 3, at 63; Dukeminier, *supra* note 59, at 1654-74, 1708-13; Morris & Wade, *supra* note 53, at 497-98. For the citations of statutes that expressly or impliedly use causal lives to measure the period for waiting under "wait and see," see Dukeminier, *supra* note 59, at 1658 n.29.

67. *See, e.g.*, R. MAUDSLEY, *supra* note 21, at 94-100; Allan, *supra* note 33, at 107-08, 111-12.

68. *See, e.g.*, R. MAUDSLEY, *supra* note 21, at 4-5, 94-101. In addition to announcing and explaining a principle of self-selection of validating lives, these commentators typically offer examples of self-selection in action. *Id*

rule, this group of opponents might reply that whenever a validating life in being exists, somehow it evidences itself.<sup>69</sup> Somehow, one accomplishes this by mere inspection of the interests created. Critics of this argument observe, however, that this method requires a conclusion which is achieved with one quantum leap and that it rests upon the "fallacy of clairvoyance."<sup>70</sup> The critics maintain that, whether or not courts have formally recognized "causal lives," these lives are an inherent part of the rule's process and no one really applies the rule without resort to them.<sup>71</sup>

Others who object to a strict causal life process of application prefer different ways of understanding the common law rule and solving problems under it. Although these commentators may decry those methods that rely upon mere inspection or clairvoyance, at least one scholar observes that any description of the general process of application is idiosyncratic; all that is important is a description that promotes understanding.<sup>72</sup> For example, Professor Samuel Fetters prefers to focus on the condition imposed and to ask whether it might happen more than twenty-one years after the deaths of all lives in being.<sup>73</sup> And to do this, he presupposes the unlikely deaths of everyone around, especially ancestors of those who are given interests after time enough for these ancestors to have another child.<sup>74</sup> To be sure, this approach is sound; because it comprehends everyone, it cannot overlook potential validating lives. Nevertheless, students generally want more direction; in a sense, they might view these broad suppositions, concerning all lives in being and momentary turnovers in world population, as no direction at all.<sup>75</sup>

Professor Lawrence Waggoner has also criticized the strict causal life

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69. See Dukeminier, *supra* note 59, at 1651.

70. See *id.* at 1652.

71. See, e.g., *id.* at 1649-54.

72. See Waggoner, *supra* note 50, at 1716.

73. See Fetters, *Perpetuities: The Wait-And-See Disaster—A Brief Reply to Professor Maudsley, With a Few Asides to Professors Leach, Simes, Wade, Dr. Morris, et al.*, 60 CORNELL L. REV. 380, 390-94 (1975).

74. *Id.*

75. Students might view this direction (in the light of the condition, can vesting occur more than twenty-one years after the death of all lives in being) as inadequate because they want, wherever possible, guidelines that afford them a finite group of people with whom they can test. Generally, if a validating life in being exists, they can find such person and they will then know that the process of application has ended. Quite differently, they become perplexed if they do not immediately locate a validating life and, therefore, suspect that the interest may cause a perpetuities violation. "Is there a potential validating life somewhere in the world that I have overlooked? How do I know when to conclude my search, and when am I prepared to conclude that a violation exists?" These are the

methodology.<sup>76</sup> He rejects the notion that there is only one realistic system for solving perpetuities problems.<sup>77</sup> To begin with, he acknowledges the need to assemble a group of lives in being that is fewer in number than the world at large.<sup>78</sup> Additionally, he recognizes that, once a manageable group is assembled, a key or real test must be applied to each of them: "Is there among this group a person who has the requisite causal connection between the person's death and the vesting or termination of the interest no later than twenty-one years thereafter?"<sup>79</sup> He even agrees that the manageable group to which one applies this test must have some connection to the transaction. Nevertheless, Professor Waggoner believes that the common law process does not require a precise formula, one which is predicated upon causation and one which limits the objects of the key test to a finite group of lives in being.<sup>80</sup> Although he rejects a precise formula for assembling the lives in being to be tested, he insists that they must have some connection to the transaction and that invariably they include people such as the beneficiaries of the disposition and persons related to them.<sup>81</sup> He believes the group can be flexible and that in cases of doubt potential members of the testing group should be included.<sup>82</sup> He concludes that all that needs to be said about the common law process is that it involves "eliminating people from the world at large, focusing attention on persons connected in some way to the transaction, and asking whether there is any person in this group who satisfies the real test . . . ."<sup>83</sup>

At first blush, it would appear that the difference between the descriptions of Dukeminier and Waggoner is negligible, perhaps one only of semantics. Both believe in a key or real test that should be applied to a

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kinds of questions students ask whenever they are offered an open ended pool of testing lives in being. For further discussion, see *infra* notes 104-17 and accompanying text.

76 Professor Waggoner criticizes the strict use of a causal life approach in solving perpetuities under the common law rule, and he also opposes its use in determining the allowable period under a "wait and see" rule. See Waggoner, *supra* note 50, at 1714-26; Waggoner, *A Rejoinder By Professor Waggoner*, 85 COLUM. L. REV. 1739 (1985).

77 See Waggoner, *supra* note 50.

78 See *id.* at 1716-17.

79 See *id.* Waggoner's "real test" is, of course, essentially the same as Dukeminier's second step in his two-step process: "Second, with respect to each person in the pool, we ask whether the interest will necessarily vest or fail within the life of such person or upon, or within twenty-one years after, such person's death." *Id.* See Dukeminier, *supra* note 50, at 1650.

80 See Waggoner, *supra* note 50, at 1717.

81 See *id.* at 1716-17.

82 See *id.* at 1717 n.13.

83 See *id.* at 1717.

special group of lives in being.<sup>84</sup> Dukeminier uses a principle of causation to define the group.<sup>85</sup> Waggoner, however, prefers a guideline that must connect people to the transaction.<sup>86</sup> Dukeminier insists upon precision and economy, but Waggoner does not.<sup>87</sup> Nevertheless, in most cases their principles of causation and connection are going to produce identical groups of lives in being to which one will apply the real test. In terms of the application of the common law rule, both principles of causation and connection must comprehend all potential validating lives. Because the ultimate test that Waggoner applies to the group of selected lives requires a proof explicitly dependent upon a causal connection to vesting, it is conceivable that the nonvalidating lives within their groups of lives to be tested will also be the same.<sup>88</sup> The principle of connection may, however, introduce additional lives for testing which, according to Dukeminier, cannot possibly validate.<sup>89</sup> At worst, this would require ad-

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84. See *supra* note 79 and accompanying text.

85. See *supra* notes 61-63, 66 and accompanying text.

86. See *supra* notes 78-83 and accompanying text.

87. See Dukeminier, *supra* note 62, at 1730-32; Waggoner, *supra* note 50, at 1716-17.

88. Although Professor Waggoner is more idiosyncratic in his approach to the selection of testing lives and although he finds ambiguities in Professor Dukeminier's principle of causation and disagrees with him about its application, Waggoner's view of lives "connected to the transaction" cannot be too far removed from Dukeminier's notion of lives that are "causally" related or "relevant" to vesting. Validity under Waggoner's ultimate test requires a causal connection between the life or death of the testing life in being and vesting of the interest in question. See *supra* note 79 and accompanying text. Waggoner must, therefore, recognize that people totally unrelated to vesting should be disregarded. He must realize that they should not be tested because they cannot possibly validate even though they might have some connection to the transaction but not to vesting itself. Although he professes a principle of broad connection, in application Waggoner undoubtedly narrows down the group for actual testing. And in doing so, he probably relies upon a principle very close to Dukeminier's own principle of causation.

89. [B]ecause it lacks an organizing principle of relevance, Professor Waggoner's group is much too broad for the task at hand. It includes persons who cannot affect vesting. I find it hard to believe Waggoner or anyone else tests the transferor of an irrevocable transfer or tests the mother or aunt or cousins of A in the gift to the children of A who reach twenty-five. I feel certain he does not test the lawyer who drafted the instrument and some others who may have any 'connection to the transaction' (whatever that means). If he does, he is testing irrelevant lives, because these persons cannot possibly be validating lives.

Dukeminier, *supra* note 62, at 1731.

This observation by Dukeminier, that the principle of connection may lead to the testing of lives in being that cannot possibly validate, is a fair one. To be sure, the principle of relevance and causality seems to be at the heart of Waggoner's thesis of connection. And undoubtedly, Waggoner himself would never apply the critical test to the estate owner's lawyer without other facts that make such lawyer especially relevant to vesting. Nevertheless, Waggoner defines the manageable group of people assembled for testing in this manner:

In my view, they would always include the transferor, if living, the beneficiaries of the disposition, including but not restricted to the taker or takers of the questioned interest, the

ditional time to apply the rule, especially in situations that result in a violation.

The significant difference in their views, however, surfaces when they transport the common law life in being concept to a "wait and see" reformation of the common law rule. Both apparently agree that, if a waiting period is to be used, it must be clearly defined.<sup>90</sup> Accordingly, if one measures this time for waiting with lives in being, the group that the statute defines must be sensible in terms of underlying policy, and its members must be readily identifiable. Even though Waggoner does not claim that a principle of connection ought to serve as a basis for determining the measuring period under "wait and see,"<sup>91</sup> he firmly rejects causation as a unifying and understandable principle that is inherent in the common law process and which one can conveniently carry over to an actualities test.<sup>92</sup> Waggoner maintains that a causal relationship formula can be difficult to understand and sometimes arbitrary and ambiguous.<sup>93</sup>

Dukeminier strongly disagrees: "What is a causal relationship? First, you determine what events can affect vesting and, second, you determine what persons can affect those events. Such persons have a causal relationship to vesting."<sup>94</sup> In reply to critics who have found application of the principle of causation baffling, Dukeminier has offered an extended explanation in which he applies the principle to many of the illustrations that have appeared in the literature discussing "wait and see" reforma-

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objects and donee of a power of appointment, persons related to the foregoing by blood or adoption, and anyone else who has any connection to the transaction. If there is a validating life, it will be in this group.

Waggoner, *supra* note 50, at 1717.

Although Waggoner may economize with respect to this group, others with less of an understanding for the common law process may go far afield and even test with distant relatives who have no remote connection to the events that control vesting.

90. Apparently, both Dukeminier and Waggoner believe that the waiting period should be defined clearly in terms of some intelligent principle and that such principle should be easy to apply. See Dukeminier, *supra* note 59, at 1659, 1709-10; Waggoner, *supra* note 50, at 1719, 1724-26; Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP., PROB. & TR. J. 569, 575-76 (1986).

91. Indeed, Waggoner is a strong advocate for measuring the "wait and see" period with a fixed term of years. See Waggoner, *supra* note 50, at 1726-28; Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP., PROB. & TR. J. 569 (1986).

92. See Waggoner, *supra* note 50, at 1714, 1716, 1718-24, 1728; Waggoner, *supra* note 76, at 1739.

93. See Waggoner, *supra* note 50, at 1719-24.

94. J. DUKEMINIER & S. JOHANSON, *supra* note 30, at 994-95.

tion.<sup>95</sup> After explaining several subordinate rules, which he views as part of the common law,<sup>96</sup> and then applying them to these illustrations, Dukeminier finds no current room for doubt in locating causal lives and, therefore, in using such lives to measure the waiting period under an actualities test.<sup>97</sup>

In a debate that carries on almost endlessly,<sup>98</sup> Waggoner replies, while using some of Dukeminier's illustrations, that the exact meaning of causal lives—persons who can affect the vesting of an interest—is disputable and that the explanations of Dukeminier need clarification and codification before causation can become a viable principle.<sup>99</sup> Without statutory elaboration, Waggoner believes that the principle of causation presents enough puzzles to cause litigation for years to come.<sup>100</sup>

Waggoner makes no argument for his principle of connection, but Dukeminier does for the principle of causation. Whatever arguments Dukeminier might muster supporting the clarity of the principle of causation, two very prominent scholars widely disagree about the meaning and application of the principle. This disagreement, perhaps more than anything else, evidences the weaknesses of a causal basis for measuring the waiting period under an actualities test. A "wait and see" test re-

95. See Dukeminier, *supra* note 59, at 1659-74.

96. At common law three rules prevent certain causally-related lives from being used as measuring lives. . . . First, redundant lives, that is, persons who cannot affect vesting after the death of other measuring lives on the list, cannot be used as measuring lives. Second, if all persons in being who can affect vesting in the same way constitute an unreasonable number, they cannot be measuring lives even though they are ascertainable. Third, if all persons in being who can affect vesting in the same way cannot reasonably be ascertained within the perpetuities period, none of such persons can be measuring lives. If such persons could be measuring lives, it would be impossible to say when the perpetuities period ends. For example, at common law a gift "to A's first descendant to marry a person now alive" is void because we cannot say that the gift has failed until there is nobody in the world who was alive at the date of the gift. That is impossible of ascertainment. . . . [U]nder the common law Rule, the time when the perpetuities period ends must be reasonably ascertainable.

*Id.* at 1661-62. See also Dukeminier, *supra* note 62; Dukeminier, *A Modern Guide To Perpetuities*, 74 COLUM. L. REV. 1867, 1875-76 (1986).

97. See Dukeminier, *supra* note 59, at 1673-74, 1710-11.

98. The debate between Professors Dukeminier and Waggoner consists of five articles, all within one issue of the Columbia Law Review. See Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985); Waggoner, *Perpetuities: A Perspective On Wait-And-See*, 85 COLUM. L. REV. 1714 (1985); Dukeminier, *A Response By Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985); Waggoner, *A Rejoinder By Professor Waggoner*, 85 COLUM. L. REV. 1739 (1985); Dukeminier, *A Final Comment By Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985).

99. See Waggoner, *supra* note 50, at 1719-24.

100. See *id.* at 1724.

quires a waiting period that one can easily administer.<sup>101</sup> If Dukeminier and Waggoner cannot agree in all cases about the persons that affect the vesting of an interest, one wonders how readily personal representatives and trustees can identify the causal lives upon which they must wait.

*C. Identifying the Group of Lives That Need to Be Tested Under the Common Law Rule—the Need for a Different and Better Methodology*

It should be clear that the certainty needed for a viable “wait and see” rule is far less important when one attempts application of the common law rule. All that is really necessary is that one select a pool of lives in being to test that includes, if they exist at all, the validating lives in a particular limitation. If one creates a pool that contains extraneous lives,<sup>102</sup> all that is lost is excessive time in conducting the common law process. If, then, the parameters of the pool of lives in being relevant to the common law process have less significance, one might wonder whether it matters at all which principle is employed—be it one of causation or connection. Both offer more than mere inspection and clairvoyance, and both present pools of lives in being that suffice. However, it does matter which kind of principle or methodology one uses to conduct the common law process. Although the exact parameters of the group of lives selected for testing may have less significance for the common law process than for “wait and see,” this is no consolation for the novice who seeks and needs assurance that the group he has formulated does not actually overlook potential validating lives.<sup>103</sup> In conducting the common law process, one must know that he is doing it correctly, and must

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101 *See id.* at 1724-26; Maudsley, *supra* note 3, at 367-70, 375-78.

102 Extraneous lives are those lives in being who are unconnected to vesting and cannot in any way affect vesting of the interest in question. Usually, they consist of lives that are unmentioned and are unconnected to the dispositive instrument. For example, consider this testamentary trust created by A: “Income to B for life; thereafter, principal to C absolutely when C attains age thirty.” Clearly, C’s life is relevant to satisfaction of his own age requirement, while all other lives are irrelevant. President George Bush may be an existing life in being; nevertheless, his life is irrelevant and extraneous to the events that control vesting.

103. The major problem every novice has is not the determination that an interest is valid; it is, instead, a determination that an interest violates the common law rule against perpetuities. Most people recognize a validating life in being once they find him. Application of the critical or key test is not exceedingly difficult, and it should reveal clearly a valid proof with respect to such person. The problem most students have, however, is what to do after they have failed to make a valid proof with obvious testing lives within the limitation under consideration. Have they overlooked any lives in being that could possibly validate? How are they to know that they have exhausted the search for potential validating lives and that they can now terminate the process and reach a conclusion of

know this all of the time. Without this assurance he becomes uneasy and is apt to avoid consideration of the rule. And, of course, if there is ambiguity in the selection of the pool of lives, he will not have this assurance. Indeed, without something more that affords this assurance, both principles of causation and connection are wanting when it comes to making the common law process workable for all.

The major problem with Waggoner's principle of connection is that it fails to recognize a novice's need for a finite group. To say that the testing group can consist of anyone connected to the transaction,<sup>104</sup> but not the entire world itself, will surely cause uneasiness among students struggling with the application of the rule. To be sure, because Waggoner's ultimate test emphasizes a "requisite causal connection,"<sup>105</sup> one who adopts his methodology is not without any guideline, and in most cases one will produce a group that closely resembles a pool of lives based upon causation.<sup>106</sup> Nevertheless, Waggoner does not insist upon any

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invalidity? These are the questions that plague the novice and this is what makes a determination of invalidity so difficult.

104. See *supra* note 81; *infra* note 107.

105. See *supra* note 79 and accompanying text.

106. Beyond the guideline of causation incorporated into his real test, Waggoner offers something more specific about the people upon whom one should focus attention for purposes of testing:

Who are such people? They vary from situation to situation, but are not difficult to identify. In my view, they would always include the transferor, if living, the beneficiaries of the disposition, including but not restricted to the taker or takers of the questioned interest, the objects and donee of a power of appointment, persons related to the foregoing by blood or adoption, and anyone else who has any connection to the transaction. If there is a validating life, it will be in this group.

Waggoner, *supra* note 50, at 1717.

Professor Dukeminier's list of potential candidates for testing is remarkably similar. With respect to measuring lives used under a "wait and see" test that incorporates the principle of causal relationship, he observed early on:

In practically all cases the measuring lives will be one or more of the following as fits the particular facts; (a) the preceding life tenant, (b) the taker(s) of the interest, (c) a parent of the taker(s) 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.

Dukeminier, *supra* note 3, at 63. More recently, Dukeminier observed:

[T]he persons who can affect vesting in interest are: (a) The beneficiary or beneficiaries of the contingent interest; (b) Any person who can affect the identity of the beneficiary or beneficiaries (such as A in a gift to A's children); and (c) Any person who can affect any condition precedent attached to the gift, or, in case of a class gift, any person who can affect a condition precedent attached to the interest of any class member.

Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1875 (1986).

To be sure, the groups identified by Dukeminier and Waggoner overlap; this must be so because both groups of testing lives are designed to reveal all lives in being with which one can actually make a valid proof. Nevertheless, they have serious differences when it comes to defining a group for

firm principle for circumscribing the group selected for testing. And this is the source of uneasiness for novices who wish to use his version of the common law process. He notes that the group connected to the transaction

would always include the transferor, if living, the beneficiaries of the disposition, including but not restricted to the taker or takers of the questioned interest, the objects and donee of a power of appointment, persons related to the foregoing by blood or adoption, and anyone else who has any connection to the transaction.<sup>107</sup>

If in doubt, Waggoner urges that particular lives in being be added to the group and subjected to the key test.<sup>108</sup> To be sure, this process works well in cases in which there is a validating life to be found. His methodology assures inclusion of such a life, and once a student locates it and makes the critical proof, he knows that he need go no further—the process of application has been concluded.<sup>109</sup>

Quite differently, a student will have difficulty in those situations in which there is no validating life and in which there is in fact a violation of the common law rule. How does a student know when to close the pool of lives to be tested? How does a student know when to conclude the process of application? Waggoner observes that persons related by blood or adoption to beneficiaries within the entire instrument and to the transferor, if living, would fall within the group of selected lives in being.<sup>110</sup> After one tests unsuccessfully with the more obvious relatives,

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testing that includes lives in being that cannot possibly validate. For example, Dukeminier sees no need to include the transferor of an irrevocable lifetime gift, nor does he see any need to include distant relatives simply because they are related to the taker by blood or to include persons simply because they are “connected” in some way to the transaction. *See* Dukeminier, *supra* note 62, at 1731. On the other hand, even if Waggoner were applying a definition predicated strictly upon a principle of causation, he would see no need to include all beneficiaries. *See infra* note 273 and the example used in the text accompanying that note.

107. Waggoner, *supra* note 50, at 1717.

108. *See supra* note 82.

109. The common law rule against perpetuities requires only one life in being about whom one can say that, within twenty-one years of his death, the interest must vest or fail. In a given limitation, one may be able to reach this conclusion about more than one life. Nevertheless, in establishing the validity of an interest, one need not find all the lives; a proof with just one life is enough. For example consider this testamentary trust by A: “Income to B for life; thereafter, principal to C absolutely if then living.” In this instance, one can say that C’s contingent interest must vest or fail within his own lifetime; one can also say that C’s interest must vest or fail by the time of B’s death. Both the lives of B and C can be used independently to validate the interest of C. Nevertheless, the common law rule allows for a valid proof with either. Once a person tests successfully with B or C, the requirements of the rule are satisfied and one need go no further with the process.

110. *See supra* note 107.

such as parents, how does one know when to conclude the search for a validating life among more distant blood relations?<sup>111</sup> Waggoner notes that, beyond these relatives, the selection of lives in being for testing can include “anyone else who has any connection to the transaction.”<sup>112</sup> Might this include the estate owner’s lawyer or the lawyer’s associate or secretary?<sup>113</sup> Once again, Waggoner’s rule of thumb is to include rather

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111. Of course, one who comprehends the logic of the common law rule against perpetuities will *know* that if a valid proof cannot be made with parents of the beneficiaries, it cannot then be made with other relatives simply because they are related by blood. Nevertheless, full understanding of this is not an easy matter for most people. There are only three ways in which a beneficiary’s blood relatives (those who do not take as members of the same class of beneficiaries) can affect vesting and, thus, qualify for possible validation of an interest. First, and foremost, relatives can affect vesting because they affect the birth of the beneficiary. Second, relatives can affect vesting because their lives are involved with the fulfillment or breach of express conditions attached to the interest of the beneficiary. Third, especially with class gifts, relatives can affect vesting because their respective life or death controls the time in which possession or distribution is conferred upon the beneficiaries. Consequently, if the beneficiaries’ parents (those relatives who affect the beneficiaries’ existence most immediately) fail to validate the interest of such beneficiaries, there is no need to consider more remote relatives unless there is something within the provision itself that clearly connects their respective life or death to a time for possession or the fulfillment or breach of express conditions. For this reason, the only relatives for which the methodology developed hereafter requires specific consideration are the parents of the beneficiaries. *See infra* Step Three D accompanying notes 190-95. All other relatives are rejected for testing unless they specifically qualify as “other takers” within the provision or as people “otherwise mentioned or separately and differently mentioned” within the provision itself or within any directly related provision. *See infra* Step Three B and Step Three C accompanying notes 179-89.

112. *See supra* note 107.

113. Professor Dukeminier strongly criticizes Waggoner’s principle of connection to the transaction. Among other things, he rejects it because:

it lacks an organizing principle of relevance. Professor Waggoner’s group is much too broad for the task at hand. It includes persons who cannot affect vesting. I find it hard to believe Waggoner or anyone else tests the transferor of an irrevocable transfer or tests the mother or aunt or cousins of A in the gift to the children of A who reach twenty-five. I feel certain he does not test the lawyer who drafted the instrument and some others who may have a “connection to the transaction” (whatever that means). If he does, he is testing irrelevant lives, because these persons cannot possibly be validating lives. Why waste time on irrelevant lives when there is a clear test of who is relevant and should be tested?

Dukeminier, *supra* note 171, at 1731.

One can readily demonstrate the wisdom of Dukeminier’s criticism. Suppose T creates a variation of the testamentary trust hypothesized by Dukeminier: “Income to A for life; thereafter, principal to the first of A’s children to attain age twenty-five absolutely and forever.” Assume that T is survived by A, A-1 (who is A’s child and is age ten at the death of T), L (who is T’s lawyer and the person responsible for planning and drafting T’s will) and S (who is L’s secretary and the person responsible for typing and replicating T’s will). Does the gift of principal violate the common law rule against perpetuities? Can a valid proof be made with either L or S, two people who have a “connection to the transaction”? The answer to the second question is clearly NO. Applying the critical test to L, one asks: Must the interest of A’s first child to attain age twenty-five vest, if at all, within twenty-one years of L’s death? Looking to all eventualities at T’s death, especially those that are remote, one observes that both L and A-1 might die immediately after the death of T. Further, it is possible

than exclude.<sup>114</sup> How does one know when to terminate the process of application and conclude that the interest is invalid? Indeed, those who teach have often heard: "But how do you know the interest violates the rule? Why didn't you test other lives as well?"

Those who understand know that their judgment rests upon an implicit principle—causation—and that this principle gives them a discrete group of selected lives and tells them when to stop the process. With this principle, one knows that after testing with certain relatives, it is pointless to test with others.<sup>115</sup> With this principle, one knows that lawyers and secretaries, unmentioned in the dispositive instrument, are irrelevant.<sup>116</sup> As Dukeminier observes, this principle affords economy in conducting the common law process.<sup>117</sup> It is, however, more than a matter of economy. Without this knowledge of when to terminate the process, without some assurance that there is a fairly discrete group to test, and that one has properly tested that entire group, students are uncertain and assuredly they will continue to flounder in their application of the common law rule.

If some discrete group for testing is needed, the question then arises whether the causal relation test is one that students can easily understand and apply with consistency and accuracy. Dukeminier claims that "the aim of scholarly explanation is to describe the process of solving perpetuities problems in the simplest and most economical conceptual formulation, and to differentiate between the necessary and unnecessary."<sup>118</sup>

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thereafter for A to have a second child, A-2, who might attain age twenty-five and claim the principal more than twenty-one years after the death of L. Consequently, one cannot make a valid proof using the life of L.

Similarly, one might apply the critical test to S by asking: Must the interest of A's first child to attain age twenty-five vest, if at all, within twenty-one years of S's death? Looking to the same kinds of eventualities, one finds that both S and A-1 might die immediately after the death of T. Further, it is possible thereafter for A to have a second child, A-2, who might later attain age twenty-five and claim the principal more than twenty-one years after the death of S. Consequently, one cannot make a valid proof using the life of S. And one could go on with other illustrations that test with lives in being connected to the transaction. Yet each illustration would be doomed to fail so long as the connection was not predicated upon a principle of relevance or causation. Indeed, it is logically impossible to prove that an event must happen, if at all, within a certain time period of a specific person's death unless that person's life or death is causally related to the event itself. A general principle of connection will not suffice; there must be more, namely, relevance to the event in question.

114 See *supra* note 82.

115 See *supra* note 111.

116 See *supra* note 113.

117 See *supra* note 62.

118 Dukeminier, *supra* note 62, at 1731.

And Dukeminier is right. To be sure, given the real test that both Dukeminier and Waggoner ultimately apply,<sup>119</sup> a potential validating life will only be found among those lives that can affect vesting or are causally related to it.<sup>120</sup> It is also clear that this method of limitation will produce a critical or discrete group for testing, and that all other lives in being are actually unnecessary.<sup>121</sup> The real question, however, is whether this process of application works, not only for scholars, teachers and practitioners of future interests, but for the competent generalist who quite regularly plans an estate and drafts a dispositive instrument. This latter group draws upon the mainstream of students who later draft instruments that must satisfy the common law rule. The thesis of causal relationship has been around a long time. Even though extensive discussion of it has occurred only as a result of “wait and see” proposals of the last several decades,<sup>122</sup> many teachers have explained the common law process in this manner for some time.<sup>123</sup> And yet the success of teachers has probably remained the same: some students master the common law process, but too many do not.<sup>124</sup> The proof is in the pudding—a strict principle of causation does not work for enough lawyers.

There are, perhaps, two reasons why so many students experience difficulty in developing a group of testing lives based solely upon a causal relation to vesting. First, there are ambiguities in the application of this principle. However clearly Dukeminier may understand the notion of

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119. See *supra* notes 73, 79 and accompanying text.

120. See Dukeminier, *supra* note 59, at 1650; Dukeminier, *supra* note 62, at 1731.

121. See Dukeminier, *supra* note 59, at 1650, 1652; Dukeminier, *supra* note 62, at 1731.

122. See *supra* notes 53, 58, 60-61.

123. Some scholars acknowledge their use of this process in their explanation and application of the common law rule against perpetuities. See *supra* notes 58, 60. All others, whether they openly embrace the causal relation test or not, surely must use something like it when they apply and explain the rule. Once one admits that not every person in being should be tested, one must confront the task of defining the limited pool of people for consideration. Thereafter, however one describes this process, one likely is searching for and using people who are connected to vesting in some manner. If one is truly attempting explanation of the logic of the rule, anything else would seem to be inefficient and, perhaps, misleading.

124. It is difficult to offer hard evidence in support of this conclusion, that too many, if not most, students never master the common law rule against perpetuities. One might infer from a decision of the Supreme Court of California that an understanding of the common law rule is beyond the competence of the average lawyer and, therefore, the average student. See *supra* note 14. Perhaps as better evidence, I have been teaching the rule for twenty-five years, and I have been using the causal relationship thesis to explain it. Although I believe that I am a good teacher, I *know* that most of my students never fully comprehend the rule and, consequently, they are unable to reach the correct solution consistently.

those lives that affect vesting, there are others who do not.<sup>125</sup> Dukeminier observes that a person is causally related to vesting if he is a beneficiary of the contingent interest, or if he can affect the identity of the beneficiary or the closing of the class of beneficiaries, or if he can affect any condition precedent.<sup>126</sup> Some people, however, have a difficult time understanding why all beneficiaries of contingent interests are viewed as causal lives, especially those beneficiaries who, at the outset, are ascertainable and have interests that are not subject to any further requirements of survivorship or conditions which they can directly or indirectly affect.<sup>127</sup> There may also be problems in locating those who can affect the identity of the beneficiary. For example, if a future interest is created in the "issue" of a named ancestor of the estate owner provided they are alive fifty years after the estate owner's death, which people among those who can possibly affect the identity of the beneficiaries should be used as the lives for testing the validity of the interest? Do they include all of the named ancestor's issue alive when the estate owner creates the future interest?<sup>128</sup> Presumably, Dukeminier would answer yes.<sup>129</sup> If so, can

125. See, e.g., Waggoner, *supra* note 50, at 1719-24; Waggoner, *supra* note 76.

126. See Dukeminier, *supra* note 59, at 1661.

127. See, e.g., Waggoner, *supra* note 59, at 1720-24; Waggoner, *supra* note 76.

128. Consider this testamentary gift of A: "To the issue of my deceased great grandparent, B, per capita, who are living fifty years after my death." Because this gift is to "issue" and because it is per capita, it can include any descendant of A's great grandparent no matter what generation they might be. Apparently, then, any descendant of A's great grandparent, B, who is alive at A's death can affect the identity of the beneficiaries. Accordingly, such descendants are causally related to vesting and one should apply the critical test to them. Conceivably, among A's relatives this might include a grandparent, such grandparent's siblings and their descendants, a parent, such parent's siblings and their descendants, A's brothers and sisters and their descendants, and A's children, grandchildren, great-grandchildren, etc. Indeed, the group of causal lives eligible for testing could be quite large, and it may be exceedingly difficult to identify the lives and trace them until the time of their respective deaths.

Those who are skilled in the application of the common law rule would see no need to apply the critical test to all of these causal lives. They would *know immediately* that it is pointless to do so. Because the ultimate class of takers is not fixed in terms of any particular generation of descendants, or in terms of a group established at A's death, and because the time for survivorship is fifty years after A's death, they would *know* that the gift to the grandparent's (B's) issue violates the common law rule. They would *know* that several turnovers in descendants could occur before the time established for making distribution to living issue. For example, they would *know immediately* that these causal lives (descendants alive at A's death) could bear other descendants before dying within several years of A's death, that these afterborn descendants could bear other descendants before dying within the fifty-year period of time, and that the group of afterborn descendants who ultimately survive the time for distribution could do so more than twenty-one years after the death of all causal lives in being.

129. Case 5. T bequeaths property "to my issue living thirty years from now." This is void at common law. The gift will not necessarily vest or fail within the lives of the testator's

one ascertain their identity without great difficulty so that the test for validation can be conducted? And when does their number become unreasonable so that as a group they must be rejected?<sup>130</sup> Dukeminier has explanations for these situations, explanations that often derive from subset principles.<sup>131</sup> Although Dukeminier claims that his explanations follow logically from the principle of causation,<sup>132</sup> others do not share his clarity of understanding and application.<sup>133</sup> Yet strangely, perhaps, others might not have difficulty at all with this example. They might examine the terms of the condition and immediately observe that, because of the open ended group of beneficiaries, there is no life in being from which a proof of validity can be made. They would reject all causal lives and make no formal attempt to locate them and apply the critical test to them.<sup>134</sup>

The second reason students have difficulty with the causal relation approach is that the test ignores the novice's penchant to test with all lives in being mentioned in the instrument. Indeed, the principle of causal relation is a method for inclusion, but of necessity it also operates to exclude lives in being unrelated to vesting—often lives that are prominently displayed in the limitation itself.<sup>135</sup> One who understands the

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issue alive at her death or twenty-one years thereafter. Under the causal relationship principle, the measuring lives are all of the testator's issue in being at the testator's death. By procreating or dying, these persons can affect the *identity* of the beneficiaries . . . .

Dukeminier, *supra* note 59, at 1666 (citations omitted). See also Case 7, *id.* at 1667-68.

130. In their elaboration of the common law rule against perpetuities, courts have developed a principle that limits the causal lives that can be used to make a valid proof. Courts require that a determination of the perpetuities period be feasible. More specifically, courts require that ascertainment of validating lives in being not be impracticable and that their number not be so large as to make it unreasonably difficult to determine when they have died. The precise limits of feasibility with respect to ascertainment and number are, however, somewhat unclear. It is also unclear whether a group of lives that exceeds this standard may render the interest under consideration void because of uncertainty or because of a perpetuities violation. See 6 AMERICAN LAW OF PROPERTY § 24.13 (A.J. Casner ed. 1952); RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.3 reporter's note 3 (1983); L. SIMES & A. SMITH, *supra* note 22, § 1223; Dukeminier, *A Modern Guide To Perpetuities*, 74 CALIF. L. REV. 1867, 1875-76 (1986).

131. See *supra* note 96. See also Dukeminier, *supra* note 62, at 1734-38.

132. See Dukeminier, *supra* note 59, at 1660-74; Dukeminier, *supra* note 62, at 1732.

133. See *supra* note 125.

134. For a discussion of a related problem and why one might immediately dismiss certain causal lives in being from consideration, see *supra* note 111.

135. There are many illustrations of how the principle of relevance or causation disqualifies for testing lives in being that are mentioned within the instrument or even the specific limitation. For example, consider this irrevocable living trust created by A, in which the corpus of the trust is Blackacre, a tract of land under long term lease to an agency of the federal government: "Income to my brother John's son, S, for life, then income to S's children for the life of the survivor; upon the

common law process can apply the rule economically and ignore these unrelated lives. But the method described by Dukeminier fails to recognize that students are seldom satisfied with a finding of invalidity until they have tested those lives that stare them in the face, even though the expert would reject such lives because they are not causally related. In short, it is exceedingly important to recognize that a method of analysis must satisfy a student's need to exclude possible validating lives through actual testing. Students seem more secure when they eliminate possible validating lives by actual testing; unfortunately, mere reliance upon a principle of causation often leaves them uneasy about the accuracy of their exclusions.

This article proposes a somewhat different method for conducting the common law process. In a sense, the proposal borrows from the principle of causation and the open ended principle of connection. Its purpose is to assemble a manageable group of lives in being to which one must apply the same critical test: Must the contingent interest vest, if at all, within twenty-one years of the death of one of the members within the group?<sup>136</sup> The proposal deviates, however, from the methods described

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death of the survivor of S's children, the trust shall terminate and Blackacre shall at that time be given over absolutely to the then living descendants of S per capita as tenants in common. If none are alive at such time, then to John's daughter, D, absolutely if Blackacre is still under lease to . . . (the agency of the federal government); if it is not, then to my good friend, F, absolutely." Assume when the irrevocable trust becomes effective that A, John, S, D, F, and T (the individual trustee named by A) are all alive. Assume further that S is childless. In this instance, each of the alternative contingent gifts of Blackacre violates the common law rule against perpetuities. However, in making this determination about D's interest, one can observe that the limitation identifies three lives in being (My A, John, and F) and that the instrument mentions another (T). Further, none of these lives in being affects the vesting of D's interest. None of these people is a causal life in being, and all four should be excluded under this principle in testing the validity of D's interest. D's interest is subject to two conditions: that S does not have descendants alive at the death of the survivor of his children and that Blackacre is then still under lease of the federal agency. The only life in being relevant to the vesting of D's interest is S, although Professor Dukeminier would also add the life of D as well. The lives of all others in being when the trust becomes effective are irrelevant and must be discarded for purposes of testing. To be sure, however, those inexperienced with the process of the common law rule may find it difficult to understand this; accordingly, application of the critical test to A, John, F and T becomes irresistible.

136 See *infra* text accompanying notes 178, 183, 189, 195. Fundamentally, this is the same test that both Dukeminier and Waggoner (and, for that matter, everyone else) apply. The difference, however, between their application of the common law rule against perpetuities and this methodology lies in the way one assembles the lives in being that are to be subjected to this test. Dukeminier tests those lives in being who affect or are causally related to vesting, while Waggoner tests those lives in being who are connected to the transaction.

This methodology assembles separate classes of potential testing lives that are drawn almost entirely from the individual persons or groups of people specifically mentioned or generally described

by Dukeminier and Waggoner in how one assembles the group to be tested. The proposed methodology recognizes the need for a discrete and closed ended group of people. But it also recognizes the problems a novice might have in accomplishing this with a general formula that is susceptible to ambiguities. Accordingly, the methodology uses carefully defined and developed classes of people from which all potential validating lives in being might be found; in some instances it might actually dispense with certain kinds of causal lives,<sup>137</sup> while in others it might comprehend for testing some lives that ordinarily affect vesting but in particular instances they may be without an actual causal relation.<sup>138</sup>

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in the dispositive provision. Nevertheless, once assembled, not all classes qualify for testing even though they might actually contain lives in being that affect vesting. More specifically, this methodology does not apply the critical test to those groups and to those individually described persons who are not restricted to lives in being and to lives already ended at the time the period of the rule commences. Once a class qualifies for testing, however, the critical test is then applied to that person or group of people independently of all the other classes of potential testing lives. Each class is tested separately. If a proof can be made with respect to any individually named or described person or with respect to any person within a described group falling within the class that has qualified for testing, then the interest is valid. If, however, one fails to make a valid proof with respect to all of these classes, and with respect to the gross period of years as well (twenty-one years from the time the period of the rule commences), then there is a perpetuities violation.

137. This methodology rejects for testing all groups of lives, whether they affect vesting or not, unless they are restricted to lives in being and to lives already ended when the period of the rule commences. This requirement applies to each of the classes considered within each of the steps for applying the common law rule against perpetuities. For example, consider this testamentary trust created by A: "Income to B for life, and at B's death, income to B's children for the life of the survivor of them; when the last of B's children dies, principal to B's grandchildren, per capita, absolutely and forever." Assume that B and B's only child, B-1, survive A and that B-1 is childless. Does the gift of principal to B's grandchildren violate the rule?

Their interest must satisfy the rule because each grandchild's interest is subject to the condition of being born. Indeed, all grandchildren must join, or fail to join, the class within the period of the rule; if not, then the entire gift of principal will fail. To be sure, B-1 is a person who can affect vesting because B-1 is a person capable of having children who can join the class of B's grandchildren. Nevertheless, under this methodology, B-1 does not qualify for actual testing under Step Three B as an other taker within the same provision because B's children are not restricted to lives in being and to lives already ended. See *infra* text accompanying notes 179-81. For a full consideration of this illustration, see *infra* illustration IV A-7.

138. This possibility for the testing of lives in being that may not affect vesting, or may not have any causal relation to vesting, can arise under several steps within the methodology. For example, consider this testamentary trust created by A: "Income to B for life, and after the death of B, income to C for life; upon the termination of all income interests, principal to C's children absolutely." Assume that B and C survive A and that C is then childless. Does the gift of principal to C's children violate the common law rule against perpetuities?

The children's interest is contingent upon being born. All of C's children must join the class or fail to join within the period of the rule or the entire gift will fail. Step Three B of the methodology covers other individual takers or groups of takers within the same provision who are restricted to lives in being and to lives already ended when the period of the rule commences at A's death. See

This methodology rests on the notion that students need and desire meticulous guidance in formulating the group of lives in being to be tested. They want precision, not ambiguity. They need to know exactly whom to test, and they need to know when they should not test any further. Stated differently, they want to know how and when to conclude the process, especially when they suspect a violation of the common law rule. The essential ingredient of this methodology is, therefore, its precise formulation of the classes of people to be tested—the entire group of testing lives in being.

In short, the object of the methodology is to guide one carefully, step by step, through the formation of these classes and the application of the critical test. Once all levels of the process are completed, if one has not previously validated the interest, he will know that it is invalid. Its purpose is to provide a series of questions that enable one to apply the common law rule successfully without full understanding of all the intricacies

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*infra* text accompanying notes 179-83. In this illustration, B qualifies for testing under Step Three B because he is an other taker within the same provision and because he is restricted to a life in being by the descriptive language itself. Nevertheless, B's life is not causally related to vesting. C's life is the only one that actually affects vesting. The takers of the gift of principal receive interests which are contingent upon being born. C is the relevant parent, and it is only his life that governs their respective births. To be sure, B's life affects the time for possession of the gift of principal because it cannot become possessory before his death. Nevertheless, the relevant relation required by the common law rule is vesting and not possession. Control over the time of possession sometimes can affect the time for vesting. In this instance, however, because C has been given an intermediate income interest for life, B's death will only affect possession and not vesting, namely, the time in which membership within the class of grandchildren becomes fixed.

Also consider this testamentary trust created by A: "Income to B's daughter, B-1, for life; thereafter, principal to her children absolutely." Assume that B and B-1 survive A and that B-1 is childless. Does the gift of principal to B-1's children violate the common law rule? Indeed, the gift of principal to B-1's children is contingent upon their being born; all must join the class or fail to join within the period of the rule or the entire gift will fail. Step Three C of this methodology covers people otherwise mentioned or separately and differently mentioned within the same provision or elsewhere in other provisions directly related who are restricted to lives in being and to lives already ended when the period of the rule commences at A's death. *See infra* text accompanying notes 184-89. In this illustration, B qualifies for testing because he is otherwise mentioned within the same provision and because he is restricted to a life in being because of the descriptive language itself. Nevertheless, B's life is not causally related to vesting. Just as before, B-1's life is the only one that affects vesting. To be sure, B-1 is a child of B, but the mention of B in the limitation is superfluous. The gift of principal is not to all of B's grandchildren; instead, it is only to the children of B-1. B-1 is specifically described and identified within the limitation. B-1 is the only relevant parent, and it is only her life that governs the respective births of potential members within the class entitled to receive the principal. Nevertheless, the methodology calls for the testing of B's life under Step Three C even though one who understands the logic of the rule will know that B's life cannot possibly validate the gift of principal. As an aside, the interest does satisfy the rule. Under Step Three B of this methodology, B-1's life will be tested and it will validate the gift of principal to her children.

of the process itself. In a sense, it resembles many of the rules of arithmetic that some of us were taught to follow without comprehending the process by which we were actually solving the problems.<sup>139</sup> And like these rules of arithmetic, in time many who use this methodology will develop a facility with the common law rule and a real understanding of it—and, perhaps, their own shortcuts and improvements upon the proposed methodology.<sup>140</sup>

### III. TOWARDS A BETTER METHODOLOGY

#### A. *Some Preliminary Observations*

Before the specifics of the methodology proposed by this article are developed, several preliminary and important observations must be made. The title to this section is "Towards a Better Methodology," and it is stated in this way for good reason. The methodology offered has been developed with great care, and in the course of its formulation, many changes have been made to reflect new insights to problems that can be discovered only through time and application. The methodology, in its current form, works successfully on every problem this author has been able to conceive. Nevertheless, it may not be perfect; indeed, who knows what complex hypotheticals law professors might construct or what convoluted gifts imaginative lawyers might contrive. This article, therefore, does not offer a methodology that is without conceivable error

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139. In arithmetic, some of us were taught to solve problems of addition and multiplication by learning how to "carry." We also were taught to solve problems of subtraction by learning how to "borrow." In each instance, we conducted the arithmetic process and reached the correct solution through rigorous application of the rules for "carrying" and "borrowing." Little did we know, or for that matter care, about the "concept of tens" and the logic that underlies these rules. The knowledge and skills we acquired were focused on results. A true understanding of the process was only incidental, something that would, perhaps, evolve over time and repeated application of these rules. So it is with this perpetuities methodology. Although the aim of all good education, especially legal education, is to develop a thorough understanding of what we do and why we do it, somehow the logic of the common law rule against perpetuities has escaped too many lawyers. Nevertheless, lawyers must know when the rule has been satisfied or violated. They must know how to reach the correct result at all times. Absent a full understanding of the rule's internal logic, one must resort to a process that consistently and mechanically reaches correct solutions to perpetuities problems.

140. Once one comprehends the concept of causation, one might immediately observe, when confronted with a particular limitation, that a valid proof can be made with a certain person and not with others. And in this situation, a valid proof will be accomplished by proceeding directly to the specific step within the methodology (see *infra* Part Three B (1)) by which such proof can be made. In doing this, all other steps will be bypassed. For illustrations of the application of this advanced understanding of the process and the methodology, see *infra* notes 482-85.

and is irrevocably cast for all time. It is, instead, an effort "towards a better methodology."

One must also reemphasize that the focus of the proposal is upon formation of the group of lives in being established for the purpose of testing. The methodology attempts to fashion a finite group, and after applying the critical test to members within this group, one will know whether there is a violation of the common law rule.<sup>141</sup> This group will consist primarily of lives in being causally related to vesting, but it may exclude some of them from consideration in certain situations.<sup>142</sup> Further, on occasion this group will include for testing some lives that actually have no effect upon vesting in the particular limitation.<sup>143</sup> For these reasons, this methodology departs somewhat from recent terminology used to describe the common law process. It adopts the term "validating life in being"<sup>144</sup> to describe a person with whom one can make a successful proof. But it rejects such terms as "causal lives," "relevant lives," "connected lives," "limiting lives" and "lives postponing vesting" to describe the group of lives to be tested.<sup>145</sup> Although causation, relevancy, connection and postponement enter into the formulation of this group, this methodology employs another phrase to describe its members—one that does not reflect the mixture of principles upon which the group is actually based. Henceforth, within this article these people will be known as "testing lives in being" (and for short, as "testing lives").<sup>146</sup>

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141 Actually, one must take an additional step before knowing whether an interest violates the common law rule against perpetuities. If one concludes for all members within the groups established for testing that the interest can vest beyond twenty-one years of their respective deaths, this does not mean that such interest violates the rule. One must also determine whether the interest can vest more than twenty-one years after the time of its creation. More specifically, in the case of a devise or bequest, the time of creation is the testator's death. See *infra* Step Four, notes 196-97 and accompanying text.

142 See *supra* note 137.

143 See *supra* note 138.

144 In recent years, with respect to application of the common law rule, several commentators have advanced the use of this term instead of the more familiar "measuring life." See, e.g., J. DUKEMINIER & S. JOHANSON, *supra* note 59; Dukeminier, *supra* note 59, at 1649-50; Waggoner, *supra* note 50, at 1715; Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1722 (1983).

145 For the use of phrases such as "lives affecting (connected to, relevant to, causally related to) vesting," see Dukeminier, *supra* note 59, at 1650-52; Dukeminier, *supra* note 76, at 1731. For the use of the phrase "lives that restrict the vesting period," see Morris & Wade, *supra* note 53, at 496-97. For the use of the phrase "people connected to the transaction," see Waggoner, *supra* note 50, at 1716-17. For the use of the phrase "lives postponing vesting," see Featheringill, *supra* note 50, at 165, 167-68.

146 This methodology does not use the term "measuring life." Others reject it as well. See *supra* note 144. This term is rejected because, more than anything else, it reflects the confusion

Additionally, although this methodology purports to systematize and simplify the common law process, it cannot eliminate the complexities of the law of future interests generally, or especially as this body of law may relate to application of the rule.<sup>147</sup> To elaborate, the common law rule applies only to contingent interests.<sup>148</sup> To apply the critical test, one must know which interests a court will construe as contingent, and which conditions, express or implied, make the interests contingent. One must also assess the events that govern fulfillment of the condition so that one can determine the latest possible time for vesting. This is not an easy matter because the distinctions between vested and contingent interests are complicated and sometimes incapable of logical explanation.<sup>149</sup>

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people have in understanding and applying the common law rule. Frequently, commentators, teachers and students ask: Who is the measuring life? What they really may be intending to ask is: Who is the person about whom one can say that such interest must vest, if at all, within twenty-one years of his death? If so, then the answer will be: There is no such person whenever one concludes that a perpetuities violation exists. What the question seeks is a determination of the life by which the interest under consideration can be validated. Yet every time one finds a violation this means that there is no validating life in being to be found. This would be enough for students if that is all they intended to ask with this question. Frequently, even when one explains that there is no measuring life because a violation exists, they will persist with the same question: Who is the measuring life? They raise this question, again and again, because with it they are also intending to ask something else: Who are the lives in being that one considers on the way to making a determination that a perpetuities violation exists? In short, although in this question their teachers may be asking only who, if there be one, is the validating life, students are also asking who are the lives tested in finding the validating life or in determining that one does not exist. In reality, then, students are raising two questions. To facilitate the answer to both of these questions, this methodology employs two terms to replace "measuring life." It uses the term "validating life" to refer to the person about whom one can say that such interest must vest, if at all, within twenty-one years of his death. And it uses the term "testing life" or "testing lives" to refer to the lives considered in finding a validating life or in determining that one does not exist.

