January 1975

Wait and See Revisited

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NOTES AND COMMENTS

WAIT AND SEE REVISITED

The Rule Against Perpetuities is a technicality-ridden legal nightmare, designed to meet problems of past centuries that are almost nonexistent today. Most of the time it defeats reasonable dispositions of reasonable property owners, and often it defeats itself. It is a dangerous instrumentality in the hands of most members of the bar.¹

The last three decades have been a most unsettling period for orthodox adherents to the venerable common law Rule Against Perpetuities. The various reform proposals which have been advanced may be placed into three categories: (1) the use of a *cy pres* doctrine; (2) specific legislation to correct particular deficiencies of the rule; and, (3) the use of the "wait and see" doctrine. That reform pressure has brought results is evidenced by the fact that each new year seems to bring new perpetuities legislation embodying to some extent the reform proposals mentioned.²

The first "wait and see" statute enacted in Pennsylvania in 1947³ evoked a plethora of law review articles⁴ and divided future interest scholars into two opposing factions. One side rose to defend the orthodox common

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3. PA. STAT. ANN. tit. 20, § 301.4(b) (1950) provides:
   Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void.
4. Only a selected list of articles follows:
   Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 Ky. L.J. 3 (1960);
   Mechem, *A Brief Reply to Professor Leach*, 108 U. Pa. L. Rev. 1155 (1960);
   Morris and Wade, *Perpetuities Reform at Last*, 80 L.Q. Rev. 486 (1964);
   Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 Mich. L. Rev. 683, 887 (1958);
   Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 Mich. L. Rev. 179 (1953);
   Tudor, *Absolute Certainty of Vesting Under the Rule Against Perpetuities—A Self-Discredited Relic*, 34 B.U.L. Rev. 129 (1954);
law Rule Against Perpetuities and urge repeal of the wait and see legislation. The other side continued their assault on the common law rule, constantly seeking new converts to the wait and see doctrine. By 1966, the scholarly combat seemed to have abated, but the war is far from over. The battle has moved from the law reviews to the legislative chambers, where the real war will be won or lost.

The purpose of this article is to review the application and efficacy of the wait and see doctrine. It will attempt to bring into focus the major areas of dispute, and to lay bare the confusion, incoherence, and sometimes die-hard resistance to common sense that has infested this controversy.

THE COMMON LAW RULE AGAINST PERPETUITIES

General Statement of The Rule Against Perpetuities

John Chipman Gray's classic formulation of the Rule Against Perpetuities which has been much memorized but little understood states: "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." Although Gray's formulation may be properly criticized on various grounds, as a shorthand sketch


6. Professor Leach has been particularly prolific on this subject, and the following is only a selected list of his more important contributions:
Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 HARV. L. REV. 721 (1952);
Perpetuities: Staying the Slaughter of the Innocents, 68 L.Q. REV. 35 (1952);
Perpetuities Legislation, Massachusetts Style, 67 HARV. L. REV. 1349 (1954);
An Act Modifying and Clarifying the Rule Against Perpetuities, 39 MASS L.Q. (No. 3) 15 (1954);
Perpetuities Reform by Legislation, 70 L.Q. REV. 478 (1954);
Perpetuities Legislation: Hail, Pennsylvanian! 108 U. PA. L. REV. 1124 (1960);
Perpetuities: New Absurdity, Judicial and Statutory Correctives, 73 HARV. L. REV. 1318 (1960);
Perpetuities in the Atomic Age: the Sperm Bank and the Fertile Decedent, 48 A.B.A.J. 942 (1962);
Perpetuities: Cy Pres on the March, 17 VAND. L. REV. 1381 (1964);


8. Without attempting to be exhaustive, Gray's statement is defective in that: (1) a class gift, even though vested in some members, may be void under the rule (See 6 AMERICAN LAW OF PROPERTY § 24.26 (A.J. Casner ed. 1952)); (2) in the United States, neither the possibility of reverter nor the power of termination, even though contingent, is subject to the rule (See 6 AMERICAN LAW OF PROPERTY § 24.62 (A.J. Casner ed. 1952)); (3) some contingent gifts to charities are exempt from the rule (See 6 AMERICAN LAW OF PROPERTY §§ 24.37-42 (A.J. Casner ed. 1952)); (4) in some cases the perpetuity period is counted from some time other than that of the creation of the interest (See 6 AMERICAN LAW OF PROPERTY §§ 24.35, 36, 54 (A.J. Casner ed. 1952)); (5) the perpetuity period may be extended by one or more periods of gestation (See 6 AMERICAN LAW OF PROPERTY §§ 24.13, .15 (A.J. Casner ed. 1952)).
of the rule, it has never been equalled and will be utilized by lawyers as long as there is a Rule Against Perpetuities. The Rule Against Perpetuities is a rule against remoteness of vesting.\(^9\) It strikes down those contingent interests which may not vest within some life in being and twenty-one years. The rule was intended to prevent the removal of real property from the stream of commerce rendering it inalienable for a period of time longer than was thought socially desirable.\(^{10}\) The rule was initially designed as a means of enhancing the marketability and development of real property in an agrarian society. Today it applies as well to legal and equitable interests in personality, tangible and intangible, including beneficial interests in trusts.\(^{11}\)

Objections to the common law Rule Against Perpetuities have revolved primarily around the following: (1) the requirement of prospective certainty of vesting determined as of the time of the creation of the future interest, and (2) the total invalidation of an interest that violates the rule. Each will be discussed in turn.

**Prospective Certainty of Vesting**

At common law a future interest not necessarily vesting within the perpetuity period, determined as of the date of the creation of the future interest,\(^{12}\) is void from the beginning. It is not enough that it is highly probable or almost certain that the future interest will vest within the perpetuity period. The rule demands absolute certainty.\(^{13}\) Furthermore, since we ascertain the validity as of the date of the creation of the interest, whether the interest does in fact vest well within the perpetuity period is irrelevant.\(^{14}\) If,  

9. That is, vesting in interest and not in possession. Vested interests may tie up property just as long as contingent ones, and for this reason, the exemption of vested interests from the rule has been criticized. Even Gray himself pointed out that “in the ideal system . . . no interests which did not vest in possession within the allotted period of time should be allowed. They are within the practical reason of a Rule against Remoteness.” J. Gray, *supra* note 7, at § 972. For an extensive discussion of this aspect of the rule, see Schuyler, *supra* note 4.


11. By far the most important current application of the rule.

12. The testator's death in the case of a will; the date of delivery in the case of a deed or trust.

13. Leach has this to say about the requirement of absolute certainty: “We decide other civil cases on a 'preponderance of the evidence.' We send men to the gallows on 'proof beyond a reasonable doubt.' But in perpetuities cases we demand absolute certainty. What nonsense!” Leach, *The Rule and Its Gremlins*, 6 U.W. AUSTL. L. REV. 12 (1963).

14. In most cases, litigation does not arise until after the future interest has in fact vested. But the orthodox dogma insists that we close our eyes to events which have occurred since the creation of the future interest. Perpetuity purists would have us believe that the important thing is not that the future interest actually vested within the perpetuity period, but that it might not have. Though highly aesthetic to the legal mind, it is mind-boggling to the layman,
at the creation of the future interest, there is a hypothetical possibility, however remote, that it might not vest within the perpetuity period, the future interest is void.

The destructive quality of the "might-have-been" rule may be best appreciated when illustrated by concrete cases that have gained notoriety by Professor Leach's delightful mastery of the sobriquet. In all of the following cases, a knowledgeable lawyer could have avoided the pitfalls of the rule by careful drafting. In each case, the court was not dealing with some evil nabob bent on subverting the social policy underlying the rule against perpetuities, but rather the hapless client of an incompetent or careless lawyer.

The Case of the Unborn Widow

The case of the unborn widow arises where the testator (hereinafter T) leaves property in trust to pay the income to A for his life, then to pay the income to A's widow, if any, for her life and then to pay the principal to the children of A then living. Suppose that at T's death, A is sixty, his wife is fifty-nine, and that A has six children ranging from twenty-five to forty. The might-have-been rule requires the assumption that A's current wife might immediately die, that A might thereafter marry a woman unborn at T's death (thus not a life in being), that she might have children by A, and that she might live more than 21 years after the death of the last to die of A and all of his children by his first wife. The interest of A's children by his second marriage thus might not vest within the perpetuity period. These might-have-been assumptions are patently absurd to the average layman. And, of course, the careful lawyer could have preserved this reasonable disposition from destruction by adding the following clause to the will: "provided that, if A leaves a widow who was unborn at my death, the interest to A's children shall indefeasibly vest not later than 21 years after the death of A."