147. See J. GRAY, *THE RULE AGAINST PERPETUITIES* (1886). This monumental treatise by John Chipman Gray contains 453 pages, 78 of which are devoted generally to the law of future interests.

148. The common law rule against perpetuities provides that: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." J. GRAY, *supra* note 1, at 191. Distinguishing between contingent and vested interests can be extremely complicated since the bases by which courts make their classifications are not always underscored by logic. See *infra* notes 149, 246. These distinctions become all the more complex with respect to the rule against perpetuities because there are circumstances in which they are made differently from the methods used in other contexts. See *infra* notes 157-58 and accompanying text.

149. Decisions involving future interest problems frequently contain this statement of issue: "Is the interest contingent or vested?" The rules of construction governing the distinctions between contingent and vested interests are exceedingly complex and, in many respects, unclear. Commentators devote significant portions of their treatises to these distinctions. See, e.g., 5 *AMERICAN LAW OF PROPERTY* §§ 4.25-4.36, 21.5-21.32 (A. Casner ed. 1952); J. GRAY, *supra* note 1, at 88-113; L. SIMES & A. SMITH, *supra* note 22, §§ 131-66, 571-94. Too often, this stated issue obscures the

When a substitute gift is used, these distinctions may affect only the determination of whether the primary gift is contingent along with its substitute.<sup>150</sup> Nevertheless, when a limitation does not include a substitute

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question actually before the court. Indeed, to make this the apparent issue, and to resolve it, can sometimes confuse more than it clarifies.

There are at least two reasons for this confusion, complexity and predilection to misstate issues. First, although the words "vested" and "contingent" are used in, and are frequently critical to, legal analysis, they are words which have more than one accepted meaning. Accordingly, intelligent analysis is confounded whenever it is not made absolutely clear which meaning is being accorded this terminology. This plurality of meaning is explained by Professors Leach and Logan in their future interests coursebook:

The word *vested* is commonly used in at least four senses and *contingent* in at least three:

- (1) To say that an interest is vested may mean that it has become possessory or vested in possession. . . .
- (2) To say that an interest is vested may mean that, although it is still a future interest, it has acquired that metaphysical and artificial status which under the feudal law made it an estate rather than the possibility of becoming an estate—i.e., that it is vested in interest. A remainder is vested in this sense when it is not subject to a condition precedent other than the termination of the particular estate. . . .
- (3) To say that an interest is vested may mean that if the named taker dies before it becomes possessory the interest is transmissible to his estate, and that his heirs or distributees will take the interest which he would have taken had he lived. . . . Antithetically, contingent is used to denote that the interest is nontransmissible and that the named taker must survive to the time of vesting in possession. It has proved easy for courts to slip from an obvious premise that a remainder is contingent upon the occurrence of some collateral event . . . to the dubious conclusion that it is contingent in the sense here discussed and that the remainderman must be living when the estate becomes possessory. . . .
- (4) Where the Rule against Perpetuities is involved, to say that an interest is vested means that it has acquired the degree of certainty which under the Rule an interest must acquire within lives in being and twenty-one years or fail. The term contingent is used to indicate that the interest has not acquired the necessary degree of certainty. In the main these usages are the same as those discussed in paragraph (2).

W. LEACH & J. LOGAN, *CASES ON FUTURE INTERESTS AND ESTATE PLANNING* 253-54 (1961).

The other principal reason for these problems arises out of the illogical distinctions made in applying the definitions described in paragraph (2)—vested or contingent in interest. Leach and Logan point out. "A remainder is vested in this sense when it is not subject to a condition precedent other than the termination of the particular estate." *Id.* at 253. To be sure, if a remainder satisfies this definition it is vested. Yet, even if it does not, it can still be vested in interest. *See J. GRAY, supra* note 1, §§ 101-03, 108. *See also infra* notes 150-51, 153, 245. Although the definition described in paragraph (2) appears founded on the presence or absence of a precedent condition to possession, this distinction has been obscured and confused by the maze of exceptions courts have developed over the years. Accordingly, even if a court has correctly viewed the question presented—"vested or contingent in interest"—the solution it articulates may be neither easy nor sensible.

150. This can be illustrated with two variations of a testamentary trust created by A. First, consider this example: "Income to B for life, thereafter, principal to B's children at age thirty; the share of any child who fails to attain age thirty shall belong to those who do, but if none, then to C absolutely." Second, consider this example: "Income to B for life, thereafter, principal to such of B's children who attain age thirty; if none, then to C absolutely." In both examples, C's interest is clearly contingent. No matter how one might characterize the interest of B's children, C's interest is contingent and subject to the common law rule against perpetuities. Nevertheless, even though the condition appears to be the same in both examples, some courts will find that B's children have a

gift, these distinctions can affect the basic classification and, therefore, whether the provision is subject to the rule at all.<sup>151</sup> Above all, one cannot conduct the critical test without full knowledge of these distinctions,<sup>152</sup> including those that are obscure along with those that are obvious.<sup>153</sup>

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vested remainder subject to divestment in the first example and a contingent remainder in the second. See L. SIMES & A. SMITH, *supra* note 22, §§ 148-49. This difference in construction can, of course, govern the conditions affecting the time in which B's children are entitled to benefit from the principal. More important, it can affect the application of the common law rule against perpetuities and the existence of a violation.

151. This can be illustrated with two variations of a testamentary trust created by A. First, consider this example: "Income to B for life, thereafter, principal to B's children at age thirty." Second, consider this example: "Income to B for life, thereafter, principal to B's children, payable at age thirty." If there had been a substitute gift, B's children might have received a vested interest in both illustrations. See *supra* note 150. In the absence of a gift over, however, the classification will turn on the presence of one word—"payable." See L. SIMES & A. SMITH, *supra* note 22, § 586. In the first example, B's children have a contingent remainder that is subject to the common law rule against perpetuities. In the second example, B's children have a remainder that is vested absolutely with enjoyment postponed and is not subject to the rule.

152. To conduct the critical test, one must determine which interests are classified as contingent and, therefore, subject to the rule. Additionally, one must understand fully the nature of each condition, express or implied, and the latest time in which each condition might be fulfilled. Stated otherwise, one must isolate and focus carefully upon each condition and then determine the latest possible time for vesting. For further discussion, see *infra* notes 273-78 and accompanying text.

153. Some distinctions are, of course, quite obvious. Consider this testamentary trust created by A: "Income to B for life; thereafter, principal to B's children absolutely." Assume that B and B's three children (B-1, B-2 and B-3) survive A, but that B-1 thereafter predeceases B. Absent other language to the contrary, all courts should conclude that B-1's interest vested absolutely at A's death, that B-1's share of the remainder interest in the principal passes to his successor at the time of his death, and that possession of this share of the principal will belong to B-1's successor at the time of B's subsequent death.

A different conclusion, however, must be reached if the gift of principal had read: ". . . thereafter, principal to B's children then living absolutely and forever." B-1's interest fails, with the principal to be divided ultimately among those children who actually survive B. The reason is obvious: the language includes an express requirement of survivorship that renders the remainder contingent. There is a clear condition attached to the requirements for possession of the remainder interest beyond the expiration of B's prior income interest. This is enough to make the remainder contingent. Absent this express language of survivorship, there would seem to be no such requirement just as there was none in the original example.

In the original example, one would assume that, upon B's death, the trustee must divide the corpus and then pay it over to each of B's children or their successors in interest. Nevertheless, some of the distinctions courts make are not obvious. For example, if the foregoing direction for division and payment impliedly imposed upon the trustee had been made explicit, some courts would treat such language the same as an express requirement of survivorship of the time of possession—B's death. This distinction rests upon a dubious rule known as the "divide and pay over rule." For further discussion of this rule, see Becker, *Future Interests and the Myth of the Simple Will: An Approach to Estate Planning—Part One*, 1972 WASH. U.L.Q. 607, 613-14 n.13. There are other obscure distinctions between contingent and vested interests. See *supra* note 151.

It should also be noted that these distinctions are not the only principles of future interests that must be mastered. For example, sometimes one must know about the common law rule that can result in the destruction of a contingent remainder.<sup>154</sup> Does the rule still apply in the jurisdiction that governs the subject matter of the dispositive instrument?<sup>155</sup> If so, how might it affect the latest time for vesting of legal remainders created under a will? Indeed, knowledge of this rule may become important because it sometimes saves contingent interests which otherwise would be invalid if indestructible.<sup>156</sup>

One must also know a great deal about the rules of construction that govern the composition of class gifts because of the special features of the common law rule as it applies to these kinds of interests. Unlike other vested interests, members of a class whose interest must vest, if at all, within the period of the rule—including even those members whose interests vest immediately upon creation—may still be subject to the rule and even violate it. The common law rule treats the class as a single

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154 At common law, and even today in a number of jurisdictions (*see infra* note 155), a freehold contingent remainder must vest by the time all preceding possessory freehold estates terminate, and if it does not, then such contingent remainder is destroyed. This rule derives from two feudal precepts: seisin must be continuous, it cannot be held in abeyance; and no freehold estate can be created to commence in the future. This rule of destructibility most commonly operates when a supportive freehold estate terminates before the condition imposed upon a remainder is satisfied. Consider, for example, this devise of Blackacre by A: "To B for life; thereafter, to C in fee simple absolute if he attains age thirty." Assume that both B and C survive A and that C is age ten at the time of A's death. Because C's remainder is subject to a precedent condition that he attain age thirty, C's interest is classified as a contingent remainder in fee simple absolute. C cannot claim possession until B dies and until and if he reaches age thirty. If C dies before satisfying this age requirement, his interest will fail. Nevertheless, because of the rule of destructibility applicable to C's contingent remainder, his interest will also fail if C has not yet reached age thirty by the time of B's death. It will fail immediately upon B's death and be destroyed even though C subsequently attains age thirty. The practical effect of this rule upon C's contingent remainder is to subject it to a condition that C reach age thirty and that he do so by the time of B's death. For further discussion of the doctrine of destructibility, see C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 133-39 (2d ed. 1988); L. SIMES & A. SMITH, *supra* note 22, §§ 191-209.

155 In England a series of statutes commencing in 1845 abolished the destructibility rule. In the United States approximately one half of the states have enacted statutes abrogating the rule in whole or in part. In a few jurisdictions there are decisions rejecting the rule without the aid of legislation. Only in Florida, Oregon, Pennsylvania, and Tennessee do the cases recognize that the rule continues to exist . . . . In about twelve states there are no decisions on the point and no legislation. The position taken by the Restatement of Property that contingent remainders are indestructible may influence these uncommitted jurisdictions to reject the doctrine of destructibility. C. MOYNIHAN, *supra* note 154, at 138-39 (footnotes omitted).

156 For an illustration of how the common law rule of destruction might operate to avoid a perpetuities violation, see *infra* illustration IV B-3. See also *Drury v. Drury*, 111 Ill. 336, 111 N.E. 140 (1916).

entity; if any potential member's interest causes a violation, then the entire class gift is invalid and it must fail. The rule requires, therefore, that full membership within the class be determined within the allowed time.<sup>157</sup> Stated differently, if any potential member can join the class beyond the period of the rule, then the interests of all class members violate the rule, including those members who had vested interests from the outset.<sup>158</sup> Accordingly, to apply the common law rule correctly, one must know exactly when the last potential member can join the class. And to do this, one first must determine the very latest time in which a potential member can be born. If membership is subject to further conditions, one then must determine the latest time a potential member can satisfy such conditions and join the class.<sup>159</sup>

Further, it should be observed that these determinations must be made in light of other principles that circumscribe the opening and closing of classes and, therefore, affect the latest time in which a potential member can join the class. For example, even though the latest time in which a potential class member can be born has not arrived, when the limitation calls for earlier distribution of a member's share, the "rule of convenience" may require that the class be closed, and that people who are born thereafter and later satisfy the descriptive requisites and conditions of the class be precluded from becoming members.<sup>160</sup> Consequently, there are

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157. See, e.g., R. MAUDSLEY, *supra* note 21, at 39-42; L. SIMES & A. SMITH, *supra* note 22, § 1265.

158. This "all or nothing" principle—that the interests of all class members violate the rule unless the identity of every actual member must, if at all, be determined within the period of the rule—has been soundly criticized. See 6 AMERICAN LAW OF PROPERTY § 24.26 (A.J. Casner ed. 1952); Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 HARV. L. REV. 1329 (1938). Consistent with this criticism, it has been the subject of legislative reformation. See, e.g., Perpetuities and Accumulations Act, 1964, ch. 55, §§ 4(3),(4) (England). Some courts have also rejected the principle. See, e.g., *Carter v. Berry*, 243 Miss. 321, 140 So. 2d 843 (1962).

159. For further discussion and illustration, see *infra* text accompanying notes 275-78; see also *infra* illustration IV A-6.

160. In the main, construction problems regarding the closing of a class arise when, at the earliest date distribution can be made, an increase in potential members is still physically possible. Suppose, for example, that A leaves a testamentary trust that governs the residue of his estate in the following manner: "Income to my wife, W, for life; thereafter, the principal shall be sold and the proceeds distributed to my grandchildren in equal shares." Assume that A is survived by his wife, W, and three young children, A-1, A-2, and A-3, but not by grandchildren. Subsequently, assume that at W's death all three children survive along with A-1's child, G-1, who happens to be the only grandchild A has had by that time. Finally, assume that within five years of W's death, two additional grandchildren are born, namely, G-2, the child of A-2, and G-3, the child of A-3.

Which grandchildren are entitled to share in the remainder of the residuary trust? All grandchildren of A whenever they might be born, including G-1, G-2, and G-3? Perhaps this is what A

circumstances in which class membership will be fully determined before the possibility of afterborn people within the group description has become exhausted. A precise understanding of how and when to apply this rule of construction is important because it can operate to save a class gift that otherwise would violate the common law rule. By forcing an earlier closing of a class, this "rule of convenience" sometimes assures that the vesting of all interests within the class must occur, if at all, within the period of time allowed by the common law rule.<sup>161</sup>

Finally, before one conducts any version of the common law process, several observations should be made about the time in which the period of the rule commences and about the facts that can be accounted for in projecting possibilities for remote vesting. Generally speaking, the period begins from the time the subject matter of the dispositive instrument

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intended, or would have wished had his estate planner raised the issue with him. Yet, the construction given by courts in this situation is apt to compel quite a different result. Unless A adequately directs otherwise, if a grandchild is able to take at the date distribution is called for, the maximum class membership is fixed at that time. Relying heavily upon A's direction for distribution, courts have fixed maximum membership to determine the minimum size of the share a grandchild is then entitled to take. And this necessarily means that potential members of the class (herein at least G-2 and G-3) will be precluded from enjoying an interest in their grandfather's estate. Grandchildren born after the date of first distribution (herein the death of W) take nothing.

The reasons courts give for this position are certainly open to question. Courts have, for the most part, been unwilling to inconvenience themselves by exercising continuous supervision over a share which has already been distributed. Accordingly, they have refrained from making distribution subject to partial recall in the event others thereafter become entitled to share in the gift, thus reducing the size of each recipient's distributed share. Further, courts have been reluctant to ignore completely an estate owner's direction for distribution to members of a class occurring before possibility of added membership becomes extinct. To hold the class open long enough to include all potential members, which in this illustration would be until all of A's children died, would require either making distributions subject to partial recall, a choice courts believe is both impractical and inconvenient, or withholding distribution until further membership became an impossibility, a choice courts regard as a flat-out repudiation of the estate owner's intent. Therefore, courts have adopted what they consider a compromise, an accommodation of intent known as the rule of convenience. In the foregoing example, A is regarded as having intended, and thus by implication declared: ". . . to my grandchildren in equal shares who are born prior to the date set for first distribution." And if only A-1 had children by the date of W's death, then only these grandchildren would take. Surely, it is questionable whether this reflects the probable intent of A. The rule, therefore, may be convenient for the court and convenient for members eligible to take, but it is certainly inconvenient for those not born in time and consequently excluded. For full discussion of the rule of convenience and of related principles that govern determination of the maximum membership of a class, see 5 AMERICAN LAW OF PROPERTY §§ 22 39-46 (A.J. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, §§ 634-51.

161 For illustrations of these circumstances, see *infra* notes 258-59 and accompanying text, and notes 279-82 and accompanying text. See also L. SIMES & A. SMITH, *supra* note 22, § 1270 for illustrations of how the rules governing determination of maximum class membership affect application of the common law rule against perpetuities.

is "tied up."<sup>162</sup> It is at this point in time that validating lives in being must be found. Accordingly, it is among people alive at this time from which one must assemble a pool of testing lives in being. In the case of a will, the rule begins with the death of the testator,<sup>163</sup> while in the case of an irrevocable life time transfer, it begins from the time in which such transfer is consummated.<sup>164</sup> In the case of a revocable lifetime transfer, however, the period begins when the power of revocation ends—usually at the transferor's death—even though the transfer became legally effective when the dispositive instrument was previously executed.<sup>165</sup>

Additionally, it is at this same time that the rule requires the projection of possibilities of remote vesting. More specifically, one must make a proof of validity in the light of only those facts known when the period of the rule commences. Stated differently, for an interest to be valid, the common law rule requires that one prove, on the basis of possibilities existing when the period begins, either that there is no possibility for vesting later than twenty-one years after the death of some life in being or that there is no possibility for vesting later than twenty-one years after the property is "tied up."<sup>166</sup>

One important exception should be noted with respect to powers of appointment. Under the common law rule, because a general power of appointment by deed or by will does not encumber the donee's use or

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162. See L. SIMES & A. SMITH, *supra* note 22, § 1226.

163. See *id.*

164. See *id.* See also R. MAUDSLEY, *supra* note 21, at 38.

165. See L. SIMES & A. SMITH, *supra* note 22, § 1226. One might observe that Gray's statement of the common law rule against perpetuities has the period begin "at the creation of the interest." J. GRAY, *supra* note 1, at 191. Nevertheless, consistent with the underlying policy of the rule, this has been reinterpreted to mean that the period of the common law rule is measured from the time the property is "tied up." In most instances, this occurs at the time the dispositive instrument takes effect and the interest in question is created. However, in the case of a revocable living trust, the period of the rule is measured from the time the settlor dies. Even though in theory interests are created at the time the trust is validly executed, the capacity to alienate and market the subject matter is not significantly affected until the power of revocation is suspended by the settlor's death.

166. One cannot overemphasize that the common law rule against perpetuities requires a proof of vesting or failure to vest based upon *possibilities*, not actualities. What might happen is relevant to establishing validity; what actually happens is totally irrelevant. See Dukeminier, *supra* note 130, at 1870-72, 1876-80. Consider this devise of Blackacre by A: "To B in fee simple; however, if Blackacre is ever used for any purpose other than residential, then to C in fee simple absolute." In this illustration, C's contingent executory interest violates the common law rule against perpetuities. See *infra* illustration IV B-1. C's interest fails because of a perpetuities violation even if B actually causes a land use violation within five years of A's death. A violation occurs even though the breach actually occurs within the lifetime of a life in being (B) and, additionally, even though it actually occurs within twenty-one years of A's death (the time when the period of the rule begins).

alienability of the property, the period does not begin until the donee actually exercises such power.<sup>167</sup> The period of the rule, however, is different for a special power of appointment and for a general testamentary power of appointment. Because the donee's discretion to alienate is significantly limited, the period of the rule begins when the power is created and not when it is exercised.<sup>168</sup> Nevertheless, unlike other applications of the common law rule, one does not have to make a proof in light of facts—and therefore possibilities—known when the period begins. The common law process allows a delay in application until the donee actually exercises the power, and then it allows a proof to be made in light of possibilities existing at that same time.<sup>169</sup> In short, although the period

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167 The period of the rule commences when the donee exercises a general power presently exercisable by deed or will because the donee has the power at any time to make the subject matter his own and, therefore, its alienability is not impaired after the power is created. For this reason, the perpetuities period is deferred beyond the time the power is created. For a discussion of the rule against perpetuities in relation to powers of appointment, see 6 AMERICAN LAW OF PROPERTY §§ 24.30-36 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, §§ 1271-77. For an elaboration of the methodology regarding such general powers of appointment and an illustration of its application, see *infra* notes 210-19 and accompanying text; illustration IV A-10.

168. Under general testamentary powers of appointment, the subject matter is tied up until the power can be exercised at the donee's death. Until then, the donee cannot make the subject matter his own, and then it is only for the benefit of his estate. And under special powers of appointment, disposition of the subject matter is tied up throughout; the donee cannot make it his at any time. Accordingly, special powers and general testamentary powers are subject to a perpetuities period measured from the time the power is created. For a discussion of the rule against perpetuities in relation to powers of appointment, see 6 AMERICAN LAW OF PROPERTY §§ 24.30-36 (A. Casner ed. 1952), L. SIMES & A. SMITH, *supra* note 22, §§ 1271-77. For an elaboration of the methodology regarding general testamentary and special powers of appointment and an illustration of its application, see *infra* notes 197-209 and accompanying text; illustration IV A-8.

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

begins when the donor creates the power, in applying the rule one can delay until the power is exercised and can therefore account for all events and facts that materialize between the time of creation and exercise.<sup>170</sup>

## *B. The Methodology Stated and Explained*

The following methodology presents a series of questions which are developed in a several step analysis. Once again, the basic purpose of these questions is to isolate potential validating lives in being and to subject them to the critical test: Must the contingent interest under consideration vest, if at all, within twenty-one years of the death of such person?<sup>171</sup> In selecting and testing these lives in being, once one is able to make a proof—once one establishes that vesting cannot occur beyond twenty-one years of such person's death—the interest is valid and the process ends without proceeding to subsequent questions. To establish a violation of the common law rule, however, one must proceed through all of the questions and steps of the methodology. Only then will one know that there is no validating life to be found and that vesting can occur beyond the allowed time period.<sup>172</sup>

### *1. The Methodology Stated*

#### *a. The Basic Methodology*

#### **Step One—Determination of When the Period of the Common Law Rule Begins**

**When does the period of the rule commence—from what point in time is the subject matter of the interest “tied up”?**<sup>173</sup>

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see 6 AMERICAN LAW OF PROPERTY §§ 24.34-.35 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, §§ 1274-75. For an illustration of how this “second look” is applied, see *infra* illustration IV A-8.

170. For further discussion and elaboration of the proposed methodology in regard to powers of appointment, see *infra* notes 197-219 and accompanying text. For an illustration of the methodology as applied to a special power of appointment, see *infra* illustration IV A-8.

171. See *infra* Steps Three A, Three B, Three C, and Three D, text accompanying notes 175-95.

172. To find a violation of the common law rule, one must, of course, determine that no validating life exists. This is accomplished with the use of Steps Three A, Three B, Three C, and Three D. Each of these steps isolates testing lives in being and applies the critical test to them. Nevertheless, the failure to discover a validating life in being does not necessarily mean that the interest violates the rule. One must proceed through the entire methodology, including Step Four which applies the critical test without any life in being: Must the interest vest, if at all, within twenty-one years of the time the period of the rule begins? See *infra* Step Four, text accompanying note 196.

173. See *supra* notes 162-65, 167-68 and accompanying text.

### Step Two—Determination of Which Interests are Contingent.

Which interests are contingent under the common law rule against perpetuities? And what conditions, express or implied, make them contingent?<sup>174</sup>

### Step Three—Selection of Testing Lives In Being and the Application of the Critical Test to Determine Whether a Validating Life In Being Exists

A. Looking to the taker or group of takers of the interest in question, in light of facts known when the period of the rule commences, is such individual or group restricted to lives in being and to lives already ended when the period of the rule begins because of descriptive language, because of applicable rules of construction, or because they are not physically capable of expansion or reconstitution to include those that are afterborn?<sup>175</sup>

If the answer is NO, then proceed to the next group of potential testing lives in being contained in Step Three B.

If, however, the answer is YES, then use such taker or takers to test after eliminating those who have predeceased the point in time when the period of the rule begins.<sup>176</sup> Looking at all possibilities for vesting in light of facts known when the period of the rule begins and in light of applicable rules of construction and principles of law,<sup>177</sup> including those possibilities that are most remote, must the interest vest, if at all, within twenty-one years of the death of one of these testing lives in being?<sup>178</sup>

If the answer is YES, then such testing life becomes a validating life in being; therefore, the interest is VALID—it satisfies the common law rule against perpetuities—and one need go no further with the process.

If, however, the answer is NO, if the interest can vest beyond

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174. For further discussion and explanation of Step Two, see *infra* notes 238-50 and accompanying text.

175. For further discussion and explanation of Step Three A, see *infra* notes 251-60 and accompanying text.

176. For further discussion and elaboration, see *infra* notes 267-68 and accompanying text.

177. For further discussion and elaboration, see *infra* notes 279-82 and accompanying text. For an illustration of why and how one accounts for relevant rules of construction and principles of law in applying the critical test, see *infra* illustration IV B-3.

178. For further discussion and explanation of the critical test, see *infra* notes 269-82 and accompanying text.

twenty-one years of the deaths of each of these testing lives in being, then proceed to the next group contained in Step Three B.

**B. Looking to each of the other individual takers or groups of takers within the same provision, in light of facts known when the period of the rule commences, is such individual or group restricted to lives in being and to lives already ended when the period of the rule begins because of descriptive language, because of applicable rules of construction, or because they are not physically capable of expansion or reconstitution to include those that are afterborn?<sup>179</sup>**

If the answer is NO for each of these other takers or groups of takers, then proceed to the next group of potential testing lives in being contained in Step Three C.

If, however, the answer is YES for any other individual taker or group of takers, then use such other taker or takers to test after eliminating<sup>180</sup> those who have predeceased the point in time when the period of the rule begins.<sup>181</sup> Looking at all possibilities for vesting in light of facts

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179. For further discussion and explanation of Step Three B, see *infra* notes 261-66 and accompanying text. See also *supra* note 175.

180. One sometimes might wish to eliminate other takers as testing lives even though they are clearly restricted to lives in being and to lives already ended. As the methodology indicates, one does not actually test with lives already ended when the period of the rule commences. See *supra* note 176. Additionally, one might eliminate an other taker or takers when such person or persons are also takers of the interest in question and have previously been tested and failed to validate. This should not be done, however, when the definition of the other taker is different from the taker of the interest in question even though their identity might be the same. Consider, for example, this testamentary trust created by A: "Income to B and C for their joint lives, and then income to the survivor of them for life; thereafter, if a Democrat is then President of the United States, principal to B absolutely, and if a Republican is then President of the United States, principal to C absolutely." B and C qualify as testing lives under Step Three A; nevertheless, in testing them individually, one cannot make a valid proof. One cannot say that B's alternative contingent remainder must vest, if at all, within twenty-one years of B's death, nor can one say that C's alternative contingent remainder must vest, if at all, within twenty-one years of C's death. B and C also qualify as other takers with respect to the joint life estate, and because they are defined in the same way as they are described as takers of the interest in question, one can dismiss them for purposes of further testing. Nevertheless, there is an additional other taker that cannot be dismissed; namely "the survivor of them." The "survivor of them" will be either B or C, and he is also a potential taker of the interest in question. Both description and definition of this other taker differ from that of the taker of the interest in question. Accordingly, given the fact that the survivor is restricted to a life in being, one must apply the critical test to him. Although neither B nor C, as such, affords a valid proof, one can say for the "survivor of them" that the interests in question must vest, if at all, at his death. This discussion may appear overly complicated to some who use this methodology. The solution for them is a simple one: when in doubt, do not dismiss an other taker, but instead apply the critical test to him.

181. See *supra* note 176.

known when the period of the rule begins and in light of applicable rules of construction and principles of law,<sup>182</sup> including those possibilities that are most remote, must the interest vest, if at all, within twenty-one years of the death of one of these testing lives in being?<sup>183</sup>

If the answer is YES, then such testing life becomes a validating life in being; therefore, the interest is VALID—it satisfies the common law rule against perpetuities—and one need go no further with the process.

If, however, the answer is NO, if the interest can vest beyond twenty-one years of the deaths of each of these testing lives in being, then proceed to the next group contained in Step Three C.

C. Looking to specific people or groups of people otherwise mentioned or separately and differently mentioned within the same provision or elsewhere in other provisions directly related,<sup>184</sup> in light of facts known when the period of the rule commences, is such individual or group restricted to lives in being and to lives already ended when the period of the rule begins because of descriptive language, because of applicable rules of construction, or because they are not physically capable of expansion or reconstitution to include those that are afterborn?<sup>185</sup>

If the answer is NO for each of these other individual people or groups of people, then proceed to the next group of potential testing lives in being contained in Step Three D.

If, however, the answer is YES for any such mentioned person or groups of people, then use such person or group to test after eliminating<sup>186</sup> those who have predeceased the point in time when the period of the rule begins.<sup>187</sup> Looking at all possibilities for vesting in light of facts

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182. See *supra* note 177.

183. See *supra* note 178.

184. For further discussion and explanation of Step Three C, see *infra* notes 282-98 and accompanying text. For specific discussion of the phrase "provisions directly related," see *infra* notes 295-98 and accompanying text.

185. For further discussion concerning the determination of whether such individual or group is restricted to lives in being and to lives already ended, see *supra* note 175.

186. The problem of avoiding duplicative testing and eliminating lives that already qualify under Steps Three A or Three B, see *supra* note 180, should not arise under Step Three C. Someone who is already a taker of the interest in question or an other taker will not qualify as a testing life under Step Three C unless he is "separately and differently mentioned." See *infra* notes 282-98 and accompanying text. Accordingly, only those lives already ended should be dismissed. As a general rule, however, when in doubt, one should apply the critical test, even when it seems to repeat the process unnecessarily.

187. For further discussion, see *supra* note 176.

known when the period of the rule begins and in light of applicable rules of construction and principles of law,<sup>188</sup> including those possibilities that are most remote, must the interest vest, if at all, within twenty-one years of the death of one of these testing lives in being?<sup>189</sup>

If the answer is YES, then such testing life becomes a validating life in being; therefore, the interest is VALID—it satisfies the common law rule against perpetuities—and one need go no further with the process.

If, however, the answer is NO, if the interest can vest beyond twenty-one years of the deaths of each of these testing lives in being, then proceed to the next group contained in Step Three D.

D. Once again, looking to the taker or group of takers of the interest in question, if one has previously answered in Step Three A, YES, that such individual or group is restricted to lives in being and to lives already ended when the period of the rule begins, and after testing with these lives in being one has also answered NO, that there is no testing life in being within this group about whom one can say such interest must vest, if at all, within twenty-one years of his death, then proceed to Step Four.<sup>190</sup>

If, however, one has previously answered in Step Three A, NO, that such individual taker or group of takers is not restricted to lives in being and to lives already ended when the period of the rule begins, then proceed to the next question within this step.

In light of facts known when the period of the rule commences, do the parents that provide the relationship necessary to satisfy the description of such taker or group of takers consist exclusively of lives in being and lives already ended when the period of the rule begins because they are not physically capable of expansion or reconstitution to include those that are afterborn?<sup>191</sup>

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188. For further discussion, see *supra* note 177.

189. For further discussion, see *supra* note 178.

190. There is good reason why the parents of the takers of the interest in question should be bypassed in this situation. If the takers themselves are restricted to lives in being, they will fail to validate only when the condition that renders their interest contingent is unrelated to their lifetimes or is specifically performable more than twenty-one years after their deaths. If their lives do not validate, neither will their parents' lives unless the condition itself is specifically connected to the lives of the parents. Even if the parents' lives are tied to the fulfillment of the condition, there is no need to apply the critical test to them under Step Three D because the connection already qualifies them for testing under either Step Three B or Step Three C.

191. For further discussion, see *infra* notes 299-312 and accompanying text. There is no need to carry the process further and search for validating lives among ancestors more remote than parents.

If the answer is **NO** for any of these parents, then proceed to Step Four.

If, however, the answer is **YES** for these parents, then proceed to the next question within this step.

Do such parents fully coincide with testing lives in being previously tested under either Step Three B or Step Three C?<sup>192</sup>

If the answer is **YES** for these parents, then proceed to Step Four.

If, however, the answer is **NO**, then use these parents to test after eliminating those who have predeceased the point in time when the period of the rule begins.<sup>193</sup> Looking at all possibilities for vesting in light of facts known when the period of the rule begins and in light of applicable rules of construction and principles of law,<sup>194</sup> including those possibilities that are most remote, must the interest vest, if at all, within twenty-one years of the death of one of these testing lives in being?<sup>195</sup>

If parents of the takers in interest fail to validate, then so will grandparents or great grandparents unless they are connected to the fulfillment of the condition. And if their lives are tied to the condition, they already will have qualified for testing under Steps Three B or Three C.

Professor Dukeminier, in his most recent explanation of the common law rule, sets out the various groups of people who are most likely to "affect vesting." Among them is: "Any person who can affect the identity of the beneficiary or beneficiaries. . . ." His illustration uses parents of such beneficiaries; presumably, however, this group could also include grandparents, great grandparents, etc. See Dukeminier, *supra* note 130, at 1875. Conceivably, Dukeminier might exclude these more remote ancestors on the basis of an additional principle: redundancy. *Id.* at 1874-75. Yet it is not clear. His example of redundancy uses a parental spouse. "You cannot prove anything by them that you cannot prove by (the parent)" *Id.* at 1874. This would be true for all ancestors beyond parents unless the condition is somehow specifically tied to their lifetimes. In such a case, Dukeminier would include them under another group: "Any person who can affect any condition precedent attached to the gift, or, in case of a class gift, any person who can affect a condition precedent attached to the interest of any class member." *Id.* at 1875. The implication, then, is that "the person who can affect the identity of the beneficiary or beneficiaries" is limited to the parent who satisfies the necessary relationship. Nevertheless, Dukeminier does not specifically limit this group to such parents; accordingly, one might assume that they include others as well—namely, more remote ancestors.

192. For further discussion, see *infra* notes 299-312 and accompanying text. Unlike Step Three B, see *supra* note 180, the text of the methodology makes explicit a separate set of questions that attempts to avoid repetitious and fruitless application of the critical test. The methodology incorporates this substep because of the great likelihood that the parents of the taker or takers of a gift of principal have been previously considered as other takers, under Step Three B, or as people otherwise mentioned or separately and differently mentioned, under Step Three C. Nevertheless, if a determination of congruency with lives previously tested under Step Three B or Step Three C becomes confusing, one can omit this substep and apply the critical test to such parents. Just as before, when in doubt, apply the critical test.

193. For further discussion, see *supra* note 176.

194. For further discussion, see *supra* note 177.

195. For further discussion, see *supra* note 178.

If the answer is YES, then such testing life becomes a validating life in being; therefore, the interest is VALID—it satisfies the common law rule against perpetuities—and one need go no further with the process.

If, however, the answer is NO, if the interest can vest beyond twenty-one years of the deaths of each of these testing lives in being, then proceed to Step Four.

#### Step Four—Application of the Critical Test with the Period of Years Only

Looking to the interest in question and at all possibilities for vesting in light of facts known when the period of the rule begins and in light of applicable rules of construction and principles of law, including those possibilities that are most remote, must that interest vest, if at all, within twenty-one years of the time when the period of the rule commences?<sup>196</sup>

If the answer is YES, then the interest is VALID—it satisfies the common law rule against perpetuities—and one need go no further with the process.

If, however, the answer is NO, if it can vest beyond twenty-one years of the time the period of the rule commences, then the interest violates the common law rule against perpetuities and it is invalid.

Once again, there is no violation of the common law rule against perpetuities when one reaches a conclusion that the interest is VALID under either Step Three A, Step Three B, Step Three C, Step Three D, or Step Four. To find a violation, however, one must proceed through all of the foregoing steps without reaching a conclusion that the interest is valid under any one of them.

#### *b. Multiple Conditions*

Before offering some further elaboration and explanation of the foregoing steps and the questions within them, it should be observed that this methodology requires several addenda to deal with special situations and the problems they present. To begin with, there is the matter of multiple conditions.<sup>197</sup> Multiple conditions do not arise very often, and when

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196. For further discussion, see *infra* notes 317-26 and accompanying text.

197. For further elaboration and explanation of substitute Step Two concerning multiple conditions, see *supra* notes 238-50 and accompanying text.

Beyond this addendum involving multiple conditions, there are addenda that concern powers of appointment, including discretionary powers given to trustees. See *infra* notes 198-219 and accompanying text. For an addendum that addresses the situation in which the transferor has merely an

they do, frequently one can consolidate the testing of these conditions because one condition subsumes all others. As a result, most students have little difficulty with the situations in which multiple conditions arise. Somehow, they are able to make whatever adjustments are needed to apply the common law rule correctly. Nevertheless, there are those who will have a difficult time of it; consequently, this addendum on multiple conditions is included. When used, it should be substituted for Step Two. Finally, because this substitute Step Two introduces greater complexity in the application of the methodology, all elaboration, explana-

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interest of limited duration, see *infra* notes 220-23, 227-37 and accompanying text. For a discussion of contingent gifts to charitable institutions, see *infra* note 239. For further discussion of multiple conditions that are expressly split in the alternative, see *infra* note 250. For a discussion of gifts to subclasses or gifts to classes on a per capita basis, see *infra* note 244.

Another situation that warrants brief but separate attention concerns options to purchase. Generally options which give the optionee a right to specific performance create in the optionee a contingent equitable interest that is subject to the common law rule against perpetuities. Consequently, the rule then would apply to option contracts involving land or unique personal property. If so, the option is invalid unless it must be exercised, if at all, within the period of the rule. Whenever and wherever an option must satisfy the common law rule, the process for applying the methodology requires an obvious and simple adjustment. The optionor who creates the option must be treated the same as any other transferor; in particular, the optionor cannot become a testing life in being unless he independently qualifies under one of the steps of Step Three. If the optionor is also the optionee (as may be the case with a transfer accompanied in the same instrument by a right to repurchase), then the option may constitute a right of re-entry and, therefore, escape application of the rule altogether. Additionally, the optionee who receives the right to exercise the option must be viewed as a taker of the interest in question, and one then must examine whether either the optionee or his parents qualify as a testing life in being under Steps Three A and Three D. Finally, because optionors frequently give options to corporate entities, there are circumstances in which the optionee cannot possibly serve as a testing life in being under Step Three A. See *infra* note 251.

Despite the foregoing discussion, it is not entirely clear whether and when options, or the variant preemptive options, are subject to the common law rule against perpetuities. Because of the impact options have upon the alienability and improvement of land, two bodies of law would seem to govern: perpetuities and direct restraints upon alienation. Most courts and commentators conclude that options given to lessees for the term of their respective leases ought not to be subject to either the rule against perpetuities or the rule that forbids direct restraints upon alienation. Others question any application of the rule against perpetuities to commercial transactions of this nature. In principle, the period allowed by the common law rule is too long, while in application they observe that these options are always intended to expire within a reasonable time, something less than twenty-one years. Many also believe that preemptive options should be subject to the rule which forbids unreasonable restraints against alienation, but that these options should be free of the rule against perpetuities. The real perpetuities issue respecting these options, then, is not *how* the common law rule should be applied, but *whether and when* it should be applied. For a full discussion of these problems, see 6 AMERICAN LAW OF PROPERTY §§ 24.56-.57, 26.64-.67 (A. Casner ed. 1952); RESTATMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) ch. 4, at 210-28 (1983); L. SIMES & A. SMITH, *supra* note 22, §§ 1154, 1243-45; Dukeminier, *supra* note 130, at 1908-09.

tion and illustration of the methodology that appears hereafter will reflect inclusion of this substitute.

### **Step Two—Determination and Assessment of Contingent Interests**

**A.** Which interests are contingent under the common law rule against perpetuities? And what conditions, express or implied, make them contingent?

**B.** Is the contingent interest in question subject to multiple conditions which are express or implied?

If the answer is **NO**, then proceed directly to Step Three and, if necessary, Step Four to determine whether a valid proof can be made.

If, however, the answer is **YES**, then proceed to Step Two C.

**C.** Do the multiple conditions appear cumulatively; that is, does the language impliedly or expressly require satisfaction of each of the multiple conditions before the interest in question vests?

If the answer is **NO** because the multiple conditions appear alternatively, so that the interest can vest if any one of the group of alternative conditions is satisfied, then proceed to Step Two D.

If, however, the answer is **YES**, then proceed to Step Two C (1). Finally, if there are conditions appearing alternatively and there are also other conditions appearing cumulatively, then one must make a determination of validity or invalidity for the alternative conditions by proceeding with Step Two D. And one must make a determination of validity or invalidity for the cumulative conditions by proceeding with Step Two C (1).

(1). Among the multiple cumulative conditions, is there a condition that completely subsumes one or more of the other conditions, so that such subsuming condition cannot be satisfied without also satisfying the requirements of the subsumed condition or conditions as well?

If the answer is **NO**, then proceed to Step Two C (2).

If, however, the answer is **YES**, then also proceed to Step Two C (2). Nevertheless, in doing so, one should test the subsuming condition along with other conditions required by Step Two C (2), recognizing that the subsuming condition cannot be validated under Step Three and, if necessary, Step Four without prior or simultaneous validation of the subsumed condition. Finally, if the subsuming condition subsumes each of

the other multiple conditions, then proceed directly to Step Three and, if necessary, Step Four to determine whether a valid proof can be made with the subsuming condition.

(2). Looking to each of the cumulative conditions, does the same act or event satisfy the requirements of two or more of the cumulative conditions?

If the answer is NO, then proceed directly to Step Three and, if necessary, Step Four to determine whether a valid proof can be made. In doing so, one should evaluate and test each of the cumulative conditions separately, recognizing that the interest in question is valid only if a valid proof can be made with all of the cumulative conditions.

If, however, the answer is YES, then proceed directly to Step Three and, if necessary, Step Four to determine whether a valid proof can be made. In doing so, one should evaluate and test each of the cumulative conditions separately, recognizing that the interest in question is valid only if a valid proof can be made with any one of the multiple cumulative conditions predicated upon the same event and all of the cumulative conditions predicated upon different events.

D. Having concluded under Step Two C that there are multiple conditions that appear in the alternative, one must now examine and evaluate these conditions. In doing so, first dismiss those implied conditions that are implied derivatives of the express condition to which they are joined in the alternative. If elimination of these implied derivatives leaves one with a single express condition and not multiple conditions, then proceed directly to Step Three and, if necessary, Step Four to determine whether a valid proof can be made with respect to such condition. If, however, one is left with multiple conditions, then also proceed directly to Step Three and, if necessary, Step Four to determine whether a valid proof can be made with the remaining express conditions that separately appear in the alternative. In doing so, one should evaluate and test each of these express alternative conditions separately just the same as if multiple gifts had been made upon each of these separately expressed alternative conditions; accordingly, the interest in question will be enforced for each express alternative condition for which a separate and valid proof can be made.

*c. General Testamentary and Special Powers of Appointment*

Beyond the matter of multiple conditions, this methodology requires

an addendum to deal with special problems presented by general testamentary and special powers of appointment. As indicated previously, the period of the rule begins from the time these powers are created.<sup>198</sup> The common law rule against perpetuities allows a delay to determine how the power is exercised only if there is no possibility for exercise beyond the period of the rule. If this possibility for remote exercise does not exist, then application of the rule awaits exercise of the power.<sup>199</sup>

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198. *See supra* note 168. One always must observe carefully when the period of the common law rule against perpetuities begins. This is especially important when it comes to general testamentary and special powers of appointment: the period commences when the power was created. This, however, does not always coincide with the effective date of the instrument that creates the particular power under consideration. If such power has been created by the exercise of another general testamentary or special power, then the period of the rule begins at the time of creation of the original power. Consequently, in applying the methodology contained in this addendum for powers of appointment, one must remember that any power, or an appointment pursuant to it, that is created by exercise of a previous power must be evaluated upon the same basis as were the original power and original appointment themselves. In particular, this means that the period of the rule commences at the time the original power was created. *See* 6 AMERICAN LAW OF PROPERTY § 24.32 (A. Casner ed. 1952).

199. Special powers of appointment and general testamentary powers are sometimes invalid from the time of their creation. The common law rule against perpetuities forbids all appointments by these powers when they are exercisable beyond the allowed time period. If there is any possibility for exercise of the power beyond a life in being plus twenty-one years measured from the time the power is created, the power is immediately invalid even though its exercise is actually attempted within the allowed time, and even though the interests appointed vest immediately. If, however, this possibility for remote appointment does not exist, the common law rule allows its application to be deferred until after the power is actually exercised.

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

And then the rule is applied to contingent interests created under the power, with possibilities for remote vesting determined in light of facts known at the time the power is exercised, not at the time it was created and the time when the period of the rule began.<sup>200</sup>

With this procedure in mind, several changes in the process must be made, beginning with the selection of testing lives in being. Most important, in applying Step Three to a determination of the validity of the power itself, one must view the donee of the power as the “taker of the interest” under Step Three A.<sup>201</sup> Consequently, Step Three A will cover testing lives in being to be found among donees of the power of appointment. Steps Three B and C will cover testing lives in being to be found elsewhere, including the objects of the power, the substitute takers in default of its exercise, and the takers of other interests within the same provision. Step Three D will cover testing lives in being to be found among the donee’s parents.<sup>202</sup>

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*supra* note 22, §§ 1272-73. For further illustrations of the application of these perpetuities principles to powers of appointments, see *infra* illustrations IV A-8, IV A-10.

200. See *supra* notes 169-70.

201. The powers under consideration in the text are not the only kinds of powers that might raise perpetuities questions. Most important are the discretionary powers given to trustees. Generally, courts will uphold the power or find that the common law rule has no application if the power is purely administrative, such as a power to sell and reinvest. If, however, the power enables a trustee to alter beneficial interests—for example, if it gives a trustee discretion to allocate income among beneficiaries—then such power is subject to the rule. In applying the rule, courts will treat such power the same as a special power of appointment. Accordingly, when confronted with a discretionary power to shift income or principal, one should view the trustee as the donee of the power and, therefore, as the “taker of the interest” in question; thereafter one should continue to apply the methodology just the same as it is used to determine the validity of all other special powers. Although courts construe these powers to uphold them wherever possible and some courts maintain that discretionary powers over income constitute a series of annual powers that should be upheld for the period of time allowed by the rule, the safer approach still seems to be for a practitioner to rest his perpetuities determination upon the same criteria needed to uphold a special power of appointment. For a discussion of the common law rule and its application to powers given to trustees, see 6 AMERICAN LAW OF PROPERTY §§ 24.32, 24.63 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, § 1277.

202. For example, suppose A disposes of the residue of his estate with a testamentary trust that provides: “Income to B’s eldest child for life, thereafter, principal to such eldest child’s children as he or she appoints by will; however, if such child fails to exercise this testamentary power, then to C absolutely.” Assume that B survives A but that he has not had any children by the time of A’s death. In assessing the validity of the power, under Step Three A, one examines the donee of the power—B’s eldest child. If B had had a child alive at A’s death, such child would have qualified as a testing life under Step Three A. Furthermore, one then could have made a valid proof with such child. The power would have been exercised, if at all, at the death of such child, one who was in being at A’s death. Nevertheless, B had no children whatsoever at A’s death, and unless the gift is to fail altogether, such donee necessarily will be one who was not in being. Under Step Three B, C

However, the application of Step Three changes somewhat once the process reaches the stage of testing the validity of interests created by exercise of a valid power. Therein, as expected, one views the objects of the power—those for whom interests have been created—as the takers of the interest in question. Consequently, Step Three A covers this group, Steps Three B and C cover testing lives in being to be found elsewhere, including the donee, the substitute takers in default, and the takers of other interests within the same provision, and Step Three D covers the parents of the takers of the interests created by exercise of the power.

Beyond these changes, some additional adjustments must be made. To establish the validity of the power itself, observe carefully under Step Two A the conditions attached to the exercise of such power. Invariably, there is no condition beyond the exercise of the power itself. And if there are other conditions, such as the implied requirement of birth, these conditions almost always are subsumed by the exercise of the power itself. Consequently, pursuant to Step Two C (1), one can continue the process with a consideration of the subsuming condition. Next, after affirming that the period of the rule begins when the power is created, proceed to Step Three and then to Step Four if necessary. It should be emphasized that in asking the question whether the proposed testing lives are restricted to lives in being under Steps Three A, Three B, Three C, and Three D, one must answer the question in light of only those facts that are known when the power is created and the period of the rule begins.<sup>203</sup>

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qualifies as an other taker. Nevertheless, in applying the critical test, one cannot make a valid proof. (For a full statement of such test, see *infra* note 204.) Such eldest child may be born and exercise the power at his death more than twenty-one years beyond the death of C. The objects of the power, the eldest child's children, should be considered under Step Three C because, technically, they have no interest before exercise of the power. Yet nothing is lost by giving them prior consideration under Step Three B. Under either step, the eldest child's children will not qualify as testing lives. Because their parent has not been born by the time of A's death, necessarily they cannot be lives in being. However, under Step Three C, B will qualify as a testing life who is otherwise mentioned in the provision. Nevertheless, in applying the critical test to B, one concludes that B's life will not validate the power. (For a full statement of such test, see *infra* note 204.) B may have a child who then might exercise the power at his death more than twenty-one years beyond the death of B. Under Step Three D, one considers the parent of the donee of the power; this would be B. However, B has already been tested and, therefore, he must be dismissed from further consideration. Finally, one arrives at the critical test to be applied under Step Four. (For a full statement of such test, see *infra* note 204.) Because B may have a child who then might exercise the power at his death more than twenty-one years after the death of A, one cannot make a valid proof under Step Four. Consequently, after having examined the power under Step Three and Step Four, one must conclude that the power itself violates the common law rule against perpetuities.