The Fertile Octogenarian

Since the infamous case of Jee v. Audley, there has been a conclusive presumption that any male or female can bear children at any age. For example, T leaves property in trust to pay the income to A (a widow of eighty who has four children living at T's death) for life, then to pay the income to the children of A for their lives, and then to pay the principal to A's grandchildren then living. The ultimate gift to A's grandchildren is void because (1) the gift to the children of A is construed to include afterborn children (a ridiculous construction in a case like this), and (2) A is conclusively

16. In Re Curryer's Will Trusts, 1 Ch. 952 (1938); Perkins v. Inglehart, 183 Md. 520, 39 A.2d 672 (1944).
17. 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).
presumed to be capable of bearing children until her death (even more ridiculous). Thus: A might remarry after T’s death, A might have more children, and the latter’s children might be born more than 21 years after death of the last life in being. Again, the capable draftsman could have saved the gift by referring to A’s children as “the children of A living at T’s death.”

The Precocious Toddler

With *Jee v. Audley* on the books to haunt lawyers, it was inevitable that someday the question would arise whether a baby could have a baby. Sure enough, in 1949 yet another hapless lawyer got caught in the fertility trap. In *In re Gaite’s Will Trusts*, a testatrix created a residuary trust to pay the income to Mrs. Hagar Gaite for life, remainder to such of the life tenant’s grandchildren, living at the testatrix’s death or born within five years thereafter, as should reach twenty-one. At the time of the testatrix’s death, Mrs. Gaite was a widow of sixty-seven with two children and one grandchild. Under the might-have-been test, the ultimate gift was void because at age sixty-seven, Mrs. Gaite might remarry, might bear another child, and that child in turn might marry and might have a child, all of this within five years after the testatrix’ death! Thus, the new grandchild might reach the age of twenty-one beyond the perpetuity period. The august court neatly skirted the issue and held the ultimate gift valid on the dubious ground that, under the English Age of Marriage Act, “A marriage between persons either of whom is under the age of sixteen shall be void,” and thus it was legally impossible for a child of Mrs. Gaite born after the death of the testatrix to produce a legitimate child within those five years. It has been suggested, however, that the court disregarded the possibility that this child might acquire a domicile in some country in which the age for marriage was less than sixteen. And Professors Morris and Leach once took opposing positions on the public policy question of whether a British Court should decline to recognize a marriage between five year-olds.  

Magic Gravel Pits

In *In re Wood*, T devised certain gravel pits to trustees to be sold when the pits should be worked out, and to then distribute the proceeds among his then living issue. Under ordinary operating conditions, the pits should have been exhausted in four years; they were actually exhausted in six years.

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18. 1 All E.R. 459 (Ch. 1949).
20. 3 Ch. 381 (1894).
The ultimate gifts to T's issue were held void under the rule because the pits might have lasted more than 21 years, the perpetuity period. The reader should ask himself what public policy is being served by such nonsense. This testator was certainly not attempting to subvert a public policy favoring alienability. Leach feels this case is particularly pernicious because the court had control over the actions of the trustees and could compel them to progress at a faster pace if necessary. Gifts to take effect on similar "administrative" contingencies (e.g., the probate of a will, or the payment of debts) have met a similar fate despite the high probability of the contingency occurring within the perpetuity period.

**Total Invalidation of an Offending Interest**

The second major criticism of the common law rule against perpetuities relates to the doctrine of total invalidation in which a future interest is completely excised from the disposition if it is found to violate the rule. For example, if T bequeaths property in trust to pay income to A (a bachelor) for life, then to pay the principal to A's first son who attains the age of twenty-five, the remainder is void for remoteness. Thus, the trustee pays the income to A for life and then holds the principal upon a resulting trust for T's next of kin or the residuary legatee. In many cases the practical result of total invalidation is to defeat the intentions of the testator by taking the gift from an intended beneficiary and giving it to someone whom the testator purposefully wished to exclude from his bounty.