203. This requirement should be apparent. In theory, the exercise itself of a general testamentary or special power of appointment is viewed the same as the vesting of a contingent remainder or

In addition to this important cautionary reminder, one must amend the critical test whenever the process calls for its application under Step Three or Step Four. It should read:

**Looking at all possibilities for exercise of the power in light of facts known when the period of the rule begins and in light of applicable rules of construction and principles of law, including those possibilities for exercise that are most remote, must the power be exercised, if at all, within twenty-one years of the death of one of these testing lives in being (or within twenty-one years of the time the period of the rule commences at the creation of the power)?<sup>204</sup>**

If one cannot establish that the power is valid under any of these steps, then the power violates the common law rule without regard to its exercise. If, however, one can establish that it is valid under any of these steps, then return to Step Two to examine which interests created by the power are contingent *after its exercise*<sup>205</sup> and to Steps Three and Four to

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contingent executory interest. Under the common law rule against perpetuities, one must prove that contingent remainders and contingent executory interests cannot vest beyond the allowed time period in light of possibilities calculated on the basis of facts known when the period of the rule begins. Logically, the same must be true for any validation of a general testamentary or special power of appointment. See R. LYNN, *supra* note 30, at 123-25; L. SIMES & A. SMITH, *supra* note 22, § 1273; Leach, *supra* note 11, at 652.

204. Using a previous illustration (see *supra* note 202), one should elaborate the full statement of the critical test in relation to C under Step Three B as follows: Looking at all of the possibilities for exercise of the power in light of facts known when the period of the rule begins and in light of applicable rules of construction and principles of law, including those possibilities for exercise that are most remote, must the power be exercised, if at all, within twenty-one years of the death of C? Under Step Three C, one should apply the critical test by substituting B in place of C in the foregoing statement. Finally, under Step Four, one should elaborate the full statement of the critical test as follows: Looking at all of the possibilities for exercise of the power in light of facts known when the period of the rule begins and in light of applicable rules of construction and principles of law, including those possibilities for exercise that are most remote, must the power be exercised, if at all, within twenty-one years of the time the power is created at A's death?

205. Consider this testamentary trust created by A regarding the residue of his estate: "Income to B for life, thereafter, to B's children upon such conditions and in such proportions as he may appoint by will; however, if B fails to exercise this testamentary power, then to C absolutely." At A's death, assume that B has two children, B-1 and B-2, and that these children are both under the age of ten. At B's subsequent death, assume further that B exercises his power on behalf of "his children who attain age thirty." Also assume that, before his death, B has another child, B-3. Finally, assume that B's only children, B-1, B-2, and B-3, have all attained age thirty by the time of his death. First, the power itself satisfies the rule against perpetuities because a valid proof can be made with B under Step Three A. Second, looking then to the interests created by B's exercise of the power, without more, it appears that B has created contingent interests because of the age requirement. Nevertheless, the common law rule permits one to account for facts known when the power is exercised. At B's death, all of his children have already attained age thirty; thus, there is no condition to be fulfilled after the exercise of the power and after the time these interests are actually

determine their validity under the rule. In this application, the operation of most steps remains the same. Nevertheless, because the common law rule allows for a "second look" at facts and possibilities as of the time the power is exercised,<sup>206</sup> two important changes must be noted.

First, one must amend slightly the process for ascertaining testing lives in being. In asking the question whether the proposed testing lives are restricted to lives in being under Steps Three A, Three B, Three C, and Three D, one must answer in light of facts that are known when the power is exercised.<sup>207</sup> For example, under Step Three A, one would ask:

**Looking to the taker or group of takers of the interest in question, in light of facts known when the power is exercised, is such individual or group restricted to lives in being and to lives already ended when the period of the rule begins at the creation of the power because of descriptive language, because of applicable rules of construction, or because they are not physically capable of expansion or reconstitution to include those that are afterborn?**

Second, to reflect further the opportunity for a "second look," one

created in B's children. Accordingly, these interests which B creates by exercise of the power should be treated as if they were vested and, thus, they satisfy the rule.

206. See *supra* notes 169-70 and accompanying text.

207. This opportunity for a "second look" at facts known about potential testing lives when the power is exercised can make a significant difference. Consider a previous illustration. See *supra* note 205. Assume, however, that B dies shortly after the time of A's death, that his two children, B-1 and B-2—alive at A's death—also survive him, and that both of these children are under age five when he dies. Assume that all other facts remain the same, especially those involving his exercise of the power of appointment. If the search for testing lives were conducted on the basis of facts known when the power is created at A's death, one would have to conclude that B's children could not qualify under Step Three A. Nothing in the terms of the power restricts the appointees to those alive at A's death, nor is there a principle of law which does so. Additionally, because B is alive at A's death, the objects of the power are not restricted to lives in being because of physical impossibility.

The common law rule against perpetuities, however, allows a "second look" at the time B actually exercises the power at his death. And with this "second look," one discovers that the appointees, B's children, do qualify as testing lives and that they do afford a valid proof. Under Step Three A, the takers of the interest in question are B's children. B exercises the power at the time of his death, after which he can have no more children. One knows at that time the identity of all potential members of the class because one knows the identity of all the children he will ever have. B-1 and B-2 are B's only children and they constitute the only potential class members. One knows their identity at B's death; accordingly, one also knows that the class will now consist of only those alive at A's death. Indeed, its membership is now restricted to lives in being at A's death because of physical impossibility even though one could not have reached this same conclusion if the determination had to be made in light of facts known at A's death. Applying the critical test to these testing lives, B's children, one can conclude that their interest must vest, if at all, within their respective lives. Neither B-1 nor B-2 can attain age thirty beyond their deaths. Accordingly, no one can join the class beyond the death of a life in being at A's death.

must amend the critical test whenever the process calls for its application under Step Three or Step Four.<sup>208</sup> It should read:

**Looking at all possibilities for vesting in light of facts known when the power is exercised and in light of applicable rules of construction and principles of law, including those possibilities that are most remote, must the interest vest, if at all, within twenty-one years of the death of one of these testing lives in being (or within twenty-one years of the time the period of the rule commences at the creation of the power)?<sup>209</sup>**

*d. Presently Exercisable General Powers of Appointment*

This methodology also requires an addendum to deal with the special problems presented by general powers of appointment that are presently exercisable both during the donee's lifetime and at the donee's death. Once again, there are two parts to the application of the common law rule: Is the power itself valid, and if so, do the interests created by its

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208 This discussion focuses upon interests created through a valid general testamentary or special power of appointment. Yet what about the gift in default? Generally, the gift in default of the exercise of a power of appointment is not viewed as contingent simply because it is dependent upon the donee's failure to make an appointment. It becomes contingent only if it is subject to an additional condition, one beyond a default in the exercise of the power itself. For example, consider this testamentary trust created by A: "Income to B for life; thereafter, principal to such of B's descendants as B may appoint by will, in default of B's appointment, then to such of B's children who attain age thirty." Assume that B survives A and is childless at such time. Further assume that B thereafter dies without exercising his power of appointment and that he is survived by two children, B-1 and B-2, ages eleven and ten, respectively. Clearly, the interest created by A in default of the appointment is contingent; namely, it is conditioned upon B's children being born and upon attainment of age thirty. If the common law rule against perpetuities did not offer a "second look," as it would with any appointment made by A, and treated the gift in default the same as any other contingent interest, then the contingent interest created in B's children would violate the rule. Although B's children cannot be conceived beyond B's death, looking at all possibilities in light of facts known at A's death, one cannot say that B's children must, if it all, attain age thirty and join the class within twenty-one years of B's death or within twenty-one years of anyone else's death.

This issue has not been the subject of much litigation, but some have said that this is the view that should be preferred. See, e.g., L. SIMES & A. SMITH, *supra* note 22, § 1276. With this approach, a contingent gift in default should be treated the same as any other contingent interest under this methodology. Some commentators, however, maintain that the gift in default should be accorded a "second look" just the same as the appointment itself. See, e.g., Dukeminier, *supra* note 130, at 1903. The principle to be applied is a simple one: if the power itself is valid, then the validity of the gift in default should be determined just the same as if the power had been exercised at the time it expired on the exact same terms as the gift in default. See 6 AMERICAN LAW OF PROPERTY § 24.36 (A. Casner ed. 1952). With this in mind, one would then apply the steps of this methodology to the gift in default exactly the same as one would apply it to interests created by exercise of the power. Accordingly, one could then make a valid proof under Step Three B: both B-1 and B-2 must join the class, if at all, within twenty-one years of B's death.

209 See *supra* note 204.

exercise violate the rule?<sup>210</sup> In determining the validity of a general power presently exercisable, the period of the rule commences when the power is created.<sup>211</sup> However, if this kind of general power is valid, one determines the validity of contingent interests created under it by measuring the period of the rule from the time such power is exercised.<sup>212</sup>

With this in mind, some observations should be made regarding the selection of testing lives in being. In evaluating the validity of the general power itself, once again, one must view the donee of the general power as the "taker of the interest" under Step Three A.<sup>213</sup> Consequently, under Step Three, Three A will cover testing lives in being to be found among the donees of the power of appointment. Steps Three B and C will cover testing lives in being to be found among the substitute takers in default of the power's exercise, the takers of other interests within the same provision and people otherwise mentioned, while Step Three D will cover testing lives in being to be found among the parents of the donees. Because this determination of the validity of the general power must be made without regard to its exercise, the ultimate objects of the power once exercised must be disregarded as a source of potential testing lives in being.<sup>214</sup> When one evaluates the validity of contingent interests created

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210. See 6 AMERICAN LAW OF PROPERTY § 24.30 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, § 1271. For a thorough discussion of the common law rule against perpetuities in relation to powers of appointment, see 6 AMERICAN LAW OF PROPERTY §§ 24.30-36 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, §§ 1271-77.

211. See 6 AMERICAN LAW OF PROPERTY § 24.31 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, § 1273; L. WAGGONER, *FUTURE INTERESTS* 269-70 (1981).

212. See 6 AMERICAN LAW OF PROPERTY § 24.33 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, § 1274; L. WAGGONER, *supra* note 211, at 271-72. Because the donee has the power at any time to make the subject matter his own, alienability is not impaired after the power is created. For this reason, the perpetuities period is deferred beyond the time the power is actually created. Indeed, the situation is treated just the same as if the donee had made the subject matter his own and thereafter disposed of it at the time the power is exercised and the appointment is made. Quite differently, under general testamentary powers of appointment, the subject matter is tied up until the power can be exercised at the donee's death. Until then, the donee cannot make the subject matter his own, and then it is only for the benefit of his estate. And under special powers of appointment, disposition of the subject matter is tied up throughout; the donee cannot make it his at any time. Accordingly, appointments under general testamentary powers and special powers are subject to a perpetuities period measured from the time the power is created.

213. See *supra* note 202 and accompanying text.

214. The reason for this observation should be quite clear. By definition, one is testing the validity of a general power of appointment that can be exercised on behalf of anyone whatsoever. By definition, one does not know the identity of the appointees; there is no way in advance of the exercise of the power by which one can know whether the appointees will be restricted to lives in being when the power is created. Also, the donor of the power of appointment may not qualify automatically for immediate testing even when he irrevocably creates the power during his lifetime.

by exercise of a valid general power, however, those for whom the general power is exercised do become a potential source of testing lives in being. As expected, one views them as takers of the interest in question. Consequently, Step Three A covers the person or group for whom interests have been created. Steps Three B and C cover testing lives in being to be found elsewhere, including the donee, the substitute takers in default, the takers of other interests within the provision creating the power, and those otherwise mentioned within directly related provisions. Finally, Step Three D covers the parents of the takers of the interests created by exercise of the power.

Beyond these matters concerning the selection of testing lives in being, some additional observations and adjustments must be made with respect to the application of Steps Three and Four in assessing both the validity of the power and interests created by exercise of a valid power. To determine the validity of the power, observe carefully under Step Two A the conditions attached to the exercise of such power. Invariably, there is no condition beyond the exercise of the power itself. And if there are other conditions, such as the implied requirement of birth, these conditions frequently are subsumed by the exercise of the power itself. Consequently, pursuant to Step Two C (1), one can continue the process with a consideration of the subsuming condition.

Next, after observing under Step One that the period of the rule begins when the power is created, one should proceed to Step Three and then to Step Four. It should be emphasized that in asking the question whether the proposed testing lives are restricted to lives in being under Step Three A, Step Three B, Step Three C, and Step Three D, one must answer the question in light of only those facts that are known when the power is created and the period of the rule begins. In addition to this important cautionary reminder, one must amend the critical test whenever the process calls for its application under Step Three or Step Four. It should read:

**Looking at all possibilities in light of facts known when the power is created and in light of applicable rules of construction and principles of**

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Even if the donor is a life in being, he will not automatically qualify without establishing some independent relevance for testing. Unless he qualifies under Step Three A because he is the donee of the power, or under Step Three B because he receives an other interest within the provision, or under Step Three C because he is otherwise or separately and differently mentioned, or under Step Three D because he is a parent of the donee of the power, the donor's life is totally irrelevant to vesting and it cannot possibly serve as a basis for a valid proof.

law, including those possibilities that are most remote, must the power become unconditionally exercisable, if at all, within twenty-one years of the death of one of these testing lives in being (or within twenty-one years of the time the period of the rule commences at the creation of the power)?<sup>215</sup>

If one cannot establish that the power is valid under any of these steps, then the power itself violates the common law rule without regard to its exercise and, of course, this concludes the process of application. If, however, one can establish that it is valid under any one of these steps, then one can proceed to examine the validity of interests created under the power.<sup>216</sup> In doing so, one must remember that the process is just the same as if the donee of the general power himself had fully owned the subject matter and then created such interests.<sup>217</sup> Accordingly, under Step One the period of the rule commences when the power is exercised, and under Step Two determinations as to contingent interests also are made at that same point in time. Under Step Three, one searches for testing lives who are in being when the power is exercised, and therefore one asks the question whether the proposed testing lives are restricted to lives in being in light of facts known when the power is exercised.<sup>218</sup>

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215. See *supra* note 204.

216. Once again, the question arises about how one determines the validity of the gift in default. When the power itself is valid, the preferred view would seem to be one in which the gift in default is treated the same as if, when the power expires, the donee had exercised the power on the same terms as the gift in default itself. See *supra* note 208. With this in mind, one then must apply to the gift in default the same steps within this methodology used to determine the validity of an appointment made by a general power of appointment presently exercisable by deed or by will. In short, if the power itself is invalid, then the gift in default must be evaluated the same as any other contingent interest. If, however, one determines that the general power is valid, then the process for applying the methodology is the same as if the donee of the general power himself had fully owned the subject matter during his lifetime. Then, when the power expires—at the donee's death if never exercised or released during his lifetime—one evaluates the gift in default the same as if the donee had then created it.

217. See *supra* note 212.

218. For example, consider this trust created by A's appointment under his presently exercisable general power: "Income to my wife for life; thereafter, principal to such of my children who attain age thirty." If A's transfer is testamentary, then under Step Three A the takers themselves of the interest in question, his children, are restricted to lives in being. The period of the rule begins when the appointment is made and, presumably, A cannot have children beyond the period of gestation following his own death. A's children, therefore, qualify as testing lives and they also supply a valid proof. No child can attain age thirty beyond his death; each child must satisfy the age requirement, if at all, within his respective lifetime. Consequently, no child can join the class beyond his own lifetime, and the class gift is valid because each child is, of course, a life in being.

If, however, A makes his appointment during his lifetime, instead of at death, the children cannot qualify as testing lives under Step Three A. Nothing in the descriptive language limits the gift of

Further, under Step Three, the critical test is applied in light of facts and possibilities known when the power is exercised. Finally, under Step Four, in applying the critical test, one measures the twenty-one year period from the time the power is exercised and one determines possibilities also in the light of facts known at that same point in time.<sup>219</sup>

*e. Interests Certain to End*

Finally, it should be observed that there is a circumstance in which an additional step must be added to the methodology previously described. Thus far, the process for solving perpetuities problems rests upon the assumption that the transferor has or is able to convey an inheritable estate, usually a fee simple. This, however, is not always the case, even in situations in which the transferor purports to create a fee simple.<sup>220</sup> Ac-

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principal to children alive when the living trust becomes effective during A's life, nor is there any rule of construction that does so. Additionally, while A is alive he is capable of having more children; presumptively, there is no physical impossibility of an expanded class of takers. Carrying the application of the methodology further, one discovers that a valid proof cannot be made. Under Step Three B, A's wife qualifies as a testing life, but she cannot validate because a child born just before her death can join the class by attaining age thirty more than twenty-one years later. Under Step Three C, A qualifies as a testing life because he is otherwise mentioned but he fails to validate because of the same possibilities previously applied to his wife. Under Step Three D, one dismisses A because he has been tested previously. And under Step Four, one observes that A may have another child who could then satisfy the age requirement and join the class more than twenty-one years from the time the living trust became effective. Consequently, this gift of principal, if appointed through an exercise made during A's lifetime, violates the common law rule against perpetuities.

219 For example, consider this trust created by A's appointment, made at his death, under a presently exercisable general power: "Income is to be accumulated and added to principal until the time for its distribution; in the year 2010, principal shall be distributed to those of my descendants who are then living." Under Step Three A, one cannot conclude that the descendants are restricted to lives in being when A dies. Under Step Three B, one observes that there is no other taker at all.

Under Step Three C, no one qualifies as a person otherwise mentioned or separately and differently mentioned. The limitation mentions A, but one must dismiss him because the same test will eventually be applied under Step Four. Under Step Three D, no one qualifies as a testing life. Because it is impossible to determine who the descendants will be, it becomes impossible to identify their parents and to make the determination that they are restricted to lives in being. Finally, then, one comes to Step Four. If A dies in the year 1990, one can account for the facts at the time he makes his testamentary appointment. Consequently, one can make a valid proof because all interests must vest, if at all, twenty years after A's death. If, however, A had died in 1988, or if he had made a lifetime appointment in 1988, after taking into account facts known in 1988, one discovers that a valid proof cannot be made under Step Four. Because all interests would then vest, if at all, twenty-two years after A's death, one must finally reach the conclusion that the gift of principal to A's descendants violates the common law rule against perpetuities.

220 Suppose that A executes and delivers a deed concerning Blackacre which provides: "To B and his heirs forever and in fee simple absolute." If A has a fee simple absolute, or the power to transfer one, then B would receive such estate. If, however, A has a life estate with no additional

cordingly, after establishing when the period of the rule begins under Step One, as a safeguard one should ask:

**Is the transferor able to convey some kind of inheritable interest or one that is not certain to end?**<sup>221</sup> If the answer is YES, if the transferor has or is able to convey some kind of estate in fee simple or even in fee tail or an interest which may never end, then one must proceed directly to Steps Two, Three and Four as before.

If, however, the answer is NO, if the transferor has an estate of limited duration and is unable to convey an inheritable estate, then one must add Step One A.

**A. Must the duration of the interest held by the transferor when the period of the rule begins terminate with absolute certainty within twenty-one years or within twenty-one years of the deaths of lives in being or lives already ended when the period of the rule begins because the duration of the transferor's interest is restricted to such period of time by express language, by rules of construction, or by physical impossibility as to the group of lives used to measure the transferor's interest?**<sup>222</sup> If the answer is YES, that the transferor's interest must end within this specified time, then the interests created by the transferor are VALID, and one need go no further with the process.

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powers, then regardless of the form of the transfer, A cannot give B any more than the estate which he owns. Accordingly, B only acquires a life estate, one which will not last forever but must end at A's death.

221. In nearly every instance, the answer to this question is YES because the transferor has some kind of fee simple. Nevertheless, there are circumstances in which the answer is YES even though the transferor does not have a fee simple or, conceivably, a fee tail which can be disentailed by statute. Instead, the transferor might have an interest "that is not certain to end." This category of interests might include equivalents of the fee simple held in personal property, namely, interests that are absolute but may not be styled a fee simple. Although most of the present estates that exist in real property can be found among chattels, they do not always bear the same description. See L. SIMES & A. SMITH, *supra* note 22, § 359. Additionally, this category might include a periodic tenancy held by the transferor. Such estate is continuous in nature until and unless it is terminated on the anniversary of the period with notice that is both timely and proper. Most important, the periodic tenancy does not cease upon the death of either the landlord or tenant. Unless the tenancy is previously terminated, the tenant can transfer his interest during his life or at death. Indeed, the periodic tenancy can continue indefinitely for generations to come. See 1 AMERICAN LAW OF PROPERTY § 3.23 (A. Casner ed. 1952). Accordingly, these are interests like the fee simple in the sense that they can last indefinitely and so they might carry on beyond the period of the rule. And from these interests, one can carve out contingencies that cause perpetuities violations. For this reason, they must be treated like the fee simple and, thus, the full methodology must be applied.

222. This determination may seem complicated, but it is not. For further explanation of Step One A and an illustration of its application, see *infra* notes 227-37 and accompanying text; illustration IV B-4.

If, however, the answer is NO, that the transferor's interest can last beyond this period of time, then one must proceed to Steps Two, Three, and Four and apply them to the interests actually created by the transferor.

In answering this question and making this determination, one must observe that if the remaining duration of the interest held by the transferor is for a period of years that exceeds twenty-one, then the answer to this question must be NO, and one then should proceed directly to Steps Two, Three, and Four.<sup>223</sup>

## 2. *Some Explanation and Elaboration*

This section discusses step by step the foregoing methodology. At the outset, Steps One and Two A present obvious components of any formulation of the common law process, and the questions within these steps have been considered briefly in the previous section on preliminary observations.<sup>224</sup> Nevertheless, because of their importance, further emphasis and explanation is desirable.

*Step One*—As to Step One, because the common law rule focuses upon a measuring period, one cannot conduct the process of application without always knowing when the period begins and, therefore, at what point in time testing lives in being might be found. Accordingly, one must know when the dispositive instrument “ties up” the property.<sup>225</sup> For example, the distinctions between revocable and irrevocable lifetime transfers and between a general power to appoint by deed or by will and all other powers of appointment must be understood fully.<sup>226</sup>

Before proceeding to Step Two, one first must determine whether it is necessary to apply Step One A. If the transferor can confer an inheritable estate, or an interest that is not certain to end, one must proceed directly to Step Two and the remainder of the process for solving perpetuities problems. If, however, the transferor has only an interest of limited duration to confer, one must examine under Step One A whether its duration must end within the period allowed by the common law rule. To determine this by asking the principal question contained within Step One A, one first must examine carefully the estate classification into

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223 For further discussion and explanation, see *infra* notes 232-33 and accompanying text.

224 See *supra* notes 147-70 and accompanying text.

225 See *supra* notes 162-66 and accompanying text.

226 See *supra* notes 164-70.

which the transferor's interest falls and any language that further affects its specific duration.<sup>227</sup> Accomplishing this may not always be easy, but it should never be as obscure—and therefore difficult—as determining the measuring period and testing lives when one applies the common law rule to inheritable interests.<sup>228</sup> Accordingly, there is no need to use variations of Steps Three and Four to conduct the test contained in Step One

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227. Estates must exist according to fixed classifications. *See infra* note 229. In most instances, courts make these classifications on the basis of language within the limitation and other language within the entire instrument itself. Inevitably, the solution to disputes requires such determination because of the different legal consequences that derive from various estates. The prevailing view today is that an interest is presumed to be a fee simple unless there is language that clearly indicates a lesser interest. *See* 1 AMERICAN LAW OF PROPERTY § 2.4 (A. Casner ed. 1952).

Consequently, in determining whether Step One A is to be applied, one cannot conclude that the estate is of a limited duration without clear evidence to support that conclusion. Nearly always, this evidence must lie in the language itself. A particular estate classification may not always be clear cut; nevertheless, courts must and do make these determinations quite commonly. *See infra* note 231. Accordingly, to conduct this methodology, one must ask: What kind of interest does the transferor, A, have? To answer, one must go back to the source of A's interest. Assume that A's predecessor, T, had a fee simple absolute and that the transfer to A had read: "To A in fee simple absolute"; "To A and his heirs"; or "To A." In each instance, A has a fee simple absolute and one proceeds to Step Two. If, however, the provision had been "To A for life" or "To A for fifty years," then A would have received a life estate or an estate for years respectively. In either instance, his estate is of a limited duration, and one must then proceed to Step One A. Finally, assume the provision had read: "To A for fifty years unless A ceases to practice law." Clearly, A has an estate of limited duration; it is an estate for years. Accordingly, one must apply Step One A. Nevertheless, before doing so, one must account for the special limitation attached to A's estate for years. A has an interest that will not endure beyond fifty years, but because of the special limitation, it cannot endure beyond A's death as well. As A cannot practice law after his death, his estate necessarily will end at his death or the expiration of fifty years, whichever happens first.

228. In applying the common law rule against perpetuities, one searches for lives in being that are connected or relevant to vesting. Somehow, this has proved to be a difficult task for a great many students of the rule. Perhaps this happens because the connections are often very obscure and because scholars often disagree on the application of a principle of relevance. Or, perhaps this happens because of the confusion engendered by a limitation replete with lives who have no relevance to vesting and a commonly held temptation to apply the critical test to each of them. *See, e.g., infra* illustration IV B-1.

Ordinarily, lawyers and students have a much easier time classifying estates and determining their specific duration. Perhaps this happens because they must do this more often by way of interpretation of existing interests or the creation of new ones. Perhaps this happens simply because the task is much easier. In creating interests, the guidelines for creation of particular estates are clear. If one wishes to give B a life estate measured by his own life, one would provide: "To B for *life*." In the interpretation of an existing limitation, one begins with the assumption that it is a fee simple absolute. If something less has been created, the constructional choices are restricted to conventional classifications. *See infra* note 229. Further, it can only be something less as a result of specific evidence, almost always within the language itself. Because the choices are restricted and because evidence of an estate of limited duration is usually apparent and quite clear, the task of classification is an easier one. At least it is not one that generations of lawyers have viewed as their nemesis.

A. The transferor has to have some kind of acknowledged interest.<sup>229</sup> If it is an estate of limited duration, there must be something—usually express language—that identifies such limits and, therefore, the point in time at which such interest must end.<sup>230</sup> Consequently, if the transferor does not have an inheritable estate, the end point of his interest is usually explicit; and if it is not clearly expressed, some conclusion must always be reached in making the necessary estate classification.<sup>231</sup>

Now then, after having determined the end point of the transferor's interest, one readily can determine whether such interest must terminate within the period allowed by the common law rule. For example, if the transferor has an estate for years that will last no longer than twenty-one years from the time the period of the rule begins when his transfer becomes irrevocably effective, then the answer to the principal question of Step One A is YES and the interests created by the transferor are necessarily valid.<sup>232</sup> However, for any estate for years that may last longer, the answer must be NO, and one then must proceed to Steps Three and Four to examine the validity of the interests actually created by the transferor.<sup>233</sup>

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229 Under the Anglo-American system of land law, the ownership of all interests must fall within fixed types or estates. The system allows for some flexibility within acknowledged kinds of interests. Nevertheless, it forbids the creation of entirely new kinds of entities. As a practical matter, this means that even when the language used to create an interest is unconventional or obscure, courts must and will find an acknowledged category for classification of such interest. *See* L. SIMES & A. SMITH, *supra* note 22, §§ 61, 63.

230. *See supra* note 227.

231 The matter of estate classification is not always an easy one to resolve, especially when there is no language used to describe the interest or when such language is obscure or presents inconsistencies. *See, e.g.,* *Foley v. Gamester*, 271 Mass. 55, 170 N.E. 799 (1930); *Thompson v. Baxter*, 107 Minn. 122, 119 N.W. 797 (1909); *Chestnut v. Chestnut*, 300 Pa. 146, 151 A. 339 (1930).

232 Consider this devise of Blackacre by A: "To B in fee simple; however, if Blackacre is ever used for any purpose other than residential, then to C in fee simple absolute." If A has a fee simple to devise, then the contingent executory interest created in C violates the common law rule against perpetuities. *See infra* illustration IV B-1. If, however, A has a term of years with only ten years remaining at the time of his death, there would be no perpetuities violation. Must the duration of the interest held by A at the time of his death terminate with absolute certainty within twenty-one years or within twenty-one years of the deaths of lives in being or lives already ended at A's death? The answer is, of course, YES. Although A purports to devise a fee simple, he cannot create in B or C an interest greater than the one he has at the time of his death. Accordingly, the contingent interest given to C must vest before the duration of the estate held by A expires. The interests A creates at his death in Blackacre cannot last beyond ten years. A's interest must clearly terminate by the end of ten years and, therefore, so must the interests of B and C. Because of this, C's interest must vest, if at all, within ten years, a duration that is clearly within the period allowed by the common law rule.

233. Using the previous example, *see supra* note 232, assume that thirty years of A's term of

If the transferor has a life estate, however, then one must ascertain the lives that measure his estate. If each of the lives is identified by name as a specific individual in the instrument that creates his interest, then necessarily by the descriptive language that governs the duration of his interest, such interest will end by the deaths of lives that are in being when the transferor creates the new interest and the period of the rule begins.<sup>234</sup> Accordingly, the answer to the key question is YES and the new interests created by the transferor are valid. If, however, the lives that measure the estate are identified by group description, then, in light of facts known when the period of the rule begins upon the transferor's creation of new interests, one must determine whether the individuals that comprise the group have been confined to lives in being as of that time.<sup>235</sup> A conclusion that they are confined to lives in being might be reached be-

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years remained at his death. Must the duration of the interest held by A at the time of his death terminate with absolute certainty within twenty-one years or within twenty-one years of the deaths of lives in being or lives already ended at A's death? The answer is, of course, NO. Because at the time of his death A has a term for thirty years, one cannot say that his interest and the interests he creates in B and C must terminate within twenty-one years. Nor can one conclude that termination of the estate for thirty years must occur within twenty-one years of the deaths of lives in being or lives already ended at A's death. In answering this question, one must make the same assumptions used in applying the critical test. *See infra* notes 269-72 and accompanying text. More specifically, each and every person alive at A's death can thereafter have a child and then die within nine years of A's death. Because of these possibilities, no matter how extraordinary they might be, one cannot say that B's and C's interests must end within twenty-one years of lives in being at A's death.

234. Consider this devise of Blackacre by A: "To B in fee simple; however, if Blackacre is ever used for any purpose other than residential, then to C in fee simple absolute." If A has a fee simple to devise, then the contingent executory interest created in C violates the common law rule against perpetuities. *See infra* illustration IV B-1. If, however, B has a life estate measured by the life of the survivor of X, Y, and Z, there would be no perpetuities violation. Must the duration of the interest held by A at the time of his death terminate with absolute certainty within twenty-one years or within twenty-one years of the deaths of lives in being or lives already ended at A's death? The answer is, of course, YES. Although A purports to devise a fee simple, he cannot create in B or C an interest greater than the one he has at the time of his death. Accordingly, the contingent interest given to C must vest before the duration of the estate held by A expires. A's estate in Blackacre is measured by the survivor of X, Y, and Z. These are specifically named individuals and, obviously, they are lives in being or lives already ended at A's death. Accordingly, A's interest must clearly terminate by the time of the last of this group to die, and so will the interests given to B and C. Because of this, C's interest must vest no later than the death of someone who was a life in being at A's death.

235. Some jurisdictions, however, might not permit the use of lives to measure the duration of a life estate once it commences other than those who are actually in existence. *See* RESTATEMENT OF PROPERTY §§ 107-08 (1936). If so, presuming that the life estate belonging to the transferor does not fail altogether, then one must conclude that the lives that measure his life estate are confined to lives in being when the new interests are created by the transferor. Accordingly, one can then answer YES to the key question; the transferor's interest cannot last beyond the period allowed by the rule, and the new interests he creates are necessarily valid.

cause of some rule of construction or because the procreators of the group of measuring lives are dead by the time the transferor creates the new interest.<sup>236</sup> If, for example, the group of lives that governs the duration of the estate is fixed and cannot expand or change identity after the period of the rule begins when the transferor creates the new interest, then the transferor's interest will end by the deaths of lives that are in being. Accordingly, the answer to the key question is YES, the transferor's interest cannot last beyond the period allowed by the rule, and the new interests he creates are necessarily valid.<sup>237</sup>

*Step Two*—This section will use substitute Step Two for the purpose of further explanation. One observes that Step Two A raises questions respecting the contingent character of particular interests created by the transferor. If an interest is not classified as contingent,<sup>238</sup> it is not subject

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236. For example, using the limitation presented previously, *supra* note 234, assume that A had purchased life estates created in "the children of W for the life of the survivor of them." Further, assume that W had predeceased A and that W had left three children—X, Y, and Z—who survived A. In this situation, because of W's previous death, one can conclude that the group of lives used to measure the interests of B and C are confined to lives in being at A's death.

237. Using the limitation presented previously, *supra* note 234, with its variation, *supra* note 236, C's interest would not violate the common law rule against perpetuities. The reasoning is much the same as before. Knowing, at the death of A, that the group of lives that measures the interests created in B and C is fixed and cannot include people born thereafter enables one to conclude that both A's interest and the interests he creates in B and C must terminate at the death of lives in being at A's death. These lives are, of course, X, Y, and Z. Accordingly, the answer to the principal question raised by Step One A must be YES.

238. The American Law Institute avoids the term "contingent" and instead applies the rule against perpetuities to "non-vested" interests. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) ch. 1, at 13-80 (1983). For the sake of consistency, the National Conference of Commissioners on Uniform State Laws also adopts the term "non-vested" in the Uniform Statutory Rule Against Perpetuities. See Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP., PROB. & TR. J. 569, 570 (1986).

It is not clear, however, why the American Law Institute chose to apply its rule to "non-vested" interests. The term has appeared in the literature on the law of future interests. Frequently, it is said that all executory interests are non-vested; more specifically, an executory interest can never vest until the time it divests. Presumably, this description is required because it would not be accurate to describe an executory interest limited upon an event certain to occur as contingent. (For example, when A devises Blackacre: "To B in fee simple absolute from and after five years from this date.") Without an unfulfilled condition precedent, one cannot properly classify such interest as contingent. See L. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 36-38 (1951). The preferred position has been to exempt these kinds of executory interest from the common law rule against perpetuities. See L. SIMES & A. SMITH, *supra* note 22, § 1236. Because the Restatement applies its rule against perpetuities to "non-vested" interests, one might think it reaches a different result with respect to executory interests that divest a prior interest upon an event certain to occur. The comment to § 1.4 indicates otherwise. An interest is non-vested only if it is subject to an unfulfilled condition precedent, but an executory interest is not deemed subject to such a condition if throughout its

to the common law rule against perpetuities.<sup>239</sup> Several important things, however, must be kept in mind. To begin with, in determining which interests are contingent, one must account carefully for all conditions that might affect the characterization of an interest, especially those conditions that are implied and not fully expressed.<sup>240</sup> Additionally, an interest that is vested subject to divestment is not, without more, subject

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existence it is certain to divest a prior interest upon the death of a person or upon the expiration of a specified period of time. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 comment b (1983).

239. Stated affirmatively, if an interest is contingent then it is subject to the common law rule against perpetuities. See *supra* notes 148-49 and accompanying text. There are, however, exceptions to this requirement. First, although possibilities of reverter and rights of re-entry are contingent, they are not subject to the common law rule. See L. SIMES & A. SMITH, *supra* note 22, §§ 1238-39. See also *infra* note 441. An exception also exists with respect to charitable gifts. A gift to a single charity may tie up the subject matter indefinitely; despite this, such gift is upheld because of a policy strongly favoring and encouraging charitable gifts. Given this position, courts also have concluded that successive gifts to charities should be upheld even though the latter gift is dependent upon a condition precedent that may happen beyond the period allowed by the common law rule. Ostensibly, courts uphold such contingent interests because of their belief that a gift to two charities does not adversely affect alienability any more than a gift to one. This exception, however, does not apply without successive charitable gifts. Although courts actively may attempt to eliminate or moderate conditions involving charities, this exception does not protect a contingent gift over from a charity to a noncharity, nor does it protect a contingent gift over from a noncharity to a charity. In either case, such contingent interest is subject to the common law rule the same as any other contingent interest. See L. SIMES & A. SMITH, *supra* note 22, §§ 1278-87. Consequently, when a charitable gift does not involve successive gifts to charities, the methodology developed in this article must be applied to the contingent interest as it is applied to any other kind of contingent interest subject to the common law rule. In that application, however, the charitable institution can never qualify as a testing life in being under Step Three A, Step Three B, Step Three C, or Step Three D.

To illustrate, consider this devise of Blackacre by A: "To the Washington University School of Law; however, if Blackacre ever ceases to be used by them for the purpose of legal education, then to the American Red Cross absolutely." In this example, A has given the Washington University School of Law a defeasible fee simple and he has created in the American Red Cross a contingent executory interest in fee simple absolute. Ordinarily, the latter interest would violate the common law rule. See *infra* illustration IV B-1. Nevertheless, because this example involves successive charitable gifts, the contingent executory interest given to the American Red Cross escapes application of the rule.

Additionally, consider this devise of Blackacre by A: "To B in fee simple; however, if Blackacre is ever used for a purpose other than residential, then to the Washington University School of Law absolutely." Here, A has given B a possessory defeasible fee simple and has also created in the Washington University School of Law a substitute contingent executory interest in fee simple absolute. Because this example does not involve successive possessory and nonpossessory interests in charitable institutions, the contingent executory interest given to the Washington University School of Law is subject to the common law rule and must satisfy its requirements. In applying the methodology of this article, one must conclude that the charitable gift to the Washington University School of Law violates the common law rule against perpetuities. See *infra* illustration IV B-1.

240. The distinctions developed by courts to distinguish between vested and contingent interests are complex and often obscure. See *supra* notes 149, 150, 151, 153. Perhaps the most common and

to the rule.<sup>241</sup> However, the substitute executory interest is contingent, and it can violate the rule. Furthermore, for purposes of the common law rule, an entire class gift is regarded as contingent until the last eligible member has joined, or failed to join, the class.<sup>242</sup> Even though members within a class have interests that otherwise are characterized as vested absolutely, the interests are still contingent under the rule<sup>243</sup> if the

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difficult problem courts have concerns whether the limitation imposes a requirement of survivorship even though such requirement is not clearly expressed.

For example, consider this devise of Blackacre by A: "To B in fee simple, but if B dies without leaving surviving descendants then to the children of C in fee simple absolute." To be sure, C's children have a contingent executory interest, one that is expressly contingent upon B's death without descendants surviving him. Nevertheless, is there an additional condition of survivorship as well, namely, that for a child of C to take, he or she must also survive B? Theoretically, a conclusion that C's children have a contingent interest should not lead to the conclusion that they also must survive the time of possession. There is no reason why a contingent interest cannot also be transmissible at death. Some courts, however, conclude that such contingent interest is subject to a requirement of survivorship and, therefore, is nontransmissible at death. Some courts have done this without more, while others have done this on the basis of additional language or circumstances that justify such implied requirement. *See, e.g., Evans v. Giles*, 415 N.E.2d 354 (Ill. 1981); *Blackstone v. Althouse*, 278 Ill. 481, 116 N.E. 154 (1917); *Drury v. Drury*, 271 Ill. 336, 111 N.E. 140 (1915). For further discussion of these problems with respect to requirements of survivorship, see L. SIMES & A. SMITH, *supra* note 22, §§ 571-94.

241. A vested interest subject to divestment escapes the common law rule against perpetuities unless it involves a class gift which is subject to open. Consider this testamentary trust created by A: "Income to B for life, thereafter, principal to B's eldest child; however, if such child fails to graduate from college by age twenty-five, then to C absolutely." Assume that B has one infant child, B-1, by the time of A's death. In this situation, B-1 has an interest that is vested subject to divestment, while C has a contingent executory interest. C's interest is subject to the rule against perpetuities; nevertheless, it does not cause a violation because one can make a valid proof with B-1 under Step Three B.

Suppose, however, that the gift of principal had provided: "to B's children; however, if any child fails to graduate from college by age twenty-five, then his or her respective share shall be given over to C absolutely." In this situation, once again, B-1 has a vested interest subject to divestment, while C has a contingent executory interest. Although B-1's interest is vested, it must satisfy the requirements of the common law rule because the remainder now involves a class gift which is subject to open until B's death. *See supra* notes 157-58 and accompanying text. In short, the rule requires that the interests of all class members vest, if at all, by the members being born within the allowed period of time. In this instance, although B-1's interest is subject to the rule, it does not violate it because a valid proof can be established with B under Step Three B.

242. *See supra* notes 157-58 and accompanying text.

243. One should note two very important exceptions to the "all or nothing" rule (*see supra* notes 157-58 and accompanying text) involving class gifts. First, if a stated sum is given per capita to each member of a class, those members' interests which must vest or fail within the period of the rule will be upheld even though there may be other potential members with interests that violate the rule. *See* 6 AMERICAN LAW OF PROPERTY § 24.28 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, § 1266. For example, consider this bequest by A: "\$100,000 apiece to each and all of my daughter D's children who attain age thirty." Assume that D survives A along with her two children, D-1 and D-2, both of whom are under age five. Assume further that the gift of residue is deferred so that

class is subject to open.<sup>244</sup>

The foregoing observations can be illustrated. Assume that A creates a testamentary trust that provides: "Income to B for life, and thereafter, principal to C absolutely; however, if C predeceases B, then principal to such of B's children as attain age twenty-five." Assume further that B survives A and has only one child at A's death, B-1, who is already age twenty-five. Most courts would conclude that C has a vested interest subject to divestment, while B's children have a contingent executory interest. Although possession of C's gift of principal is subject to a precedent requirement that C must actually survive B, courts generally view this requirement as a condition subsequent, thereby making C's interest vested and defeasible but not contingent.<sup>245</sup> Accordingly, C's interest is

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the rule of convenience itself would not otherwise restrict the class gift to D's children alive at A's death. In this instance, because a valid proof can be made under Step Three A, the interests of D-1 and D-2 satisfy the common law rule. Courts will uphold these gifts even though a gift to D-3, a child born after A's death, would violate the rule. If, however, the gift had been of a sum to be divided equally among D's children, then the entire class gift would have violated the rule. In this situation, courts will apply the "all or nothing" principle and invalidate the entire class gift even though it is quite apparent that the shares of D-1 and D-2 must vest, if at all, within their own lifetimes, namely, the lifetimes of lives in being at A's death.

Second, if an estate owner constitutes a class gift in terms of a series of subclasses, then those subclasses that must be fully determined, if at all, within the period of the rule will be upheld even though there may be other potential subclasses that violate the rule. See 6 AMERICAN LAW OF PROPERTY § 24.29 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, § 1267. Consider, for example, this testamentary trust created by A: "Income to B for life, and at B's death, income to B's children for the life of the survivor of them; when the last of B's children dies, principal to B's grandchildren, per capita, absolutely and forever." Assume that the following people are alive at A's death: B; B's only child, his daughter B-1; and B's only grandchild, his granddaughter G-1. The gift of principal to B's grandchildren violates the common law rule and this includes the share of G-1 even though it was fully vested at the time of its creation at A's death. For further explanation, see *infra* illustration IV A-7. Assume, however, that A had provided differently for subclasses: ". . . and at B's death, income to B's children for the remainder of their respective lives; after the death of each child, the share of principal from which he or she had been receiving income shall then pass absolutely to such child's children." Because of the gift of principal to subclasses of B's grandchildren, courts will uphold the gift of principal to B-1's children, G-1 and any others born thereafter, but they will invalidate the gift to the children of any other child of B, someone who necessarily must be born after A's death. The gift to B-1's children satisfies the common law rule because a valid proof can be made under Step Three B using the life of B-1.

244. For an illustration of a perpetuities violation involving a class gift that contains an interest which is vested subject to open, see *infra* illustrations IV A-6, IV A-7.

245. Most frequently, courts and commentators will say that an interest is contingent if there is some precedent requirement to possession other than the termination of preceding estates. See, e.g., J. GRAY, *supra* note 1, § 101. Applying this test to C's interest, one might conclude that it is contingent. For C's interest to become possessory, there is a requirement beyond the termination of B's income interest for life: C must survive B, otherwise a substitute gift will be made to B's children. Nevertheless, this is not the only test courts use to distinguish between vested and contingent inter-

not subject to the common law rule against perpetuities, but the substitute gift to B's children is. Now then, what are the exact conditions that make the children's executory interest contingent and, therefore, subject to the rule? Two are clearly expressed; namely, C must predecease B and each child of B must attain age twenty-five before he can share in the substitute gift of principal. There is also an implied, but obvious, condition: as to children of B other than B-1, such children must be born.<sup>246</sup> Finally, there is another implied condition that courts sometimes find: all of B's children, in addition to being born and attaining age twenty-five, must survive B.<sup>247</sup> These, then, are the possible conditions that render the interest of B's children contingent in interest, and one must keep them in mind carefully while applying the common law rule and conducting the methodology. When C predeceases B, B-1's interest becomes vested absolutely, assuming there is no implied condition requiring B-1 to survive B. Nevertheless, the common law rule requires something more. B-1's interest remains contingent under the rule until the last of B's eligible children joins the class by attaining age twenty-five or fails to join it by dying before age twenty-five. In short, the rule requires that the class membership be fully determined within the allowed time period.<sup>248</sup> All class interests must satisfy the rule, otherwise none

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ests. Often, courts will focus on the form of a condition rather than its operative requirements in relation to possession. Accordingly, courts will classify an interest as vested if the condition appears *after* the presence of other language that makes a prior gift to an ascertained taker or group of takers. Stated differently, if the conditional language is located subsequent to a description of the taker whose interest is subject to the condition, then the interest is characterized as vested subject to divestment. It is a test which focuses upon the order and form of language rather than the operative requirements for possession. *See id.*, § 108. Applying this test to C's interest, one should conclude that C has a remainder that is vested subject to divestment. The condition of survivorship attached to C's interest appears in a separate clause only after language which creates a remainder in C. Given the strong preference for vested interests, if either of these tests calls for a vested construction, courts will rely upon such test instead of others. For further discussion and illustration, see L. SIMES & A. SMITH, *supra* note 22, §§ 139, 141, 149.

246. *See infra* note 330.

247. *See supra* note 240.

248. B-1's interest violates the common law rule against perpetuities, even if there is no implied requirement that a child of B must survive B. Ultimately, the critical test must take the following form for any appropriate testing lives found under Step Three: Will all of B's children join, or fail to join, the class by (being born), attaining age twenty-five and by C's predeceasing B within twenty-one years of the testing life or of A's death? In setting out the critical test, parentheses are used to identify one or more of several multiple conditions that appear cumulatively, specifically the ones that are subsumed by another condition. However, pursuant to Step Two C (1), one should always use the subsuming condition to test and validate the interest in question under Steps Three and Four. *See infra* text accompanying notes 249-50.

Under Step Three A, the takers—B's children—are not restricted to lives in being. No descriptive

will do so.<sup>249</sup>

The remainder of Step Two appears exceedingly formidable. Nevertheless, one should not feel overwhelmed because of its length and apparent complexity. This is the case because limitations that involve multiple conditions frequently contain a condition that subsumes each of the others. Consequently, in applying this methodology, one seldom proceeds through all of Step Two. Therefore, in a first reading of the methodology one is advised at this point to proceed directly to the explanation of the most important step—Step Three.

Step Two B asks one to determine whether the contingent interest in question includes multiple conditions, express or implied. The answer to this question is, of course, already supplied by Step Two A. Once again, one should not overlook the presence of an implied condition. For example, the most common kind of implied condition requires the very existence of the taker; that is, the taker must be born. Consequently, every class gift which is subject to open to afterborn members contains the implied condition of birth. Quite often, this is the only condition; nevertheless, there are times when the class gift is subject to another condition, one that is usually express. In this latter situation, one must conclude that the interest in question is subject to multiple conditions.

This can be illustrated with a testamentary gift by A: “(In trust) income to B for life; thereafter, principal to B’s children.” Assume that B has one child, B-1, at A’s death. B-1’s interest is vested absolutely, but it is also subject to open. Because it is subject to open, it is contingent for purposes of the common law rule against perpetuities. This contingency is implied and it involves the birth of other potential members of the class. Nevertheless, because this condition is the only one that makes the

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language limits the class to B-1 and, because distribution of principal is deferred until B’s death, no occasion exists for the rule of convenience to fix maximum membership before the possibility for additional children has been exhausted. Finally, because B survives A, one must presume there is a physical possibility for additional children. Under Step Three B, B and C do qualify for testing. Nevertheless, in applying the critical test separately, one observes that neither life validates. In both instances, a second child, B-2, might be born just before the death of B or C. Accordingly, B-2 might attain age twenty-five and join the class more than twenty-one years after the death of either person. Under Step Three C, absent a saving clause, there is no one otherwise or separately and differently mentioned. Under Step Three D, B qualifies as a parent of the takers; nevertheless, one dismisses him from further consideration because he has already been tested under Step Three B. Finally, applying the critical test under Step Four, one should observe immediately that every child of B born after A’s death necessarily will join the class, if at all, more than twenty-one years after the trust takes effect at A’s death.

249. *See supra* notes 157-58 and accompanying text.

gift of principal contingent, one must conclude that the interest in question is not subject to multiple conditions. And with this conclusion, one can then bypass the rest of Step Two and proceed directly to Step Three and, if necessary, Step Four. Suppose, however, that the gift of principal had read: “. . . thereafter, principal to B’s children who attain age twenty-one.” Regardless of B–1’s age, there are now two conditions that apply to potential class members: first, there is the implied condition that they must be born, and second, there is the express condition that they must attain age twenty-one. With this in mind, one must conclude that the contingent class gift to B’s children is subject to multiple conditions, and one must now proceed to Step Two C.

Step Two C first examines how multiple conditions are ordered and connected. And ultimately, it focuses on multiple conditions that appear cumulatively—namely, those in which each condition, express or implied, must be satisfied before the interest in question vests. If one determines that the multiple conditions do not appear cumulatively, that instead they appear alternatively (with the interest able to vest if any one of the group of alternative conditions is satisfied), then one should bypass the rest of Step Two C and proceed directly to Step Two D.