In the great majority of cases, the offending interest is a gift to a class, and under the all-or-nothing rule of *Leake v. Robinson*, if a class gift is invalid as to any possible member under the Rule Against Perpetuities, the entire gift fails. Rearranging the facts of the hypothetical bequest in the preceding paragraph, suppose that the remainder is to "such of A's children who attain the age of twenty-five," and that at T's death A has ten children, all of whom have already reached twenty-five. Each child of A

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24. Moreover, in those jurisdictions which recognize the doctrine of infectious invalidity, the offending future interest may infect a prior and otherwise valid gift, resulting in the invalidation of the entire disposition. In some cases, total invalidation may be proper if the general dispositive scheme of the testator would be more appropriately carried out. But this is a matter of construction of the testator's intentions, not of perpetuities. *See 6 American Law of Property §§ 24.48-52* (A.J. Casner ed. 1952).
25. 2 Mer. 363 (Ch. 1817).
26. For a persuasive indictment of the all-or-nothing rule, see Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 Harv. L. Rev. 1329 (1938).
27. Note that the examples given in the preceding section also involved application of the all-or-nothing rule.
has a vested interest subject to open which allows afterborn children of A to share in the gift until the class closes at A’s death. Under standard perpetuity doctrine, the entire gift, including the vested interest of the ten living children of A, fails because A might bear another child whose interest might not vest within the perpetuity period.

**Reform Legislation**

With the exception of a few fundamentalists who are not disturbed by *Jee v. Audley* and, on the contrary, who are rather offended at Professor Leach’s exploitation of a “few freak cases which he has popularized by giving them cute names,” it is generally agreed that reform is in order. However, it is not generally agreed as to the precise manner in which reform should be carried out. Some feel that legislation should be restricted to the “freak” cases. For example Illinois has recently enacted legislation that, among other things, effectively deals with the unborn widow, the fertile octogenarian, the precocious toddler, the magic gravel pit, and the problems of age contingencies. Other states are most ambitious and desire legislation that gives the courts broad authority to reform any interest which

30. *Id.* at 967.
31. *Ill. Rev. Stat.* ch. 30, § 194(c) (1971) provides as follows:
   (c) In determining whether an interest violates the rule against perpetuities:
   (1) it shall be presumed (A) that the interest was intended to be valid, (B) in the case of an interest conditioned upon the probate of a will, the appointment of an executor, administrator or trustee, the completion of the administration of an estate, the payment of debts, the sale or distribution of property, the determination of federal or state tax liabilities or the happening of any administrative contingency, that the contingency must occur, if at all, within the period of the rule against perpetuities, and (C) where the instrument creates an interest in the “widow”, “widower”, or “spouse” of another person, that the maker of the instrument intended to refer to a person who was living at the date that the period of the rule against perpetuities commences to run;
   (2) where any interest, but for this subparagraph (c)(2), would be invalid because it is made to depend upon any person attaining or failing to attain an age in excess of 21 years, the age specified shall be reduced to 21 years as to every person to whom the age contingency applies;
   (3) if, notwithstanding the provisions of subparagraphs (c)(1) and (2) of this Section, the validity of any interest depends upon the possibility of the birth or adoption of a child, (A) no person shall be deemed capable of having a child until he has attained the age of 13 years, (B) any person who has attained the age of 65 years shall be deemed incapable of having a child, (C) evidence shall be admissible as to the incapacity of having a child by a living person who has not attained the age of 65 years, and (D) the possibility of having a child or more remote descendant by adoption shall be disregarded.

The statute also contains a unique provision applying to dispositions in trust that is beyond the scope of this paper. *See Schuyler, Statute Concerning Perpetuities, 65 Nw. U.L. Rev.* 3 (1970) for an exhaustive analysis of the statute.
32. Meaning as nearly as possible.
violates the rule so to effectuate the intentions of the testator as nearly as possible, within the limits of the rule against perpetuities. For example, Oklahoma recently enacted legislation providing:

[A]ny interest in real or personal property that would violate the Rule Against Perpetuities shall be reformed, or construed within the limits of the Rule, to give effect to the general intent of the creator of that interest whenever that general intent can be ascertained. This provision shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.

The most revolutionary and controversial of the reform proposals is the wait and see doctrine which replaces the traditional might-have-been test with an actualities test. Under such a statute, the validity of a future interest is measured by actual events. If the interest actually vests in time, it is valid; if it does not, it is void. Some recent statutes combine the advantages of both cy pres and wait and see, calling on cy pres reformation only if the validity of an interest is not established by actual events.

A CRITIQUE OF THE “WAIT AND SEE” DOCTRINE

Does Wait and See Increase Inalienability of Property?