This can be illustrated with the following testamentary gift by A: “(In trust) income to B for life; thereafter, principal to his daughter, B–1, if and when she either graduates from law school or medical school.” In this instance, the gift of principal contains two express conditions, and they appear in the alternative so that B–1 can take her interest following B’s death upon fulfillment of either of these conditions. With this conclusion, one must then proceed to Step Two D. Suppose, however, the conditions had read: “. . . thereafter, principal to his daughter, B–1, if and when she graduates from both law school and medical school.” In this instance, the gift of principal contains the same two conditions, but they appear cumulatively, so that both conditions must be satisfied before B–1 is entitled to principal. Consequently, one must carry on with Step Two C by proceeding to Step Two C (1).

The introductory portion of Step Two C also raises the possibility of multiple conditions in which some conditions appear cumulatively while others appear alternatively. These circumstances are not commonplace; nevertheless, they are possible. When multiple conditions appear in this manner, one must then evaluate and test these conditions by proceeding with Step Two D for the alternative conditions, and with Step Two C (1) for the cumulative conditions. In conducting this portion of the method-

ology, when multiple conditions appear in this mixed format, one should recognize that the multiple conditions can be articulated in terms of subsets of cumulative conditions and subsets of alternative conditions. Accordingly, one should find it is easiest to proceed first with an evaluation of each subset before examining the entire set of multiple conditions.

This can be illustrated with the following testamentary gift by A: "(In trust) income to B for life; thereafter, principal to his daughter, B-1, if and when such child graduates from either law school or medical school and marries." This set of multiple conditions contains a subset of alternative conditions—law school or medical school—that are cumulatively joined to another condition—marriage. Accordingly, one should proceed first to test the alternative subset under Step Two D, and then one should test the remaining conditions under Step Two C (1).

Assuming that one has concluded that all conditions appear cumulatively, then Step Two C (1) requires a determination whether any of the multiple conditions subsumes one or more of the others, so that satisfaction of the subsuming condition necessarily satisfies the requirements of the subsumed condition. If one finds such a subsumed condition, then one proceeds to evaluate and test the subsuming condition along with other cumulative conditions—those that are not subsumed—under Step Two C (2). Further, if the subsuming condition subsumes each of the other multiple conditions, then one should proceed immediately to Step Three and, if necessary, Step Four to determine whether a valid proof can be made with such subsuming condition.

This can be illustrated with the following testamentary gift by A: "(In trust) income to B for life; thereafter, principal to such of B's children who are alive at her death and who attain age thirty." Assume, further, that B is childless at A's death. With respect to the gift of principal, this limitation contains one implied condition: that potential children be born. It also contains two express conditions: that a child survive B and attain age thirty. Nevertheless, one can readily observe that the implied condition is subsumed by each of the express conditions. None of B's children can survive her or attain age thirty without first being born. As a result, one must concentrate on the subsuming conditions in any subsequent attempt to make a valid proof. And in this instance, one then should proceed to Step Two C (2). Suppose, however, one of the express conditions had been omitted: ". . . thereafter, principal to such of B's children who attain age thirty." In this instance, the condition that children must be born is completely subsumed by the condition that children

attain age thirty. Accordingly, one then should bypass the rest of Step Two and proceed directly to the matter of making a valid proof with the subsuming condition under Step Three and, if necessary, Step Four. This latter circumstance is a very common one; consequently, in most situations, the complexity of Step Two will be bypassed.

Step Two C (2) is the last step one must consider for cumulative conditions before proceeding to the matter of making a valid proof. Step Two C (2) asks whether two or more of the cumulative conditions are satisfied by the same event. The answer to this question determines which cumulative conditions must be found valid. If each cumulative condition is predicated upon a separate event, then the interest in question cannot be upheld unless one can make a valid proof with all cumulative conditions. However, whenever one finds two or more cumulative conditions predicated upon the same event, then in assessing these particular cumulative conditions, a valid proof need only be made with respect to one of the conditions.

This can be illustrated with a testamentary gift by A: "(In trust) income to B for life; thereafter, principal to B's children who attain age forty within twenty-one years of B's death and within twenty-one years of B's spouse's death." Assuming that B is childless at A's death, how does one evaluate the multiple conditions attached to the gift of principal? Recognizing under Step Two C (1) that the implied condition of birth among B's children will be subsumed by each of the express conditions, one observes that both conditions are predicated upon the same event; namely, in each case, a child of B must do the same thing to satisfy the condition—attain age forty. Accordingly, in making a proof under Step Three and, if necessary, Step Four, one can prove validity for both conditions by making a proof with just one of them. Suppose, however, the gift of principal had read: ". . . thereafter, principal to B's children who attain age forty within twenty-one years of B's death and who practice law within twenty-one years of B's spouse's death." Here, the cumulative conditions are not predicated upon the same event: the actor is the same, but the requirements are not. Consequently, a valid proof can be made under Step Three and, if necessary, Step Four, only if one is able to validate both of these cumulative conditions.

Step Two D applies only if one has previously found conditions that appear in the alternative and it applies exclusively to these conditions. In assessing these conditions, one must first identify the implied conditions and the express conditions from which they are derived and to which

they are joined in the alternative. These implied derivative conditions must then be dismissed. Having done this, one is then ready to proceed to Step Three and, if necessary, Step Four to determine whether a valid proof can be made as to the remaining condition or as to the remaining conditions that are now separately expressed in the alternative. In doing so, one carefully should observe that each express alternative condition must be tested separately just the same as if multiple gifts had been created. As a result, a court will uphold each of the conditions for which a valid proof can be made and strike those conditions in which a valid proof cannot be made.

This step can be illustrated with the following devise of Blackacre by A: "To B in fee simple; however, if none of B's children becomes a clergyman, then to C in fee simple absolute." Assume that B is childless at A's death. As written, C's contingent executory interest is subject to a single condition; namely, every one of B's children must fail to become a clergyman. Some analysts, however, might find an alternative condition that derives from the express condition itself: that C may take if B dies without having had any children whatsoever. Accordingly, one might view the devise as if it had said: "To B in fee simple; however, if B dies without having had children or if none of B's children becomes a clergyman, then to C in fee simple absolute." If the devise actually had been expressed in this manner, then each of these alternative conditions would need to be evaluated and tested separately under Step Three and, if necessary, Step Four. Accordingly, if one can make a valid proof with the first alternate condition but not the second, then the first condition will be enforced and the second struck, and the devise to B will be upheld just the same as if it had said: "To B in fee simple; however, if B dies without having had children, then to C in fee simple absolute." Nevertheless, if the devise appears as originally hypothesized, so that B's death without having had children becomes merely an implied component of the express condition, then one must dismiss the implied derivative condition and determine whether a valid proof can be made solely on the basis of the express condition. With this in mind, a court will not enforce C's executory interest simply because B thereafter dies without having had any children whatsoever.<sup>250</sup>

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250. For further illustration, consider this gift in which A creates a testamentary trust that leaves: "Income to B for life and, after his death, income to his then living wife for her life; thereafter, principal to his children absolutely who are then living at the time of distribution." Assume that B (age eighty), W (B's wife, age seventy), and B-1 (B's son and only child, age forty) survive A. If A

*Step Three A*—Step Three A initiates the process of selecting the testing lives in being.<sup>251</sup> It focuses on the takers of the contingent interest under consideration, and asks whether such takers are restricted to lives in being and to lives already ended when the period of the rule commences. Steps Three B, C, and D also raise the same question, but they do so with respect to different individuals and groups that might be connected in some way to the contingent interest.<sup>252</sup> In each step, one must

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intends the gift of income to B's wife to include not just W but any person married to B at the time of B's death, then the gift of principal to B's children violates the common law rule against perpetuities. See *infra* illustration IV A-9. The above condition imposed upon B's children embodies alternative circumstances upon which they are eligible to share the principal. It enables them to take if B survives his wife and they are then living. It also enables them to take if B leaves a surviving wife and they are alive at her death as well. The former circumstance or condition must happen, if at all, at B's death, a point in time within the rule, but the latter may happen at the widow's death, a point in time beyond the period of the rule because she may be unborn at the time of A's death. Nevertheless, under the common law rule, the conditions are treated as one and the entire gift of principal must fail.

If, however, A had expressed these two contingencies separately and in the alternative, most courts would enforce the contingency that satisfies the common law rule because it must happen, if at all, within the allowed period of time. If, for example, A had stated: ". . . thereafter, upon B's death, if he does not leave a surviving wife, or upon his wife's death if B leaves a surviving wife, principal to his children absolutely who are then living at the time of distribution," courts will elect to enforce the first condition but not the second. The gift of principal will be made to B's children living at the time of distribution only if B survives his wife. Consequently, in enforcing this first condition, courts will "wait and see" whether B leaves surviving children but no surviving wife. See 6 AMERICAN LAW OF PROPERTY § 24.54 (A. Casner ed. 1952); RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 comment o and reporter's note 15 (1983); L. SIMES & A. SMITH, *supra* note 22, § 1257.

251. The entities that qualify as testing lives under Steps Three A, Three B, Three C, and Three D must be one or more human beings; indeed, the common law rule against perpetuities does not allow a valid proof to be made with anything else. See L. SIMES & A. SMITH, *supra* note 22, § 1223. Consequently, if the estate owner creates a contingent interest in a corporation, then one cannot use Step Three A to make a valid proof with respect to such interest. Further, if the estate owner, in addition to the contingent interest under consideration, creates another interest in a corporation, then one cannot use such corporation to make a valid proof under Step Three B. Finally, if the estate owner, in addition to creating the contingent interest under consideration, otherwise mentions or separately mentions a corporation within other directly related provisions, then one cannot use such corporation to make a valid proof under Step Three C.

252. Step Three involves a search for lives in being that are connected or relevant to vesting. It attempts to comprehend and classify all potential sources of connected or relevant lives. Instead of relying exclusively upon the logic of connection or relevance to discriminate among potential testing lives, it creates broad categories into which these lives necessarily fall. Although the logic of connection and relevance is implicit in the formulation of this methodology and the categories of Step Three, without full reliance upon these criteria as the sole principle for selection, one cannot avoid categories that over include. Inevitably, then, Steps Three A, B, C, and D sometimes offer lives for testing that are destined to fail in an attempt at validation. Once again, this is unavoidable unless one applies the ultimate test of relevancy to all potential testing lives found within each category. Because of the difficulties students and lawyers have had relying upon relevance and connection, this

determine whether the individual or group has been restricted to lives in being and to lives already ended because of descriptive language, because of applicable rules of construction, or because they are not physically capable of expansion or reconstitution to include those who are afterborn. In determining physical capability, the common law rule requires that one assume that a person is able to conceive a child at any time during his or her life.<sup>253</sup> Accordingly, so long as a procreator of a taker is alive or capable of being born, one cannot conclude that the taker or takers are physically incapable of expansion or reconstitution.

The process for determining testing lives under Step Three A can be illustrated. Assume that A creates a testamentary trust that provides: "Income to B for life, and after B's death, principal to B's grandchildren who attain age twenty-five." Further, assume that B, a child of B (B-1), and two grandchildren of B (G-1, age twenty-six, and G-2, age twenty) are all alive at A's death. In this instance, the gift to the grandchildren is clearly contingent. It is contingent, of course, because of the express age requirement,<sup>254</sup> but it is also contingent for purposes of the common law rule because the class is subject to open<sup>255</sup> and will allow afterborn grandchildren to join the class.<sup>256</sup> In this example, the contingent inter-

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methodology dispenses with its overt use in an effort at simplification. All that is lost in doing so is the extra time it takes to apply the critical test to irrelevant lives in being who stand no chance at validation. For an illustration that reveals lives in being under Step Three A and Step Three B that inevitably fail to validate because they are in fact irrelevant to vesting, see *infra* illustration IV B-1.

253. See 6 AMERICAN LAW OF PROPERTY § 24.22 (A. Casner ed. 1952); R. LYNN, *supra* note 34, at 58, 60-61; R. MAUDSLEY, *supra* note 21, at 49, 52-53; L. SIMES & A. SMITH, *supra* note 22, § 1229. Although actual cases offer greater support for the presumption of fertility at age eighty than they do for such a presumption at age five, both are viewed as part of the fantastic possibilities for which one must account in a careful and foolproof application of the common law rule against perpetuities. However, these possibilities have been amended by many of the reforms that have attempted to patch up problems caused by the common law rule. See *infra* note 370.

254. In this situation, courts sometimes find by implication an additional condition: that the grandchildren must survive B. See *supra* note 240.

255. The gift of principal to the grandchildren is subject to open to include potential members born after the death of A unless language or circumstances clearly indicate that A intended to preclude afterborn grandchildren or unless the "rule of convenience" operates immediately to fix the maximum size of the class. In this example, there is neither language nor circumstances that demonstrate A's intention to restrict group membership to those born by the time of his death. Further, because of the income interest given to B, distribution of G-1's share, and the share of any other grandchild who attains age twenty-five, must be deferred until B's death, and the "rule of convenience" will not close the class until then. Consequently, the class gift created in the grandchildren will remain open until the death of B.

256. Absent circumstances indicating A's intent to confine grandchildren to the children of B-1, the class of grandchildren is still subject to open and expansion even if B-1, B's only child, had predeceased A. Presumptively, there can be afterborn grandchildren because their procreators, B's

est of the grandchildren is not restricted to lives in being and to lives already ended; consequently, the grandchildren cannot serve as testing lives in being on that basis.

If, however, the hypothetical had limited the gift of principal “. . . to B's grandchildren who are alive at the death of A and attain age twenty-five,” then the group of takers of the interest in question would have been restricted to lives in being by the descriptive language used to define the class. Thus, they would become testing lives in being.<sup>257</sup> Additionally, returning to the original language of the limitation, if B had predeceased A, the “rule of convenience” would operate to close the class before the possibility of further grandchildren had been exhausted at the death of B's last child to die.<sup>258</sup> More specifically, the class would be confined to G-1 and G-2. G-1 would be entitled to immediate distribution of his minimum share because the only prerequisites to possession were the death of B and G-1 reaching age twenty-five. Both of these were accomplished immediately at A's death.

The class gift is still contingent as a whole because G-2 has not yet joined the class; nevertheless, the class has been confined to lives in being at A's death because of a rule of construction that forecloses additional members once the time for first distribution has arrived. Thus, in this instance, the grandchildren will serve as testing lives in being.<sup>259</sup>

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children, are capable of being born. The common law rule against perpetuities requires one to assume that B, regardless of age, can have another child, B-2, and that B-2 can thereafter bear another grandchild, G-3, before the death of B and before distribution must be made of the share belonging to G-1. Accordingly, G-3 would then be eligible to join the class upon attaining age twenty-five. For further discussion of this presumption, see *supra* note 253.

257 Applying the critical test to these takers of the interest in question: Must all grandchildren join the class, if at all, by (being born and) attaining age twenty-five within twenty-one years of the death of one of these grandchildren? The answer is, of course, YES. Each grandchild is a life in being and each grandchild must attain age twenty-five within his or her own lifetime. Accordingly, each grandchild, a life in being, has an interest which must vest, if at all, within his or her own life. The lives of the grandchildren themselves can be used, then, to make a valid proof with regard to their respective interests.

258. For a discussion of the rule of convenience, see *supra* note 160.

259 If B had predeceased A, there would be no perpetuities violation. One could make a valid proof under Step Three A using the takers of the interest in question, namely, the grandchildren themselves. And the reasoning would be the same as before. See *supra* note 257. More specifically, G-1's interest vests immediately upon creation, while G-2, a life in being at A's death, has a contingent interest that must vest, if at all, within his own lifetime. If, however, G-1 had been only age twenty-four at the death of A, the takers would not then be restricted to lives in being and to lives already ended. The “rule of convenience” would not operate to close the class immediately at A's death because no one is then entitled to distribution of principal. Instead, the class would remain open to include grandchildren born thereafter. Indeed, the class should include grandchildren born

Finally, with respect to the original hypothetical, assume that both B and B-1 have predeceased A and that both grandchildren are under age twenty-five at the time of A's death. G-1 and G-2 have contingent interests, and because of the contingency they are not entitled to join the class and share in the principal until they respectively satisfy the age requirement. Nevertheless, this class gift is restricted to lives in being because the procreator of the class, B-1, is dead and because no additional procreator can be born as B is also dead. Accordingly, the class of takers whose interest is contingent is confined to lives in being because they are not physically capable of expansion or reconstitution. Stated differently, the class of takers cannot be expanded to include afterborn members, nor, even if its maximum number remains fixed, can its composition be altered to include afterborn members. Therefore, once again, one can use these lives as testing lives in being and proceed to apply the critical test.<sup>260</sup>

*Step Three B*—Step Three B operates much the same as Three A. The potential testing lives in being, however, will be found among other takers of interests within the "same provision." "Same provision" includes other takers of interests respecting the same subject matter. Most often, this involves that person or those people who take prior income interests.<sup>261</sup> It is important to note that "same provision" does not mean only those takers who are included within the "same paragraph." Indeed, among dispositive designs used today, it is not uncommon to find distribution of the residue carried out over several paragraphs.<sup>262</sup>

The process for selecting testing lives under Step Three B can also be illustrated by the foregoing hypothetical in its original form.<sup>263</sup> Once

before the time in which the first grandchild actually attains age twenty-five or before the time in which B-1 dies, whichever occurs first. Consequently, given this variation of fact, the grandchildren could not serve as testing lives in being.

260. If both B and B-1 had predeceased A, there would be no perpetuities violation. Again, a valid proof can be made under Step Three A. And the reasoning would be the same as before. See *supra* notes 257, 259. See also *infra* illustration IV A-1. More specifically, both G-1 and G-2, lives in being at A's death and the only potential class members, have interests that must vest, if at all, within their respective lifetimes.

261. See, e.g., *infra* illustrations IV A-1 to IV A-4, IV A-6 to IV A-11, IV B-1, IV B-3 to IV B-5.

262. For a collection of current will and trust forms that take multiple paragraphs to dispose of given subject matter (for example, the residuary estate or whatever remains after the settlor's death in the case of a revocable living trust), see R. WILKINS, *DRAFTING WILLS AND TRUSTS AGREEMENTS—A SYSTEMS APPROACH* (1980).

263. See *supra* text accompanying notes 253-54.

again, so long as B survives A, under Step Three A the takers of the contingent gift of principal—B's grandchildren—do not constitute a group that is confined to lives in being when the period of the rule begins. Whether B-1 is alive at A's death is immaterial because B is alive and he is assumed capable of having additional children who can then bear other grandchildren before the earliest time for distribution.<sup>264</sup> Nevertheless, under Step Three B, someone qualifies as a testing life in being. B himself is an individual taker within the same provision. B is ascertained and by descriptive language is restricted to a life in being. Consequently, one can apply the critical test to him.<sup>265</sup>

Quite differently, assume that the hypothetical had added an income interest following the death of B: “. . . then to B's children for the life of the survivor of them . . .” B's children would constitute another group of takers within the same provision; however, they would not qualify as testing lives because there was no descriptive language or any other basis for restricting the group to lives in being and because B was alive and capable of bearing children born after A's death who would then join the class of income beneficiaries.<sup>266</sup>

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264 The earliest time for distribution will be at B's death, the time in which his income interest ceases. At A's death, G-1 already has attained age twenty-five and, therefore, his interest vests immediately. His interest is absolute and will pass to his successor even if G-1 thereafter fails to survive B. Accordingly, G-1 or his successor will be entitled to a share of principal immediately after the death of B. As a result, the “rule of convenience” will require that the maximum size of the class be fixed in order to make such distribution. Even if B-1 has predeceased A, one cannot say that the grandchildren are restricted to lives in being at A's death. If B has survived A, one must presume that B can have another child, B-2, and that B-2 thereafter can have a child, G-3, before B's death—the time for distribution of G-1's interest and the closing of the class gift to the grandchildren. For further discussion of the presumption of fertility required by the common law rule against perpetuities, see *supra* note 253 and *infra* note 370.

265 Applying the critical test to B, one asks: Must all grandchildren join the class, if at all, by (being born and) attaining age twenty-five within twenty-one years of B's death? Taking into account the possible times in which potential grandchildren can join the class, one concludes that the answer is NO. The critical test requires that one examine all possibilities for remote vesting. For example, although no grandchild can be born after the death of B and still be eligible to join the class because of the rule of convenience, B-1 (or any afterborn child of B) might have a child after A's death who has not reached age four by the time of B's death. It then becomes possible for such afterborn grandchild to attain age twenty-five and join the class more than twenty-one years beyond the death of B. Accordingly, B does not become a validating life in being.

266 With this variation, B's children are not restricted to lives in being at A's death as a result of descriptive language or physical impossibility. Furthermore, they are not affected by the “rule of convenience.” Their claim to distribution of income is necessarily deferred until the death of their parent, B; namely, until a time when there can be no more children. Accordingly, there is no occasion for the “rule of convenience” to close off membership before the possibility of additional children has been exhausted. Finally, even if the only income interest created by A had been for the

*Applying the critical test*—Before one continues to specific consideration of Steps Three C and D, it should be observed that there are two central components to each of the steps of Step Three. First, one must determine whether a particular person or group—in Step Three A, for example, the takers of the interest in question—is confined to lives in being and to lives already ended at the time the period of the rule begins. Second, assuming one has found a group that cannot include afterborn members, the critical test must then be applied: Must the interest vest, if at all, within twenty-one years of the death of one of these testing lives in being?

Before proceeding with this critical test, several important observations must be made. To begin with, prior to administering the critical test under Step Three A, Step Three B, Step Three C or Step Three D, the methodology requires elimination of those projected testing lives who have predeceased the point in time when the period of the rule commences—that is, those lives that “have already ended.” These lives become unnecessary for testing because, if one adds twenty-one years to the time of their respective deaths, such period will never exceed the twenty-one years that are measured from the time the rule begins, namely the testing period used in Step Four. Stated differently, assuming the period of the rule begins at the estate owner’s death, twenty-one years added to the estate owner’s death always will exceed twenty-one years added to the death of someone who predeceases him.<sup>267</sup> As an aside, it should also be noted that there is no need to apply the critical test to the estate owner under a transfer effective at his death because Step Four already accomplishes this. However, when an estate owner makes an irrevocable transfer during his life, he can, depending on the terms of the transfer, function as a testing life under Step Three A, Step Three B, Step Three C or Step Three D. This will happen only if the estate owner independently qualifies as a testing life under one of these steps.<sup>268</sup>

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benefit of B’s children and not B himself, one would still be unable to conclude that the children were restricted to lives in being. Because the “rule of convenience” should not apply to multiple distributions of income, the class of B’s children would not be restricted to those born by the time of first distribution. See L. SIMES & A. SMITH, *supra* note 22, § 649.

267. For example, consider the previous illustration involving a gift of income to B and a gift of principal to B’s grandchildren who attain age twenty-five. See *supra* text accompanying notes 253-54. Suppose B had died one year before the testator, A. Adding twenty-one years to B’s death would extend to twenty years beyond the death of A. This is clearly less than the time period permitted by the common law rule which always allows for vesting within twenty-one years of the time interests are created—in this instance, twenty-one years beyond the death of A.

268. Under an irrevocable lifetime transfer, unless the estate owner’s life or death has some

After dismissing lives already ended, when one conducts the critical test of validity under any of the parts of Step Three, and thereby speculates about possibilities for remote vesting, it is very important to assume that testing lives in being can die immediately after the period of the rule begins and, when necessary, that their deaths can be delayed until after they have had a child who would not be regarded as a life in being.<sup>269</sup> This latter assumption is predicated upon two others: that the testing lives in being can have children whatever their age, and that they will do so within the shortest possible time after the period of the rule begins to run.<sup>270</sup>

Once again, using the previous illustration involving B and B's grandchildren,<sup>271</sup> assume that as of A's death G-1 is age twenty-six, G-2 is age twenty, B is age ninety, and B-1 is already dead. The takers of the contingent gift of principal—the grandchildren—cannot serve as testing lives because B, regardless of age, is assumed capable of having additional children and because these afterborn children are then assumed capable of having children (B's grandchildren) before B dies, in which case they would then be eligible to join the class when they attain age twenty-five thereafter. They would be eligible to join the class because it is not limited to existing grandchildren by descriptive language and because they would be born before the time for first distribution.<sup>272</sup> However, under Step Three B, as a taker of another interest within the same

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relevance or connection to vesting, there is no way in which he can be used to make a valid proof under the common law rule against perpetuities. If, however, the estate owner independently qualifies as a testing life under Steps Three A, B, C, or D, this establishes a connection that justifies applying the critical test to him. For an illustration of a situation in which a settlor of an irrevocable living trust does independently qualify as a testing life in being, see *infra* illustration IV A-11.

269. The common law rule against perpetuities does allow for consideration of a period of gestation. Those born within a period of gestation following the time when the period of the rule begins are regarded as lives in being. Presumably, then, a group that is limited to those born within a period of gestation from the time a gift is created will consist exclusively of lives in being. For further discussion of the common law rule against perpetuities in regard to the period of gestation, see *infra* note 364.

270. See *supra* note 253 and *infra* note 320.

271. See *supra* text accompanying notes 253-54.

272. The "rule of convenience" will not preclude inclusion of additional grandchildren born before the time of B's death. Assuming that nothing in the language justifies limiting the class of grandchildren to those alive at A's death, afterborn grandchildren will be entitled to share the principal. Even though G-1 has an interest that is fully vested because he has already attained age twenty-five, G-1 will not be entitled to distribution of his share until the income interest ceases at B's death. First distribution will not occur until then; accordingly, there is no occasion to close the class before B's death. For further discussion of the "rule of convenience," see *supra* notes 160-61 and accompanying text.

provision, B does qualify as a testing life in being. Nevertheless, in conducting the critical test, one must again assume, despite B's advanced age, that the group of grandchildren can expand and that it can do so before B dies; namely, B can have a child at an advanced age, while that child thereafter can have a child (B's grandchild) at an early age.

Further, in hypothesizing possibilities for remote vesting, it is irrelevant that one happens upon a possibility that is more than twenty-one years beyond the death of the testing life under specific consideration and yet is still within the life of another person who is in being. One must carefully and faithfully observe that if this other life in being can be used to validate, this will be accomplished elsewhere in the methodology through the use of another step.

In applying the critical test, one should also observe that the process is facilitated when one determines what limits exist, if any, upon the time for fulfillment of the conditions that make the interest in question contingent. For example, assume once again that A devises Blackacre: "To B in fee simple; however, if Blackacre is ever used for any purpose other than residential, then to C in fee simple absolute." Both B and C are ascertained; accordingly, neither interest is contingent for want of a fully identifiable taker. B's interest in fee simple is vested subject to divestment in the event that B or anyone else ever uses the land for a nonresidential purpose. Consequently, C's substitute executory interest is contingent upon a violation of this ongoing restriction concerning land use. And, after A's death, this restriction is the only condition in the limitation that affects vesting.<sup>273</sup> Now then, in using either C or B to test

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273. Because the condition herein is unrelated to the life of C, one might observe that it is futile to use him as a testing life and, therefore, one should summarily dismiss C as a testing life in being. Professor Dukeminier, however, views all beneficiaries as causally related to vesting. For an interest to vest, the beneficiary must be ascertained and all conditions precedent must be satisfied. Because the former requirement must be satisfied with respect to every beneficiary, all beneficiaries are relevant to and affect vesting of their own interests. And this is true for every beneficiary, even those who are fully ascertained at the moment such interest is created. Accordingly, he maintains that all beneficiaries should be tested in applying the common law rule and that they should also serve as measuring lives under any "wait and see" test. Professor Waggoner, however, believes otherwise. He admits that the common law rule against perpetuities is concerned with vesting and, consequently, with those lives causally related to vesting. Nevertheless, he maintains that the rule focuses upon aspects of vesting that are not already settled at the moment the gift is made; namely, it focuses upon those conditions that make the interest subject to the rule in the first place. Accordingly, because the beneficiary (C) is fully ascertained the moment the devise is made by A and because C's life does not in any way affect the express requirement that conditions his interest (that Blackacre be used for some purpose other than residential), Waggoner would argue that one must dismiss C as a causal life in being and, therefore, one should not apply the critical test to him. See Dukeminier.

under Steps Three A or B, one should observe that this condition carries with it no restrictions upon the time for vesting because fulfillment or breach can occur at any time; that is, the condition does not restrict vesting by creating a time limit or point in time beyond which vesting cannot occur.<sup>274</sup>

Assume, however, the hypothetical had provided: “. . . however, if Blackacre is ever used for any purpose other than residential during B’s lifetime, then to C in fee simple absolute.” In this instance, the substantive limitation upon land use is the same as before. However, the condition does fix a point in time beyond which vesting cannot occur, namely, B’s death.<sup>275</sup> For another illustration, assume that A creates a testamentary trust that provides: “Income to B for life, and then after B’s death, principal to the first of B’s children to attain age twenty-five.” Further, assume that at A’s death, B is living and that he has one child, B-1, who is age five. The gift of principal to B’s child is, of course, contingent: attainment of age twenty-five is an express and obvious condition affecting vesting. However, because B-1 may never satisfy this requirement and because the gift is not confined to children alive at A’s death, there are two additional conditions respecting any potential child of B born after A’s death: such child must be born and all older children must fail to attain age twenty-five. Accordingly, in using B to test under Step Three B,<sup>276</sup> one should observe that these conditions restrict the time for vesting. Vesting cannot occur later than twenty-five years after a particu-

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*supra* note 59, at 1661, 1706; Dukeminier *supra* note 62, at 1732-37; Dukeminier, *A Final Comment By Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985); Waggoner, *supra* note 50, at 1719-24; Waggoner, *supra* note 76.

274 C’s contingent executory interest violates the common law rule against perpetuities. For further discussion, see *infra* illustration IV B-1.

275 With this limitation upon the duration of the condition, B’s fee simple will become absolute in his successor so long as the restriction upon land use is not violated during the remainder of B’s lifetime. With this time limitation, it should also be clear that C’s interest does not violate the common law rule against perpetuities. Applying the critical test to B under Step Three B, one readily concludes that C’s interest must vest, if at all, within B’s lifetime.

276 The taker of the interest under consideration (“the first of B’s children to attain age twenty-five”) cannot qualify as a testing life under Step Three A. Such taker is not restricted to a life in being or to a life already ended because of descriptive language, because of a rule of construction, or because of physical impossibility. Nothing in the language itself confines the gift of principal to someone born by the time of A’s death. The “rule of convenience” is irrelevant because this is not a class gift. Further, because B is alive and presumed capable of having additional children, there is no physical impossibility that precludes a gift to someone born after A’s death. Quite differently, however, B will qualify as a testing life under Step Three B. By the descriptive language itself, the other taker is restricted to someone alive at A’s death.

lar child's birth. And because it is possible that B's youngest child may be the first to reach age twenty-five—that all elder children might die before attaining age twenty-five—the latest point in time for vesting would not be later than the time in which the youngest of B's children might attain age twenty-five. Assuming B's youngest child must be born by the time of B's death, or within a period of gestation thereafter,<sup>277</sup> vesting could not occur later than twenty-five years after the death of B. With this in mind, one can apply the critical test to B. This recognition of the latest time for vesting, however, is not enough to make a valid proof.<sup>278</sup>

Additionally, in applying the critical test and assessing time limits upon the fulfillment of relevant conditions, one must always keep in mind the effect of other rules of construction. For example, assume that A creates a testamentary trust that provides: "Income to B for life, and, after B's death, then principal to B's grandchildren." At A's death, assume that B is alive and that he has one child, B-1, and one grandchild, G-1, who are then living. G-1's share of the gift is vested in interest absolutely because the only apparent condition attached to each grandchild's interest is being born.<sup>279</sup> However, for purposes of the common law rule, G-1's interest remains contingent until the last eligible grandchild joins, or fails to join, the class.<sup>280</sup> Presumably, A intends the class of B's grandchildren to include all who may ever be born, and, therefore, vesting under the rule cannot occur until the death of B's last

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277. Given the miracles of modern science, the assumption that a person's children must be born by the time of his or her death, or within a period of gestation thereafter, may no longer be justified. Nevertheless, in all likelihood, courts will continue to observe this assumption, especially in determining who falls within the meaning of a gift made to a class. In this example, then, courts might view the gift made by A as if it had been given expressly to the first of B's children who attains age twenty-five and is born by the time of B's death. For further discussion of this assumption, see *infra* note 337.

278. Therefore, when one applies the critical test under Step Three B, B's life will not afford a valid proof. Must the first of B's children to attain age twenty-five do so, if at all, within twenty-one years of B's death? The answer is, of course, NO. B-1 might die shortly after the death of A and, thereafter, B might have another child, B-2. Further, as already observed in calculating the latest time for vesting, B could die before B-2 attains age four, perhaps even within days of B-2's birth. And with this assumption, it then becomes possible for B-2 to become the first to attain age twenty-five more than twenty-one years beyond the death of B.

279. There are, however, circumstances in which courts have found additional conditions even when the conditions are not clearly expressed. For example, courts sometimes impute a requirement of survivorship of the time of possession or distribution. In this example, such requirement would mean that G-1 and all other grandchildren must survive B. For further discussion, see *supra* note 240.

280. See *supra* notes 157-58 and accompanying text.

child to die—someone who may be born after A's death. Nevertheless, because of the "rule of convenience,"<sup>281</sup> the class of grandchildren will be fixed at B's death. G-I has an interest that is vested and transmissible at death. Payment must be made to him, his successors, or his estate at B's death, and, in order to make such distribution, courts will close the class at that time. As illustrated, in order to understand conditions and the time for their fulfillment under the rule, and to apply the critical test, one must first account for applicable rules of construction—in this instance, the "rule of convenience."<sup>282</sup>

Finally, in considering any group of testing lives identified under Step Three, one must remember two things while applying the critical test: Must the interest vest, if at all, within twenty-one years of the death of *one* of these testing lives in being? First, validity is established whenever one can make a proof with a single member of the group of testing lives. There are times, however, when one can make a valid proof with several members. This never affects one's conclusion that the contingent interest under consideration satisfies the common law rule against perpetuities. Instead, it merely cumulates the opportunities for demonstrating validity.

Second, sometimes validity as to all members of a group of takers cannot be established with merely one member of the group of testing lives in being, especially with one testing life who can be specifically identified. Nevertheless, the interest in question may still satisfy the common law rule. The requirements of the critical test will be met if one is able to find different people within the group of testing lives that, taken collectively, validate the interests of all members of the group of takers. Somewhat differently, the requirements of the critical test also will be met whenever one can demonstrate that it is logically impossible for the interests of every member of the group of takers to vest beyond twenty-one years of the death of some member of the group of testing lives in being—someone who exists and clearly falls within the group, but someone who cannot be identified precisely at the time the rule is applied. In applying the critical test, most people will reach this same conclusion by intuition be-

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281. *See supra* notes 160-61 and accompanying text.

282. The "rule of convenience" is not the only rule that must be observed when one applies the critical test. For example, one must also account for the common law rule that renders contingent remainders destructible when applicable. *See supra* notes 154-56 and accompanying text. For an illustration of how this rule might operate to avoid a perpetuities violation, see *infra* illustration IV B-3. *See also* *Drury v. Drury*, 271 Ill. 336, 111 N.E. 140 (1916).

cause the methodology requires one to group people together for purposes of testing.

The second point can be illustrated with this testamentary trust of A: "Income to W, my wife, for life; thereafter, principal to my grandchildren absolutely." Assume that A is survived by W and three children, A-1, A-2 and A-3, and that A had no grandchildren by the time of his death. Consequently, the gift to the grandchildren is contingent; specifically, each grandchild must be born before becoming eligible to join the class. Nevertheless, this gift of principal does not cause a perpetuities violation because one can make a valid proof with A's children under Step Three D.

There are two ways to accomplish this. To be sure, one cannot use A-1 to validate the interests of all grandchildren, nor can one use solely A-2 or A-3. However, one can use A-1 to validate the interests of A-1's potential children, A-2 to validate the interest of A-2's potential children, and A-3 to validate the interests of A-3's potential children. The reason for this should be clear. None of A's children can have a grandchild of A beyond such child's death. Each set of A's grandchildren must be born by the time of such grandchildren's respective parent's death. As a result, A-1, A-2, and A-3 collectively will validate the interests of all of A's potential grandchildren.

Alternatively, one can make a valid proof with a somewhat different analysis. No grandchild of A can be born and join the class beyond the death of A's last child to die. Although one does not know if that person will be A-1, A-2, or A-3, one does know that either A-1, A-2, or A-3 will become the survivor beyond whose death a grandchild cannot be born. *One* of A's children will become the survivor. Even though it is not known precisely which person it will be, a valid proof can be made with this *one* person. And this is all that the common law rule requires.

*Step Three C*—Step Three C continues the search for a viable group of testing lives in being. It focuses on specific people or groups of people otherwise mentioned or separately and differently mentioned within the same provision or elsewhere in other directly related provisions. A person shall be deemed "otherwise mentioned or separately and differently mentioned" through the use of a pronoun or phrase that clearly identifies him. Under Step Three C, specific people or groups of people qualify as potential testing lives even if they fall within groups already considered under Step Three A or Step Three B provided there is "separate" lan-

guage that identifies and defines them “differently” from the person or groups previously considered under either of these foregoing steps. It should be emphasized that this requirement of a different definition is not satisfied by a new description of an exact same person or group already covered under Steps Three A or Three B. The “different mention” must be qualitatively or quantitatively different. For example, an individual taker is “separately and differently mentioned” when other distinct language identifies a group of which he is a member. The same is also true when distinct language separately identifies an individual member of a group that is to take an interest under the provision. Further, this group of testing lives will consist of people “otherwise mentioned,” namely new people not found under previous steps, and they will appear within the same provision or elsewhere within other provisions directly related. These people “otherwise mentioned” will not take any interest within the same provision itself, although they may take through provisions elsewhere within the dispositive instrument.

In applying Step Three C, especially for lives “otherwise mentioned,” one must account for an ever present limitation imposed by the common law rule that circumscribes the number and identity of lives that one can use to make a valid proof. More specifically, the rule imposes a requirement of feasibility: this group of lives can never be so numerous or difficult to ascertain that it becomes impractical to determine when the survivor of them has died.<sup>283</sup> For example, consider this testamentary trust created by A: “Income to my husband, H, for life; thereafter, principal to such of my descendants living twenty years after the death of the survivor of all residents of the United States alive at my death.” Without more, this group of residents of the United States qualifies as testing lives under Step Three C. And if so, the gift to A’s descendants would satisfy the common law rule because one then could say that all of A’s descendants must join the class, if at all, within twenty-one years of the deaths of lives in being—namely, all residents of the United States alive at A’s death. Nevertheless, because of the extraordinary difficulty one would encounter in tracing the life and ultimate death of each member of this group, the common law rule rejects consideration of the entire group and, accordingly, the group will not offer any life that qualifies as a testing life in being under Step Three C.<sup>284</sup>

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283 See *supra* note 130. See also R. MAUDSLEY, *supra* note 21, at 88-90.

284 See *In re Moore* (1901) 1 Ch. 936, 938.

Additionally, one should observe that, theoretically this same requirement of feasibility applies to each of the other parts of Step Three. As a practical matter, however, the problem is not apt to materialize because every time the issue of feasibility arises with respect to the taker of the interest in question under Step Three A, or the taker of an other interest under Step Three B, there is a great likelihood that the court will have addressed the same issue already in its determination of whether or not the gift must fail because the description of the beneficiary is too indefinite.<sup>285</sup>

The following examples illustrate the meaning of "otherwise mentioned or separately and differently mentioned." Consider this variation of a foregoing hypothetical: "Income to B for life, and after the death of B, principal to B-1's children who attain age twenty-five."<sup>286</sup> Assume that both B and B-1 survive A, along with B-1's children, G-1 (age twenty) and G-2 (age eighteen). For the reasons given previously, B-1's children do not qualify as testing lives under Step Three A, but B does qualify under Step Three B.<sup>287</sup> Additionally, although B-1 is a person who does not take any interest within the provision itself, he is "otherwise mentioned" and, because of the descriptive language, he is a life in being. Therefore, he qualifies under Step Three C as a testing life.<sup>288</sup>

For an example of a person or group that is "separately and differently mentioned," assume that the gift to B's grandchildren had provided: ". . . principal to B-1's children who attain age twenty-five within twenty-one years of the death of the survivor of B-1's children alive at A's

285. For a discussion of the principle by which a gift to trust beneficiaries may fail because they are too indefinite, see G. BOGERT, TRUSTS § 34 (6th ed. 1987).

286. See *supra* text accompanying notes 253-54.

287. See *supra* notes 254-60, 263-65 and accompanying text. Although B does qualify as a testing life in being, after applying the critical test, one discovers that B's life will not validate the contingent interest created in his grandchildren (the children of B-1). See *supra* note 265.

288. Applying the critical test to B-1, one asks: Must all grandchildren (B-1's children) join the class, if at all, by (being born and) attaining age twenty-five within twenty-one years of B-1's death? Taking into account the possible times in which potential grandchildren can join the class, one concludes that the answer is NO. The critical test requires that one examine all possibilities for remote vesting. For example, B-1 might have a child after A's death and before the time for first distribution, which is when the class would close because of the rule of convenience—that is, before B's death or the time G-1 or G-2 attains age twenty-five, whichever occurs last. Such afterborn child, G-3, would, therefore, be entitled to join the class thereafter upon attaining age twenty-five. Yet, it is also possible for B-1 then to die before G-3 has attained age four. It then becomes possible for such afterborn grandchild (B-1's child) to attain age twenty-five and join the class more than twenty-one years beyond the death of B-1. Accordingly, B-1 does not become a validating life in being.

death." In this instance, the survivor of G-1 and G-2 would qualify as a testing life in being under Step Three C. To be sure, G-1 and G-2 are takers of the interest in question, but they do not qualify under Step Three A because the group of takers is not restricted to lives in being and, therefore, only to G-1 and G-2.<sup>289</sup> However, the survivor of G-1 and G-2 is also separately and differently mentioned by general description, though not by individual name. The survivor derives from a group that is expressly restricted to lives in being that is "separate" from and "different" from the potentially larger group to whom principal is ultimately given—namely, B-1's children who attain age twenty-five within the required time, including those born after A's death.<sup>290</sup>

For a second illustration of a person or group that is "separately and differently mentioned," consider a variation of an earlier limitation.<sup>291</sup> A devises Blackacre: "To B in fee simple; however, if Blackacre is ever used during the lifetime of the survivor of B and C for any purpose other than residential, then to C in fee simple absolute." Once again, C and B qualify independently as testing lives under Steps Three A and Three B.<sup>292</sup> But when one applies the critical test to C and B independently,

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289. See *supra* notes 254-60 and accompanying text.

290 G-1 and G-2 qualify as testing lives under Step Three C because they are a group restricted to lives in being that is "separately and differently mentioned"; nevertheless, do these lives validate the gift of principal to B's children, including those born after A's death? In applying the critical test, one asks: Must all of B-1's children join the class, if at all, by (being born and) attaining age twenty-five within the *time required by the limitation*, and do so within twenty-one years of the death of the survivor of B-1's children alive at A's death, namely, the survivor of G-1 and G-2? Clearly, the answer is YES. The latest time for vesting and entry into the class allowed by the limitation itself is the same as that required by the critical test—within twenty-one years of the death of the survivor of G-1 and G-2. This is so because the limitation expressly restricts the latest time for vesting to no later than twenty-one years after the death of a specified life in being, in this case the survivor of G-1 and G-2. Indeed, the limitation itself incorporates the requirements of the critical test into the definition of the group of beneficiaries ultimately eligible to take the gift of principal. This is the essence of every saving clause and every saving phrase. See Becker, *Estate Planning and the Reality of Perpetuities Problems Today: Reliance Upon Statutory Reform and Saving Clauses Is Not Enough*, 64 WASH. U.L.Q. 287, 383-90, 408-16 (1986). Consequently, with respect to the contingent interests of G-1 and G-2, the interest of the first to die must vest, if at all, before the death of the survivor, while the survivor's interest must vest, if at all, within his own lifetime. For children of B-1 born after A's death, only those who are born and attain age twenty-five within twenty-one years of the death of the survivor of G-1 and G-2 will satisfy the requirements of the limitation and thus be eligible to join the class. Of necessity, they will all join the class, or fail to join it, within the period of time allowed by the critical test.

291 See *supra* text accompanying notes 273-75.

292 B and C qualify as testing lives in being because they are ascertained and because the descriptive language identifies them specifically by name.

neither life in being validates C's contingent interest.<sup>293</sup> Nevertheless, one of them is "separately and differently mentioned." One of them will become the "survivor"—although we do not know who it will be—and as a "survivor," C or B is "separately and differently mentioned." Further, when one applies the critical test to the "survivor," there is a proof of validity under the common law rule.<sup>294</sup>

Finally, it should be observed that testing lives in being discovered through Step Three C sometimes are found in "other provisions" that also deal with other property or ostensibly with other matters. This step, however, does not require that one look to every other person or group mentioned in the entire dispositive instrument. Above all, there must be some direct relation between such mentioned person or group and the interest in question.<sup>295</sup> There must be some expressed connection be-

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293. Applying the critical test to C, one must ask: Will C's interest vest, if at all, in C or C's successors by breach of the restriction upon land use within twenty-one years of the death of C? After taking into account the possible times in which C's interest might vest as a result of the breach of condition, one concludes that the answer is NO. Herein one cannot eliminate all possibilities for remote vesting. While B is still alive, C may die before violation of the restriction and, accordingly, C is entitled to transmit his contingent executory interest to another person. Thereafter, B might continue using the land only for residential purposes over the next thirty years and, then, breach the restriction upon land use. In this situation, the interest would vest in C's successor more than twenty-one years beyond the death of C. Accordingly, C does not become a validating life in being.

Applying the critical test to B, one must ask: Will C's interest vest, if at all, in C or C's successors by breach of the restriction upon land use within twenty-one years of the death of B? After taking into account the possible times in which C's interest might vest as a result of the breach of condition, one concludes that the answer is NO. Herein one cannot eliminate all possibilities for remote vesting. While C is still alive, B may die before violation of the restriction and, accordingly, B is entitled to transmit his defeasible fee simple to another person. Then B's successor might continue using the land only for residential purposes over the next thirty years and breach the restriction upon land use before C's death. Given these circumstances, the interest would vest in C more than twenty-one years beyond the death of B. Accordingly, B does not become a validating life in being.

294. Must the interest vest, if at all, in C or his successors upon violation of the restriction upon land use within twenty-one years of the death of the survivor of B and C? The answer is, of course, YES. The survivor is, necessarily, a life in being at A's death, and, although one does not know who the survivor will be, the task of tracing him is not an unreasonable one. Consequently, one can conclude that C's interest must vest or fail in C or his successors within the lifetime of a person who is necessarily in being at A's death. At the death of the survivor, if there has been no violation of the land use restriction, the executory interest of C will fail and B's interest will become absolute in his successor.

295. Without finding some direct relation to the interest in question, there is no way that one can make a valid proof with a person mentioned in another provision. Such other person must be connected to events affecting vesting or possession of the interest under consideration. A determination of whether the necessary relevance is present may not always be an easy matter. If in doubt about whether the appropriate connection can be made, one should treat such person or persons as "people otherwise mentioned" and include them under Step Three C. Nothing will be lost other than the additional time it might take to conduct this step.

tween these lives and the operation of the interest with regard to possession or vesting.<sup>296</sup> The most common example of this<sup>297</sup>—and almost always the only one within a dispositive instrument that introduces an otherwise or separately and differently mentioned group of lives in an “other provision directly related”—is the saving clause. Invariably, the group within the saving clause will consist of “all beneficiaries under this instrument who are alive” when the period of the rule commences.<sup>298</sup>

*Step Three D*—Step Three D is the final one in the search for viable testing lives in being. Under the circumstances developed in this step, it may become necessary to determine whether the parents of takers of the interest in question qualify as testing lives and, if so, it may also become necessary to use them in applying the critical test. One examines these parents only if the takers themselves fail to constitute a group of testing lives<sup>299</sup> and only if these parents as a group differ in some respect from

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296. Although the common law rule against perpetuities imposes its time constraint only upon vesting, many saving clauses go further and control the duration of trusts and thus the time for possession as well. See Becker, *supra* note 290, at 384-85.

297. Beyond saving clauses, there may be other people mentioned in directly related provisions. For example, because of powers granted to executors and trustees, one might view them as directly related. Accordingly, one should consider them for testing under Step Three C. Nevertheless, executors and trustees seldom qualify for actual testing under this step because they usually may be replaced upon death or resignation by someone not in being when the period of the rule commences. See *infra* notes 451-52 and accompanying text.

Additionally, under Step Three C, one might contemplate testing people mentioned in other dispositive provisions. These other provisions could be related directly to the one under specific consideration. This especially would be true if the provision under consideration involves a gift of the residue and the others contain contingent interests that may render such disposition incomplete if requisite conditions are not satisfied. Because the failure of a specific devise or bequest can affect distribution of the residue and the composition of a residuary class gift, one must account for these circumstances and apply Step Three C to people identified in these specific gifts. The reverse, however, should not be true. Unless the terms of a specific gift or of the residue itself can affect vesting, distribution or termination of the specific gift under consideration in relation to the gift of the residue itself, people mentioned in the residue are not directly related and will not qualify under Step Three C. Nevertheless, when in doubt, one should apply Step Three C. Once again, nothing is to be lost except the time it takes to apply Step Three C itself. Because the number of people mentioned in dispositive instruments is limited and not open ended, this additional time will not be great even if one were to apply Step Three C to everyone identified in other provisions.

298. See, e.g., MODERN LEGAL FORMS § 9271 (1968 & Supp. 1983). For a discussion of saving clauses and the problems they present, see Becker, *supra* note 290, at 378-416.

299. Professor Waggoner believes that the critical test should be applied to people connected to the transaction and that these people always include persons related by blood or adoption to the taker of the interest in question. See Waggoner, *supra* note 40, at 1716-17. Presumably, this group of blood relatives always includes the taker's parents. Professor Dukeminier essentially agrees,

other testing lives in being identified under Steps Three B and C.<sup>300</sup>

This step can be illustrated with a previous limitation involving a gift in trust of income to B for life and, thereafter, principal to B's grandchildren who attain age twenty-five.<sup>301</sup> In this instance, assume that B, B-1, G-1 (age twenty) and G-2 (age eighteen) survive A. No validation can be established under Steps Three A, B, or C.<sup>302</sup> Under Step Three D, although one can identify the parents—B's children—of the takers of the interest—B's grandchildren—as a group distinct from others identified under previous steps,<sup>303</sup> these parents will not qualify as testing lives in being. Because B is alive and capable of having additional children who,

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although he would include the taker's parents among a more focused group of testing lives, namely, persons who can affect vesting:

Any person who can affect the time a future interest vests in possession is causally related to vesting of the interest. An interest is vested in interest when (1) the beneficiary or beneficiaries are ascertained and (2) any condition precedent is satisfied. Accordingly, the persons who can affect vesting in interest are: . . .(b) Any person who can affect the identity of the beneficiary or beneficiaries (such as A in a gift to A's children); . . . .

Dukeminier, *supra* note 130, at 1875.

Nevertheless, it should be apparent that there are circumstances in which it becomes pointless to test a taker's or takers' parents. The only conditions that a taker's parents can affect as such are birth and events that are specifically connected in time to birth. Under this methodology, if the takers themselves previously have qualified under Step Three A as testing lives, it means that the group already is restricted to lives in being and to lives already ended, and that no one may affect their identity thereafter by producing an afterborn member. Further, if the lives of the takers themselves have failed to validate under Step Three A, it should be clear that the condition involved is unrelated to their lives or deaths—or to a point in time within twenty-one years of their death—and that the lives of their parents (and all other ancestors) who have affected their existence are going to fail as well. To be sure, when the takers have previously qualified as testing lives—when the takers are restricted to lives in being—parents and others related to the takers sometimes can affect vesting by having a causal relationship to its fulfillment or breach. Nevertheless, these circumstances arise only when there is a special connection to vesting other than birth. And whenever this special connection exists, the takers' parents (and all other relatives) previously will have qualified for testing under Step Three B or Step Three C.

300. This requirement appears in the following question contained in Step Three D: Do such parents fully coincide with testing lives in being previously tested under either Step Three B or Step Three C? Its purpose is the same as the requirement of "separately and differently mentioned" under Step Three C—to avoid repetitious testing and, thereby, achieve greater economy in applying the methodology. Nevertheless, if one is ever in doubt as to whether the takers' parents fully coincide with those previously tested, there is no harm in applying the critical test to such parents. Nothing can be lost except for the time it takes to conduct the test.

301. See *supra* text accompanying notes 253-54.

302. For a comparable illustration in which it is demonstrated why no validation can be established under Steps Three A, B, and C, see *infra* illustration IV A-6.

303. Quite obviously, under Step Three A, B's children are not the takers of the interest in question. Under Step Three B, B—not his children—is the other taker within the provision. Finally, absent a saving clause, there is no one otherwise mentioned or separately and differently mentioned that qualifies under Step Three C.

before the death of B, are also presumed capable of having children who would then become potential takers,<sup>304</sup> one cannot say that these parents—B's children—consist exclusively of lives in being and lives already ended.

If, however, B had predeceased A, the taker's parents—B's children, herein B-1—would qualify for testing under Step Three D. Because both G-1 and G-2 were under the required age at A's death and, therefore, were not entitled to immediate distribution, the class of takers would not be confined to lives in being.<sup>305</sup> It would include those born thereafter, at least until the first grandchild qualified for distribution by attaining age twenty-five. Accordingly, under Step Three D, one can now examine the parents of the takers. Who are the parents that provide the relationship necessary to the description of the takers, namely, B's grandchildren? They are, of course, B's children. Are they restricted to lives in being and to lives already ended at A's death? The answer is YES because B has predeceased A and, therefore, the group of parents is not capable of expansion or reconstitution to include those born after A's death. Consequently, assuming that B's children have not qualified as testing lives under Step Three B (because they are not an "other taker") or Step Three C (because they are not "otherwise mentioned"), they will qualify under Step Three D. Therefore, one can apply the critical test to B's only child, B-1.<sup>306</sup>

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304 Because of the "rule of convenience," the class of grandchildren will not necessarily remain open to include all the grandchildren B will ever have. Instead, the maximum membership will be fixed at the time of first distribution. This will occur at B's death or at the time in which the first of B's grandchildren attains age twenty-five, whichever happens last. However, nothing in the descriptive language confines the class of grandchildren to those born by the time of A's death, nor does anything restrict the class to those born to B's children alive at A's death. The only time constraint is the one imposed by the "rule of convenience," that the afterborn child of B and such child's child must be born by the time of first distribution. Presumptively, then, B can have another child, B-2, who could then have another grandchild, G-3, before B's death. B-2 is then the parent who provides the necessary relationship for a grandchild who qualifies as a taker of the interest in question. Given the inclusion of B-2's child, quite obviously, the parents who provide the necessary relation to the takers in question are not restricted to lives in being at A's death.

305 If, however, G-1 already had attained age twenty-five by the time of A's death, the class of grandchildren entitled to share in the gift of principal then would be confined to those alive at A's death, namely, G-1 and G-2. Because G-1's interest had vested upon creation and because this entitled G-1 to immediate distribution of his interest, the "rule of convenience" would thereby fix the maximum class membership at A's death and preclude all grandchildren born thereafter. See *supra* notes 160-61.

306 In applying the critical test to B-1, one asks: Must all potentially eligible grandchildren of B join the class, if at all, by (being born and) attaining age twenty-five within twenty-one years of B-1's death? The answer is NO. Surely, it is possible for B-1 to have another child, G-3, before

One additional observation must be made with respect to answering this important question within Step Three D: Do the parents of the takers in question consist exclusively of lives in being and lives already ended? When the period of the rule begins, if the description of the potential taker or group of takers makes it impossible to determine exactly who they are and, therefore, whether their parents are lives in being and lives already ended, then the answer to this question must be NO. This problem of identifying takers and their parents will arise in those situations in which the takers are defined in terms that do not reveal a specific person, group, or generation known at the time the gift is made.<sup>307</sup>

This situation can be illustrated with a variation of the foregoing example.<sup>308</sup> If the gift of principal is to B's grandchildren, one can readily identify the taker's parents as B's children. If, however, the gift of principal were ". . . to B's descendants (other than children), per capita, who attain age twenty-five," it then becomes impossible to determine the exact mix of generations that ultimately will comprise the membership of this class gift. Accordingly, it is impossible to determine the identity of their parents.<sup>309</sup> This also would be true if B had predeceased A. Assuming that none of B's descendants attained age twenty-five by the time of A's death,<sup>310</sup> it is impossible to determine which generations of B's

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either G-1 or G-2 attains age twenty-five, the point in time at which the maximum membership of the class of grandchildren is fixed because of the "rule of convenience." And, of course, B-1 then might die before G-3 arrives at age four. With these events in mind, it then becomes possible for G-3 to join the class by attaining age twenty-five more than twenty-one years after the death of B-1.

307. This problem arises when the identity of the takers and their parents can change because those who currently satisfy the description can have children and then die, and this can happen again and again until the time set for final determination of the group of people entitled to take. Commonly, it arises when the description of the takers at the time such interest is created does not identify a specific person, a specific group of people, or a specific generation of takers. Even though specific takers have not been determined precisely at the time of creation, this problem should not arise in those situations in which potential takers can be identified generationally. This problem must not be confused, however, with the common law rule against perpetuities' general requirement that it must be feasible to trace the lives used to validate an interest, or, more specifically, that the number of lives used to validate should be reasonable and that it should not be impracticable to ascertain their identity. This latter requirement applies in all situations in which testing lives are being gathered for the purpose of validation. *See supra* note 130.

308. *See supra* text accompanying note 301.

309. For further explanation and illustration, see *infra* notes 311-12.

310. If, however, G-1 had already attained age twenty-five by the time of A's death, the "rule of convenience" would require that the maximum class membership be fixed immediately. G-1 would be entitled to distribution. To accomplish this a court would close the class to G-1 and G-2 and, hypothetically, to any other descendants of B born by the time of A's death. In this situation, there would be no perpetuities violation because a valid proof could be accomplished under Step Three A. Because of the "rule of convenience," the takers themselves would be restricted to lives in being.

descendants ultimately might comprise the class members eligible to share in the principal.<sup>311</sup> Consequently, it also becomes impossible to determine the identity of their parents and whether these parents consist exclusively of lives in being and lives already ended at A's death.<sup>312</sup>

*The entire group of potential testing lives must be in being: an exception*—Before proceeding to Step Four, recall that, to qualify as a testing life in being under Step Three, each individual or group must be restricted to lives in being and to lives already ended when the period of the rule begins. One should observe, however, that there are limited and rare circumstances<sup>313</sup> in which lives in being within a group must qualify as

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And as to each taker, none could attain age twenty-five beyond his own death, namely, beyond the death of one who is in being at A's death. Their interests must either vest before their respective deaths or they must fail at their respective deaths.

311. Changing the foregoing facts slightly, assume that G-1 and G-2 are ages three and one, respectively, at A's death. Now that B has predeceased A, the class will include all descendants who attain age twenty-five and are born before the first descendant attains age twenty-five. Once again, the "rule of convenience" should fix the maximum membership when the first descendant is able to claim distribution of his share of the principal. With this in mind, what possibilities exist? To be sure, it is conceivable that no additional descendants will be born by the time G-1 attains age twenty-five. If so, the class membership is restricted to two grandchildren, G-1 and G-2—assuming G-2 attains age twenty-five. However, it is also possible that G-1 will not attain age twenty-five and that before his death he has a child, X. In this situation, assume further that G-2 does become the first descendant to satisfy the age requirement. Nevertheless, before he does so, assume further that B-1 has an additional child, G-3, and that G-3 has two children, Y and Z. If each of these people attains age twenty-five, the class of takers will include G-2, G-3, X, Y, and Z—two grandchildren and three great-grandchildren of B. These possibilities and others exist at the death of A. Accordingly, it is impossible to predict the generational composition of the class members entitled to share in the principal. Indeed, it is impossible to make this prediction at the death of A, the time when the period of the rule commences and the time when possibilities are to be determined in light of known facts.

312. Using the possibilities presented in the first example of note 311. *supra*, the parent that provides the necessary relationship is B-1. In this instance, such parent is a life in being at A's death. Nevertheless, in the second example, the parents who provide the necessary relationship are B-1 and G-1, lives in being at A's death, and G-3, a parent who was born after A's death. Indeed, with each combination of possibilities for ultimate class membership there are corresponding possibilities for their parents. Because one cannot predict the class composition, one cannot reach a conclusion about who their parents might be and whether they must be lives in being at A's death. Accordingly, in this situation, one cannot resort to Step Three D as a source for testing lives.

313. These circumstances were discovered by Jonathan Goldstein, then a student and research assistant at the Washington University School of Law. He believed that there must be some situations in which one of the groups identified within Step Three could produce a validating life in being even though the entire group itself was not restricted to lives in being and to lives already ended. He was correct. However, given the limitations he needed to use to illustrate his point, my initial reaction was to ignore the circumstances altogether. Surely, conditions so absurd do not deserve to be upheld. But he was still correct. Consequently, these special circumstances are addressed. Because they are so rare, this treatment is not made a part of the formal four step methodology or the

testing lives even though the entire group itself is not restricted to lives in being and to lives already ended. This situation arises whenever the occasion for fulfillment or failure under the requisite condition is tied to an event which *must happen* before or at the time in which the first member of the group dies. One way or another, the time of death of the first member of the group to die must be critical.

For example, it can be critical because the condition attached to the interest in question must be fulfilled when the first member dies or within a period of time directly connected to such death. It also can be critical because the interest in question may fail if the first member of the group dies before a designated time. The following testamentary trusts illustrate some of these circumstances: "Income to B for life; thereafter, principal to his grandchildren absolutely who are living when the *first* (or *any*) of his grandchildren dies";<sup>314</sup> "Income to B for life; thereafter, principal to such of his grandchildren who attain age thirty within twenty-one years of the death of the *first of B's children to die*"; "Income to B for life, then income to B's children for the life of the survivor of them; thereafter, principal to B's grandchildren absolutely if *all of them are then living*"; "Income to B for life; thereafter, principal to B's grandchildren absolutely when the *first grandchild 'retires'* (or *when the first grandchild 'leaves' the city of St. Louis, Missouri*)."<sup>315</sup>

Whenever any of the foregoing kinds of limitation occur, one must ask: Does this group contain any lives in being when the period of the rule commences? If the answer is NO, then one dismisses the group and proceeds to the next step. If, however, the answer is YES, then one must apply the critical test to members within the group who are lives in be-

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addenda discussed in Part Three B-1. After considerable thought and countless hypotheticals, I now believe that this discussion fully accounts for the aberrational musings of research assistants. But, one never knows for certain.

314. Once again, one must carefully observe that this exception does not apply unless fulfillment or failure of the event to which the requisite condition is tied *must happen* before or at the time in which the first member of the group dies. Stated otherwise, death must be an event that necessarily determines the time of fulfillment or failure of the condition. Consequently, unlike the examples in the text, the following illustrations do not qualify under this exception. "Income to B for life; thereafter, principal to his grandchildren absolutely who are living when the first of his grandchildren attains age thirty"; "Income to B for life; thereafter, principal to his grandchildren absolutely who are living when the first of his grandchildren graduates from law school"; "Income to B for life, and then income to B's children for the life of the survivor of them; thereafter, principal to B's grandchildren absolutely if all have attained age thirty."

315. This illustration assumes that "retirement" can occur during life, but that it must occur at death. Similarly, the substitute illustration assumes that one cannot remain in St. Louis after death.

ing. And in doing so, one must recognize and hypothesize that such testing lives in being may or may not become the first member of the group to die.<sup>316</sup>

For example, consider this testamentary trust created by A: "Income to B for life, then income to B's children for their *joint* lives; thereafter, principal absolutely to B's grandchildren born before and alive at the termination of such life estates." At A's death, assume that B and B-1 (a child of B) are living. Also assume that B has had no grandchildren and no other children by the time of A's death. The interest under consideration is the gift of principal to B's grandchildren. Each grandchild's share is contingent upon birth and survivorship to an appointed time, and the common law rule requires that all grandchildren must satisfy these conditions and join the class within the allowed period of time. Under Step Three A, one cannot say that B's grandchildren—the takers of the interest in question—are restricted to lives in being and to lives already ended. Indeed, the entire class of grandchildren will consist of lives born after the death of A. Under Step Three B, one cannot say that B's children—other takers within the provision—are restricted to lives in being and to lives already ended. B is alive at A's death and can have other children who would be entitled to share in the income interest that becomes possessory after B's death. Nevertheless, the income interest given to B's children is for their joint lives and, therefore, it must terminate upon the death of the first to die. And one should also observe that this is the time at which the conditions of birth and survival for grandchildren must be satisfied. With this in mind, one must ask: Does this group contain any lives in being when the period of the rule commences? The answer is, of course, YES. B-1 is alive at A's death; accordingly, one must apply the critical test to B-1. Must all of B's grandchildren join the class, if at all, by (being born and) surviving the first of B's children to die, within twenty-one years of the death of B-1? Here again, the answer is YES. If

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316 The special situations described in the text can be proliferated almost ad infinitum. For example, these kinds of circumstances also arise whenever fulfillment or failure of the requisite condition is tied to an event which *must happen* before or at the time in which the second member of the group dies. This can be illustrated with the following testamentary trust: "Income to B for life; thereafter principal to B's grandchildren absolutely who are living when the second of his grandchildren dies." Faced with such a condition, in applying Step Three A, one must ask: Does this group of grandchildren (the takers of the interest in question) contain two lives in being when the period of the rule commences? If the answer is NO, then one must dismiss the group and proceed to the next step. If, however, the answer is YES, then one must apply the critical test to members within the group who are lives in being, recognizing that such testing lives may or may not be the first two members of the group to die.

B-1 is the first of B's children to die, then all grandchildren must join the class, if at all, at the time of B-1's death. If, however, B-1 is not the first to die, then all grandchildren must join the class, if at all, within the lifetime of B-1. Under either circumstance, the determination is made within the required time period. Consequently, the gift to B's grandchildren satisfies the common law rule.

*Step Four*—Step Four is the final step, and it should be applied if, under Step Three, one is unable to find testing lives or one is unable to validate with them.<sup>317</sup> Step Four does not use any life in being. Instead, it tests with the allowed period of years only: Must the interest vest, if at all, within twenty-one years of the time the period of the rule begins? It should be observed, once again, that to conduct this test, one must anticipate all possibilities for remote vesting, and that one can facilitate this assessment by determining whether there is a point in time beyond which vesting cannot occur.<sup>318</sup>

This can be illustrated with a previous example involving a gift in trust of income to B for life and of principal to his grandchildren who attain age twenty-five.<sup>319</sup> Assume that B, B-1, G-1 (age twenty) and G-2 (age eighteen) survive A. Under Step Two, the grandchildren's interest is contingent. Individually there are two conditions: each grandchild must be born and attain age twenty-five. Further, for purposes of the common law rule, their interests will not vest until the last eligible grandchild has satisfied, or fails to satisfy, these conditions. Under Step Three A, the grandchildren themselves do not qualify as testing lives because they are not restricted to lives in being.<sup>320</sup> B does qualify under Step Three B;<sup>321</sup> nevertheless, his own life fails to validate. Do these conditions set a time beyond which vesting cannot occur? The answer is YES, and that latest possible point in time is twenty-five years after the death of the last of B's children to die.<sup>322</sup> When one applies the critical test, it is possible for B's

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317. Step Four can, of course, be applied before Step Three. And there are circumstances in which one will do this, especially when it is apparent that a proof of validity can be accomplished immediately under Step Four. *See infra* note 484.

318. To apply the critical test throughout this methodology, one must understand all possibilities for vesting and the point in time, if there is one, beyond which vesting cannot occur. *See supra* notes 273-78 and accompanying text.

319. *See supra* text accompanying note 301.

320. For further explanation, see *supra* notes 253-60 and accompanying text.

321. B is an other taker who by the descriptive language is specifically identified as an existing person. Accordingly, B qualifies as a testing life in being.

322. Given the fact that neither G-1 nor G-2 has attained age twenty-five by the time of A's

children to live more than twenty-one years after his death and bear additional children—B's grandchildren—thereafter, who could then join the class by attaining age twenty-five well beyond twenty-one years from the time of B's death. Absent a saving clause, no one else is otherwise mentioned or separately and differently mentioned that would qualify as a testing life in being under Step Three C.<sup>323</sup> Under Step Three D, although B-1 is alive at A's death and is a parent of the takers, B himself is also alive and capable of having additional children, namely, additional procreators of the class of grandchildren. Therefore, no one qualifies under Step Three D as a testing life in being.<sup>324</sup>

Finally, one arrives at the test of Step Four: Must the last eligible grandchild join the class, if at all, within twenty-one years of A's death, the time when the period of the rule begins? Surely, the answer is NO. The last possible time for vesting would be twenty-five years beyond the death of the last of B's children to die.<sup>325</sup> Clearly, this can occur more than twenty-one years after the time of A's death.<sup>326</sup> Accordingly, this gift of principal to B's grandchildren violates the common law rule and it must fail.

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death, it is possible that neither will satisfy that condition. And it is also possible that no grandchild will have attained age twenty-five by the time of B's death or before the death of the survivor of B's children, whether it be B-1 or another child born after the death of A. If no grandchild satisfies this age requirement before the deaths of B and all of his children, the "rule of convenience" will not close the class prematurely. Instead, the class will be open to all the grandchildren ever born who actually attain age twenty-five. With this in mind, it is conceivable that the last grandchild will be born at the latest possible time, namely, at the death of the surviving child of B, or within a period of gestation thereafter. Accordingly, it then becomes possible for that grandchild to satisfy the age requirement and join the class twenty-five years later. *Cf. supra* notes 275-78 and accompanying text

323 A uses the pronoun "his" to describe and define the interest in question—the gift of principal to B's grandchildren. B does, of course, qualify as an other taker under Step Three B. Through the pronoun "his," he is also "separately" mentioned. Nevertheless, to avoid unnecessary and repetitious testing, Step Three C also requires that one must be "differently" mentioned. And in this instance B is not qualitatively or quantitatively mentioned "differently." For further discussion of this requirement under Step Three C, see *supra* notes 282-94 and accompanying text.

324. See *supra* notes 303-04 and accompanying text.

325 See *supra* note 322.

326 This conclusion should be quite obvious; regardless, it can be confirmed with a simple illustration. Surely, it is possible for B-1 to have another child, G-3, two years after the death of A but before the death of B. It then becomes possible for G-3 to satisfy the age requirement and join the class twenty-seven years after the death of A. Under this scenario, it has become possible for a grandchild to join the class beyond the twenty-one year period allowed by the common law rule.

#### IV. THE METHODOLOGY APPLIED—SOME ILLUSTRATIONS

The purpose of this section is to provide illustrations that promote further understanding of the foregoing methodology. For many, the preceding statement and explanations afford a sufficient understanding to apply the methodology. If so, a careful reading of Part Four becomes unnecessary. For others, however, a series of examples are needed to enhance and confirm comprehension of this approach to solving perpetuities problems. In either situation, more than enough illustrations are provided to perfect one's technique. Accordingly, many readers will find it unnecessary to proceed through each of the illustrations. Some of the examples used for this instructional purpose derive from classic cases<sup>327</sup> actually involving the common law rule against perpetuities, while others do not.<sup>328</sup> In each instance, however, the selected illustration is designed to demonstrate the methodology and to enable its user to become adept in its application. At the outset, each step of the methodology will be carefully addressed, just as one might do while attempting to master something foreign and complex. In some of the subsequent examples, however, the discussion will proceed directly to the critical steps of the methodology, just as one might do after developing a facility for this testing process.

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327. See, e.g., *infra* illustrations IV A-6 to IV A-11, IV B-1 to IV B-2. Illustration IV A-6 combines the problems of the "fertile octogenarian" and the "precocious toddler." For a discussion of these problems and references to cases that raise them, see R. LYNN, *supra* note 34, at 60-61; Leach, *supra* note 11, at 643. Illustration IV A-7 presents the problem created by two generation trusts. For a discussion of this problem and references to cases that raise it, see McGovern, *Perpetuities Pitfalls and How Best to Avoid Them*, 6 REAL PROP., PROB. & TR. J. 155, 165-68 (1971). Illustrations IV A-8 and IV A-10 present problems created by the use of powers of appointments. For a discussion of these problems and references to cases that raise them, see *id.* at 168-70. Illustration IV A-9 presents the problem of the "unborn widow." For a discussion of this problem and references to cases that raise it, see *id.* at 157-60. Illustration IV A-11 presents the problem created by the irrevocable living trust. For a discussion of this problem and references to cases that raise it, see *id.* at 170-72. Illustration IV B-1 presents the problem created by a restriction upon land use that lasts for an indefinite period of time. See, e.g., *Brattle Square Church v. Grant*, 3 Gray 142 (Mass. 1855). Illustration IV B-2 presents the problem of the "administrative contingency." For a discussion of this problem and references to cases that raise it, see Leach, *supra* note 11, at 644-46.

328. See, e.g., *infra* illustrations IV A-1 to IV A-5. One should observe, however, that these other illustrations are not pure fabrication. Although they may not derive from classic perpetuities cases, they do employ familiar dispositive designs and they do resemble perpetuities illustrations that frequently appear in the literature. See, e.g., R. MAUDSLEY, *supra* note 21, at 46-48; Leach, *supra* note 11, at 641-42.

A. *Variations on a Previous Theme: "Income to B for life; thereafter, principal to B's grandchildren."*

1. —Assume that A creates a testamentary trust that leaves: "Income to B for life; thereafter, principal to such of B's grandchildren who attain age thirty." Further, assume that B and all of his children predecease A;<sup>329</sup> nevertheless, assume that B's grandchildren, G-1, G-2, and G-3, do survive A, and that each of these grandchildren is under age five. Is there a violation of the common law rule against perpetuities?

Beginning with Step One, when does the period of the rule commence? Because the trust is created by A's will and because A's will can be altered until the time of his death, the property is not "tied up" until then and, therefore, the period of the rule must begin at A's death.

Under Step Two A, B's interest has failed, but is the remaining interest in B's grandchildren contingent? To be sure, the interest of each of B's grandchildren alive at A's death—G-1, G-2, and G-3—is expressly contingent upon attaining age thirty. If afterborn grandchildren were a possibility, the interest of such grandchildren would also be contingent upon their respective births.<sup>330</sup> Finally, because this is a class gift, the entire gift to the grandchildren is deemed contingent under the common law rule until the last eligible member joins, or fails to join, the class.<sup>331</sup> Under the facts presented, at A's death, B and B's children are already dead; accordingly, there can be no more grandchildren beyond G-1, G-2, and G-3. B's grandchildren are fully ascertained; therefore, one must conclude under Step Two B that the interest is not subject to multiple conditions because the age requirement is the only relevant condition.

Examining Step Three A, are B's grandchildren restricted to lives in being and to lives already ended when the period of the rule begins? Because B and his children have predeceased A, the class of grandchildren is not physically capable of expansion or reconstitution to include those that are afterborn and, therefore, the answer must be YES. Accordingly, under Step Three A, one can then test with the grandchildren—the takers themselves. Must the interest vest, if at all, within twenty-one years

329 If, however, B or any of his children had survived A, then there would be a perpetuities violation as to the gift of principal to B's grandchildren. See *infra* illustration IV A-6.

330 Interests created in persons who are unascertained because they are not yet born are classified as contingent. See L. SIMS & A. SMITH, *supra* note 22, § 152. Accordingly, this condition is inherent in any class gift that is subject to open to include members born after the time the dispositive instrument takes effect.

331 See *supra* notes 157-58 and accompanying text.

of the death of one of these grandchildren? Will the class of grandchildren be fully determined within this period of time? The answer is, of course, YES and, consequently, the gift of principal is valid. Although each grandchild will require more than twenty-one years from the time of A's death to reach age thirty, none can attain that age beyond their respective deaths. No grandchild can satisfy the age requirement and join the class beyond his own death—beyond the death of a testing life in being. Each interest within the class, therefore, must vest or fail within the lifetime of one of the testing lives in being.

2. —Assume that A creates a testamentary trust that leaves: "Income to B for life; thereafter, principal to such of B's children who attain age twenty-one." Also assume that in this instance B survives A and, at A's death, B is childless.<sup>332</sup> Unlike the previous illustration, A gives the principal to B's children and not to his grandchildren; however, in both situations, there is an age requirement. Is there a violation of the common law rule against perpetuities?

Under Step One, the analysis is the same as before—the period of the rule commences at A's death. Under Step Two A, the analysis is similar to the one developed in the first illustration. B has survived A, but his

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332. The analysis of the problem would be the same if B had had a child, B-1, who predeceased A, assuming that such child's interest was not preserved by an antilapse statute. Antilapse statutes do preserve the interests of certain relatives for the benefit of statutorily determined substitute takers, usually descendants of the devisee or legatee. Nevertheless, many of these statutes do not expressly comprehend class gifts, and some courts have interpreted these statutes in a manner that excludes class gifts. Others have applied these statutes to class gifts the same as gifts to individuals. The rationale used to justify this expansive interpretation rests upon the view that estate owners generally wish to treat family members within a class equally. The purpose of antilapse statutes is to do more than prevent a lapse. They are also intended to preserve equality of distribution inherent within the dispositive scheme adopted by a testator.

In this illustration, it is assumed that A wants to treat the children of B equally and that he would want to include the descendants of B-1, who naturally represent B-1, if B-1 were to predecease A. Accordingly, if B-1 were to have attained twenty-one before predeceasing A and if B-1 were to have left a child, G-1, who survived A, then under this interpretation G-1 would be entitled to the share B-1 would have received if he had survived A. If, of course, B-1 had never attained age twenty-one, then G-1 would be excluded just the same as if B-1 had survived A but had died thereafter before satisfying the age requirement. For a discussion of antilapse statutes and their application to class gifts, see 5 AMERICAN LAW OF PROPERTY §§ 22.48-22.51 (A. Casner ed. 1952).

The Restatement takes the same position but only when the antilapse statute, by its terms or by judicial interpretation, applies to class gifts. It also closes the class and fixes the maximum membership in an immediate gift if there is a substitute taker that qualifies as a result of the antilapse statute. The Restatement applies this principle even though it may preclude afterborn members of the family. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 26.1, § 26.1 comment 1, § 27.2 (Tent. Draft No. 9, 1986). One wonders whether this latter position doesn't contravene the rationale of equality of distribution that underlies application of antilapse statutes to class gifts.

interest is vested.<sup>333</sup> However, with regard to B's potential children there are two obvious conditions that make their respective interests contingent. There is the express condition that each must attain age twenty-one; however, before that can be fulfilled there is the obvious requirement of ascertainment—the birth of such child. And, once again, because this is a class gift, the interest of each class member remains contingent under the common law rule until the class membership is fully determined—until the last eligible member joins, or fails to join, the class.<sup>334</sup> Consequently, looking to Steps Two B and Two C, one must conclude that there are multiple conditions that appear cumulatively. Nevertheless, because under Step Two C (1) the implied requirement of birth is subsumed by the age requirement, one can proceed directly to a consideration of the subsuming condition under Step Three A.

Examining Step Three A, are B's children restricted to lives in being and to lives already ended when the period of the rule commences? Quite obviously, the answer is NO. At A's death, B's children are totally unascertained. B is alive and is presumed capable of having children.<sup>335</sup> Further, neither the descriptive language nor the "rule of convenience" restricts the class of children to those alive at A's death.<sup>336</sup> Consequently, if this class gift is not to fail altogether, it will consist exclusively

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333 In this illustration, B's interest is clearly vested. No condition whatsoever is specifically attached to B's income interest for life. There are, of course, those conditions that attend all testamentary gifts; for example, the payment of debts and taxes. These conditions, however, do not render B's interest contingent. If they did, then all interests would be viewed as contingent. *See, e.g.,* *Ducker v. Burnham*, 146 Ill. 9, 34 N.E. 558 (1893).

334. *See supra* notes 157-58 and accompanying text.

335 The common law rule against perpetuities presumes that B, regardless of age, is capable of having children until the time of his death. *See supra* notes 253, 270. *See also infra* note 370. In this illustration, of course, if B were not capable of having children after A's death, then the gift of principal would fail altogether for want of class members.

336 Nothing in the language itself describing the recipients of the gift of principal restricts the group to those who are alive at the death of A. If there were such a restriction, express or implied, then the class gift would, of course, fail for want of members. Further, in this illustration, the "rule of convenience" will not close the class immediately, and it would not do so even if B had a child alive at A's death who had already attained age twenty-one. The gift of principal is deferred at least until the death of B who is entitled to income for the remainder of his life. Ordinarily, a class gift will include all people who may satisfy the group description, herein, all the children B may ever have. The "rule of convenience," however, will close the class before the possibility of further membership has been exhausted whenever the limitation requires an earlier distribution to a class member. This cannot occur in this illustration because distribution will not happen until B's income interest ends at his death, and at that time the possibility of further membership is exhausted because B cannot have additional children beyond his death. For further discussion of the "rule of convenience," *see supra* notes 160-61 and accompanying text.

of members born after the death of A—after the time in which the period of the rule begins.

Proceeding then to Step Three B, is there any other taker or group of takers within the same provision that is restricted to lives in being and to lives already ended when the period of the rule commences? The answer, of course, is YES. B is the only other taker and he is ascertained and restricted by the descriptive and identifying language itself. Accordingly, B qualifies as a testing life in being. One can then proceed to the critical test: Must the children's interest vest, if at all, within twenty-one years of B's death? Additionally, because this is a class gift, the test must be refined further: Will all eligible children join the class, if at all, by (being born and) attaining age twenty-one within twenty-one years of B's death? The answer is YES and, therefore, the gift of principal to B's children is valid.

By way of explanation, the critical question might be restated: Can any child of B join the class beyond twenty-one years of B's death? Assuming that B cannot have a child beyond what would be considered his death,<sup>337</sup> no child can be ascertained beyond that point in time. Conse-

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337. Until recently, one justifiably could presume that a person could not have a child beyond his death, or at least beyond a period of gestation following his death. Furthermore, this presumption also has been indulged by the common law rule. Accordingly, in this illustration, the contingent gift of principal to B's children satisfies the common law rule. Because no child of B can be born beyond his death, or within a period of gestation thereafter, no child of B can attain age twenty-one beyond a period of gestation plus twenty-one years following B's death. This is within the period of time allowed by the common law rule whenever a child is actually born during such period of gestation following B's death. More accurately, under the rule a person is deemed to be in being when conceived and not born. In a certain sense no child of B will reach age twenty-one beyond twenty-one years from the time of conception which must occur before the time of B's death. See L. SIMES & A. SMITH, *supra* note 22, § 1224.

The miracles of modern science, however, now make it possible for one to conceive after death, and because of these advances, the preceding presumption has been undermined. Technically, one can no longer assume that B will conceive a child no later than the time of his death. Accordingly, one can no longer conclude that all of B's children will attain twenty-one, if at all, within twenty-one years of his death. Without this assumption, many interests that were deemed valid under the common law rule—such as the one created herein in B's children—might now be found invalid. Thus far, this problem has not been fully addressed by courts or legislatures. Some states have formally rejected the common law presumption that one can conceive throughout his or her lifetime regardless of age. Often, this rejection is accomplished by allowing a proof of validity predicated upon the assumption that one is deemed absolutely incapable of having or adopting a child beyond a particular age. See, e.g., ILL. ANN. STAT. ch. 30, para. 194(c)(3) (Smith-Hurd Supp. 1983). By setting an age limit upon assumed procreation while one is alive, such statutes do, of course, deal indirectly with the issue of conception after death.

Most perpetuity statutes, however, do not address specifically the problem of conception beyond the time of a person's death. One proposed perpetuity reform carefully notes this problem but fun-

quently, if a child is born as of B's death, the very latest such child can join the class by satisfying the express age requirement would be twenty-one years after the death of B. Accordingly, B is a testing life who validates the gift of principal to his own children.<sup>338</sup>

3. —Assume that A creates a testamentary trust that leaves: "Income to B for life; thereafter, principal to such of B-1's children who attain age twenty-one." Also assume that B-1 is B's daughter and that both B-1 and B survive A. Finally, assume that B-1 has had no children by the time of A's death. Is there a violation of the common law rule against perpetuities?

Because the dispositive instrument is a will, the analysis under Step One is the same as before: the period of the rule commences at A's death. Under Step Two A, B's interest is vested and not subject to the

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damentally ignores it. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 reporter's note 11 (1983). Another formally disregards it. See Waggoner, *supra* note 238, at 591, 593. Some, however, suggest that absent language or circumstances indicating a different intent, one should assume that with respect to class gifts, those conceived after the procreator's death should not be included within the terms of the gift. See, e.g., RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) introductory note to ch. 26 at 2-3 (Tent. Draft No. 9 1986).

However, Professor Leach, the foremost commentator on the rule against perpetuities, recommended that gifts be held valid as if these advances in medical science had never occurred. More specifically, he argued that children conceived after death should be included within the terms of a gift; that the duration of a life in being under the rule should be defined in terms of reproductive capacity; and that this period should comprehend the time in which a person has reproductive capacity even after death. See Leach, *Perpetuities In The Atomic Age: The Sperm Bank And the Fertile Decedent*, 48 A.B.A.J. 942, 944 (1962).

Upon examining existing statutes and commentary, one thing seems clear: no matter how states choose to resolve this problem, they are not apt to do so in a way that would cause interests that are traditionally valid under the common law rule to become invalid. At most, they might presume that an estate owner intends to exclude class members conceived after the procreator's death. Consequently, only in those instances in which the dispositive instrument contains language that overcomes this presumption will one be unable to attempt a valid proof with the procreator of the class. Because of this likelihood, both this methodology and its application proceed upon the assumption either that one cannot conceive after death or, to the extent one can, that the estate owner intends to exclude from the group those who are conceived after the procreator's death.

338. If the age requirement in this example were twenty-five instead of twenty-one, then there would be a perpetuities violation. Just as before, the takers themselves, B's potential children, do not qualify as testing lives under Step Three A. And, once again, B serves as a testing life under Step Three B. Nevertheless, one cannot use B to make a valid proof. B might have a child, B-1, and then die before that child attains age four. It then becomes possible for B-1 to join the class more than twenty-one years beyond the death of B. Absent a saving clause or some other directly related provision, there is no testing life to be found under Step Three C. Nor is there a new testing life to be found under Step Three D because B, the parent of the takers of the gift of principal, has already been tested. Finally, when one applies the critical test under Step Four, the answer must be NO. Because B has no children alive at A's death, quite obviously, all of his children born thereafter will attain age twenty-five more than twenty-one years after the death of A.

rule. Nevertheless, the interest created in B-1's potential children—B's grandchildren—is contingent and, therefore, it must satisfy the rule. Their gift of principal is contingent because they are yet to be born, and therefore are unascertained, and also because they must satisfy an express age requirement that takes the form of a condition precedent. Once again, because this is a class gift, the interests of all members remain contingent under the common law rule until the last potential member joins, or fails to join, the class.<sup>339</sup> Consequently, looking to Steps Two B and Two C, one must conclude that there are multiple conditions that appear cumulatively. Nevertheless, because under Step Two C (1) the implied requirement of birth is subsumed by the age requirement, one can proceed directly to a consideration of the subsuming condition under Step Three A.

Under Step Three A, the takers of the interest—B-1's children—clearly do not qualify as testing lives in being. Indeed, if the gift of principal does not fail for want of class members, the entire group of takers will consist of afterborn lives. B-1, the procreator of the class, is alive and is presumed capable of having children. Further, neither the descriptive language nor the “rule of convenience” restricts this class to those alive at A's death.<sup>340</sup>

Nevertheless, under Step Three B, B is ascertained and because of identifying language this other taker cannot be afterborn. Therefore, B does qualify as a testing life in being. Accordingly, one must ask: Must all potential class members join the class, if at all, by (being born and) attaining age twenty-one within twenty-one years of B's death? Given the possible time in which a potential child of B-1 can join the class,<sup>341</sup>

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339. See *supra* notes 157-58 and accompanying text.

340. The class described consists of “B-1's children who attain age twenty-one.” Presumably, this includes afterborn children because nothing in the language limits the class to children born by the time of A's death. Just as before, see *supra* note 336, if the class were restricted in this fashion, then the gift of principal would fail not because of a perpetuities violation but, instead, for want of any members. Further, even if a child of B-1 had been born and attained age twenty-one by the time of A's death, because the gift of principal to B-1's children is deferred until B's death, the rule of convenience will not operate to fix the maximum class membership before that time. Accordingly, the class gift to B-1's children is not restricted to those who are living at A's death.

341. Given the fact that B-1 has no children at A's death, the latest date that a child of B-1 can join the class is twenty-one years after her death. Conceivably, if not probably, the class will be fully determined before then. Once B dies and once the first child of B-1 attains age twenty-one, the “rule of convenience” will fix the maximum class membership because of a need to distribute the share of such first child. And the full class membership will be determined once the last member of the group born by that time attains, or fails to attain, age twenty-one. Nevertheless, one must dismiss this probability for earlier class determination in applying the critical test. The common law rule against

the answer must be NO. The critical test requires that one look at all possibilities for remote vesting. For example, B may die immediately, and then B-1 can bear her first child, G-1, who might then attain age twenty-one and join the class more than twenty-one years after B's death. Because of this possibility, B fails to become a validating life in being.<sup>342</sup>

Proceeding, then, to Step Three C, is there a person or group of people otherwise mentioned or separately and differently mentioned within the same provision, or elsewhere in other directly related provisions, that is restricted to lives in being and to lives already ended when the period of the rule begins? Absent a saving clause,<sup>343</sup> or any other directly related

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perpetuities requires a proof that all of B-1's children must, if at all, join the class within the allowed time period. Stated otherwise, it requires that one eliminate *all* possibilities for remote vesting. Therefore, in applying the critical test, one must account for all possibilities, especially those which defer vesting to the latest conceivable point in time.

342 Suppose, however, with this same limitation, that B-1 had a child, G-1, who was age thirty at A's death. In this situation, there would be no perpetuities violation. A valid proof could be made under Step Three C using B-1 as the testing life, but it could also be made under Step Three B using B as the testing life. The common law rule permits one to recognize all facts known when the period of the rule commences. Thus, it enables one to anticipate a salutary application of the "rule of convenience." From the moment his interest is created, G-1 has an interest that is vested absolutely because he has already attained age twenty-one. No other requirements must be satisfied; indeed, there is no condition that B-1's children must survive B. When B's income interest ends at his death, G-1 (or his successors in interest) will be entitled to distribution of his share. To accomplish this, the "rule of convenience" will require that the maximum class membership be fixed at that time. Accordingly, all potential class members must be born by the death of B. If such child of B-1 is born on the day of B's death, the very latest time such child can join the class, or fail to join, is twenty-one years after the death of B. Consequently, one is able to make a valid proof with B because the interests of all of B-1's children must vest, if at all, within twenty-one years of B's death.

343 The most popular form of saving clause functions with a safety net that supersedes all dispositive conditions and ultimately restricts the vesting of interests or the duration of a trust to a period of time that purportedly satisfies the common law rule against perpetuities and, perhaps, related rules as well. The purpose of these saving provisions is to set an absolute time limit beyond which no interest created by the instrument can vest. Safety-net clauses are intended to prevent actual violations and not simply to overcome them by escaping their consequences. Most of these kinds of saving clauses expressly limit the maximum time period to the death of a designated person or to the survivor of a group of people or to within twenty-one years of their deaths. The persons involved are identified individually or referred to by a group designation, but in either case they are always people born before the instrument becomes effective and they are usually beneficiaries under some provision. See, e.g., THE NORTHERN TRUST COMPANY, WILL AND TRUST FORMS (6th ed. 1983), which provides:

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

provisions,<sup>344</sup> B-1 would be the only person to qualify as a testing life in being under Step Three C. B-1 is not a taker, but she is expressly and newly mentioned, and thus she qualifies as "otherwise mentioned." Further, by the descriptive language itself, B-1 cannot be someone who is afterborn. Accordingly, one should apply the critical test to B-1: Must all potential members join the class of B-1's children entitled to share the principal, if at all, by (being born and) attaining age twenty-one within twenty-one years of the death of B-1? The answer is, of course, YES and, accordingly, the gift of principal to B-1's children is valid. The explanation for this conclusion is a familiar one. B-1 cannot bear a child beyond her death,<sup>345</sup> and if she did bear a child at the time of her death, that child could not join, or fail to join, the class more than twenty-one years later. Therefore, all potential class members must join the class, if at all, within twenty-one years of B-1's death. Accordingly, B-1 is a testing life who validates the gift of principal to her children.<sup>346</sup>

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*Id.* at 201-19. For further discussion of saving clauses, see Becker, *supra* note 290, at 378-416. By including beneficiaries found within all provisions of the dispositive instrument, one should observe that this kind of saving clause introduces a whole group of testing lives beyond those identified in the limitation under specific consideration.

344. Beyond saving clauses, there can be other directly related provisions that introduce additional lives in being that should be tested to determine whether they might validate an interest contained within the specific limitation under consideration. Often wills and trusts contain provisions which, under express conditions, allow for a pourover to the residue or to other trusts. Under these circumstances, people named within the provision that is the source of the pourover can have a direct bearing on the conditions affecting interests created in the recipient residuary provision or trust. Accordingly, these source provisions are directly related and the people named within them must be considered under Step Three C.

345. Regardless of the miracles that modern science has or might produce with respect to having children after a parent's death, for the purpose of applying the common law rule against perpetuities, one must assume that these afterborn children are beyond the contemplation of the estate owner, A, and, therefore, one must exclude them from the class entitled to take the gift of principal. See *supra* note 337.

346. Suppose, however, that A had imposed a different age requirement, namely, one that conditioned the gift of principal upon attaining age thirty. In this instance, assume that B-1 had one child, G-1 (age five), at the time of A's death and that G-1 and B survived A but B-1 predeceased him. To be sure, G-1's interest in the principal is contingent upon his attaining age thirty; nevertheless, it does not violate the common law rule against perpetuities. B-1 is already dead when these interests are created at the death of A. Therefore, under Step Three A, the class of takers of the interest in question is restricted to a life in being because of physical impossibility. Applying the critical test, then, to G-1, one observes that a valid proof exists. G-1's interest must vest, if at all, within his own life. For a comparable analysis and proof, see *supra* illustration IV A-1.

Suppose, however, that both B and B-1 survive A and that B-1's child, G-1, has attained age thirty by the time of A's death. In this instance, there would be a perpetuities violation even though G-1's interest had vested absolutely at the time of creation. For a similar analysis, see *infra* illustration IV A-6. Under Step Three A, no one qualifies as a testing life because the takers are not

4. —Assume that A creates a testamentary trust that leaves: “Income to B for life; thereafter, principal to such of my (A’s) grandchildren who attain age twenty-one.” Further, assume that B and A’s only children, A-1 and A-2, survive A. Finally, assume that neither A-1 nor A-2 has had any children by the time of A’s death. Unlike the previous examples, A leaves the ultimate gift of principal to his own descendants instead of B’s. Does this gift of principal to A’s grandchildren violate the common law rule against perpetuities?

Once again, under Step One, the period of the rule begins at A’s death. Under Step Two A, although the principal will belong to A’s grandchildren instead of B’s, the terms of the gift are essentially the same and so are the conclusions one must reach. B’s interest is vested, but the gift to A’s grandchildren is contingent. Their interest is contingent because they are unascertained; additionally, after they are born they must satisfy an age requirement that operates as a condition precedent.<sup>347</sup> Because

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restricted to lives in being. Under Step Three B, B does qualify as a testing life; nevertheless, one cannot use him to make a valid proof. B-1 can have another child, G-2, before the maximum class membership is fixed, and then B can die a year later. Accordingly, it becomes possible for G-1 to attain age thirty and join the class more than twenty-one years after B’s death. Under Step Three C, B-1 qualifies as a testing life but fails to make a valid proof. B-1 can have another child, G-2, before the maximum class membership is fixed by the rule of convenience at B’s death and then B-1 can die within a year. Accordingly, it becomes possible for G-1 to attain age thirty and join the class more than twenty-one years beyond B-1’s death. Under Step Three D, although the takers’ parent, B-1, is restricted to a life in being, one must dismiss B-1 because she has already been tested under Step Three C. Finally, one applies the critical test contained in Step Four. Once again, B-1 can have another child, G-2, before B’s death. Quite clearly, it then becomes possible for G-2 to attain age thirty and join the class more than twenty-one years after the death of A, the time when the period of the rule commences.

347 Not all age requirements operate as a condition precedent thereby making an interest contingent. Consider these two illustrations of testamentary trusts created by A: “Income to B for life; thereafter, principal to C absolutely at age thirty”; “Income to B for life; thereafter, if C attains age thirty then principal to C absolutely, if he does not, then to D absolutely.” In both examples, courts will usually find that C has a contingent remainder which is conditioned upon reaching age thirty. In the second example, there is a substitute gift to D who has an alternative contingent remainder.

These characterizations might change, however, with only a slight variation in language. Consider these modifications: “Income to B for life; thereafter, principal to C absolutely, *payable* at age thirty”; “Income to B for life, thereafter, *principal to C absolutely; however, if C fails to attain age thirty, then to D absolutely.*” Although these limitations look essentially the same, most courts would view C’s interest in the first variation as vested absolutely with enjoyment postponed. And in the second variation, most courts would classify C’s interest as vested subject to complete divestment in favor of D, who would then have a contingent executory interest. In both of these variations, there is an age requirement. Yet, in neither variation does such requirement cause C’s interest to be characterized as contingent. For a discussion of these kinds of constructions, see W. LEACH & J. LOGAN, *FUTURI INTERESTS AND ESTATE PLANNING* 266-315 (1961). *See also supra* notes 150-53 and accompanying text.

this is a class gift, the interest of each class member is contingent under the common law rule until the last potential member does or does not join the class by being born and attaining age twenty-one. Consequently, looking to Steps Two B and Two C, one must conclude that there are multiple conditions that appear cumulatively. Nevertheless, because under Step Two C (1) the implied requirement of birth is subsumed by the age requirement, one can proceed directly to a consideration of the subsuming condition under Step Three A.

Under Step Three A, one observes that the takers of the contingent interest—A's grandchildren—do not consist exclusively of lives in being and lives already ascertained and, therefore, they do not qualify as testing lives in being. At A's death, they are nonexistent and, of necessity, they will consist exclusively of afterborn lives. A-1 and A-2, the procreators of the class of A's grandchildren, are alive and they are presumed capable of having children. Further, neither the descriptive language nor the "rule of convenience" restricts this class to those alive at A's death.<sup>348</sup>

Under Step Three B, B does qualify as a testing life in being for the same reasons as before. B is an other taker who is ascertained and by the terms of this other gift it is limited to someone born before A's death. Accordingly, one must apply the critical test to B: Must all of A's grandchildren join the class, if at all, by (being born and) attaining age twenty-one within twenty-one years of B's death? Taking into account the possible times in which potential grandchildren can join the class,<sup>349</sup>

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348. The explanation, herein, is the same as before. See *supra* notes 336, 340.