Some critics posit that the major shortcoming of the wait and see doctrine is the very existence of a waiting period itself. Professor Simes maintains that determining the validity of an interest when it arises is a completely normal process and that the wait and see doctrine is a big step in the direction

33. New Hampshire has achieved the same result without the necessity of legislation: Edgerly v. Barker, 66 N.H. 434 (1891).

34. OKLA. STAT. ANN. tit. 60, § 75 (Supp. 1972). If a legislature is persuaded to adopt such a broad cy pres statute, it is unnecessary to enact specific provisions dealing with the freak cases. See Leach, Perpetuities: Cy Pres on the March, 17 VAND. L. REV. 1381 (1964).

35. See note 3 supra for the relevant portion of the Pennsylvania wait and see statute.


37. As we shall see later, no one is quite sure how long we are supposed to wait.

38. An example is VT. STAT. ANN. tit. 27, § 501 (1967):

Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate said rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events. Other states having a combination wait and see-cy pres statute are Kentucky (KY. REV. STAT. § 381.216 (1972)) and Ohio (OHIO REV. CODE ANN. § 2131.08(C) (1971)).

39. For a comprehensive comparative analysis of these various statutes, see Perpetuities Legislation Handbook, supra note 2.
of inalienability of property.\textsuperscript{40} A discussion of these criticisms inevitably leads to the ultimate question of whether the Rule Against Perpetuities really serves a useful function in modern society.

It is sometimes forgotten that the Rule Against Perpetuities was originally formulated with respect to future interests in particular pieces of real property.\textsuperscript{41} The objective of the rule was to foster the alienability of real property. Otherwise, property is less productive, and the national income decreases. The possessory owner may not wish to make a specific piece of property productive because he lacks the capacity for that sort of thing, or because he has nothing to invest in its development. Or it may be that the existence of a remote future interest means that the possessory owner does not wish to invest in the development of the property because his ownership may terminate on an uncertain event. But he cannot sell it to a person who is willing and able to make the property productive, because the existence of the future interest makes it unmarketable.\textsuperscript{42}

But it should be remembered that the Rule Against Perpetuities was designed in an era of legal estates. Today, nearly all conveyances of future interests are in the form of trusts in which the trustee has a power of sale, granted either by the trust instrument or by statute. Furthermore, the trust portfolio normally consists of securities, not real property. Thus, the alienability justification for the rule has little application to beneficial interests in trusts. As to legal interests in land, even if we concede Simes’ assertion that problems involving contingent legal interests in land are not negligible,\textsuperscript{43} and joining in his concern at the removal of land from its most productive use, the answer lies not in opposition to wait and see, but in legislation such as that in Massachusetts which permits the sale of the fee simple in the land and the transfer of the proceeds to a trust for the benefit of those persons who would have been entitled to estates in the land.\textsuperscript{44}

Lest there be confusion on this point, no one has suggested that the Rule Against Perpetuities should be abandoned. The Rule Against Perpetuities

\textsuperscript{41} Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).
\textsuperscript{42} Simes, \textit{supra} note 40, at 191.
\textsuperscript{43} Id. at 188.
\textsuperscript{44} Mass. Gen. Laws Ann. ch. 183, § 49 (1969):
If land is subject to a vested or contingent remainder, executory devise, conditional limitation, reversion or power of appointment, the probate court for the county where such land is situated may, upon the petition of any person having an estate or interest therein, either present or future, vested or contingent, and after notice and other proceedings as hereinafter required, appoint one or more trustees and authorize him or them to sell and convey such land or any part thereof in fee simple, if such sale and conveyance appears to the court to be necessary or expedient, or to mortgage the same for such an amount, on such terms and for such purposes as may seem to the court judicious or expedient; and such conveyance or mortgage shall be valid and binding upon all parties.
strikes a balance between the unlimited disposition of property by the members of the present generation and its unlimited disposition by members of future generations.\textsuperscript{45} Even Professor Leach, a leading proponent of wait and see, indicates that he shares the "visceral impression that there is something wrong in permitting a testator to exercise the power of the dead hand a century after his death."\textsuperscript{46} However, proponents of reform argue that no conceivable public policy is promoted by continuing to arbitrarily destroy future interests that constitute reasonable dispositions of reasonable men because of absurd hypothetical possibilities. A balance between the desires of the present and future generations can be achieved without unreasoning adherence to an obsolete might-have-been test that was designed to serve the purposes of a bygone era.