349. In making this determination, one must dismiss the fact that the rule of convenience might operate to close the class before the birth of all of A's grandchildren. To be sure, A-1 might have a child, G-1, who attains age twenty-one before the death of B. In that instance, the class of grandchildren would close at B's death because G-1 is then entitled to distribution of his share of the principal. All grandchildren born thereafter would be excluded. Consequently, one could then say that no grandchild could join the class beyond twenty-one years of B's death. Nevertheless, the common law rule against perpetuities requires that one anticipate all possibilities for remote vesting. One has to prove that all of A's grandchildren *must, if at all*, join the class within twenty-one years of B's life (or the life of any one else who is being tested). Stated otherwise, one must rule out all possibilities for remote vesting, and in this example one cannot dismiss the possibility that A will not have a grandchild who attains age twenty-one by the time of B's death. Indeed, one cannot eliminate the possibility that all grandchildren ever born will be included because none attains age twenty-one before the death of the survivor of A's children. With this in mind, one must consider the latest time a grandchild of A can join the class. Because it is possible for any of A's children to have a child at death, or within a period of gestation thereafter, the latest time a grandchild can attain age twenty-one and join the class is twenty-one years after the death of the survivor of A's children (or twenty-one years after the point in time during the period of gestation following the surviving child's death during which such grandchild was born).

one concludes that the answer must be NO. The critical test requires that one examine all possibilities for remote vesting. For example, it is possible for B to die shortly after the time of A's death. It is also possible that A's only grandchildren will be born thereafter. If so, A's grandchildren will not join the class, if at all, until more than twenty-one years after the death of B. Accordingly, B cannot serve as a validating life in being.

Under Step Three C, absent a saving clause or any other directly related provision, no one except for A ("my grandchildren") is "otherwise mentioned or separately and differently mentioned" and, therefore, no testing life can be found on this basis. To be sure, A is mentioned in the phrase that describes the gift to grandchildren. Nevertheless, A should be dismissed immediately because naturally his death marks the point in time when the period of the rule begins.<sup>350</sup> In the case of a testamentary transfer, there is no need to test separately with the testator who is already dead.<sup>351</sup> The twenty-one year period of time allowed from the testator's death is separately covered under Step Four.

Proceeding next to Step Three D and the first question within it, one observes the previous conclusion under Step Three A, that the takers of the interest—A's grandchildren—are not restricted to lives in being and to lives already ended. Accordingly, one can then address the next question: Do the grandchildren's parents who provide the necessary descriptive relationship consist exclusively of lives in being and lives already ended when the period of the rule begins? The answer to this question, of course, is YES. The parents that provide the relationship necessary to satisfy the description of the takers—A's grandchildren—are A's children. This is a dispositive instrument that operates as of A's death, and by that time all of A's children will be born.<sup>352</sup> After A's death, the group of parents is not deemed physically capable of expansion or reconstitution; therefore, none will be deemed afterborn.<sup>353</sup> Accordingly, the group of parents who provide the necessary relationship must consist exclusively of A-1 and A-2, both of whom are in being at A's death. Fur-

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350 For further discussion, see *supra* notes 267-68 and accompanying text.

351 If, however, A had made an irrevocable lifetime transfer, instead of one that took effect only at his death, there might then be a circumstance in which one would apply the critical test to A. This would occur only when A independently qualifies as a testing life in being under either Step Three A, Three B, Three C, or Three D. For further discussion, see *supra* notes 267-68 and accompanying text.

352 See *supra* note 337.

353 See *supra* note 337.

ther, one notes as to the next question under Step Three D that such group of parents does not fully coincide with testing lives in being already tested under previous steps. The only step in which one has already reached the point of testing in this example was Three B. And the testing life, B, did not coincide with the grandchildren's parents, A-1 and A-2. As a result of these conclusions, A-1 and A-2 become testing lives in being. Must all of A's grandchildren join the class, if at all, by (being born and) attaining age twenty-one within twenty-one years of the death of one of these testing lives? The answer is YES and, therefore, the gift of principal to A's grandchildren is valid.<sup>354</sup> To be sure, no grandchild can join the class beyond twenty-one years of the death of the survivor of A-1 and A-2. The very latest time a child of A will be deemed to have a grandchild of A is at such child's death.<sup>355</sup> Accordingly, the very latest time a grandchild will be born is at the death of the survivor of A-1 and A-2. Therefore, the final time for attaining age twenty-one and joining

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354. Suppose, however, that A had irrevocably created this trust during his lifetime instead of at his death, and assume that all other facts remain the same except that they exist as of the trust's creation. In this instance, the gift of principal to his grandchildren would violate the common law rule against perpetuities. To begin with, under Step One, the period of the rule now commences during the life of A when the trust becomes effective. Under Step Two A, the gift of principal is subject to the same conditions; namely, grandchildren must be born and they must attain age twenty-one. Again, under Step Two C (1), one can proceed directly to a consideration of the subsuming condition—the age requirement—under Step Three and, if necessary, Step Four. Under Step Three A, the takers themselves, the grandchildren, do not qualify as testing lives for the same reasons as before. Under Step Three B, once again, B qualifies as a testing life; nevertheless, just as before, his life fails to validate. Under Step Three C, A is a person otherwise mentioned. In this instance, because A makes this gift during his lifetime, by the descriptive language he is restricted to a life in being and, accordingly, he qualifies for testing. Must all of A's grandchildren join the class, if at all, by (being born and) attaining age twenty-one within twenty-one years of A's death? The answer is, of course, NO. A may die shortly after creation of the trust; thereafter, A-1 could have A's first grandchild, G-1. Accordingly, it then becomes possible for G-1 and all grandchildren born thereafter to join the class more than twenty-one years beyond the death of A. Under Step Three D, A's children no longer qualify as testing lives. Absent anything in the instrument indicating that A intended to include only those grandchildren born to A-1 and A-2, one can no longer conclude that the parents of the takers are restricted to lives in being and to lives already ended. In this example, A is alive and, therefore, one can no longer say that physical impossibility restricts the group to lives in being when the period of the rule commences. Finally, under Step Four, one applies the critical test by asking: Must all of A's grandchildren join the class, if at all, by (being born and) attaining age twenty-one within twenty-one years of the time A's irrevocable trust becomes effective? The answer is NO because all grandchildren will be born thereafter and, consequently, no one will be able to satisfy the age requirement until twenty-one years from the time of their respective births. Necessarily, this can only happen more than twenty-one years after creation of these interests, the time when the trust becomes irrevocably effective. For another illustration of perpetuities problems presented by an irrevocable living trust, see *infra* illustration IV A-11.

355. See *supra* note 337.

the class can be no later than twenty-one years after the survivor of A's children has died. The common law rule does not require that one identify the exact validating life in being. All that is needed is a proof that from this group of testing lives there will be one life—in this instance, whoever the survivor is—about whom one can say that no one can join the class, if at all, beyond twenty-one years of his or her death.<sup>356</sup>

5. —Assume that A creates a testamentary trust which accumulates income and adds it to the principal for twenty-one years and, thereafter, leaves: "The principal to B's descendants, per capita, living twenty-one years after my (A's) death." Further, assume that B has predeceased A, but that B has two children, B-1 and B-2, who survive A. Finally, assume that these two children are the only descendants B has ever had by the time of A's death. Is there a violation of the common law rule against perpetuities?

Once again, under Step One, the period of the rule commences at A's death. Under Step Two A, the interest of B's descendants is contingent. They are not confined to those alive at A's death;<sup>357</sup> accordingly, potential members beyond B-1 and B-2 must still be born and ascertained. Additionally, there is the condition precedent that the descendants must be living twenty-one years after A's death. Therefore, B-1, B-2, and

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356. There is another, and perhaps superior, way to understand the basis for this valid proof. Must all grandchildren join the class, if at all, by (being born and) attaining age twenty-one within twenty-one years of the death of one of the members of this group of testing lives in being? To make a valid proof, one must find a person within the testing group of lives in being who will validate the interest of a potential grandchild, and one must do this for all grandchildren. In doing so, one need not use the same testing life for each potential class member. What is important is that one find some testing life to validate for each and every potential grandchild. Herein, of course, no grandchild can join the class *beyond twenty-one years of the death of his respective parent*. And each of these parents—members of the testing group—is a child of A and is naturally someone in being at A's death. Consequently, one can make a valid proof for each potential grandchild with such grandchild's very own parent, that is, one can satisfy the requirements of the rule for each grandchild with the parent who supplies the necessary relationship and, therefore, is the parent who is also the child of A.

357. A has made the gift of principal "to B's descendants." Presumably, he was aware of B's death and meant to include others born thereafter to B-1 and B-2. Yet even if B were alive when A executed his will, A has used the term "descendants" which suggests that he had a group in mind that might expand beyond B-1 and B-2. Therefore, absent a clear indication of another basis for a restrictive interpretation, one must conclude that the descriptive language does not confine the gift of principal to those alive at A's death. Additionally, the rule of convenience will not fix the maximum membership to those born by the time of A's death. This rule does not close off membership until the first time for distribution of principal. In this case, distribution for all class members must occur at the same time and, by the express language itself, it does not occur immediately. Instead, distribution is deferred until twenty-one years after the time of A's death. For a discussion of the rule of convenience, see *supra* notes 160-61 and accompanying text.

afterborn descendants will not satisfy this condition if they are not alive at that time. Also, because this is a class gift, the interest of each class member is contingent until all potential members join, or fail to join, the class. Such special requirement should not present a problem, however, with respect to this class gift because all members must necessarily join the class at the same time—twenty-one years after A's death.<sup>358</sup> Looking next to Steps Two B and Two C, one must conclude that there are multiple conditions that appear cumulatively. Nevertheless, because under Step Two C (1) the implied requirement of birth is subsumed by the survivorship requirement, one can proceed directly to a consideration of the subsuming condition under Step Three A.

Proceeding then to Step Three A, one observes that the takers of the interest, B's descendants, are not restricted to lives in being and to lives already ended. Neither descriptive language nor applicable rules of construction preclude afterborn descendants of B.<sup>359</sup> And because existing descendants, B-1 and B-2, presumptively can have other descendants, the group is capable of physical expansion.<sup>360</sup> Under Step Three B, because B's descendants are the only takers included under this provision, one cannot find other takers to serve as testing lives in being.

Under Step Three C, however, B is "otherwise mentioned" in the phrase used to describe those who will take the principal—namely, "B's descendants." B was, of course, ascertained, but he is dead at the time of A's death when the period of the rule begins; therefore, B cannot serve as a testing life in being. Additionally, A himself is "otherwise mentioned" in the phrase that conditions the gift of principal—"after *my* death." Nevertheless, A cannot serve as a testing life. Necessarily, A is not a life

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358. This special requirement for class gifts under the common law rule against perpetuities only arises when there is a condition that enables class members to join the class at different times. Only then can one member's interest become vested before all potential members acquire vested interests enabling them to join the class as well. Typically, these conditions involve birth and age requirements. For example, consider this testamentary trust of A: "Income to B for life; thereafter, principal to such of B's children absolutely who attain age thirty." Assume that B survives A and that he has one child, B-1 (age thirty-five), alive at that time. B-1 has an interest which is vested absolutely. Nevertheless, absent anything in the language restricting the group of children to those alive at A's death, B-1's interest is subject to open. The class will include all of B's potential children who satisfy two requirements; they must be born and they must attain age thirty. The effect of these requirements is to produce a class gift in which members can join at different points in time.

359. See *supra* note 357.

360. Further, these other afterborn descendants can have additional descendants within the twenty-one years following A's death, and these additional descendants would also become eligible to share in the principal once they survived the appointed time.

in being because he is dead when his testamentary trust becomes effective and the period of the rule begins. In any event, Step Four already incorporates the same testing period by measuring twenty-one years from the time the period commences at A's death. Under Step Three C, then, absent a saving clause or any other directly related provision, no one else is mentioned and, consequently, no testing life can be found on this basis.

Under Step Three D, one can reaffirm that the takers themselves are not restricted to lives in being and, consequently, one should then proceed to an examination of whether the takers' parents are restricted to lives in being and to lives already ended when the period of the rule begins. Nevertheless, because the class of takers is multigenerational, and because it can expand, it is impossible to determine the exact identity of the takers and, therefore, their parents.<sup>361</sup> Accordingly, one must conclude that their parents fail as testing lives because they can include those that are afterborn. Thus, one can proceed directly to Step Four.<sup>362</sup>

This final step does not call for the use of testing lives in being. Ordinarily, one uses it only after he has exhausted, under Step Three, the search for testing lives in being that validate. Nonetheless, Step Four can be applied before the search for testing lives in being begins. It can be applied immediately after determinations under Steps One and Two have been made. This would be appropriate especially in those situations in which the condition that makes the interest contingent appears limited to a twenty-one year period from the time of its creation.<sup>363</sup> If one acceler-

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361. As noted previously, B-1 and B-2 are alive at A's death. Presumptively, within the twenty-one year period following A's death, they can have children, who can then have another generation of children, who can then have another generation of children, etc. See *infra* note 370. Each of these descendants will qualify for a share of the principal if he survives the appointed time for distribution. Nevertheless, fulfillment of this express condition and the matter of how many additional generations of descendants will be born involve uncertainty. Accordingly, because one cannot determine the exact generational group of takers, one cannot determine the identity of their parents and whether they are restricted to lives in being at A's death.

362. See *supra* notes 307-12 and accompanying text.

363. Consider, for example, this testamentary trust created by A: "Income to B for life; thereafter, principal to such of B's grandchildren who are born and attain age thirty within twenty-one years of my death." Assume that B and his two children, B-1 and B-2, survive A. Also assume that neither B-1 nor B-2 have children by the time of A's death. Without the condition that grandchildren must attain age thirty within twenty-one years of A's death, there would be a perpetuities violation. See *infra* illustration IV A-6. With this condition, however, the interest given to the grandchildren is valid. Indeed, a valid proof can be accomplished directly under Step Four. The class must be fully determined within twenty-one years of A's death. Accordingly, one can dispense with Step Three and proceed immediately to Step Four in order to demonstrate the validity of the gift of principal.

ates the application of Step Four and validates the interest, the testing is at an end because the rule has been satisfied. If, however, one cannot establish validity under the accelerated application of Step Four, then one must proceed through Step Three. Once again, under this methodology an interest does not violate the common law rule unless one has failed to validate it under Steps Three and Four, regardless of their order of application.

Now then, looking to Step Four, must all descendants of B join the class, if at all, by being (born and) alive twenty-one years after A's death within twenty-one years of the time when the period of the rule commences—A's death? Quite obviously, the answer is YES and, therefore, the gift of principal to B's descendants satisfies the common law rule. The terms of the condition are clear. Even though the identity of the takers can change, and even though the class may consist exclusively of descendants born after A's death, the conditions—that they be born by and living at a certain time—are expressly limited to a time that satisfies the rule. Indeed, the time for application of the conditions coincides with the period allowed by the rule: twenty-one years after A's death.<sup>364</sup>

6. —Assume that A creates a testamentary trust that leaves: "Income to B for life; thereafter, principal to such of B's grandchildren who attain age thirty." This limitation is the one used in the first illustration. This time, however, the contextual facts surrounding A's death are quite different. Assume that B (age eighty-five) and B's only child, a daughter B-1 (age sixty), survive A. Finally, assume that B-1's three children—B's only grandchildren—also survive A. They are G-1 (age forty), G-2

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364. Suppose, however, that the gift of principal had been: ". . . to B's descendants, per capita, living thirty years after my (A's) death." Quite clearly, this would violate the common law rule against perpetuities because under Step Four one no longer can say that all interests must vest, if at all, within twenty-one years of the time when the period of the rule commences at A's death. Indeed, by the terms of the limitation itself, no one's interest can vest until thirty years after A's death. Commentators have observed that the common law rule only allows a grace period of twenty-one years. They believe that one cannot add to the period in gross the number of months normally accorded a period of gestation. For example, they would argue that a gift of principal "to B's descendants, per capita, living twenty-one years and one month after A's death" violates the common law rule. They maintain that periods of gestation are relevant only when they actually arise with respect to a particular limitation. For example, lives in being when the period of the rule commences always include those who are actually in gestation at such time. Professor Fetters, however, disagrees. He maintains that the period in gross under the common law rule is twenty-one years plus an additional period in gross of less than five months. His argument is a very interesting one. For a discussion of this problem, see Fetters, *The Perpetuities Period In Gross and the Child En Ventre Sa Mere In Relation to the Determination of Common-Law and Wait-And-See Measuring Lives: A Minor Heresy Stated and Defended*, 62 IOWA L. REV. 309 (1976).

(age thirty) and G-3 (age twenty-five). Is there a violation of the common law rule against perpetuities?

Once again, under Step One, the period of the rule begins at A's death. Under this set of facts, the determinations under Step Two A become more complicated. B has a vested interest; however, his grandchildren have interests that must directly satisfy the time requirements of the common law rule.<sup>365</sup> The gift of principal to B's grandchildren contains two obvious conditions: a grandchild must be born and must attain age thirty. Both G-1 and G-2 are ascertained and they have already attained age thirty by the time of A's death; accordingly, they have interests that are fully vested. They must satisfy no other condition for their interests to become possessory in them or their successors in ownership.<sup>366</sup> Nevertheless, their interests are subject to open and, accordingly, the exact size of their respective shares has not been fixed at the outset.<sup>367</sup> Because of this, their vested interests are still subject to the

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365 Once again, the common law rule against perpetuities imposes special requirements with respect to class gifts. All eligible class members must join the class, if at all, within the period of time allowed by the rule. And if any potential member may not do so, then the entire class gift fails, including the interests of even those members whose interest had vested immediately upon creation. See *supra* notes 157-59 and accompanying text.

366 For example, there is no express requirement that any of B's grandchildren must survive B, their respective parents or, for that matter, any other event. As for G-1 and G-2, if they were to die before the time for distribution of principal, their respective interests would belong to their own successors. Nevertheless, there are circumstances in which courts have, often without adequate justification, found requirements of survivorship even though none had been expressed clearly. For a discussion of these situations and of the complexities that exist with respect to the matter of characterizing interests, see *supra* notes 153, 240.

367 Currently, there are two grandchildren, G-1 and G-2, whose interests have vested. Nevertheless, one does not know at A's death the exact size of the share of principal they ultimately will receive. They may each take a third if G-3 attains age thirty, but they may take a smaller share if there are any afterborn grandchildren who also attain age thirty. The size of their share is unknown at A's death because their interests are subject to open. The language within A's testamentary transfer does not expressly restrict the class of B's grandchildren to those alive at A's death. Further, because distribution of principal is not immediate but is, instead, deferred until B's income interest ceases at his death, the rule of convenience does not require that the maximum class membership be fixed at A's death. Finally, because B and B-1 have survived A, one must presume that the class is capable of physical expansion through the birth of additional grandchildren thereafter. Nevertheless, there are circumstances in which a court might immediately restrict the class of grandchildren to the three who are alive at A's death. This occurs in situations in which a court, after considering the language of the full instrument and all that bears upon intent, concludes that A had only these three grandchildren in mind even though he identified them by group description rather than by their individual names. Conceivably, this example presents such circumstances. Indeed, after taking into account the ages of B and his daughter B-1 and the virtual certainty that there would be no more children and grandchildren, a court might be persuaded that A could only have had the three grandchildren in mind when he made this gift of principal. If a court adopts this restrictive con-

common law rule.<sup>368</sup> The third grandchild, G-3, is also ascertained; nevertheless, his interest is still contingent upon satisfying the express age requirement.

Because this class is not confined by its terms to B's grandchildren alive at A's death, it will remain open to include those born before the time for first distribution. This will occur at B's death because two grandchildren already have vested interests, and they can claim immediate distribution upon termination of all prior income interests. Thus, the rule of convenience will fix the maximum class membership at that time.<sup>369</sup> The interests of potential grandchildren born after A's death but before B's death are, of course, still subject to both conditions: the grandchildren must be born as well as attain age thirty. Once again, because this is a class gift, one must carefully note that the common law rule deems the interest of each class member contingent—including those whose interests are otherwise fully vested, such as G-1 and G-2—until all potentially eligible class members join, or fail to join, the class. The class is treated as one; if any member's interest can vest beyond the period of the rule, then there is a perpetuities violation for all members. Looking to Steps Two B and Two C, one must conclude that there are multiple conditions that appear cumulatively. Nevertheless, because under Step Two C (1) the implied condition of birth is subsumed by the age requirement, one can proceed directly to a consideration of the subsuming condition under Step Three A.

Proceeding then to Step Three A, it should be apparent from the preceding discussion that the takers themselves cannot qualify as testing lives in being. B's grandchildren are not restricted by the descriptive language itself to lives in being and to lives already ended. Further, although the rule of convenience limits the class of takers, it allows for inclusion of those born after A's death until the time of B's death. Finally, the class can physically expand. B-1, despite her age, must be

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struction, the gift to G-1 and G-2 remains vested subject to open, but it is only open to G-3 when and if he attains age thirty.

368. See *supra* notes 157-58, 365 and accompanying text.

369. Ordinarily, by using the descriptive term "B's grandchildren," one might assume that A intends to include all of the grandchildren B may ever have. If so, the class of grandchildren should remain open until B-1 and any afterborn children of B die and, therefore, can have no more grandchildren. Nevertheless, in this example the rule of convenience will not allow for this interpretation. Because their interests have fully vested, G-1 and G-2 must receive distribution of their shares at the death of B. Accordingly, courts assume that A's intent is restrictive; more specifically, they assume that A intends to include only those grandchildren born by the time of B's death the same as if he had said exactly that.

presumed capable of having additional children, and B, even though an octogenarian, is assumed capable of having an additional child who could then conceive a class member before the class closes at B's death.<sup>370</sup>

Under Step Three B, B—an other taker within the provision—does qualify as a testing life in being. By definition, B is ascertained and cannot be a person born after A's death. Accordingly, one applies the critical test to B: Must all grandchildren join the class, if at all, by (being born and) attaining age thirty within twenty-one years of B's death? Taking into account the possible times in which potential grandchildren can join the class, one concludes that the answer is NO. The critical test requires that one examine all possibilities for remote vesting. For example, although no grandchild can be born after the death of B and still be eligible to join the class, it is possible for B-1—or any afterborn child of B—to have a child after A's death who has not reached age nine by the time of B's death. It then becomes possible for such afterborn grandchild

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370 Under the common law rule against perpetuities, one is presumed capable of having a child throughout his or her entire life. See 6 AMERICAN LAW OF PROPERTY § 24.22 (A. J. Casner ed. 1952); R. LYNN, *supra* note 34, at 58, 60-61; R. MAUDSLEY, *supra* note 21, at 49, 52-53; L. SIMES & A. SMITH, *supra* note 22, § 1229. For example, consider this testamentary trust of A: "Income to B for life, thereafter, principal to such of B's grandchildren who are living at my death, or are born within five years after my death, and who attain age twenty-one." As of A's death, assume that B is age eighty, that his children have previously died, and that B has three grandchildren who have not already attained age twenty-one. Absent a construction which demonstrates A's intent to limit grandchildren to the three alive at his death, one must assume that the class of grandchildren is capable of expansion. This hypothetical presents the famous cases of the fertile octogenarian and the precocious toddler. In applying the common law rule, most commentators believe that one must presume that B, age eighty, is capable of having another child after A's death. Further, one must presume that such afterborn child of B is capable of having a child (another grandchild of B). Finally, one must presume that both events can occur within five years of A's death. For a case that addresses this problem, see *Re Gaite's Will Trusts*, [1949] 1 All E.R. 459.

This presumption of fertility throughout one's life has been rejected by some courts and has been altered by some legislatures in an attempt to patch up problems presented by the common law rule. See, e.g., *In re Bassett Estate*, 104 N.H. 504, 190 A.2d 415 (1963); *In re Lattovf's Will*, 87 N.J. Super. 137, 208 A.2d 411 (1965); *A. B. v. Wilmington Trust Co.*, 41 Del. Ch. 191, 191 A.2d 98 (1963); FLA. STAT. ANN. § 689.255 (West Supp. 1989); IDAHO CODE §§ 55-111 (1979); N.Y. EST., POWERS & TRUSTS LAW § 9-1.3(e) (McKinney Supp. 1979). See also ILL. STAT. ANN. ch. 30, para. 194(c)(3) (Smith-Hurd 1989) which provides:

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

to attain age thirty and join the class more than twenty-one years beyond the death of B. Accordingly, B does not become a validating life in being.<sup>371</sup>

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371. Suppose, however, that A's testamentary trust had provided: "Income to B for life; thereafter, principal to such of B's grandchildren who attain age twenty-one." Does the gift of principal violate the common law rule against perpetuities? There is no violation because, with this change in the limitation and with the same contextual facts, B now becomes a validating life in being. Applying the critical test, one asks: Must all grandchildren join the class, if at all, by (being born and) attaining age twenty-one within twenty-one years of B's death? Looking at all possibilities for vesting in light of facts known when the period of the rule begins at A's death and in light of applicable rules of construction and principles of law, one must conclude that the answer is YES. In applying this test, one must account for the rule of convenience which fixes the maximum class membership at the time when first distribution of principal is made. In this example, G-1, G-2 and G-3 have vested interests at the moment of creation at A's death. They have already attained age twenty-one, and no other conditions must be satisfied before they are entitled to possession beyond the termination of B's income interest for life. Distribution of principal will be made to each of them, or to their successors in interest, upon the death of B even if they subsequently fail to survive B. Accordingly, because of the rule of convenience, all potentially eligible grandchildren must be born before the death of B. If a grandchild is born thereafter, he will be excluded from the class entitled to principal. With this in mind, because no grandchild can be born beyond the death of B, none can satisfy the age requirement more than twenty-one years beyond the death of B. Accordingly, all grandchildren must join the class, or fail to join it, within twenty-one years of B's death.

Assume, however, that neither G-1, G-2, or G-3 had attained age twenty-one by the time of A's death. Once again, when applying the critical test to B, one must account for the rule of convenience in calculating all possibilities for vesting. With the foregoing change in the factual context, one can no longer say that the maximum class size must be fixed at A's death. Under the rule of convenience, the class will close upon the death of B or the time when the first of B's grandchildren attains age twenty-one, whichever occurs last. It then becomes possible for B to die immediately after A's death and, thereafter, for B-1 to have another child, G-4, before the first grandchild attains age twenty-one. Because G-4 is born before the time for first distribution of principal, he will be eligible to join the class when and if he attains age twenty-one. Accordingly, with G-4 having been born after B's death, it becomes possible for a grandchild to join the class more than twenty-one years beyond the death of B. Consequently, one cannot say that all grandchildren must join the class, or fail to join it, within twenty-one years of B's death.

Does this mean, however, that the gift of principal violates the rule against perpetuities? Under Step Three A, no one qualifies as a testing life in being. *See supra* text accompanying notes 369-70. As just demonstrated, under Step Three B, B qualifies as a testing life, but his life fails to validate the gift of principal. Under Step Three C, absent a saving clause or some other directly related provision, there is no one who is otherwise mentioned or separately and differently mentioned. Under Step Three D, one can examine the parents of the takers of the gift of principal, those who provide the necessary relationship. These people are, of course, B's children. Are they restricted to lives in being? Nothing in the language itself limits the class of grandchildren to the children of B's children alive at A's death; nor does a rule of construction or a physical impossibility restrict the group of qualifying parents. The rule of convenience will not close the class before B's death. Further, B is alive and he is presumed capable of having other children who can then have other children (B's grandchildren) before B's death. These grandchildren will join the class when and if they attain age twenty-one. In each instance, their parent, B's child, will have been someone who was not alive at A's death. Consequently, B's children cannot qualify as testing lives in being.

Finally, under Step Four, one asks: Must all grandchildren join the class, if at all, by (being born

Under Step Three C, absent a saving clause or some other directly related provision, no one qualifies as a testing life in being. To be sure, B is "separately" mentioned in the description of those entitled to take the principal, which reads "B's grandchildren"; nevertheless, B is not "differently" mentioned. Although B appears in a new context, the clause again refers to B as an individual and not differently—for example, as part of a group.

Proceeding next to Step Three D, one observes again that the class of takers is not confined to lives in being, and so one must consider their parents as potential testing lives in being. Do the parents that provide the relationship necessary to satisfy the description of this group of takers—B's children, but not their respective spouses—consist exclusively of lives in being and lives already ended when the period of the rule begins? The answer is NO. As noted earlier, B is alive and he is presumed capable of having additional children who can have children of their own (B's grandchildren) before B's death—before the time in which the maximum class membership is fixed. These afterborn grandchildren—born to afterborn children of B—would be eligible to join the class upon attaining age thirty. Accordingly, the grandchildren's parents—B's children—are physically capable of expansion or reconstitution following A's death.<sup>372</sup>

After having failed to establish validity through potential testing lives

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and) attaining age twenty-one within twenty-one years of the time the period of the rule commences at A's death? The answer is NO. Surely, it is possible for B-1 to have a child after the death of A but before the time for first distribution of principal, the time in which the maximum class membership is fixed. B-1's child (B's grandchild) then can join the class by attaining age twenty-one more than twenty-one years beyond the death of A. Having failed to make a valid proof under both Step Three and Step Four, one must conclude that the entire gift of principal to B's grandchildren violates the common law rule against perpetuities.

372 Suppose, however, that B had failed to survive A and that all other facts remained the same. Is there a perpetuities violation? There is none because, in this instance, a valid proof can be made under Step Three A. The group of takers of the interest in question, B's grandchildren, is restricted to G-1, G-2, and G-3—grandchildren in being at A's death. Even though the descriptive language allows for afterborn grandchildren and even though it is presumed physically possible for B-1 to have children after A's death, the rule of convenience operates to limit the class to the grandchildren existing at A's death. With the previous death of B, because G-1 and G-2 have already attained age thirty by the time of A's death, they are eligible for immediate distribution of principal. To accomplish this, the rule of convenience calls for an immediate determination of the maximum class membership. Accordingly, the class must be restricted to those alive at A's death. G-1 and G-2 join the class immediately, while G-3 will join the class when and if he attains age thirty thereafter. Must all grandchildren who are potentially eligible to take join the class, if at all, by (being born and) attaining age thirty within twenty-one years of either the life of G-1, G-2, or G-3? The answer is YES. G-1 and G-2 join the class immediately upon creation of their interests

in being under Step Three, one must now proceed to the final test under Step Four. Must all potentially eligible grandchildren join the class, if at all, by (being born and) attaining age thirty within twenty-one years of the time when the period of the rule commences—A's death? Quite obviously, after taking into account possible times in which potential grandchildren can join the class, one concludes that the answer is NO. Once again, this test requires that one examine all possibilities for remote vesting. There are many possibilities that will extend fulfillment of these conditions well beyond the twenty-one year time period and, therefore, support this conclusion. For example, all that is necessary is for B-1 to have another child before the death of B. Once this happens, that child becomes a potentially eligible class member who cannot join the class until attaining age thirty. Of necessity, then, such afterborn grandchild can join the class, if at all, only after more than twenty-one years have elapsed from the time of A's death. Having gone through all four steps without having established a positive answer to the critical test, one can now properly conclude that the grandchildren have an invalid interest

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at A's death, while G-3 must join the class, if at all, only during his own lifetime. Thus, his own life can be used to validate his interest.

Somewhat differently, assume that B failed to survive A, that all three of his grandchildren survived A, and that all three were under age thirty when A died. Is there a perpetuities violation? In this situation, because no grandchild was eligible for immediate distribution of principal at A's death, one could not conclude that the gift of principal was restricted to lives in being because of physical impossibility, descriptive language, or the rule of convenience or any other rule of construction. Indeed, the class of grandchildren should remain open to include B's grandchildren who are born before the first grandchild attains age thirty. Accordingly, Step Three A does not produce any life in being eligible for testing. Nor can one find any testing life in being under Steps Three B or Three C. B is already dead, so there is no other taker. Absent a saving clause or some other directly related provision, there is no one who is otherwise mentioned or separately and differently mentioned. However, under Step Three D, B-1 does qualify as a testing life in being. No one qualifies under Step Three A, so one must examine the parents of the takers who provide the relationship necessary to their description. Such parents must be the children of B since the gift of principal is to B's grandchildren. B has predeceased A; therefore, he can have no children beyond the death of A. Consequently, his children (the parents of the takers) are restricted to lives in being. Herein, B has only one child, his daughter B-1, alive at A's death; therefore, she qualifies as a testing life in being. Must all potentially eligible grandchildren join the class, if at all, by (being born and) attaining age thirty within twenty-one years of the death of B-1? The answer is NO. To begin with, B-1 might have another child (G-4, a grandchild of B) before any grandchild attains age thirty. Accordingly, G-4 becomes eligible to join the class thereafter upon attaining age thirty. Yet B-1 may die before G-4 attains age nine. It then becomes possible for G-4 to join the class, or fail to join it, more than twenty-one years after the death of B-1. Consequently, B-1's life fails to validate the interest of the grandchildren. Finally, one cannot make a valid proof under Step Four. *See infra* text accompanying notes 372-73. As a result, one must now conclude that there is a violation of the common law rule against perpetuities.

because it violates the common law rule against perpetuities.<sup>373</sup>

7. —Assume that A creates a testamentary trust that leaves: “Income to B for life, and at B’s death, income to B’s children for the life of the survivor of them; when the last of B’s children dies, principal to B’s grandchildren, per capita, absolutely and forever.” Further, assume that the following people are alive at A’s death: B (age eighty-five); B’s only child, his daughter B-1 (age sixty); and B’s only grandchild, his granddaughter G-1 (age thirty-five). Is there a violation of the common law rule against perpetuities?

Under Step One, because this is a testamentary trust, the period of the rule commences at A’s death. Under Step Two A, B has a vested interest; therefore, it is not subject to the rule. The successive remainders to B’s children and his grandchildren are obviously subject to the condition that a child or grandchild must be ascertained. Nevertheless, there is no express condition precedent to possession or benefit once a child or grandchild is born. Accordingly, both B-1 and G-1 have vested interests.<sup>374</sup> Therefore, looking to Step Two B, one must conclude that neither the interest of the children nor the interest of the grandchildren is subject to multiple conditions. Nevertheless, because the descriptive language does not confine children and grandchildren to those alive at A’s death,<sup>375</sup> and because the rule of convenience does not close a class until

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373 Conceivably, a court might also invalidate B’s income interest. Ordinarily, interests which violate the common law rule are stricken, while those that satisfy it are upheld. Perhaps for punitive reasons, some courts have tended to invalidate the entire instrument. See, e.g., the movie *Body Heat* (Warner/Ladd 1981). Nevertheless, there are circumstances in which most courts will go beyond the invalid interests themselves in striking provisions because of the rule against perpetuities. They do so because of a principle of “infectious invalidity.” This principle fundamentally rests upon a notion of preferred intent. Whenever it becomes clear that the invalid interest is essential to the estate owner’s dispositive scheme and that the enforcement of valid interests alone would distort such plan, courts have tended to invalidate other interests within and without the provision that contains the invalid limitation. When intestacy would produce a distribution consonant with the estate owner’s apparent dispositive design, courts will sometimes go further and strike all valid interests, forcing an intestate distribution on the assumption that such action reflects the preferred intent of the estate owner. For a discussion of the principle of “infectious invalidity” and some of the instances in which the principle is applied, see 6 AMERICAN LAW OF PROPERTY §§ 24.47-52 (A. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, § 1262.

374 In this situation, it is clear why B-1 and G-1 have vested interests. To be sure, there is no precedent requirement to distribution of their gifts other than the termination of prior estates. This test is the one courts ordinarily apply in making their determinations. Nevertheless, it is not the only one that courts use. Indeed, the problem of distinguishing between vested and contingent interests is very complex, and often it is difficult to anticipate the characterization a court will make. For further discussion of this problem and the tests courts use, see *supra* notes 149, 245.

375 Once again, without any language or specific reason to close the class prematurely, one

the time for first distribution (which cannot occur until B's death for the children and the deaths of B and all of his children for the grandchildren),<sup>376</sup> and because the common law rule against perpetuities presumes that it is still physically possible for B to have children and for his children (including B-I) to have children,<sup>377</sup> B-I and G-I have vested interests subject to open to include afterborn members.<sup>378</sup> This makes their interests subject to the common law rule as well as the interests of afterborn members whose interests cannot vest until they are born and ascertained. Therefore, because this is a class gift,<sup>379</sup> under the rule the interest of B-I is deemed contingent until all potential children join, or fail to join, the class, and the interest of G-I is deemed contingent until all potential grandchildren join, or fail to join, the class.

Examining first, then, the contingent interest of the children, one discovers under Step Three A that the takers themselves—the children of B—cannot serve as testing lives in being. As already demonstrated, they are not restricted to lives in being because of descriptive language, rules of construction, or impossibility of physical expansion.<sup>380</sup> Under Step Three B, both B and his grandchildren constitute other takers within the same provision. B does qualify as a testing life in being. He is ascertained, and the descriptive language restricts such income beneficiary to a

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must presume that, by providing a gift of income to "B's children" and of principal to "B's grandchildren," A wishes to include in each class all of those that ever may be born.

376. In this illustration, the rule of convenience would not close the class and fix the maximum membership of the gift to B's children before the death of B—before the time in which the possibility of further membership is exhausted. The gift to B's children is one of income and, ordinarily, the rule of convenience does not apply to such a gift. See L. SIMES & A. SMITH, *supra* note 22, § 649.

Further, the rule of convenience would not force a determination of the maximum membership of the class gift of principal to B's grandchildren before the possibility of further membership had been exhausted. No grandchild can be born beyond the death of the last of B's children to die, and no child can be born beyond the death of B. However, because of the successive income interests to B and then to his children, no distribution of principal is called for before the deaths of B and all of his children, namely, the time in which there can be no more grandchildren. Because of these successive income interests for life, no distribution of principal can be made until the possibility for further membership has become extinct. Accordingly, there is no conflict between A's directions concerning who should take the principal and when they should have it. For further discussion of the rule of convenience, see *supra* notes 160-61 and accompanying text.

377. See *supra* note 370.

378. The term "afterborn" appears throughout the text, especially in the discussion of illustrations included in Part Four. In each instance, "afterborn" refers to people born after the time when the period of the rule begins. More specifically, in this illustration, "afterborn members" refers to B's children and grandchildren who are born after A's death. Consequently, it should be quite clear that "afterborn" does not mean born after the death of the person who procreates such person.

379. See *supra* notes 157-58 and accompanying text.

380. See *supra* notes 375-77.

specific person. Accordingly, one can apply the critical test: Will all of B's children join the class, if at all, by being born within twenty-one years of B's death? Obviously, after taking into account possible times in which potential children can join the class, one concludes that the answer is YES. Because B is not viewed as capable of having a child beyond his death,<sup>381</sup> no child can be born and, therefore, enter the class beyond his death. Accordingly, B becomes a validating life in being and his children's interest satisfies the common law rule against perpetuities.

Examining next the contingent interest of the grandchildren, one applies Step Three A to find the takers themselves—the grandchildren of B—cannot serve as testing lives in being. Once again, they are not restricted to lives in being because of descriptive language, rules of construction, or impossibility of physical expansion.<sup>382</sup> Under Step Three B, both B and his children constitute other takers within the same provision. Once again, B qualifies as a testing life in being. Therefore one must ask: Will all of B's grandchildren join the class, if at all, by being born within twenty-one years of B's death? Taking into account possible times in which potential grandchildren can join the class, one concludes that the answer is NO. Once again, this test requires that one examine possibilities for remote vesting, and if one finds a possibility for vesting beyond this period, the proof fails and the answer is NO. Herein, one can elaborate many possibilities to confirm this conclusion.<sup>383</sup> For example, it is possible for B to die immediately and for B-1's income interest to commence. The class of grandchildren will not close until B-1's death—the time for distribution and the time when further membership is exhausted because of physical impossibility. It is also possible for B-1 to live more than twenty-one years beyond the death of B and then, given the common law rule's presumption, to have a child who would then join the class beyond the permitted period of time.<sup>384</sup> B's children as other

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381. See *supra* note 337.

382. See *supra* notes 375-77.

383. In addition to the illustration appearing in the text, one can speculate about other possibilities for remote vesting. For example, despite his advanced age, B might have another child, B-2, before his death. Because of the income interest left to B's children for the life of the survivor of them, the class gift of principal given to the grandchildren will not close before the death of B-2. Nothing in the language itself restricts the grandchildren to the children born to B-1; nor does the rule of convenience apply to close the class before the death of B-2. Consequently, B-2 might survive B and then have a child, G-2, more than twenty-one years later. It then becomes possible for a grandchild to join the class more than twenty-one years beyond the death of B. Accordingly, B cannot serve as a validating life in being.

384. In applying the critical test and in accounting for all possibilities that might lead to remote

takers cannot qualify as testing lives in being for the same reason they were not testing lives with respect to their own interest; namely, they are not restricted to lives in being and to lives already ended.

Under Step Three C, B is separately mentioned in the description of the children and grandchildren entitled to take principal. Nevertheless, B is not differently mentioned. The reference is still to B individually and not, for example, to a group that includes B. However, in examining the time when the gift of principal is to be made to the grandchildren (the takers of the interest), one observes someone "separately and differently mentioned," namely, the last of B's children to die. Although such child is previously included in the group of other takers (B's children), he is individually identified separately from the group itself as the person whose death marks the time for distribution of principal. Nevertheless, such child of B cannot qualify as a testing life. Because B is alive and capable of having children born after the death of A, the last of B's children to die may not be a life in being at A's death. Absent a saving clause or some other directly related provision, Step Three C cannot be used to test and validate in this illustration.

Under Step Three D, one can move to an examination of the grandchildren's parents because of the previous conclusion that the takers themselves—B's grandchildren—were not restricted to lives in being and to lives already ended. Nevertheless, their parents—B's children—cannot qualify as testing lives. Under Step Three B, herein, and under Step Three A, for the children's own interest, one already concluded that such group was not restricted to lives in being and to lives already ended. Because B is alive and presumed capable of having additional children, the group of parents—B's children—is physically capable of expansion.

Having failed to discover a validating life in being under all of Step Three, one must now apply the critical test under Step Four: Must all

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vesting, one must always focus only on the specific testing life or lives under specific consideration. In this instance, the critical test is applied to B. At that moment, then, one looks only to B for the purpose of making a valid proof. In examining possibilities for remote vesting, one must disregard the fact that the circumstances hypothesized involve vesting within twenty-one years of the death of another life in being. More specifically, the possibilities hypothesized in the text above involve a grandchild joining the class no later than B-1's death, and B-1 is a life in being at A's death. Nevertheless, this proof is for B only; for purposes of conducting this particular application of the critical test, one must disregard B-1. If B-1's life can be used to validate, it will become evident under another step. Eventually, in this illustration, B-1 will be considered and rejected as a testing life under Steps Three B and D. Because B is alive at A's death and presumably can have other children, B-1 is a member of a group of other takers that is not restricted to lives in being at A's death.

grandchildren join the class, if at all, by being born within twenty-one years of the time the period of the rule commences—A's death? After taking into account possible times in which potential grandchildren can join the class, one concludes that the answer, of course, is NO. Once again, this test requires that one eliminate all possibilities for remote vesting. Herein, however, it is possible for B-1 to live for more than twenty-one years after A's death. The class will not close until her death; therefore, any child she might have will definitely join the class of grandchildren entitled to take the principal. And it is possible, despite her advanced age at such time, for B-1 to have another child—a grandchild of B—who would then join the class beyond twenty-one years of A's death.<sup>385</sup> Having failed to establish a positive answer to the critical test under each of the foregoing steps, one can now properly conclude that the gift of principal to B's grandchildren is invalid because it violates the common law rule against perpetuities.<sup>386</sup>

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385 In addition to the illustration appearing in the text, one can speculate about other possibilities for remote vesting. *See supra* note 383. After A's death, B might have another child, B-2, before his death. Once again, because of the income interest left to B's children for the life of the survivor of them, the class gift of principal given to the grandchildren will not close before the death of B-2. Therefore, B-2 may live for more than twenty-one years after the death of A and then have a child, G-2. It then becomes possible for a grandchild to join the class more than twenty-one years beyond the time the perpetuities period commences at the death of A. Accordingly, no validation can be made with the gross period allowed by the common law rule.

386 Consider these three variations of illustration IV A-7. First, using the same testamentary trust, assume that B had failed to survive A. In this situation, the gift of principal to B's grandchildren would satisfy the common law rule against perpetuities. Under Step Three B, B's only child, B-1, is an other taker, and she qualifies as a testing life. B is already dead; consequently, he can have no other children. The income interest given to B's children for the life of the survivor of them is, therefore, restricted to a life in being because of physical impossibility. Applying the critical test to B-1, one asks: Will all of B's grandchildren join the class, if at all, by being born within twenty-one years of B-1's death? The answer is YES. Because B-1 is B's only child and because she cannot have a child beyond her death, all of B's grandchildren—namely, all of B-1's children—must join the class, if at all, by the time of her death.

Second, assume that A's testamentary trust had provided somewhat differently for the gift of principal: ". . . to such of B's grandchildren, per capita, absolutely and forever who are children of such of B's children who are born by the time of my death." Once again, there is no perpetuities violation. Under Step Three C, B-1 qualifies as a testing life. Because she is B's only child born by the time of A's death, she becomes a life in being who is separately and differently mentioned. Just as before, one applies the critical test to B-1, and, for the same reasons, the answer is YES. B-1 is a validating life in being. By the terms of the limitation itself, all grandchildren must be children of lives in being; consequently, none can join the class beyond the death of a life in being.

Third, assume that A's testamentary trust had been changed in this fashion: ". . . to such of B's grandchildren, per capita, absolutely and forever who are born within twenty-one years of the death of the survivor of B and B-1." In this instance, there is no perpetuities violation. Under Step Three C, the survivor of B and B-1 is a life in being and such person is separately and differently men-

8. —Assume that A creates a testamentary trust that leaves: “Income to B for life and, following his death, principal to such of B’s descendants on whatever conditions as B appoints by the terms of his last will referring specifically to the power herein given him; in default of the exercise of this power, principal to C absolutely.” Further, assume that C (age forty), B (age fifty-five), B’s only daughter B-1 (age thirty), B’s only son B-2 (age twenty), and B’s only grandchild G-1 (age five and the child of B-1) survive A. Five years later B dies, and he is survived by C, B-1, B-2, G-1, and G-2 (B-2’s only child, born shortly before B’s death). Finally, with specific reference to the power given to B in A’s will, assume that B exercises his special testamentary power of appointment<sup>387</sup> in which he continues the trust and leaves: “Income to my children for the life of the survivor of them; thereafter, principal to my grandchildren absolutely and per capita.” Do any of the interests created by A or appointed by B violate the common law rule against perpetuities?

First, until B has validly exercised his special power, the substitute interest of C is vested subject to divestment. C is ascertained and there is no condition precedent attached to his interest. Courts generally say that such interest vests subject to exercise of the power; consequently, the rule does not apply to C’s interest.<sup>388</sup> As a result, one can proceed directly to a consideration of the power itself and the interests B creates under his appointment.

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tioned. Applying the critical test, one asks: Will all of B’s grandchildren join the class, if at all, by being born within twenty-one years of the death of the survivor of B and B-1? The answer is, of course, YES. Because the limitation imposes the precise requirement that all grandchildren entitled to take must be born by the time required by the critical test itself, the common law rule is fully satisfied.

387. Given the definitions of general and special powers of appointment, the power created by A in this illustration is clearly a special power of appointment. For prevailing definitions of a general power of appointment, see I.R.C. § 2041(b)(1) (1954) (“The term ‘general power of appointment’ means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. . . .”); I.R.C. § 2514(c) (1954) (“[T]he term ‘general power of appointment’ means a power which is exercisable in favor of the individual possessing the power . . . , his estate, his creditors, or the creditors of his estate. . . .”). Under the Internal Revenue Code, all other powers are deemed special powers. For another definition, see 3 RESTATEMENT OF PROPERTY § 320 (1940):

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

388. See L. SIMES & A. SMITH, *supra* note 22, § 150. If C’s interest is contingent, it must derive from an uncertainty imposed by A that is independent of the power of appointment.

Under Step One, because this is a special testamentary power of appointment, one must conclude that the period of the rule commences at A's death when the power itself is created.<sup>389</sup> Next, without regard to how B exercises it, does the power itself violate the common law rule? At this point, one passes quickly through Steps Two A and Two B, after observing that the only condition lies in the exercise of the power itself by B, and proceeds directly to Step Three A.<sup>390</sup>

For purposes of testing the power itself, one should view B—the donee of such power—as the taker of the interest in question. Because B is ascertained and restricted by the descriptive language to a specific person in being at A's death, one can apply the critical test to B under Step Three A: Must the power be exercised, if at all, within twenty-one years of the death of B? Clearly, the answer is YES and, therefore, the power itself is valid. B has a special testamentary power that can only be exercised by his will which is viewed as effective as of his death.<sup>391</sup> In short, the power cannot be exercised before or beyond the death of B; of necessity, it falls within the proscription of the common law rule. Accordingly, with a valid power one can then proceed to examine the interests B actually creates in exercising his power.

B creates remainders in his children and grandchildren. They are his "descendants" and, thus, properly fall within the scope of his power.<sup>392</sup> At this point, if one engrafts B's appointment onto the terms of A's trust,

389. See *supra* notes 168-70 and accompanying text.

390. See *supra* notes 201-04 and accompanying text.

391. B's testamentary exercise of the special power of appointment is not viewed as effective until his death because an essential ingredient of all wills is that they are revocable until the testator's death. See R. MENNELL, *WILLS AND TRUSTS* 84 (1979).

392. Within the context of A's description of the objects of the power of appointment, it seems clear that a court would find that B's exercise of the special power for both his children and grandchildren properly has been made on behalf of his "descendants." Nothing herein indicates otherwise. The problems of interpretation, however, become more acute when terms such as "descendants" and "issue" are used as words of purchase to describe a direct gift to a group of people. Several kinds of problems arise. For example, is the term multigenerational or does it just refer to the children of the person used to define the gift? Ordinarily, courts find that the terms "descendants" and "issue" include multigenerational relatives other than those who are ascendant or collateral. Courts may, however, confine the group to the children of the person used to define the gift if language or circumstances imply such a restricted construction. In addition, problems arise with respect to whether any descendants are excluded because they have a living ancestor who also falls within the group of descendants, and they also arise with respect to whether division of shares should be made per capita or per stirpes. For a discussion of these problems, see 5 *AMERICAN LAW OF PROPERTY* § 22.36 (A. J. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, §§ 743-46. See also *RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS)* § 28.2, § 28.2 comments, statutory note and reporter's note (Tent. Draft No. 10, 1987).

the resulting provision looks virtually identical to the one contained in a previous illustration.<sup>393</sup> In that illustration, the gift to B's children satisfied the common law rule, but the gift to his grandchildren did not.<sup>394</sup> Should one reach the same conclusion in this example? Under Step Two A, one must determine which interests are contingent and which are vested. With respect to a valid power, this determination can only be made as of the time interests are actually created by the appointment.<sup>395</sup> Technically, at the time the period of the rule begins, the appointment B makes to his children is contingent.<sup>396</sup> However, if the appointment creates an interest that vests immediately upon exercise of a valid power, it will always satisfy the rule. Because the power must be exercisable only within the period of the rule, interests which vest immediately upon appointment necessarily vest within the allowed time period. Therefore, as of the death of B, because the interest he appoints to his children for the life of the survivor is vested, it should not be subject to the rule. B is dead and he can have no more children. The class is closed and there is no condition precedent that otherwise would render their interest contingent.

Nevertheless, as of B's death, his appointment of principal to his grandchildren is contingent under the common law rule.<sup>397</sup> B's appoint-

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393. See *supra* illustration IV A-7.

394. *Id.*

395. If the power itself is valid, as it is in this illustration, the common law rule allows one to "wait and see" how it is exercised. Obviously, one cannot apply the rule to interests created by the power until the appointment is made because until then one has no way of knowing whether the power will be exercised and what specific appointment will be made. Having waited for the exercise of the power, one can, according to the common law rule, use facts known at the time of such appointment to determine which interests are contingent and to determine whether such contingent interests must vest, if at all, within the allowed period of time. See *supra* notes 169-70 and accompanying text.

396. It is contingent, of course, upon exercise of the power itself. In a sense, B's children have a contingent executory interest, which will divest C's vested interest when and if the power is exercised. Nevertheless, many people might view this differently; they might conclude that B's children have no interest worthy of the protection afforded executory interests before the power is actually exercised. See L. SIMES & A. SMITH, *supra* note 22, § 224.

397. The interests of potential class members, grandchildren born after B's death (the time when he exercises his power of appointment), are contingent upon their respective births. See *supra* note 330. However, the interests of B's grandchildren alive at his death, G-1 and G-2, are apparently vested since there is no condition precedent to possession beyond the termination of the prior life estates given to B's children. Nevertheless, the meaning of vested and contingent takes on a new dimension with respect to the common law rule against perpetuities. Once again, because this is a class gift, the interests of G-1 and G-2 do not satisfy the rule unless all potential class members must join, or fail to join, the class within the allowed time period. In a sense then, for purposes of the common law rule, the interests of G-1 and G-2 remain contingent until the last potentially eligible

ment to G-1 and G-2 is unconditioned and because of this they have vested interests. However, G-1's and G-2's interests are subject to open to include afterborn grandchildren, whose interests are, of course, contingent upon their respective births. Distribution of principal cannot be made until the death of all of B's children. Neither the descriptive language nor the rule of convenience confines the class of grandchildren to those alive at B's death.<sup>398</sup> B's children, B-1 and B-2, have survived B, and until their respective deaths they are deemed capable of adding to the class of grandchildren. Therefore, the class membership is not fixed at B's death by reason of physical impossibility.<sup>399</sup> Because this is a class gift, the interest of each grandchild (including the vested interests of G-1 and G-2) is deemed contingent until all potentially eligible grandchildren will, if at all, join the class.<sup>400</sup> Finally, one must conclude under Step Two B that the gift of principal to the grandchildren is not subject to multiple conditions because birth of a grandchild is the only relevant condition attached to each class member's interest.

Proceeding then to Step Three A, one must conclude that the takers themselves of the contingent interest—the grandchildren—are not restricted to lives in being and to lives already ended. As of the time the power is exercised at B's death, neither physical impossibility, descriptive language nor rules of construction preclude the inclusion of grandchildren born after A's death.<sup>401</sup> Indeed, one of the grandchildren, G-2, was born after A's death. Therefore, the grandchildren cannot serve as testing lives in being to validate their own interests.

Under Step Three B, B is an other taker and by the descriptive language itself, he must be viewed as an other taker restricted to a life in

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grandchild joins, or fails to join, the class. For a discussion of the common law rule as applied to class gifts, see *supra* notes 157-58 and accompanying text.

398 Because B's children, B-1 and B-2, survive him, distribution cannot be made immediately to the grandchildren, G-1 and G-2. Indeed, distribution of principal will be delayed until the income interests of B-1 and B-2 cease upon the survivor's death. Accordingly, there is no occasion to apply the rule of convenience and, thereby, fix the maximum class membership before the possibility for birth of additional grandchildren has been exhausted by the death of the survivor of B's children. For further discussion of the rule of convenience, see *supra* notes 160-61 and accompanying text.

399. If, of course, B-1 and B-2, B's only children, had predeceased B, then the class membership of the gift to grandchildren would have been fixed immediately as of the death of B—the time in which he exercises the power of appointment—by reason of physical impossibility. In this instance, the income interests for life in B's children would have failed and the gift of principal to B's grandchildren, G-1 and G-2, would have vested immediately upon creation at B's death.

400 See *supra* notes 157-58 and accompanying text.

401 See *supra* notes 397-400 and accompanying text.

being. Accordingly, one can apply the critical test to B, and under the common law rule, one must do this in light of facts known when the power is exercised. Even though B is dead when one applies this test, he should not be eliminated as a testing life because he was in being at A's death—the point in time when the period of the rule begins. Therefore, one must ask: Looking at all possibilities in light of facts known when the power is exercised at B's death, must all of B's grandchildren join the class, if at all, by being born within twenty-one years of B's death? Taking into account possible times in which potential grandchildren can join the class, one concludes that the answer is NO. Once again, this test requires that one eliminate all possibilities for remote vesting, but one cannot do so here. As indicated previously, the class of grandchildren remains open until the death of both of B's children, B-1 and B-2. However remote, it is possible for B-1 or B-2 to live beyond twenty-one years of B's death and then to have a child, in which case this grandchild of B would join the class more than twenty-one years beyond his death.<sup>402</sup>

Proceeding next to B's children, who are also other takers<sup>403</sup> under this provision, one must inquire, as of the appointment at B's death, whether B's children are in actuality confined to lives in being or to lives already ended at A's death. Although B could have had additional children as of A's death, he did not. And this is something the common law rule allows one to take into account.<sup>404</sup> When B exercises his power at his death, the only two children to survive him are B-1 and B-2, and both of these children were alive at A's death as well. As of B's death, the group of other takers—B's children—is restricted in actuality to lives in being at A's death because it becomes physically impossible for there to be any others beyond B-1 and B-2. Accordingly, B's children qualify as testing lives in being and one must apply the critical test to them.<sup>405</sup>

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402. If, of course, B-1 and B-2 had predeceased B, there would be no perpetuities violation. The interests of G-1 and G-2 would vest immediately under the common law rule upon exercise of the power of appointment at B's death because of the physical impossibility of any other grandchildren being born and joining the class.

403. C, the taker of the gift in default of B's exercise of the power of appointment, must also be viewed as an other taker. One cannot, however, make a valid proof using C as the testing life in being. Indeed, one cannot answer YES to the question: Must all grandchildren of B join the class, if at all, by being born within twenty-one years of the death of C? Surely, it is possible for either B-1 or B-2 to live more than twenty-one years beyond the death of C and then have a child, a grandchild of B. Such grandchild would then be eligible to join the class, and he would do so more than twenty-one years after the death of C.

404. See *supra* notes 169-70 and accompanying text.

405. Suppose, however, B had another child, B-3, following the death of A. Would the gift of

Looking at all possibilities in light of facts known when the power is exercised at B's death, must all of B's grandchildren join the class, if at all, by being born within twenty-one years of the death of the survivor of B-1 and B-2? After taking into account possible times in which potential grandchildren can join the class, one concludes that the answer is YES. Herein, one can eliminate all possibilities for remote vesting. No grandchild of B can be born beyond the death of a child of B;<sup>406</sup> there-

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principal to B's grandchildren made pursuant to his appointment violate the common law rule against perpetuities? First, assume that B-3 does not survive B and that, once again, only B-1 and B-2 are alive at B's death. In this situation, one can conclude that, in light of facts known when the power is exercised at B's death, this group of other takers is restricted to lives in being when the period of the rule begins at A's death—the time in which the power was created. Although B could have had children born after the death of A who survived B, his only children alive at his death were those also alive at A's death. The group of children is, therefore, restricted to lives in being at A's death because after B's death it becomes physically impossible for him to have any others. Consequently, B's children, B-1 and B-2, qualify as testing lives in being, and after applying the critical test, one discovers that their lives validate the gift of principal just the same as in the illustration within the text itself.

There would, however, be a perpetuities violation if B-3 had survived B. In this situation, taking into account facts known at B's death, one must conclude that this group of other takers has expanded since A's death and does in fact include someone not in being at A's death. Accordingly, they cannot qualify as testing lives. Also, under Step Three B, C is an other taker, and C does qualify for testing because by the descriptive language he is identified as a life in being. Applying the critical test to C, one asks: Looking at all possibilities in light of facts known when the power is exercised at B's death, must all of B's grandchildren join the class, if at all, by being born within twenty-one years of C's death? The answer is NO. Surely C may die immediately after the death of B. Also, any one of B's three children might live for another thirty years and then have a child, another grandchild, who then would join the class more than twenty-one years beyond the death of C. Under Step Three C, the "survivor" of B's children might be viewed as a person who is separately and differently mentioned. Nevertheless, because the survivor might be B-3, one cannot conclude that such person is restricted to a life in being at A's death. Under Step Three D, B's children are the parents who provide the necessary relationship. However, once again, taking into account facts known at B's death, one must conclude that they are not restricted to lives in being at A's death. Because B-3 has survived B, the parents include someone born after the time the power was created—the time in which the period of the rule commences. Finally, one must apply the critical test contained in Step Four: Looking at all possibilities for vesting in the light of facts known when the power is exercised at B's death, must all of B's grandchildren join the class, if at all, by being born within twenty-one years of the time the period of the rule commences at A's death? The answer is, of course, NO. Surely any one of B's three children may live more than twenty-one years beyond A's death. Indeed, this may already have happened by the time of B's death. It then becomes possible for such child to have a child thereafter (another grandchild of B) who would then join the class more than twenty-one years beyond the death of A. Having failed to establish a positive answer to the critical test under each of the foregoing steps, one now can conclude properly that the gift of principal under B's appointment is invalid because it violates the common law rule against perpetuities.

<sup>406</sup> No person can have a child beyond his or her death or beyond the period of gestation following his death. *See supra* note 337.

fore, the very latest a grandchild will be deemed to join the class is at the death of the surviving child, either B-1 or B-2. Accordingly, because B's children become validating lives in being, the interest of the grandchildren satisfies the common law rule against perpetuities and therefore is valid.

9. —Assume that A creates a testamentary trust that leaves: "Income to B for life and, after his death, income to his then living wife for her life; thereafter, principal to his children absolutely who are then living." Further, assume that B (age eighty), W (age seventy and B's wife), and B-1 (age forty and B's son and only child) survive A. Is there a violation of the common law rule against perpetuities?<sup>407</sup>

In answer to the question contained in Step One, the period of the rule begins at A's death because these interests are created by A's will. Under Step Two A, one must conclude that B's interest is vested but that the interests of B's wife and B's children are contingent and, therefore, subject to the rule. Beginning with the gift of income "to B's then living wife," because this remainder interest does not identify W specifically by name but includes anyone who satisfies the descriptive language,<sup>408</sup> two conditions make the interest contingent. First, presumably such person must qualify as B's wife at the time of his death—there is the express requirement that they must be married and not divorced. Second, such person, whoever she might be, must, of course, be born. Although it is unlikely that B will be married at the time of his death to someone unborn at A's death, this is possible, and, therefore, this becomes an implicit condition. Further, one might be tempted to add that there is a

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407. This illustration presents the classic case of the "unborn widow," one which has been a fertile source of unwitting perpetuities violations. See McGovern, *supra* note 327, at 157-60.

408. There may be circumstances, however, in which a court will restrict the meaning of "his then living wife." If there is evidence, especially within the entire instrument itself, indicating that A had a particular person in mind, courts are apt to reject the construction that such a gift is to anyone who satisfies the descriptive language at the time of B's death. Indeed, a court may construe the language the same as it would have if a specific person had been named. See, e.g., *Willis v. Hendry*, 127 Conn. 653, 20 A.2d 375 (1941).

In an effort to patch up problems presented by the common law rule against perpetuities, some jurisdictions presume this kind of language was intended to restrict the taker to a person who was in being when the interest was created and the period of the rule commenced. See, e.g., CAL. CIV. CODE § 715.7 (West 1982); FLA. STAT. § 689.22(5)(b) (1981); N.Y. EST., POWERS AND TRUSTS LAW § 9-1.3(c) (McKinney 1967). See also ILL. ANN. STAT. ch. 30, para. 194 (1)(C) (Smith-Hurd Supp. 1983): "[I]t shall be presumed. . . (C) where the instrument creates an interest in the 'widow,' 'widower,' or 'spouse' of another person, that the maker of the instrument intended to refer to a person who was living at the date that the period of the rule against perpetuities commences to run; . . ."

requirement of survivorship as well. Nevertheless, because B's wife has been given a life estate, there is in the duration of the estate itself already a requirement that such wife must be alive for the interest to endure. Accordingly, the explicit statement that she must be "then living" is surplusage.<sup>409</sup> To summarize then looking to Steps Two B and Two C, one must conclude that there are multiple conditions that appear cumulatively. Nevertheless, because under Step Two C (1) the implied condition of birth is subsumed by the requirement of marriage (that she be B's then living wife), one can proceed directly to a consideration of the subsuming condition under Step Three A.

Next, with regard to the gift of principal to B's children, one also observes two conditions. Although B has a child, B-1, and although B is an octogenarian not likely to have additional children, this class gift must be viewed as subject to open and to reconstitution. Indeed, neither the minimum nor maximum class membership is fixed at the time of A's death. No distribution of principal to B's children can be made at least until the death of B and, accordingly, the maximum class membership will not be fixed until the possibility of additional children is exhausted at B's death.<sup>410</sup> Therefore, afterborn children will be included and for these children there is the initial condition of birth. Additionally, for all of B's children, including B-1, there is the explicit requirement that they be alive when the prior life estates terminate. Once again, because this is a class gift, each class member's interest is deemed contingent until all po-

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409. Ordinarily, conditions that do nothing more than describe the time or manner in which preceding estates terminate or simply reiterate characteristics inherent in a particular estate are not enough to make an interest contingent. See 6 AMERICAN LAW OF PROPERTY § 24.19 (A.J. Casner ed. 1952); L. SIMES & A. SMITH, *supra* note 22, § 142. If, however, the gift of principal had been "to B's then living wife absolutely," then the language of survivorship would have added a new requirement and courts would, accordingly, view the gift as contingent. Consider, however, this variation of the gift of principal: ". . . and after B's death, to his wife absolutely." Suppose B's only wife, W, survives A but predeceases B. Is her interest contingent upon survivorship of B? Quite literally, after B's death, W is no longer B's wife even if she were to survive him. Presumably, the marriage ends with the death of B or W. This interpretation would, of course, make the gift of principal a nullity because under no circumstance could W, or anyone else, satisfy the requirements of the descriptive language. With this in mind, a court should not give "wife" its literal meaning and, consequently, it should dismiss any inherent requirement of survivorship. Conceivably, in this situation, a court might construe "wife" the same as if the language had said "widow." If so, the foregoing nullity does not exist because it is possible for a wife to survive her husband and become his widow. With this interpretation, a requirement of survivorship presents itself, and a court might then conclude that W cannot take the principal because she has predeceased B.

410. Accordingly, the rule of convenience will not preclude inclusion of B's children born after A's death. For further discussion of the rule of convenience, see *supra* notes 160-61 and accompanying text.

tentially eligible members join, or fail to join, the class.<sup>411</sup> To summarize then as to the gift of principal, looking to Steps Two B and Two C, one must conclude that there are multiple conditions that appear cumulatively. Nevertheless, because under Step Two C (1) the implied condition of birth is subsumed by the requirement of survivorship (of B and B's wife), one can proceed directly to a consideration of the subsuming condition under Step Three A.

Applying Step Three A of the methodology first to the contingent interest of B's wife, such taker cannot qualify as a testing life in being. Neither the descriptive language nor the rule of convenience restricts such gift to a life in being.<sup>412</sup> However unlikely it might seem, W may die and the person B remarries—his wife “then living” at his death—might be someone unborn at A's death. One cannot say that B's wife is restricted to a life in being or to a life already ended; one cannot reach such conclusion because such taker is physically capable of reconstitution to include someone born after A's death.<sup>413</sup>

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411. In this illustration, the “all or nothing” principle that is applied to class gifts under the common law rule against perpetuities does not present a problem. Because the condition attached to the gift of principal involves survivorship of a single point in time (namely, the death of the survivor of B and his wife), all of B's children who become actual takers will enter the class at the same time. Stated differently, there is no occasion for children to enter the class of actual takers at different times and, therefore, there is no possibility for one child to have a vested interest before the class of takers is fully determined.

412. If the language of the entire instrument makes clear that A had W specifically in mind as B's wife just the same as if he had expressly identified her, one might then be able to say that B's “then living wife” was restricted to a life in being because of the descriptive language. *See supra* note 408. Absent such interpretation, the descriptive language must be assumed to include anyone who is married to B at the time of his death, including those born after A's death. Nor is there any rule of construction that restricts B's wife to a life in being when the period of the rule commences at A's death. In particular, the rule of convenience is not applicable at all. For one thing, this involves a gift of income and, for another, this is a gift to an individual and not to a class.

413. To qualify as a testing life, there must be no opportunity for inclusion of lives born after the period of the rule commences. Often, some person or group that falls within the various classifications of Step Three will fail to qualify because it is possible for such person or group to expand in number with afterborn lives. Accordingly, in finding a testing life or lives, one must rule out the chance of such expansion. Just as important, however, one must also rule out the possibility of reconstitution. Often the number is fixed. In this situation, B can have only one wife who is then living. Nevertheless, because her exact identity is not fully determined by the language itself at A's death, the person who qualifies as B's then living wife may change by the time of B's death. Indeed, her identity may be reconstituted. The same may be said about the gift of principal to B's children living when the income interests cease. To be sure, although only B-1 is alive at A's death, B may have additional children. The group can expand with afterborn children and more than one can actually survive and ultimately share in the principal. Nevertheless, even though there is only one taker who qualifies for distribution of principal, the identity of such taker may be reconstituted with an afterborn child. Indeed, it is possible for B-1 to die before B and B to then have another child,

However, under Step Three B, B as an other taker does qualify as a testing life. B is ascertained and by the descriptive language his interest can belong to no one else—a specific person in being at A's death. Accordingly, one can apply the critical test to B: Must the condition(s) of (birth and) marriage attached to B's wife's interest be fulfilled, if at all, within twenty-one years of B's death? Obviously, after accounting for all possibilities, the answer is YES. Herein one can eliminate all possibilities for remote vesting. To become B's wife at his death, one must be born and married to him at the time of his death. Both conditions will be met, if at all, by the time of B's death; therefore, this gift satisfies the common law rule and it is valid.

Applying Step Three A of the methodology next to the gift of principal—the contingent interest in B's children—one finds that the takers themselves cannot qualify as testing lives. As indicated previously, although B already has a child, B-1, neither the descriptive language nor the rule of convenience restricts the class to lives in being, and presumptively B is physically capable of having children born after the death of A.<sup>414</sup> Additionally, under Step Three B, for reasons already given, B's wife cannot qualify as a testing life in being.<sup>415</sup> Once again, the person who ultimately qualifies as "his then living wife" can include someone

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B-2, who then might survive the time of distribution. In this case, the sole taker would be someone born after the time the period of the rule commences.

414. A has given the principal to B's "children who are then living." B has had one child, B-1; presumably, in making the gift to children, A intended to include any who were born after his death. Consequently, one cannot say that the descriptive language restricts the takers of the principal to lives in being. Additionally, the rule of convenience does not fix the maximum membership to those alive at A's death. See *supra* notes 410-11 and accompanying text. Finally, the takers are not restricted to lives in being because of physical impossibility of reconstitution or expansion. Although B is age eighty, under the common law rule, he must be presumed capable of having children. See *supra* note 370. Conceivably, however, there might be a situation in which a court, after considering the entire instrument and all surrounding circumstances, concludes that A intended that B's children be restricted to those born by the time of A's death the same as if he had limited the takers by expressly naming B-1. This interpretation might gather force if B had had another child, B-2, who had died between the time A executed his will and the time of his death. Presumably, A knew of B's advanced age and that his children were well into adulthood. Undoubtedly, he did not anticipate B's having additional children and he probably had B-1 and B-2 specifically in mind. Most likely, the term "children" was used as a short-hand expression and not because of a desire to elasticize the group for inclusion of those born after A's death. With this interpretation, the taker himself then qualifies as a testing life under Step Three A because of the descriptive language. As a result, one can then make a valid proof. B-1, a life in being, can only take the principal by surviving the time of possession. Accordingly, his interest must vest during his own lifetime or else it will fail at his death.

415. See *supra* notes 412-13 and accompanying text.

born after A's death.<sup>416</sup>

Nevertheless, under Step Three B, as an other taker B does qualify as a testing life. Therefore, one must ask: Will all of B's children join the class, if at all, by (being born and) surviving the life tenants within twenty-one years of B's death? After taking into account the possible times in which potential children can join the class, one concludes that the answer is NO. Here, one cannot eliminate all possibilities for remote vesting. To be sure, all of B's children will be deemed born by the time of his death. Nevertheless, it is possible that B's wife, whoever she might be, will survive him for more than twenty-one years. It then becomes possible for B's children to survive her and then to join the class more than twenty-one years after the death of B.

Under Step Three C, B is separately mentioned through the pronoun "his" in the description of both remainder interests. Nevertheless, B is not differently mentioned. The reference is still to B individually and not, for example, to a group that includes B. Absent a saving clause or other directly related provision, one must proceed next to Step Three D. Here, because the children are not restricted to lives in being and, therefore, were not eligible for testing under Step Three A, one can continue the process and consider their parent who provides the necessary descriptive relationship. That parent is B, someone who is a life in being. However, because B has already been tested and failed as a validating life under Step Three B, one must proceed directly to the critical test contained within Step Four.

Will all of B's children join the class, if at all, by (being born and) surviving the life tenants within twenty-one years of the time the period of the rule commences—A's death? After taking into account the possible times in which potential children can join the class, one concludes that the answer is, of course, NO. Herein, one cannot eliminate all pos-

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416. If, however, the entire instrument makes clear that A had W in mind as the person to whom he referred as "B's wife," then W will qualify as a testing life in being just as she would if A had specifically identified her. See *supra* note 408. If one is able to reach this conclusion, then there is no perpetuities violation. If "then living" refers only to the death of W, whether she dies before or after B, a valid proof can be made with W under Step Three B. The gift of principal will belong to B's children alive at her death. Clearly then, it must vest, if at all, at W's death. If, however, "then living" impliedly refers to those children alive at the death of the survivor of B and W, then the survivor qualifies as a testing life under Step Three C because such person is separately and differently mentioned. And under Step Three C, one can make a valid proof with such survivor. The survivor of B and W is necessarily a life in being. The gift of principal will belong to B's children alive at the survivor's death. Clearly then, it must vest, if at all, at the survivor's death. Consequently, in either case, the common law rule against perpetuities is satisfied.

sibilities for remote vesting. Very simply, B may live more than twenty-one years beyond A's death. Whether his wife does or does not survive him, B's children then living—B-1 alone or afterborn children as well—will then join the class more than twenty-one years beyond the death of A. Having failed to establish a positive answer to the critical test under any of the foregoing steps, one can now properly conclude that the principal interest of B's children is invalid because it violates the common law rule against perpetuities.

10. —Assume that A creates a testamentary trust that leaves: "Income to B for life, and at his death income to his then living wife for life, with principal to whomever the survivor of them appoints by deed or trust during his or her lifetime or by will at his or her death and on whatever terms or conditions the survivor elects; in default of the exercise of such power, principal to C absolutely." At A's death, assume that B, age five, survives and thirty years later marries W, who is ten years younger than B and, therefore, was not born by the time of A's death. Thereafter, they have two children, B-1 and B-2. B then dies, and twenty-five years later W dies having exercised the power of appointment in her will. Her appointment leaves the subject matter in trust: "Income to our (B's and W's) children for the life of the survivor of them; thereafter, principal is to belong absolutely to our grandchildren per capita." Finally, at W's death assume that B-1 (age thirty-five) and B-2 (age thirty) survive and that they are then childless but recently married.

Once again, the interests created by exercise of this power resemble those interests created in two previous illustrations.<sup>417</sup> Illustration IV A-7 contained a perpetuities violation, but illustration IV A-8 did not. Here, the gift in default to C is vested subject to divestment at the time of A's death; therefore, it is not subject to the rule. However, in this illustration, does either the power itself or the interests created by its exercise present a violation of the common law rule against perpetuities? With the general power to appoint during one's life or at death,<sup>418</sup> the period of

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417 *See supra* illustrations IV A-7 and IV A-8. Both illustration IV A-8 and this one, IV A-10, involve powers of appointment that are exercised at the donee's death. After incorporating these appointments into the original gift made by the donor of the power (in each case a provision within the will of A), one observes that in all three illustrations there is a trust that leaves income first to B for his life and thereafter to his children for the life of the survivor of them. Further, in each case principal will belong absolutely to B's grandchildren per capita. Illustration IV A-10, however, includes an additional interest. The trust leaves an interest to B's wife that entitles her to the entire income immediately after the termination of B's income interest at his death.

418 For a discussion of how the common law rule against perpetuities applies to general powers

the rule begins at the time the power is created, and herein it is created at A's death. The critical test ultimately to be applied with respect to some testing life in being<sup>419</sup> is: Must the power become unconditionally exercisable, if at all, within twenty-one years of the death of a testing life in being (or within twenty-one years of the time the period of the rule commences at A's death)?<sup>420</sup> And herein one should note that the right to exercise the general power rests on two conditions: that one be born and become the survivor of B and his wife. Nevertheless, even though this presents multiple cumulative conditions under Step Two B and Two C, the condition of birth is subsumed by the condition of survivorship. Consequently, pursuant to Step Two C (1), one can proceed directly to Step Three A for purposes of testing the general power itself.

Under Step Three A, looking at the donee of the power at the time the power is created at A's death—looking at the survivor of B and his wife—is the donee restricted to a life in being? The answer is NO. Obviously, B is restricted to a life in being, but his wife is not and, therefore, the survivor of them is not limited to a life in being at A's death. The analysis is similar to the one developed previously.<sup>421</sup> The identity of B's wife is not determined immediately, but at the time of his death. Whether B is married or not at A's death, he may eventually become divorced or a widower and remarry someone not in being at A's death who then survives B. Neither descriptive language nor rules of construction preclude this possibility, nor is this a physical impossibility. Indeed, under the hypothesized facts herein, B does marry someone born after A's death. Accordingly, one must then search for a testing life under Step Three B.

As an other taker within the provision, B qualifies as a testing life. By the descriptive language itself, the initial income interest is given to a specific person who cannot be afterborn. Consequently, one can apply the critical test to B to determine whether the general power given to the survivor of B and his wife satisfies the common law rule: Must the power

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of appointment that are presently exercisable during the donee's life and at death, see *supra* notes 210-19 and accompanying text. For a discussion of the different treatment accorded general testamentary powers of appointment and special powers of appointment under the common law rule, see *supra* notes 197-209 and accompanying text.

419. For further discussion of this test for validity of the power itself, see *supra* notes 210-15.

420. The phrase within the brackets constitutes the critical test applied under Step Four of the methodology. If a valid proof cannot be made with the testing lives to be found under Steps Three A, Three B, Three C or Three D, one must proceed to Step Four. And to accomplish this, one should substitute the phrase within the brackets in place of the following language: "within twenty-one years of the death of a testing life in being."

421. See *supra* illustration IV A-9.

become unconditionally exercisable, if at all, within twenty-one years of the death of B? After taking into account possible times in which the power can be acquired and become unconditionally exercisable, one concludes that the answer is YES. Obviously, B himself cannot unconditionally acquire and exercise the power beyond his death, but B may not be the surviving life tenant who acquires and can exercise the power. Therefore, one must refine the question: Will his wife acquire the power, if at all, by (being born and) surviving him and have a right unconditionally to exercise it within the allowed time? Obviously, if she is ever to acquire the power, this must occur at B's death, and she then can exercise it immediately because there is no further condition upon her right to make an appointment. Therefore, the general power itself is valid and one can now proceed to examine the interests created by W's exercise of this power.

Under Step One, once the validity of this kind of general power has been established, it should be observed that for all other determinations the period of the rule commences at the time the power is exercised and appointments are made.<sup>422</sup> Therefore, the period of the rule herein begins at W's death. By way of emphasis, it is totally irrelevant that W was not in being when the general power was created and that she may have exercised it in fact more than twenty-one years beyond the deaths of all lives in being at A's death.

Examining the interests W appoints at her death, under Step Two A one observes that the income interests created in her children are vested and not subject to the rule. The only conceivable conditions are that their children must be born and that one of them survive her.<sup>423</sup> Because she cannot have children after her death and because her children—B-1

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422 See *supra* notes 217-19 and accompanying text.

423 In all likelihood, however, the condition of survivorship is a limited one. The income interest in their children is for the life of the survivor of them. Unlike an income interest for the life of the life tenant, this is an interest for the life of others as well. One, therefore, cannot say that survivorship is inherent in the duration and quality of the estate itself. There is a requirement of survivorship, but it is only a requirement that one child, whoever that might be, survive W.

Additionally, if the common law rule against perpetuities were to require one to incorporate the actual appointment into the original gift made by the donor of the power and then to evaluate interests created by the appointment in light of facts known when the power was created, one would have to conclude that the income interests created in B's and W's children were contingent upon their respective births. At the time of A's death, B was, of course, childless. Accordingly, being born would become a condition of the children's gift of income. Nevertheless, the common law rule does not require that one go back in time in this manner. It allows an examination of interests as of the time the power is exercised

and B-2—survive her, both of these conditions are fulfilled by the time her appointment is made and takes effect.

Nevertheless, those who take the principal—the grandchildren—have a contingent interest. None have been born by the time of W's appointment. Because neither the descriptive language nor any rule of construction limits the grandchildren to those born by W's death, the class will not fail, but instead will remain open to include those born until the time of distribution, a time when the physical possibility of further members is also exhausted. The grandchildren's interest is contingent solely because they must be born, as there is no other condition precedent. Therefore, because this is a class gift, the interest of each grandchild is deemed contingent until all potentially eligible class members join the class, if at all, by being born. Further, under Step Two B, one can conclude that this gift of principal is not subject to multiple conditions and, thus, one can go directly to Step Three A.

Under Step Three A, the takers themselves—the grandchildren—cannot serve as testing lives in being. Neither the descriptive language nor the rule of convenience limits the grandchildren to lives in being, and because W has children who survive her, it is physically possible for there to be afterborn grandchildren. Indeed, if this were not so, the class would fail for want of members. Of necessity, because there are no grandchildren alive at W's death, the entire class of grandchildren will be comprised of members born after her death.

Proceeding next to Step Three B, one observes that the other takers of the income interest—the children of B and W—do qualify as testing lives in being. They are restricted to lives in being and to lives already ended at W's death because they are not capable of physical expansion or reconstitution after the death of the first of the procreators to die—namely, B. Accordingly, one must apply the critical test to the children of B and W: Will all potentially eligible grandchildren join the class, if at all, by being born within twenty-one years of the death of the survivor of the children of B and W—namely, the survivor of B-1 and B-2? Taking into account the possible times in which potential grandchildren can join the class by being born, one concludes that the answer is YES. Presumptively, no child of B and W can be deemed to have a child beyond his or her death. Therefore, the very latest any grandchild can be born and join the class is at the death of the survivor of the children, a point in time well within the allowed period. Therefore, the principal interest W has appointed to

her grandchildren is valid because it satisfies the common law rule against perpetuities.

11. —Assume that A creates an irrevocable trust during his lifetime that leaves: “Income to my mother, B, for life; thereafter, principal to such of my (A’s) children who attain age forty.” Further, assume when the trust is created that B (age eighty-five) is alive and that A (age sixty-five) has three living children, A-1 (age forty), A-2 (age thirty) and A-3 (age twenty-five). Is there a violation of the common law rule against perpetuities? This example bears some resemblance to a previous illustration,<sup>424</sup> but there are very important differences.

Most significant, one must reach a different conclusion under Step One. Herein, A has “tied up” the property irrevocably during his lifetime; therefore, the period of the rule commences at the date the living trust becomes effective instead of at A’s subsequent death.<sup>425</sup> One must keep this in mind throughout. The analysis under Step Two A is much the same as in illustration IV A-6. B’s income interest is vested and, therefore, it is not subject to the common law rule. A’s children, however, have a remainder that is ostensibly contingent because of the express age requirement. A-1 has already satisfied this age requirement; accordingly, his interest is fully vested. Nevertheless, because the gift does not allow for distribution of A-1’s interest while B is alive and entitled to income, because the class of children is not by its terms restricted to those alive when the trust is created, and because A is still alive and presumed capable of having children,<sup>426</sup> A-1’s vested interest is subject

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424 See *supra* illustration IV A-4

425. See *supra* notes 162-65. See also 6 AMERICAN LAW OF PROPERTY § 24.12 (A. Casner ed. 1952), RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.2, § 1.2 comments a and b (1983). An irrevocable trust becomes effective when the requirements for its creation have been fulfilled. This is accomplished when a settlor manifests an intention to create a trust that imposes fiduciary duties upon a trustee for the benefit of beneficiaries with respect to property thereby transferred to the trustee. See R. MINNELL, *supra* note 391, at 198-275 (1979). Ordinarily, this happens upon the execution and delivery (i.e., a manifestation that it shall have immediate effect) of one or more instruments that create the trust and properly transfer property to the trustee. Because these requirements—especially those that pertain to intent—rest upon criteria that cannot be satisfied with a litmus test, there is often disagreement about whether and when a trust was properly created. For further discussion of the requirements for creation of an express trust, see G. BOGERT, *supra* note 285, at 19-165

426 In applying the common law rule against perpetuities, one must presume that a person is capable of having a child throughout his or her life. See *supra* note 370. Consequently, in using this methodology, one must account for the presumption of fertility in determining whether a gift is contingent under the rule because it is subject to open. See, e.g., text accompanying notes 425-28. Additionally, one must account for this presumption in determining whether the groups of lives

to open. The class will include those additional children who are born before B's death and attain age forty.<sup>427</sup> Accordingly, even though A-1's interest is vested, it is still subject to the common law rule. As for A-2 and A-3, their interests are still subject to the age requirements which they had not satisfied when A created the trust, and their interests are contingent for that reason. As for other potential members, their interests are contingent because they must, of course, satisfy both the requirements of birth and attainment of age forty. Because this is a class gift, one must carefully note that the common law rule deems each class member's interest contingent—including those whose interest is otherwise vested, such as A-1—until all potentially eligible members join, or fail to join, the class. With these observations in mind, looking to Steps Two B and Two C, one must conclude that there are multiple conditions that appear cumulatively. Nevertheless, because under Step Two C (1) the implied requirement of birth is subsumed by the age requirement, one can proceed directly to a consideration of the subsuming condition under Step Three A.

Proceeding, then, to Step Three A, one should immediately observe that the takers themselves—A's children—cannot serve as testing lives in being. As just indicated, the class is subject to open; it is not restricted to lives in being as a result of descriptive language,<sup>428</sup> rules of construc-

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under consideration in Steps Three A, B, C, or D are restricted to lives in being and to lives already ended. See, e.g., *infra* text accompanying notes 428-31. Finally, one must also account for the presumption of fertility when applying the critical test. See, e.g., *infra* text accompanying notes 431-32.

427. The class will, of course, admit A-2 and A-3 when they respectively attain age forty. Children of A born after creation of this irrevocable trust will also join the class at age forty if they are born before the time of B's death. Conceivably, then, some of A's children will be excluded if they are born too late. This occurs, once again, because of the rule of convenience. A's irrevocable trust immediately creates an interest in A-1 that is vested absolutely. All requirements beyond the termination of B's income interest have been satisfied. A-1 must attain age forty, which he has done, but he need not survive B for his successor to take his interest. His share in the principal is certain to become possessory. All that remains uncertain is the precise size of that share. Therefore, distribution of A-1's share of the principal, to A-1 personally or to his successor, must occur at the death of B. To accomplish this, one must close the class and fix its maximum membership. The class will close earlier if A predeceases B. But if A survives B, the class must close at B's death (the time of first distribution of principal) because of the rule of convenience. For further discussion of the rule of convenience, see *supra* notes 160-61 and accompanying text.

428. Assume, however, that by descriptive language A had limited the gift of principal to only those of his children who were alive at the creation of the irrevocable trust. In this situation, there would be no perpetuities violation. The explanation is very similar to the one used in a previous illustration. See *supra* illustration IV A-1. The proof of validity would be made under Step Three A. The takers themselves would qualify as testing lives in being because the descriptive language

tion,<sup>429</sup> or physical impossibility.<sup>430</sup> A is alive and he is presumed capable of having children born after creation of the trust but before B's death—before the time for closing off the maximum class membership.<sup>431</sup>

Under Step Three B, however, B is an other taker under the provision and she qualifies as a testing life in being. She is ascertained and by the descriptive language used in the instrument, this other taker cannot be someone afterborn. Accordingly, one must ask: Will all of A's potentially eligible children join the class, if at all, by (being born and) attaining age forty within twenty-one years of B's death? Taking into account the possible times in which potential children can join the class, one concludes that the answer is NO. Herein, one cannot eliminate all possibilities for remote vesting. To be sure, the existing children of A who have not yet joined the class—A-2 and A-3—must do so, if at all, within fifteen years, because the youngest was age twenty-five when the trust was created. As to potential children of A born after creation of the trust, once again, the rule of convenience requires that maximum membership be determined at B's death and not later because A-1 is already age forty. Although A must be presumed capable of having additional children, no child can gain admission to the class unless he or she is born before B's death. Nevertheless, it is possible that those born by the time

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does not allow for inclusion of any afterborn children of A. After applying the critical test to A's children, one is able to conclude that the answer to the question is YES. Because no child can enter the class beyond his own death and because each child is a life in being, each child has an interest that must vest, if at all, no later than the time of his death. Accordingly, none of A's children can join the class beyond the period of time allowed by the common law rule. The entire class gift, therefore, is valid.

429 If, however, B had died after the irrevocable trust had been drafted but before it had become effective, then the class of A's children would have been restricted to lives in being because of the rule of convenience. A-1 is already age forty; therefore, his interest is fully vested and he is entitled to distribution of his share of principal immediately after creation of the trust and the time in which it became effective. To do this, courts find it necessary to fix the maximum number of class members. Accordingly, because of the failure of B's income interest for life, the group of A's children entitled to principal will be restricted to A-1, A-2, and A-3. For further discussion of the rule of convenience, see *supra* notes 160-61 and accompanying text. Applying the critical test to the takers themselves, one discovers that a valid proof can be made. No child can attain age forty beyond his own death, and each child is a life in being. Accordingly, each child's interest must vest or fail within his own lifetime, namely within the life of a person in being when the trust takes effect.

430 If, however, the gift of principal had been made "to such of the children born to me (A) and my wife, W, who attain age forty" and, further, if W had predeceased the creation of the irrevocable trust, then the class of children would have been restricted to lives in being because it is physically impossible for any others to be born thereafter. And there would, of course, be no perpetuities violation. Applying the critical test to the takers themselves, one discovers that a valid proof can be made. See *supra* note 429.

431 See *supra* note 427.

of B's death may not attain age forty, or fail to do so, within twenty-one years of B's death. For example, A may have an additional child, and then B might die within the next year. It then becomes possible for such afterborn child to attain age forty thirty-nine years later, a time period well beyond the one allowed by the rule.<sup>432</sup>

Under Step Three C, A does qualify as a person "otherwise mentioned" within the provision ("to *my* mother" and "to . . . *my* children"); because he is ascertained and by definition someone who cannot be afterborn, he will qualify as a testing life in being. At this point, one should observe that because this involves an irrevocable living trust, the estate owner, A, necessarily is a life in being. This does not mean, however, that the settlor-estate owner always becomes a testing life in being. It should be emphasized, once again, that there is no need to apply the critical test to the settlor-estate owner unless such person independently qualifies under one of the parts of Step Three.<sup>433</sup> In this instance, A specifically qualifies under Step Three C and, therefore, one must ask: Will all of A's potentially eligible children join the class, if at all, by (being born and) attaining age forty within twenty-one years of A's death? Taking into account the possible times in which potential children can join the class, one concludes that the answer is NO. Here, one cannot eliminate all possibilities for remote vesting. Clearly, A cannot have a child beyond his death. Yet, it is possible for A to have another child after creation of the trust but before B's death and for A then to die within the year. Given these circumstances, it then becomes possible for a child of A to join the class, or fail to join it, thirty-nine years later—clearly more than twenty-one years after the time of A's death. Absent a saving clause or some other directly related provision, one must proceed to Step Three D.

The takers themselves—A's children—are not restricted to lives in being, and so one can begin a consideration of their parents. A is the parent that provides the relationship necessary to satisfy the group description, and he is, of necessity, a life in being. Nevertheless, because one has already applied the critical test unsuccessfully to A under Step Three C, there is no need to repeat it under Step Three D.

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432. Indeed, because it is possible for A to have children born after creation of the irrevocable living trust and because it is possible for B to die before all of A's afterborn children attain age nineteen, it is clearly possible for a potential member to join the class more than twenty-one years beyond the death of B. Accordingly, one cannot use B to make a valid proof.

433. See *supra* note 268 and accompanying text.

Having failed to validate the interest of A's children with a testing life in being under all of Step Three, one can now proceed to the critical test contained in Step Four: Will all of A's potentially eligible children join the class, if at all, by (being born and) attaining age forty within twenty-one years of the time the irrevocable trust becomes effective? Quite obviously, after taking into account possible times in which potential children can join the class, one concludes that the answer is NO. Again, one cannot eliminate all possibilities for remote vesting. As in a previous illustration,<sup>434</sup> many possibilities will support this conclusion. For example, it is possible for A to have another child, A-4, before B's death. As a result, A-4 becomes a potentially eligible member who cannot join the class until A-4 reaches age forty. Of necessity, then, A-4 will join the class, if at all, only after forty years have elapsed from the time of his birth and more than forty years from the time the trust was created. Having gone through all four steps without establishing a positive answer to the critical test, one can now properly conclude that A's children have an invalid interest because it violates the common law rule against perpetuities.

### *B. Some Other Illustrations*

1. —Assume that A makes a lifetime transfer by deed of Blackacre: "To B in fee simple; however, if Blackacre is ever used for a purpose other than residential, then and in that case to C in fee simple absolute." Assume, further, that both B and C are alive when the transfer is made and that Blackacre is currently being used exclusively for residential purposes. Is there a violation of the common law rule against perpetuities?

Under Step One, the property is "tied up" when A's deed becomes an effective transfer, so the period of the rule commences at that same point in time. Under Step Two A, one observes that B has a defeasible fee simple. It is vested subject to complete divestment if the land is ever used for a nonresidential purpose. Conversely, C has an executory interest in fee simple absolute. It is a contingent interest that is conditioned upon Blackacre thereafter being devoted to a forbidden use. But it is not conditioned upon C or anyone else surviving the violation of the land use restriction. Therefore, looking to Step Two B, one must conclude that C's interest is not subject to multiple conditions. C has a contingent in-

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434. *See supra* illustration IV A-6.

terest, yet it is an interest transmissible at death.<sup>435</sup> Further, because C's executory interest is contingent, it is subject to the common law rule. To be valid, it must vest, if at all, in C or his successors within the period allowed by the rule.

Next, under Step Three A, C is the taker of the interest in question. C is ascertained, and by the descriptive language itself which refers to a specific individual, he cannot be someone born after the time in which the deed became effective. C, therefore, qualifies as a testing life in being under Step Three A and one must ask the question: Will C's interest vest in C or C's successors, if at all, as a result of breach of the land use restriction within twenty-one years of the death of C? Taking into account the possible times in which C's interest might vest as a result of the breach of condition, one concludes that the answer is NO. Here, one cannot eliminate all possibilities for remote vesting. C's interest is contingent upon a violation of the prescribed land use. Once again, however, no other condition is imposed upon C's interest—for example, that C must be alive whenever the land use restriction is violated. Because A has imposed no condition of survivorship,<sup>436</sup> C may die before violation of the restriction and C may then transmit his contingent executory interest to another person.<sup>437</sup> This might occur before Blackacre is devoted

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435. For C's interest to vest, there is the express requirement that the land use restriction be violated. Because there is no additional condition requiring C to be alive when the restriction is violated, C has an interest that is not defeated by his death. Consequently, the interest is one that C can transmit to others at his death. It will pass by the terms of C's will or by intestacy to his heirs at law. *See infra* note 437. Nevertheless, courts sometimes infer a requirement of survivorship even where no such condition is expressed. *See supra* note 247. If a court were to find a requirement that C must be alive when the express restriction upon land use is violated, there would be no violation of the common law rule against perpetuities. *See infra* note 436.

436. If, however, A had imposed a condition requiring C to survive the time in which Blackacre is used for any purpose other than residential, there would be no violation of the common law rule against perpetuities. In this instance one would answer YES to the critical question: Must C's interest necessarily vest if, at all, in C or C's successors during the lifetime of C? Breach of the restriction upon land use would not be enough for C's interest to vest; C must also be alive at such time. Accordingly, the interest can never vest beyond C's death. Stated otherwise, C's interest fails if by the time of his death the restriction upon land use has been observed faithfully and continuously. Because of this, the interest will either vest during C's lifetime or fail at his death; consequently, the condition clearly falls within the time period allowed by the common law rule.

437. In some jurisdictions, even today, contingent remainders and executory interests may not be alienable during the lifetime of the owner of such interest. *See* L. SIMES & A. SMITH, *supra* note 422, §§ 1857-59. Nevertheless, absent a requirement of survivorship to the time of possession, these interests are fully descendible and devisable at the death of such owner. *See id.*, §§ 1883-86, 1901-03. Whatever interest the transferee, heir, or devisee receives from the previous owner of such contingent interest, it is still subject to the same condition or conditions.

to a nonresidential use. As a result, it becomes possible for C to transmit his executory interest at death and for the land use violation not to occur until more than twenty-one years later.

Under Step Three B, B is an other taker under the same provision, and he qualifies as a testing life in being because he is ascertained and the gift is restricted to him as a specific individual. And so one applies the critical test: Must C's interest vest in C or C's successors, if at all, as a result of breach of the land use restriction within twenty-one years of the death of B? Taking into account the possible times in which C's interest might vest as a result of the breach of condition, one concludes that the answer is NO. Herein, one cannot eliminate all possibilities for remote vesting. B has a fee simple. By definition, B's estate will not as a matter of certainty end at his death or the death of anyone else, but instead it has a potentially infinite duration. It will remain indefinitely in B and his successors until the condition is violated. Further, the condition itself has no time limit.<sup>438</sup> It should be clear that both the estate and the condition of defeasance can endure indefinitely—indeed, for many decades beyond the death of B. Thus, it is possible for B to die without violating the condition and for his interest in Blackacre then to pass to a successor. It is also possible for such successor to comply with the restriction upon land use for more than twenty-one years beyond the death of B. Finally, it is possible thereafter for such successor to violate the condition, in which case the fee simple in the successor is terminated and the executory interest vests in C or whoever owns C's interest at that time. Accordingly, it is possible for the divestiture to occur more than twenty-one years beyond the death of B.

One important thing to remember when using the methodology is that in applying the critical test one focuses only on the question raised by the particular test. In this instance, one must focus only on events in relation to the selected testing life—B. One is only concerned with whether the executory interest can vest more than twenty-one years beyond B's

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438 If, however, the condition of defeasance had a time limitation, a perpetuities violation might not arise. For example, suppose the limitation had read: "To B in fee simple; however, if Blackacre is ever used by B for a purpose other than residential, then and in that case to C in fee simple absolute." In this instance, the land use restriction applies only to B himself. Presumably, if B complies with the condition for the remainder of his life, his fee simple will become absolute in his successor. Stated otherwise, C's executory interest must vest during B's lifetime, otherwise it will fail at B's death. Accordingly, there is no perpetuities violation because a proof can be made under Step Three B using B as the validating life. Given the terms of the condition, C's interest must vest, if at all, within B's lifetime.

death. In hypothesizing possibilities for remote vesting, it is irrelevant that one happens upon a possibility that is more than twenty-one years beyond the death of the testing life but within the life of someone who is in being.<sup>439</sup> One must carefully and faithfully observe that if this other life in being can be used to validate, this will be accomplished elsewhere in the methodology through the use of another step. To reiterate, the only person of importance is the testing life found in applying a particular part of Step Three, and the only gross period of importance is the one used when applying Step Four. All hypothesized possibilities must focus squarely on the particular critical test being applied, and this should be carried out with complete disregard for whether the interest vests within the life of someone else in being when the period of the rule commences.

Next, under Step Three C, absent a saving clause or some other directly related provision, no one is otherwise mentioned or separately and differently mentioned.<sup>440</sup> Under Step Three D, there is no need to examine the parents of the taker of the interest in question—C. C previously qualified as a testing life in being under Step Three A, but he did not become a validating life as well.