It is well known that a competent draftsman can tie up property for over a hundred years and still pass the might-have-been test under strictest perpetuities doctrine. As Mechem notes: "People can make plenty of foolish provisions within the rule; any good draftsman can tie up property validly for many years and with no good reason shown. So the rule doesn't conspicuously stand in the way of unsocial people with good lawyers."\textsuperscript{47} And yet an individual who desires to provide for his son and grandchildren (a perfectly natural testamentary plan) may run afoul of the orthodox Rule Against Perpetuities because he has hired an incompetent or careless lawyer. For example, a testator who has employed an expert draftsman can make a valid devise to "such of his issue as are living 21 years after the death of the last survivor of A, B, C, D, E, F, G, H, I, J, K, L," (12 healthy babies from families of known longevity), and effectively tie up his property for at least a hundred years. But a testator who has employed an inept draftsman, in devising property to his "son for life, remainder to his son's children who attain the age of 25," has violated the might-have-been test and his grandchildren must bear the consequences.\textsuperscript{48}

The Rule Against Perpetuities is "not protecting the public welfare against the predatory rich but is imposing forfeitures upon some beneficiaries and awarding windfalls to others because some member of the legal profession has been inept."\textsuperscript{49} Wait and see is not a panacea that will solve the problems of careless lawyers,\textsuperscript{50} but it will give the testator who is unfortunate

\begin{itemize}
\item 45. L. SIMES, PUBLIC POLICY AND THE DEAD HAND 58 (1955).
\item 46. Leach, Perpetuities Legislation: Hail Pennsylvania! 108 U. PA. L. REV. 1124, 1142 (1960); see also Simes, supra note 40, at 190-92; Schuyler, supra note 4, at 688-93; Mechem, supra note 5, at 968-69.
\item 47. Mechem, supra note 5, at 968.
\item 48. Why? To teach a lesson to the testator, of course. He must learn that the Rule Against Perpetuities is not to be trifled with. If that answer is unsatisfactory, try invalidation serving as a prophylactic function for future testators.
\item 49. Leach, supra note 21, at 723.
\item 50. The draftsman of the Pennsylvania wait and see statute characterizes the effort
enough to choose a "nonspecialist" as his lawyer the same treatment as if he had gone to a specialist. Since the rule allows a postponement of vesting for the duration of the perpetuity period in any case, it is rather unsportsman-like to visit punishment on the family of the testator whose estate in fact vested in time when his only offense was to have selected the wrong attorney.

As for Simes' contention that "since a contingent future interest exists when the creating instrument takes effect, its validity should be determined as of that time," buttressed by the weak assertion that it is a completely normal process, it should first be pointed out that it is not so normal in some states. Some states refuse to pass upon the validity of a gift under the Rule Against Perpetuities until prior estates have terminated. Even if it is conceded that the preponderance of the states follow the so-called normal process, it is unclear how such a fact weakens the policy arguments of the wait and see proponents as laid out in previous discussion. Furthermore, the wait and see doctrine was designed to get away from the "normal" absurdities of the rule that do nothing but frustrate a testator's intentions.

Finally, the wait and see doctrine has made important inroads into the orthodox possibilities test over the years even without the aid of legislation. For example, if a gift is made upon alternative contingencies, one of which is remote while the other is not, a wait and see approach is taken to see if the second contingency actually occurs; if it does, the gift is valid. Secondly, where the instrument contains a power to amend or a power to appoint, facts existing at the date of the amendment or appointment can be considered in determining the validity of the amendment or appointed interest. Since most well-drawn trusts contain such powers, thus giving rise to the benefit of wait and see, it is seen once again that it is only the poorly drafted trusts that do not get the benefit of this wait and see application.

of a nonspecialist draftsman: "To A for life, then to his children for their lives... jibber-jabber, jibber-jabber." It seems characteristic of draftsmen who do not understand the rule against perpetuities to lapse into incoherence after the second life estate if not before." Bregy, supra note 4, at 321.