As a result, one must proceed directly to the critical test under Step Four: Must C's interest vest in C or C's successors, if at all, as a result of breach of the land use restriction within twenty-one years of the time A's lifetime transfer became effective? Taking into account the possible times

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439. For example, in explaining the possibilities which demonstrate that no valid proof can be made with B under Step Three B, it was hypothesized that B might die without violating the condition and that his interest would then pass to a successor—perhaps, B-1, a child who was not in being at the time of A's transfer. It was also assumed that B-1 might comply with the land use restriction for more than twenty-one years and, thereafter, that he would then breach the condition. Accordingly, the executory interest would vest in C *himself* or, perhaps, his successors. If it vests within the lifetime of C, this would be within the period of the rule. But this possibility is not enough to satisfy the rule. If C's life is to validate his own interest, one must prove that it cannot vest beyond twenty-one years of his death. One has, however, already observed under Step Three A, that this proof cannot be made. Therefore, in conducting this methodology with testing lives under Steps Three A, Three B, Three C or Three D, one must focus only on the testing lives being used under the particular step. It is totally irrelevant that one happens upon a possibility for vesting within the lifetime of another life in being. In applying the critical test, one adheres only to the lives in being who are being tested under that particular step. If someone else's life may validate, it will surface under a different step and such person or persons will be tested accordingly.

440. Suppose, however, that the limitation had read: "To B in fee simple; however, if Blackacre is ever used for purposes other than residential during the lifetime of the survivor of B and C, then and in that case to C in fee simple absolute." In this instance, C's contingent executory interest would satisfy the common law rule against perpetuities. The survivor of B and C would constitute someone "separately and differently mentioned" under Step Three C, and a valid proof could then be made using the survivor as a testing life in being. See *supra* notes 291-94 and accompanying text.

in which C's interest might vest as a result of the breach of the condition, one concludes that the answer is NO. Here, one cannot eliminate all possibilities for remote vesting. Very simply, it is possible for B to maintain Blackacre exclusively for residential use for over twenty-one years. Thereafter, it is possible that B will violate the condition. In this instance, B's fee simple will be divested and C's executory interest will then vest in C or C's successors more than twenty-one years after the period of the rule has begun. Having gone through all four steps without establishing a positive answer to the critical test, one can properly conclude that C's interest is invalid because it violates the common law rule against perpetuities.<sup>441</sup>

2. —Assume that A creates a testamentary trust that has Blackacre as its subject matter. This tract of land contains a gravel pit which, if operated at its current rate, should remain active for no more than four years after the time of A's death. The terms of the trust provide: "The trustees shall conduct the gravel pit operation until the gravel is exhausted; thereafter, both Blackacre and the accumulated gravel shall be sold and the proceeds divided per capita among my (A's) descendants then living."<sup>442</sup> Assume also that the only descendants who survive A are his two children A-1 and A-2, both of whom are past age sixty. Finally, assume that A has left the residue of his estate to his wife, W, absolutely. Is there a violation of the common law rule against perpetuities?

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441 As a result of this perpetuities violation, B's interest becomes a fee simple absolute. There are, however, circumstances in which a court might find otherwise. Suppose the limitation in IV B-1 had been changed so that it read: "To B in fee simple so long as Blackacre is used exclusively for residential purposes; if and when Blackacre is not used exclusively for residential purposes, then to C in fee simple absolute." Just as in illustration IV B-1, the contingent executory interest given to C violates the rule against perpetuities. Despite this violation, some courts might maintain the restriction upon land use and divest B's interest whenever the condition is breached. The difference in result arises because of the presence of language of special limitation in this example. Historically, this language ("so long as Blackacre is used") has been decisive. It is phraseology that, without more, is enough to produce a determinable interest, one that ends automatically upon breach of the condition and, thereby, causes the subject matter to revert to the transferor even in the absence of language that fully elaborates this result. In this example, then, C's interest fails, but the language of special limitation does not. It is enough to raise the possibility of reverter in A which becomes possessory upon actual breach of the condition. Because possibilities of reverters have been exempted from the common law rule against perpetuities, A retains an interest that maintains the condition and supplants the interest of B whenever the restriction upon land use is violated. For further discussion as to the effect of the failure of an executory interest because of a perpetuities violation, see L. SIMLS & S. SMITH, *supra* note 22, § 825.

442 See *In re Wood*, [1894] 3 Ch 381.

Once again, because the trust is testamentary, under Step One the period of the rule commences at A's death. Under Step Two A, one observes that the gift to A's descendants is subject to three possible conditions which make it contingent. To begin with, there are the obvious requirements pertaining to the descendants themselves: they must be born before and be alive at the time the gravel pit operation ends. Additionally, a court might conclude that the administrative requirement itself presents a condition. In all likelihood, the gravel pit operation will terminate within four years; yet, if conducted differently, it may never end. Perhaps this is virtually impossible; nevertheless, courts have been known to make these assumptions and unexpectedly classify certain kinds of interests as contingent.<sup>443</sup> If the interest created in A's descendants is viewed as contingent for this reason, there will, of course, be a perpetuities violation.<sup>444</sup> This violation would obtain even if the gift had been made to a named individual but without any requirement of survivorship.<sup>445</sup> In the illustration under consideration, however, for pur-

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443. Courts sometimes find that conditioning a gift upon probate of a testator's estate presents not only an uncertainty as to when the event will occur but also an uncertainty and, therefore, a contingency as to whether it will occur. *See, e.g., Johnson v. Preston*, 226 Ill. 447, 454-58, 80 N.E. 1001, 1003-04 (1907).

444. The perpetuities violation arises because the condition pertaining to the exhaustion of the gravel pit operation is unlimited in terms of time and because the survivorship requirement is imposed upon a group of recipients who may consist exclusively of descendants not born by the time of A's death. Under Step Three A, the takers themselves will not serve as testing lives because they are not restricted to lives in being. Step Three B does not provide any testing lives because there is no other taker. Under Step Three C, the trustees are persons "otherwise mentioned"; nevertheless, one cannot apply the critical test to the trustees because that position is not restricted to lives in being at A's death. Additionally, under Step Three D, the parents of the takers of the interest will not qualify as testing lives because the takers consist of a group that is not defined in terms of one generation and, therefore, it is impossible to determine exactly who the takers are and whether their parents are lives in being or lives already ended. Finally, in applying the critical test under Step Four, one immediately discovers that the answer is NO because the gravel pit operation may continue forever, or at least for a period of time that exceeds twenty-one years after A's death.

445. For example, consider this change in the original illustration: "That the trustees shall conduct the gravel pit operation until the gravel is exhausted; thereafter, both Blackacre and the accumulated gravel shall be sold and the proceeds shall then be distributed to C absolutely." If one views the end of the gravel pit operation as an event that may never occur, C's interest is contingent and it results in a perpetuities violation. Indeed, C's interest violates the common law rule for essentially the same reasons C's interest caused a perpetuities violation in illustration IV B-1. C's interest is transmissible at death; it is contingent only upon exhaustion of the gravel, and this event is unlimited in time. Accordingly, C has a contingent interest that may vest in his successors, generations after C's death and the deaths of everyone else alive when the trust was created at the death of A.

More specifically, under Step Three A, C qualifies as a testing life; nevertheless, after applying the critical test, one discovers that C's life will not validate his own interest. C may die shortly after the death of A and his interest will then pass to his successor, for example, C-1. It is then possible for

poses of further analysis, the potential administrative contingency will be ignored. Indeed, it will be assumed that the gravel operation must end at some time; however, no assumption will be made as to when such operation will in fact cease.<sup>446</sup> Now then, because this is a class gift, the interests of all class members will be deemed contingent until the last potential member may join the class, if at all, by being born and surviving termination of the gravel pit operation. Finally, looking to Steps Two B and Two C, one must conclude that there are multiple conditions that appear cumulatively. Nevertheless, because under Step Two C (1) the implied requirement of birth is subsumed by the survivorship requirement, one can proceed directly to a consideration of the subsuming condition under Step Three A.

Under Step Three A, the takers themselves, A's descendants, cannot qualify as testing lives in being. The descriptive language does not limit the group to lives in being at A's death. Because the trust defers distribution, neither does the rule of convenience restrict the group in this manner.<sup>447</sup> Finally, even though A's children, given their age, are not apt to have descendants born after A's death, one must presume otherwise. Accordingly, there is a physical possibility of expansion or reconstitution.<sup>448</sup> Next, under Step Three B, there are no other takers designated within this provision.

Under Step Three C, absent a saving clause or some other directly related provision, A and the trustees are the only persons "otherwise

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the gravel pit operation to end many years later, perhaps as many as forty years. Consequently, C-1's interest may vest more than twenty-one years after the death of C. Step Three B cannot be used to validate because there is no other taker. Under Step Three C, the trustees are persons "otherwise mentioned"; nevertheless, they do not qualify as testing lives because their position is not restricted to lives in being at A's death. C's parents will not qualify as testing lives under Step Three D because the critical test has already been applied to C under Step Three A. Finally, under Step Four no validation can be made because it is possible for the gravel pit operation to continue more than twenty-one years beyond the death of A.

If, however, a condition requiring survivorship of the time of possession by C had been added to C's interest, there would be no perpetuities violation. In this variation, a valid proof could be made under Step Three A. C's life would validate his own interest because it would then be possible to conclude that C's interest must vest, if at all, within C's lifetime. If C survives the end of the gravel pit operation, his interest will vest. However, if C dies before then, his interest must fail.

<sup>446</sup> After making the assumption that the gravel pit operation must end at some time, one should observe that the uncertainty involved is very much like a life estate followed by a remainder. In both situations, there is certainty about whether possession will occur, but there is uncertainty about when it will arise.

<sup>447</sup> For a discussion of the "rule of convenience," see *supra* notes 160-61 and accompanying text.

<sup>448</sup> For a discussion of the presumption of fertility, see *supra* note 370.

mentioned" within this provision.<sup>449</sup> As previously indicated, in the case of a testamentary disposition a testator should not be used to test.<sup>450</sup> Of necessity, he is not in being, and the gross period of time used in Step Four is tantamount to an application of the critical test to such estate owner. Accordingly, one must dismiss a testator as a testing life just as one must, for each of the steps within Step Three, eliminate as testing lives those who predecease the point in time when the period of the rule begins. One might say that the trustees, if individually named, are always people "otherwise mentioned" within the provision. Invariably, however, one readily dismisses them from further consideration because they cannot satisfy the remaining requirements for a testing life in being under Step Three C. Ordinarily, such trustees will not qualify as a group restricted to lives in being because a court will replace a trustee who resigns or dies, and eventually it may do so with someone born after creation of the trust.<sup>451</sup> Nevertheless, the provisions of a trust sometimes make its duration referable to the lives of specifically named or described individual trustees. In such a case, these trustees will appear in an express statement that directly connects them to the gift. If so, they will become testing lives not simply because they hold the position of trustees, but because they are "separately mentioned" beyond their position as trustees or because as a group they are necessarily restricted to lives in being. In this illustration, even if the trustees are individually named, no language restricts them to lives in being or mentions them further by connecting them personally to the conditions of the gift or the duration

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449. A has left the residue of his estate to his wife, W. She is "otherwise mentioned" in his will, but not in a provision that is directly related or connected to the one that disposes of Blackacre and the gravel pit. Consequently, W does not qualify as a testing life under Step Three C. Nevertheless, there is no harm in applying the critical test to W, or for that matter, to any other person actually in being at A's death. All that is lost is the time it takes to do so. If someone does not qualify as a testing life under any of the parts of Step Three, although one might test with him, such person will not supply a valid proof. For example, applying the critical test to W, one must conclude that the answer is NO. One cannot say that the interest must vest, if at all, within twenty-one years of W's death. W could die shortly after A, while the gravel operation might continue for the next thirty years and then, upon its conclusion, the interest would finally vest in A's living descendants. In this situation, the contingency would be fulfilled more than twenty-one years beyond the death of W; consequently, as a testing life, W fails to validate.

450. See *supra* notes 267-68 and accompanying text.

451. A court of equity will not allow a trust to fail for want of a trustee. Absent a provision that governs the selection of a successor trustee, a court will use its discretion in appointing one. In making its selection, a court is not precluded from appointing a person born after the time in which the trust was created. See G. BOGERT, *supra* note 285, §§ 29, 32.

of the trust.<sup>452</sup>

Proceeding next to Step Three D, because the takers themselves are not restricted to lives in being, one can begin a consideration of their parents. Nevertheless, because the takers—the descendants—can be multigenerational, and because others may be born while existing descendants die, it is impossible to determine who the descendants are and, therefore, impossible to identify their parents. Consequently, one must conclude that the parents who provide the necessary descriptive relationship are not restricted to lives in being and to lives already ended because the parents are capable of physical expansion or reconstitution.

Accordingly, one can now move to the critical test contained in Step Four: Must all of A's descendants join the class, if at all, by being (born and) alive when the gravel pit operation ceases within twenty-one years of A's death? Taking into account the possible times in which the descendants' interest might vest upon termination of the gravel pit operation, one concludes that the answer is NO. Here, one cannot eliminate all possibilities for remote vesting. However likely it may be that the gravel operation will terminate within four years, it is possible that it may not. If it may last more than four years because it is operated differently, there is no certainty that the pit will be exhausted within twenty-one years.<sup>453</sup> However remote this hypothesis may be, it is possible and,

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452 One can, of course, apply the critical test to any trustee who is individually named. Once again, there is no harm in doing so. All that is lost is the extra time and effort it takes to conduct the test. *See supra* note 449. Unless the trustees are impliedly or expressly restricted to lives in being or unless individual trustees are additionally mentioned, invariably in a manner that connects them to the trust's duration, application of the critical test is doomed to fail in finding a validating life among the trustees. For example, assume that T-1 is the trustee selected by A under the terms of his will, but that nothing else in A's will links the life of the trust to that of T-1. Must the interest of A's descendants vest, if at all, by their being (born and) alive when the gravel pit operation ceases within twenty-one years of T-1's death? The answer is, of course, NO. Assuming that after A's death a court appoints T-1 trustee, it is possible for T-1 to die—and for a successor trustee then to be appointed—and for the gravel operation to continue for an additional thirty years. Accordingly, it then becomes possible for the interest to vest in A's living descendants more than twenty-one years beyond the death of T-1. The same would be true for any other individually named trustee. If, however, the duration of the trust had been expressly limited to the survivor of named trustees or if its duration had been limited impliedly and similarly by restricting selection of successor trustees to lives in being, then a valid proof could be made using the survivor of these trustees or successor trustees.

453 Some courts might uphold this gift of principal to A's surviving descendants by assuming that A meant the gift to occur when the gravel pit was exhausted or should have been exhausted. More specifically, they assume that this is an event that must happen within a reasonable time—herein, at least within twenty-one years of A's death. With this assumption, one can, of course, make a valid proof under Step Four. For a discussion of how courts have dealt with and sometimes

therefore must be taken into account in applying the critical test. Having gone through all four steps without establishing a positive answer to the critical test, one can now properly conclude that the gift to A's descendants is invalid because it violates the common law rule against perpetuities.

3. —Assume that A makes a testamentary devise of Blackacre: "To B for life, remainder in fee simple absolute to the first of C's children to be married." Further, assume that B and C survive A and that C has had no children by the time of A's death. Finally, assume that the common law rule of destructibility with respect to contingent remainders still obtains in this jurisdiction.<sup>454</sup> Is there a violation of the common law rule against perpetuities?

Under Step One, because this transfer derives from A's will, the period of the rule must begin at A's death. Under Step Two A, B's interest is vested and not subject to the common law rule. However, the remainder given to one of C's children is contingent and, therefore, subject to the rule. It is contingent because of three precedent requirements to possession: such child of C must be born and marry; additionally, that child must be the first child to marry. Consequently, looking to Steps Two B and Two C, one must conclude that there are multiple conditions that appear cumulatively. Nevertheless, because under Step Two C (1) the requirements of birth and marriage are subsumed by the first to marry requirement, one can proceed directly to a consideration of the subsuming condition under Step Three A.

Proceeding then to Step Three A, one should conclude that the taker himself—the potential child of C who will be the first to marry—does not qualify as a testing life. C has no children at A's death, and no descrip-

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overcome perpetuities problems regarding related kinds of contingencies, see 6 AMERICAN LAW OF PROPERTY § 24.23 (A. Casner ed. 1952); RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 reporter's note 14 (1983). Additionally, in addressing this kind of perpetuities problem, some state legislatures avoid a violation by presuming that the administrative contingency cannot occur beyond the period allowed by the rule. ILL. ANN. STAT. ch. 30, para. 194(c)(1) (Smith-Hurd Supp. 1983) provides:

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

(1) it shall be presumed (A) that the interest was intended to be valid, (B) in the case of an interest conditioned upon the probate of a will, the appointment of an executor, administrator or trustee, the completion of the administration of an estate, the payment of debts, the sale or distribution of property, the determination of federal or state tax liabilities or the happening of any administrative contingency, that the contingency must occur, if at all, within the period of the rule against perpetuities. . . .

454. For a discussion of the rule of destructibility and of its application today in the United States, see *supra* notes 154-55.

tive language, rule of construction or physical impossibility precludes a gift of the remainder to a child of C born after the time of A's death.<sup>455</sup> Nevertheless, under Step Three B, as an other taker B does qualify as a testing life in being. The descriptive language refers to a specific individual who cannot be afterborn. Accordingly, one must apply the critical test to B. Ordinarily, in an abbreviated version of the test, one might ask: Will the interest vest, if at all, in a child of C who (is born, married and also) becomes the first to marry within twenty-one years of B's death? After taking into account the possible times in which C might have a child who becomes the first to marry, one concludes that the answer to this formulation of the critical test would be NO. With this test, one cannot eliminate all possibilities for remote vesting. At the very least, it is possible for B to die and for C to continue living for another twenty-one years. Then, it becomes possible for C to have his first child who could not then marry until more than twenty-one years beyond B's death.<sup>456</sup>

Nevertheless, a different result should be reached. The full statement of the critical test requires one to account for possibilities in light of applicable rules of construction and principles of law. One should ask instead: Looking at all possibilities for vesting in light of facts known when the period of the rule begins and in light of applicable rules of construction and principles of law, including those possibilities that are most remote, must the interest vest, if at all, in a child of C who (is born, married and also) becomes the first to marry within twenty-one years of B's death? The answer to this correct formulation of the critical test is YES. One must account for the common law rule of destructibility in calculating the times in which C might have a child who satisfies the requirements of the contingent remainder.<sup>457</sup> The remainder created in the potential child of C consists of realty which is not placed in trust;

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455. One should reach the same conclusion even if C had children by the time of A's death, assuming none had married. No descriptive language or rule of construction restricts the remaindermen to a life in being at A's death, nor is there a physical impossibility for a child of C to be born after the death of A. Consequently, C's children could not qualify as testing lives in being. If, however, at the death of A, C has a living child who is married, there would be no need to test at all. Absent any other conditions, such child would have a vested remainder at the outset and, accordingly, the common law rule would then be inapplicable.

456. There are, of course, other scenarios that warrant and explain the answer NO. After the death of A, even if C were to have a child during B's lifetime, such child might not marry until more than twenty-one years after B's death.

457. For an illustration of the common law rule of destructibility operating to avert a perpetuities violation, see *Drury v. Drury*, 271 Ill. 336, 111 N.E. 140 (1916).

therefore, it is destructible.<sup>458</sup> Under this rule, the remainder must vest, or else be destroyed, by the time all supportive freehold estates end. In this instance, the remainder must vest in a child of C—by becoming the first to be married—by the time of B's death. If it does not vest at or before B's death, then it is destroyed, not because of a perpetuities violation but because of an independent rule of destructibility. Accordingly, after accounting for this independent rule that limits the opportunity for contingent interests to vest, one can say that the remainder must vest or fail at B's death. Unless all conditions are satisfied by the time of B's death, the remainder to C's child must fail. It cannot vest beyond B's death. B, therefore, becomes a validating life in being, and the remainder satisfies the common law rule against perpetuities.

4. —Assume that A makes a testamentary devise of Blackacre: "To B in fee simple; however, if Blackacre is ever used for a purpose other than residential, then and in that case to C in fee simple absolute." Further, assume that both B and C survive A and that at A's death the land is being used exclusively for residential purposes. Unlike all previous illustrations, assume that the interest held by the transferor, A, before his death is one of limited duration—that is, something less than a fee simple. More specifically, assume that A held a life estate measured by the life of the survivor of A and his children.<sup>459</sup> Finally, assume that A is survived by two children, A-1 and A-2, who were also alive when A originally received his life estate. Is there a violation of the common law rule against perpetuities? The interests created in this limitation appear to be identical to those created in a previous illustration.<sup>460</sup> In that illustration, C's contingent executory interest caused a perpetuities violation. Except for the difference in the interest held originally by A, one might reach the same result.

Under Step One, the period of the rule begins at A's death, and for the first time one must answer NO to the question of whether the transferor's interest is some kind of inheritable estate or one that is not certain to end.<sup>461</sup> Because A had a life estate *per autre vie*, for the first time in these illustrations, one must now proceed to the question raised by Step One

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458. If the subject matter had been personalty or if it had been placed in trust, the remainder would have been indestructible. *See supra* note 454.

459. Some jurisdictions limit the lives that govern the duration of a life estate to existing lives. *See supra* note 235.

460. *See supra* illustration IV B-1.

461. For a discussion of Step One A and the circumstances in which one must apply it, see *supra* notes 220-23, 227-37 and accompanying text.

A: Will the duration of the interest held by A, the transferor, at the time of his death terminate with absolute certainty within twenty-one years or within twenty-one years of the deaths of lives in being or lives already ended at A's death—when the period of the rule begins—because the duration of A's interest is restricted to such period of time by express language, by rules of construction, or by physical impossibility as to the group of lives used to measure A's interest?

If the remaining duration of the interest held by A is for an express period of years that exceeds twenty-one,<sup>462</sup> then the answer to this question must be NO, and one can then proceed directly to Steps Two, Three and Four. Herein, however, this is not true, and so the answer to the basic question is YES. The interest held by A at his death was measured by the survivor of the life of A and his children. A-1 and A-2 survive A and the life estate that A had and could transfer will continue until the survivor of them dies. Whether A-1 or A-2 was alive when A received his life estate is irrelevant.<sup>463</sup> It is, however, relevant whether they are born by A's death. Herein, A cannot have children after his death—the time in which the period of the rule begins. Thus, the duration of his life estate is restricted to lives in being at his death because it is physically impossible for the group of lives that measure the interest to contain people born after A's death. Accordingly, the interest held by A will in fact end by the deaths of specific lives in being at A's death. Because A's interest must end within the period allowed by the rule, so must the interests he creates in B and C. Consequently, the contingent interest of C satisfies the common law rule against perpetuities because the lives of A's children validate his interest.

5. —Assume that A devises Blackacre: "To B forever, but if B dies without issue, then to C absolutely."<sup>464</sup> Also assume that both B and C survive A and that B currently has no descendants. Finally, assume that the relevant jurisdiction has no statute that affects or abrogates the fee

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462 Professor Fetters believes that the period in gross allowed by the common law rule against perpetuities is "twenty-one years plus an additional period in gross of less than five months to account for the minimum human gestation period." Fetters, *supra* note 364.

463 However, although the fact that A-1 and A-2 were alive when A received his life estate is irrelevant to application of the rule against perpetuities, it may not be irrelevant to whether their lives properly could have been used to measure the life estate in the first place. See *supra* note 458.

464. Assume that the jurisdiction which governs this testamentary disposition has abolished the common law requirement that necessitated the phrase "and heirs" for the creation of a fee simple. Furthermore, assume that in this jurisdiction all created interests are presumptively a fee simple unless there is specific language that clearly indicates a lesser estate.

tail.<sup>465</sup> Is there a violation of the common law rule against perpetuities?

This is a devise and so, under Step One, the period of the rule begins at A's death. Under Step Two A, whether or not C has a contingent interest depends upon the nature of the interest A has given to B. The phrase "die without issue" is extremely ambiguous, and courts have construed it in more than one way.<sup>466</sup> Some might still give it an "indefinite failure of issue" construction so that it would read just the same as if it had said: "To B forever, but whenever B's line of descent expires, then to C absolutely."<sup>467</sup> In short, under this construction the condition is ongoing. The interest created originally in B ceases once B dies without surviving descendants, or thereafter whenever his descendants die without surviving descendants. If an "indefinite failure of issue" construction is adopted, courts would then view B as having a fee tail and not a fee simple.<sup>468</sup> Because the language introducing the interest of C contains no condition other than that which describes the termination of B's interest—language which simply paraphrases the circumstances upon which B's fee tail naturally comes to an end—these same courts would find C's interest to be a vested remainder.<sup>469</sup> Therefore, because the interests of B and C would be vested, neither would be subject to the common law rule.<sup>470</sup>

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465. There is in fact no jurisdiction that fully supports this assumption. However, several jurisdictions recognize the common law fee tail when created by deed. In each instance, the donee in tail has the power during his lifetime to bar the entail and any expectant reversion, remainder or executory interest as well. These states, nevertheless, are the exception. Nearly all jurisdictions in the United States abrogate the fee tail by statute. Over half of these states do so by giving the donee in tail a fee simple. Others convert the donee in tail's interest into a life estate, while leaving the fee simple to those who would next take at common law. These remaindermen ordinarily would be the issue of the donee in tail. Finally, there are jurisdictions that essentially leave the estate tail to the donee in tail for his lifetime, but, thereafter, give to the issue of the donee in tail a fee simple. See C. MOYNIHAN, *supra* note 154, at 37-39.

466. For a discussion of these various constructions, see L. SIMES & A. SMITH, *supra* note 22, §§ 521-51.

467. See L. SIMES & A. SMITH, *supra* note 22, §§ 522-28.

468. See *id.*, § 522.

469. Absent some express condition beyond the circumstances required for a fee tail to come to an end, courts have found that a remainder which is then to become possessory in an ascertained person is classified as vested. See *id.*, § 142. It is unclear why such a remainder is classified in this manner. Perhaps, it is because the assumption is made that one's line of descent must always come to an end. It may last indefinitely, and so there is uncertainty about when it will end. Yet, once one assumes that it must end, there is no uncertainty about whether the remainder will become possessory. And for an interest to be characterized as contingent, there must be uncertainty about whether possession will occur and not simply when.

470. If, however, the subject matter had been personal property, in which case B's interest could not have been a fee tail, then C's interest would have been contingent and, therefore, it would have

Most courts, however, would today give "die without issue" a "definite failure of issue" construction, so that it would read just the same as if it had said: "To B forever, but at B's death, if B does not have issue who survive him, then to C absolutely."<sup>471</sup> In short, they would view the condition as operating at one point in time—B's death. If B is not survived by issue, then C or his successors assume possession. However, if B is survived by issue, then B's interest becomes absolute and passes to B's successors.<sup>472</sup> Consequently, B has a vested fee simple subject to complete divestment, while C has a contingent executory interest in fee simple that must satisfy the rule.

Before proceeding further, one should observe that the express condition involves only B and his issue: B must himself die without surviving issue. There is no added prerequisite that C or anyone else in particular must be alive at B's death before C's interest can vest. If C predeceases B and thereafter B dies without surviving issue, B's fee simple will be divested in favor of the successors to C's interest—for example, the beneficiaries under C's will.

It is possible, under Steps Two B and Two C, to view the requirement as creating multiple conditions appearing alternatively. There is the implied condition that C will take if B dies without ever having had issue. This implied derivative of the express condition must, however, be dismissed for purposes of testing as directed under Step Two D. Then there

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violated the common law rule against perpetuities. *See id.*, § 523. For further discussion of why a perpetuities violation arises, see *infra* notes 474-81 and accompanying text.

471 *See id.*, §§ 522, 525-27.

472. There are, of course, other interpretations courts have given to the phrase "die without issue." Generally, before deciding whether the language should be given an "indefinite failure of issue" or "definite failure of issue" construction, courts must decide when the determination of death without issue must be made. Stated differently, is the construction *substitutional* or *successive*? Consider, for example, this devise by A: "To B for life, remainder to C in fee simple; however, if C dies without issue, then to D in fee simple." Three interpretations are possible. First, C's death without issue refers only to C's death during A's lifetime. Second, C's death without issue refers only to C's death during the lifetime of either A or B. These constructions are viewed as substitutional. Finally, it is possible to conclude that C's death without issue refers to his death at anytime, even after the deaths of A and B. In this instance, C may assume possession after the deaths of A and B and D may do so as well upon C's subsequent death without issue. With this construction, their claims to possession are successive and not merely substitutional. *See id.*, §§ 521, 533-42. Whether the construction made is substitutional or successive, courts must also decide whether or not the issue must survive their named procreator. Queried differently, for D to take in the foregoing illustration, must C die without ever having had issue or without leaving issue surviving him? *See id.*, §§ 521-43. In the foregoing example, if a court gives "die without issue" a substitutional construction or interprets it to mean die without ever having had issue, there would be no perpetuities violation. *See infra* note 481.

is the express condition itself. Looking to Steps Two B and Two C, one must conclude that it consists of multiple conditions that appear cumulatively. Nevertheless, the implied condition that issue be born is subsumed by the condition that issue must predecease B. Accordingly, pursuant to Step Two C (1), one can proceed directly to a consideration of the subsuming condition under Step Three A.

Under Step Three A the taker himself, C, qualifies as a testing life in being. C is ascertained and by the descriptive language the executory interest is created in a specific individual who is alive when A executes his will. Accordingly, one must ask: Will C's interest vest in C or his successors, if at all, by B dying (having had issue and by B dying) without surviving issue within twenty-one years of C's death? After taking into account the possible times in which B might die without surviving issue, one concludes that the answer is NO. Here, one cannot eliminate all possibilities for remote vesting. It is possible for C to die immediately and for B to continue living more than twenty-one years thereafter. Accordingly, it becomes possible for B to then die without issue surviving him and, thereby, for C's interest to vest in C's successors more than twenty-one years beyond C's death.<sup>473</sup>

Under Step Three B, B—an other taker within the same provision—also qualifies as a testing life. B is ascertained and, by the descriptive language, the possessory fee simple is created in a specific individual who is alive when A executes his will and when he dies. Accordingly, one must ask: Will C's interest vest in C or his successors, if at all, by B dying (having had issue and by B dying) without surviving issue within twenty-one years of B's death? Taking all possibilities for vesting into account, one concludes that the answer, of course, is YES. The only time for determination of whether B personally has or has not been survived by issue is likewise at B's death and, therefore, the only time in which C's interest will vest, if at all, is at B's death. As a result, with a definite

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473. One should observe that C would become a validating life in being if the limitation had read: "To B forever, but if B dies without issue, then, if C is alive, to C absolutely." Applying the critical test, one asks: Will C's interest vest in C (or in his successors if he makes a lifetime transfer), if at all, by C surviving B's death without surviving issue within twenty-one years of C's death? Quite obviously, the answer is YES. Indeed, the question itself provides its own answer. Because C must himself survive B's death without surviving issue in order for his interest to vest, C's interest must vest, if at all, within his own lifetime. If C dies before then, his interest fails. If, however, he does not, then his interest vests in him personally or in the successors to his interest. Accordingly, one can make a valid proof with C himself, the taker of the interest in question.

failure of issue construction, B becomes a validating life in being and C's interest satisfies the common law rule against perpetuities.

One should observe that if A's will had made this gift a bequest of personal property instead of a devise of realty, the result would be exactly the same—with the same analysis and for the same reasons—if a court adopts the “definite failure of issue” construction. Suppose, however, that in this situation, the prevailing construction is one of “indefinite failure of issue.” Is there a perpetuities violation?<sup>474</sup> Because a fee tail estate cannot exist when the subject matter is personal property,<sup>475</sup> a court could not find that C had a vested remainder. Instead, with this “indefinite failure of issue” construction, B would have the counterpart of a fee simple that is defeasible whenever B's line of descent expires.<sup>476</sup> Under Step Two A, B's interest would be subject to divestment in favor of C, or C's successors, who would have a contingent executory interest in fee simple absolute. Once again, C's interest is contingent only upon expiration of B's line of descent. There is no requirement that C, or anyone else, survive that point in time. Accordingly, C has a contingent interest which is transmissible at C's death.<sup>477</sup> In this instance, expiration of B's line of descent is viewed as an uncertainty—an uncertainty about whether such event will occur and not simply when it will occur.<sup>478</sup> Accordingly, C's interest must be classified as contingent and,

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474 See, e.g., the classic case of *Jee v. Audley*, 1 Cox 324 (1787).

475 See L. SIMES & A. SMITH, *supra* note 22, § 359.

476. Although the fee tail estate is not recognized when the subject matter is personal property, other possessory estates attributable to real property are acknowledged and so are most kinds of future interests. See *id.*, §§ 359-71.

477 Once again, courts are prone to find a requirement of survivorship even when it is unexpressed, and are more inclined to do this for interests which are otherwise contingent. See *supra* note 240. In this example, then, if a court were to impute a condition requiring C to survive the expiration of B's line of descent, there would be no perpetuities violation. No violation would arise because C's contingent interest must vest, if at all, within C's own lifetime. Regardless of how long it takes for B's line of descent to terminate, C's interest cannot vest unless C is still alive. Accordingly, one can make a valid proof with C himself, the taker of the interest in question. See *supra* note 473.

478 If one could assume that B's line of descent must come to an end (namely, that it is an event certain to occur), then the only uncertainty for C, or his successors, would be *when* possession will occur, not whether it will happen. Nevertheless, when the subject matter is personal property, this limited assumption is not made. Accordingly, there is an uncertainty about whether and when possession will occur. If, however, one could make such an assumption, the interest of C would then be viewed as vested and not contingent and there would, of course, be no perpetuities violation. For example, consider this devise by A: “To B for life, then to C for life, then to C's children for the life of the survivor of them, remainder to D in fee simple absolute.” D's interest is characterized as vested absolutely. To be sure, we cannot compute precisely the time in which D's interest will become possessory; indeed, we do not know whether it will even be within his own lifetime. Never-

therefore, subject to the common law rule.

Once again, it is possible under Steps Two B and Two C to view the requirement as creating multiple conditions appearing alternatively. There is the implied condition that C will take if B dies without ever having had issue. This implied derivative of the express condition must, however, be dismissed for purposes of testing as directed under Step Two D. Then there is the express condition itself. Looking to Steps Two B and Two C, one must conclude that it consists of multiple conditions that appear cumulatively. Nevertheless, the implied condition that issue be born is subsumed by the condition that this line of issue must expire—must come to an end. Accordingly, pursuant to Step Two C (1), one can proceed directly to a consideration of the subsuming condition under Step Three A.

Under Step Three A, the taker himself, C, qualifies as a testing life in being for the same reason as before. Therefore, one must ask: Will C's interest vest in C or his successors, if at all, by (B having had issue and by) B's line of descent dying out and coming to an end within twenty-one years of C's death? Taking into account the possible times in which B's line of descent might come to an end, one concludes that the answer is NO. Here, one cannot eliminate all possibilities for remote vesting. It is possible for C to die immediately and for his interest to pass to a successor, and it is possible for B to continue living more than twenty-one years thereafter. Accordingly, it then becomes possible for B to die without any surviving issue (in which case his line of descent ends) and for C's interest then to vest in C's successors more than twenty-one years beyond the death of C himself.

Under Step Three B, as an other taker within the same provision, B qualifies as a testing life in being for the same reason as before. Therefore, one must ask: Will C's interest vest in C or his successors, if at all, by (B having had issue and by) B's line of descent dying out and coming to an end within twenty-one years of B's death? Taking into account the possible times in which B's line of descent might come to an end, one concludes that the answer is NO. Again, one cannot eliminate all possibilities for vesting. It is possible for B to have a child and then for B to die. It is subsequently possible for that child to live more than twenty-one years thereafter and then to die without surviving descendants. Ac-

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theless, we do know with absolute certainty that it will become possessory in C or his successors at some point in the future. This should be enough to establish the existence of a vested interest in C.

cordingly, it becomes possible for C's interest to vest, in C or C's successors, more than twenty-one years after the death of B.

Proceeding to Step Three C, B is mentioned first as an other taker, and then B is separately mentioned as part of the phrase that sets out the condition of divestment. Nevertheless, B is not differently mentioned in the condition; accordingly, there is no need to apply the critical test exactly the same as before under Step Three B. Also, under Step Three C, B's issue is otherwise mentioned within the condition of divestment.<sup>479</sup> However, the limitation allows for afterborn issue to affect the duration of B's defeasible interest. Neither the descriptive language nor rules of construction preclude inclusion of afterborn descendants to define and measure the condition of defeasance.<sup>480</sup> Further, because B is alive, presumptively he still can have issue born thereafter; indeed, there is no physical impossibility that precludes inclusion of afterborn issue to define the line of descent that must die out and end before C's interest can vest. Obviously, then, because B has no issue at A's death, his potential descendants cannot qualify as testing lives in being. One must reach this same conclusion even if B had children or other descendants living at the death of A. Nothing in the language, or anything else, limits B's line of

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<sup>479</sup> Occasionally, language is used that appears to refer to a group of people but courts will construe it instead as language that describes the nature of an interest created under the provision. More specifically, there are circumstances in which a court will view language as words of limitation instead of words of purchase. In such instance, one must disregard that group in conducting this methodology. For example, consider this devise by A: "To B and his heirs; however, if the land is ever used for a purpose other than residential, then to C and his heirs." Neither the heirs of B or C take by purchase, nor is this language intended to refer to a group of people as such. In both instances, courts would view the reference to "heirs" as words of limitation, indicating the creation of a fee simple in B and C. Accordingly, the heirs of B and C must be dismissed in conducting the methodology under each of the parts of Step Three.

<sup>480</sup> Any restriction upon B's line of descent to those alive at A's death would seem to be inconsistent with the presumed indefinite failure of issue construction. By definition, this construction fixes the duration of B's interest to the expiration of his line of descent, whenever that may occur. Also, by definition his line of descent cannot be restricted to any group of people. Nevertheless, if it could be confined to B's descendants alive at A's death, there would be no perpetuities violation. B has no descendants alive at the death of A. Therefore, his interest must end at his death. C's interest is certain to become possessory, consequently, if it is to be given effect at all, it will not be viewed as contingent. Accordingly, it is not subject to the common law rule against perpetuities. In all probability, however, a court would conclude that A has given B an absolute interest and that C has received nothing. Initially, A has created the equivalent of a fee simple in B, and courts are reluctant to recognize any gift over that repudiates the fee simple first given to B. Such interest must have a potentially infinite duration. In this instance, however, if the gift to C is to be given effect, it will necessarily become possessory at B's death. Accordingly, the gift over to C repudiates the potential for infinite duration needed for the creation of a fee simple. Because of this, courts are inclined to recognize the fee in B and ignore the interest given to C.

descent to those alive at A's death. Nor would there be any physical impossibility for B or any of his descendants to have issue born thereafter. In short, the group itself is not restricted at A's death to lives in being and to lives already ended. Consequently, absent the mention of other people or groups within a saving clause or some other directly related provision, one must proceed to Step Three D. Here, because the taker himself, C, has already been tested under Step Three A and because his life has failed to validate, an examination of the parents of C is unnecessary.

Therefore, one must proceed to the critical test of Step Four: Will C's interest vest in C or his successors, if at all, by (B having had issue and by) B's line of descent dying out and coming to an end within twenty-one years of the time the period of the rule begins at A's death? Taking into account the possible times in which B's line of descent might come to an end, one concludes that the answer, of course, is NO. Here, one cannot eliminate all possibilities for remote vesting. It is possible for B to live for more than twenty-one years beyond the death of A and then for B's line of descent to end because he dies without surviving issue. Accordingly, it would then be possible for C's interest to vest at B's death in C or his successors more than twenty-one years beyond the death of A. Having gone through all four steps without establishing a positive answer to the critical test, one can now conclude, given a bequest of personal property and an indefinite failure of issue construction,<sup>481</sup> that the con-

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481. Beyond the definite and indefinite failure of issue constructions, courts have given the phrase "die without issue" other interpretations. *See supra* note 472. For example, some courts find that such language provides a substitute gift to C only if B dies without issue before the death of A, the testator in this illustration. With this construction, there would, of course, be no perpetuities violation. At A's death, there would be an absolute interest in either B or C. If B survives A, he would receive an absolute interest and C would acquire no interest whatsoever. If, however, B dies without issue before the time of A's death, his interest would fail while the interest of C would vest absolutely.

Quite differently, some courts find that "die without issue" is to be construed the same as if it had read "die without having had issue." With this construction, the substitute gift to C arises only if B never has any children at all, without regard to whether they survive him. Once B has a child, his interest becomes absolute while C's interest is extinguished. Under this interpretation, there is no perpetuities violation because a valid proof now can be made under Step Three B using B as the testing life. In applying the critical test, one asks: Must C's interest vest in C or his successors, if at all, by B dying without ever having had a child within twenty-one years of B's death? The answer is YES. If B is going to have a child, it must be during his life or within a period of gestation following his death. Consequently, the very latest one must wait for C's interest to vest or fail is until B's death or within a period of gestation thereafter. Because C's interest can vest no later, it satisfies the requirements of the common law rule against perpetuities.

tingent executory interest is invalid because it violates the common law rule against perpetuities.

## V. CONCLUSION

The preceding sections of this article have developed the need for understanding and applying the common law rule against perpetuities with respect to the interpretation of interests already created or designed. These sections also demonstrate the need for a new way of solving these kinds of perpetuities problems, and they present and illustrate a methodology which attempts to do just that. Once again, although this methodology cannot obviate the complexities of relevant principles of future interest law, it does attempt to systematize the process of solution itself by presenting, step by step, the potential lives by which one might test and ultimately validate an interest. To be sure, the full process can be cumbersome; nevertheless, this is inevitable with any methodology that leads one mechanically to a specific result—one that can be reached without having to master the rationale that underlies the problem-solving technique. After all, the purpose of this article is to present a methodology that produces correct solutions without having to develop full comprehension of the rule and the problem-solving process itself.

Despite the methodology's apparent length, the novice should find it relatively easy to follow and, above all else, reassuring. More extensive experience with the rule itself and with this methodology should not produce tedium and impatience. Repeated use of the methodology likely will reveal its underlying rationale and, thereby, afford a greater facility for application of the rule.<sup>482</sup> With experience, one will bypass Steps Three A and B whenever he sees that a particular interest can vest no later than the death of a person in being otherwise mentioned in the pro-

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<sup>482</sup> For myself, I understand and apply the common law rule by isolating causal or relevant lives and then applying the critical test to them. I attempt to explain the process in this manner, much the same as Professor Dukeminier. *See, e.g.,* Dukeminier, *supra* note 130, 1868-80. (I must confess, however, I do not always see eye-to-eye with Professor Dukeminier on the identity of causal lives in specific limitations.) Even with repeated explanations and illustrations, most students do not "catch on"; at the very least, they are terribly uneasy about their ability to solve perpetuities problems. The methodology developed in Part Three, and applied in Part Four, is nothing more than an effort to identify, collect and categorize all conceivable sources of relevant lives that might affect vesting and then to determine whether they validate the contingent interest. It is also hoped that repeated use of the methodology will reveal the logic inherent in the process and the search for lives that affect vesting. It is also hoped that in time one will no longer proceed step-by-step, but instead one will *know* through a principle of relevancy which lives can possibly validate, and if they cannot one will *know* that the interest is invalid.

vision.<sup>483</sup> With experience, one might proceed directly to Step Four whenever he observes a condition that is limited in terms of a gross period of years from the time such interest takes effect.<sup>484</sup> And with experience, one might even dispense with Steps Three and Four and proceed directly to a conclusion of invalidity whenever he observes a condition that is unrestricted in terms of time and is imposed with respect to interests that are not limited to existing lives or to twenty-one years from the time of creation.<sup>485</sup> But until that experience has been acquired and such understanding and mastery of the rule has been earned, strict adherence to each of the steps of this methodology should facilitate correct solutions and, in the end, reasonably assure creation of interests that carry

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483. Consider, once again, this testamentary trust created by A: "Income to B for life; thereafter, principal to such of B-1's children who attain age twenty-one." Assume that both B and B-1 survive A and that B-1 is childless at A's death. With experience, one will observe immediately that no potential child of B-1 (an existing person "otherwise mentioned" in the instrument) can, by being born and attaining age twenty-one, satisfy the conditions attached to the gift of principal more than twenty-one years beyond the death of B-1. With experience, one observes instantly that, with these conditions, B-1 is a validating life in being. With experience, one fixes immediately upon B-1, someone who would be discovered under Step Three C of the methodology, and in doing this, one will *know* that, having already discovered a validating life, there is no need to use Steps Three A and B. For a step-by-step solution to the perpetuities problem presented by this illustration, see *supra* illustration IV A-3.

484. Consider, once again, this testamentary trust created by A in which income is accumulated and added to principal for twenty-one years and, thereafter, it leaves: "The principal to B's descendants, per capita, living twenty-one years after my (A's) death." Assume that B and his only descendants, his two children B-1 and B-2, survive A. With experience, one will observe immediately that no descendant of B (whether alive at A's death or born thereafter) can, by being born and surviving the time for distribution, satisfy the conditions attached to the gift of principal more than twenty-one years beyond the death of A. With experience, one fixes instantly upon the flat twenty-one years allowed by the common law rule, something to be discovered under Step Four of the methodology, and in doing this one will *know* that, having already made a valid proof, there is no need to use Step Three at all. For a step-by-step solution to the perpetuities problem presented by this illustration, see *supra* illustration IV A-5.

485. Consider, once again, this lifetime transfer by deed of Blackacre by A: "To B in fee simple; however, if Blackacre is ever used for a purpose other than residential, then and in that case to C in fee simple absolute." With experience, one observes that vesting of C's executory interest depends upon a breach of the land use restriction only; it does not depend upon the fulfillment of any other condition. More specifically, the vesting of C's interest is not in any way circumscribed by the life of either B or C. With experience, one immediately addresses the time limits within a condition and notes that in this example compliance with or breach of the condition upon land use is not tied to anyone's life—or, for that matter, to any period of time at all. See *supra* notes 273-75. Having made these observations, with experience one should immediately *know* that there is no way in which a valid proof can be made under either Step Three or Step Four of the methodology. Accordingly, one will *know* that C's interest violates the common law rule against perpetuities without having to proceed formally through Steps Three and Four. For a step-by-step solution to the perpetuities problem presented by this illustration, see *supra* illustration IV B-1.

out an estate owner's design without violation of the common law rule against perpetuities.<sup>486</sup>

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486. After this methodology was developed, other systems for solving perpetuities problems were published before the publication of this article. See F. SCHWARTZ, *A STUDENT'S GUIDE TO THE RULE AGAINST PERPETUITIES* (1988); Finan and Leyerle, *The Perp Rule Program: Computerizing the Rule Against Perpetuities*, 28 JURIMETRICS J. 317 (1988).

In their article, Professors Finan and Leyerle attempt to explain why the common law rule against perpetuities is so difficult to master, and then they explain why a computer program is needed to cope with its complexities. Finan and Leyerle have developed such a program, and in their article, they offer a careful explanation of how it operates. Quite obviously, there must be similarities between the methodology elaborated in this article and their computer program and explanation. Both focus upon a series of questions. Although this methodology does not incorporate these questions into a computer program, it is something that could easily be accomplished. In both instances, these questions are designed to lead one to the critical test: Must the interest vest, if at all, within twenty-one years of the death of a life in being or within twenty-one years of the time the period of the rule commences. To reach a correct solution, both require active analysis by the user in answering these questions; that is, neither provides a formula which, after simple factual input, mechanically and automatically solves the perpetuities problem.

Additionally, just as this article maintains that experience with this methodology should lead to real understanding of the common law rule (see *supra* notes 482-85 and accompanying text), Finan and Leyerle observe:

There is also a phenomenon known as "trained intuition," and a computer program can aid a student in training his intuition in such a manner that his threshold is expanded and the Rule becomes understandable. Perp Rule is such a program, guiding students through the legal reasoning involved with the Rule and providing a model of the reasoning process.

. . . Experience with this program suggests that students who spend as little as two hours at the computer terminal using Perp Rule get what some students have described as the "aha-ness" ("Aha, I see it") or "eureka" effect. . . . [O]nce the eureka effect has been experienced, students are no longer intimidated by the Rule and can read cases with the same confidence they feel in other areas

Finan and Leyerle, *supra* note 486, at 322, 335.

Beyond the foregoing similarities, these two methodologies differ in important ways. The most significant difference, and a critical one to be sure, involves selection of testing lives in being. Finan and Leyerle begin their search for a validating life with the taker of the interest in question. If that life fails to uphold the interest, their program then asks the user to provide other lives for testing, lives they refer to as Provisional Measuring Lives (PML's). Ultimately, the selection of alternative PML's must be initiated by the user. Nevertheless, their program presents a "help screen" to assist in making the selection. Their article does offer a general principle for selection, one based upon "connection" to the contingent interest. Given the authority they cite in support of this principle, their idea of connection may be as broad as Professor Waggoner's (see *supra* notes 76-117 and accompanying text). Their program, however, goes beyond a general principle. It tells the user that the instrument itself may provide some help and that one should also consider selecting the holders of preceding interests or the ancestors of the taker of the interest. See Finan and Leyerle, *supra* note 486, at 324-25, 327.

This methodology, however, is far more specific in its search for a potential validating life in being. In time, students understand and accept the quirks of the common law rule, but they do not master the selection of testing lives in being. They may hear and even comprehend a principle of causation or connection, yet they seldom apply it with confidence and without frustration. Thus, the real purpose of this methodology is to overcome the problem of selection. More specifically, it deter-

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mines and assembles for the user exactly which lives in being must be tested and under what circumstances. Consequently, it offers direct and exhaustive guidance in the search for testing lives in being. It formulates a precise pool of testing lives from which a validating life in being must be found, if one exists at all. And most important, when one exhausts the list of lives within this pool, one knows that the search for a validating life has failed and that the testing of all lives in being has come to an end.