51. Simes, supra note 40, at 184.
52. Id. Simes makes a similar assertion on p. 186 as if mere repetition will win over the doubting Thomases. Mechem makes similar assertions. See Mechem, supra note 5, at 979.
55. This has been called the "second look" doctrine. Actually, it's just another name for wait and see. See Minot v. Paine, 230 Mass. 514, 120 N.E. 167 (1918); Warren's Estate, 320 Pa. 112, 182 A. 396 (1936); 6 AMERICAN LAW OF PROPERTY § 24.35 (A.J. Casner ed. 1952). In Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952), wait and see was also applied to determine the validity of gifts in default of appointment.
56. There doesn't seem to be much left of Simes' normal process,
At common law, very little difficulty was experienced in establishing the measuring lives for the perpetuity period because of the initial certainty requirement. Any person who was alive at the commencement of the perpetuity period was a potential measuring life. But unless it could be said with certainty that the future interest would vest within his life or 21 years thereafter, his life was useless, irrelevant and, therefore, not a measuring life. Take the simple devise of "A for life, remainder to A's children who attain the age of 21." Any individual may be a potential measuring life, but because it cannot be said with absolute certainty that the future interest in A's children will vest, if at all, within 21 years of that individual's death, he does not qualify as a measuring life. On the other hand, A is a measuring life because it is absolutely certain that his children will attain the age of 21, if at all, within 21 years after his death. The presence of A in the dispositive instrument is not critical. At common law the measuring life need have no relationship either to the property or to the dispositive instrument. For example, in a devise to T's grandchildren who attain the age of 21, T's children are the measuring lives even though not mentioned in the will. Or, in a devise by T to such of his issue as are living 21 years after the death of the last survivor of A, B, C, D, (four healthy babies from families of known longevity), A, B, C, and D are the measuring lives even though they are completely unrelated to T and take nothing under the will.

One thing should be apparent from the preceding discussion: although at common law a measuring life may be any person in existence at the creation of the future interest, the initial certainty requirement immediately restricts the range of lives that one need consider for perpetuity purposes. Of necessity, the measuring lives must be related in some way to the vesting contingency. If we select any individual not so related to the vesting contingency, that individual may die a moment later without any relation to the vesting of the future interest. The commonly used statement that the measuring lives must be mentioned either expressly or by necessary implication in the dispositive instrument is true not by definition, but by operation of the initial certainty requirement.

**The Universal and Effective Life Approaches**

Professor Simes contends that by adopting the wait and see doctrine, the initial certainty requirement that restricts the range of measuring lives no longer applies; therefore, any person living at the creation of the interest can qualify as a measuring life for the purpose of the Rule Against Perpetui-

57. "The measuring lives need not be mentioned in the instrument, need not be holders of previous estates and need not be connected in any way with the property or the persons designated to take it." Leach, *supra* note 15, at 641.
ties. The implications of Simes’ position are clear from his examples:

CASE 1: A devise by T to “such of his descendants as shall be living 120 years after his death.”

At common law, this is clearly void for remoteness. But Simes maintains that under the Pennsylvania wait and see statute the gift is valid if at the end of 120 years a person can be found who was living when the testator died and lived for more than 99 years afterwards.

CASE 2: T devises Blackacre “to the B Church in fee simple; but if the land should ever cease to be used for church purposes, then to C in fee simple.”

In the second example, Simes observes that we might have to wait 120 years to determine whether or not the future interest violates the Rule Against Perpetuities.

At the other end of the spectrum is the so-called “effective life” approach offered by Professor Allan. Allan was the draftsman of the Western Australia Law Reform (Property, Perpetuities, and Succession) Act of 1962, which incorporated the wait and see recommendations of the English Law Reform Committee. Allan recognized the problem raised by Professor Simes and thought he had overcome the problem by providing in section 7(3) of the Act that “Nothing in this section makes any person a life in being for the purpose of ascertaining the perpetuity period unless that person would have been reckoned a life in being for that purpose if this section had not been enacted.” But he later questioned the wisdom of section 7(3).

According to the statute, we first ascertain the measuring lives as under common law, and then wait to see if actual vesting in fact takes place within 21 years of the termination of those lives. But Allan would argue somewhat along the following lines: “We only apply the wait and see doctrine if the gift fails at common law. But if the gift fails at common law, it is because there are no measuring lives to validate the gift; if there were, the gift would be valid and there would be no need to wait and see. It bears repeating that the only relevant lives at common law are those that validate the gift; all others are irrelevant. Therefore, it is submitted that section 7(3) emasculates the wait and see doctrine, because if the gift is invalid at com-

58. Thus, the “universal life” approach.
60. Id.
62. 11 Eliz. 2, No. 83.
63. LAW REFORM COMMITTEE, FOURTH REPORT (THE RULE AGAINST PERPETUITIES) PRESENTED BY THE LORD HIGH CHANCELLOR TO PARLIAMENT BY COMMAND OF HER MAJESTY (November 1956).
64. Allan, supra note 61,
mon law, there is no life who 'would have been reckoned a life in being for that purpose if this section had not been enacted.'

Relevant Life Approach

Professor Leach considers the foregoing propositions as "patently frivolous" and maintains that the Pennsylvania legislators never contemplated such "nonsense." In his famous 1960 law review article Leach cites the report of the Pennsylvania commissioners who recommended the statute which states that "this subsection . . . is intended to disturb the common law rule as little as possible, but to make actualities at the end of the period, rather than possibilities as of the creation of the interest, govern . . . ." Finally, Leach cites a book by the draftsman of the Pennsylvania statute which comments on the wait and see statute as follows: "[U]nder the statute, it is submitted that lives in being reasonably related to the gift should be used in measuring the period for actual vesting." It is apparent that Leach considers the measuring life problem to be no problem at all. With due respect, however, it is submitted that it is a problem that cannot be disposed of this easily.

Leach himself advert to relevant lives in describing the measuring lives under wait and see. Though Leach is quite fervent in his criticism of the theories of the anti-reformists, he nowhere explains what he means by the phrase "relevant lives," apparently considering such an explanation unnecessary and demeaning. However, an examination of how he handles hypothetical cases tendered by the anti-reformists indicates a discernible pattern.

Reconsider Case 1 offered by Professor Simes: a devise by T to "such of his descendants as shall be living 120 years after his death." Simes contended that the gift would be valid if, at the end of 120 years, it is possible to find any person at all who was alive at T's death and who died within 21 years of its vesting. Leach, on the other hand, indicates that the measuring lives by implication are those of T's descendants who are living at his

65. The thoughtful reader might question whether Allan's analysis applies to a Pennsylvania-type statute which is completely silent on the subject of measuring lives. But Leach, Morris, and others contend that what Western Australia makes explicit in their statute is implicit in any wait and see statute; that is, the measuring lives for determining validity under the wait and see doctrine are no different from those that are relevant under the common law rule. See, e.g., Morris and Wade, supra note 4.

66. Leach, supra note 46, at 1144.

67. Id.

68. Id.


70. Supra note 69, quoted in Leach, supra note 46, at 1144.

death.\textsuperscript{72} Consider the following acrid comment on Simes’ proposition: “Such an absurd result is not specifically prevented by the statute. But no doubt the Pennsylvania courts will interpret the statute intelligently and will determine the measuring lives substantially as they were determined before it was passed.”\textsuperscript{73} Mechem, who is even more adamant in his opposition to wait and see than Simes,\textsuperscript{74} avers that under wait and see the gift will be void on the theory that as no relevant lives are involved, the time of vesting is determined solely by the number of years mentioned. Since the number of years specified exceeds the period allowed by the rule, twenty-one, the gift is void.\textsuperscript{75}

Reconsider Case 2 offered by Professor Simes: \textit{T} devises Blackacre “to the \textit{B} Church in fee simple; but if the land should ever cease to be used for church purposes, then to \textit{C} in fee simple.” Leach contends that there are no measuring lives specified or implied (thus no relevant lives), and so the waiting period is limited to 21 years.\textsuperscript{76} Why is \textit{C} any less “relevant” in Case 2 than the descendants living at \textit{T}’s death in Case 1? Consider also in this respect Mechem’s hypothetical limitation:

CASE 3: \textit{T} devises to “\textit{W} for life, then to the children of \textit{B} who reach the age of 25.”\textsuperscript{77} Mechem questioned whether \textit{W} ought to be considered a measuring life in that there was no connection between the time she died and the time when \textit{B}’s children reached 21. Leach suggested that both \textit{W} and \textit{B} were measuring lives.\textsuperscript{78} Again, why is \textit{W} more relevant than \textit{C} in Case 2? It is respectfully submitted that things are not as crystal clear as Leach and other scholars would indicate.

\textbf{The Causal Relation Test}

A few years later, Morris and Wade proffered the “causal relation” test which they maintain is “inexorably deducible from the common law.”\textsuperscript{79} First, Morris and Wade concede that the common law Rule Against Perpetuities allows every life in existence to be used, but because of the initial certainty requirement, only those lives which as a matter of causality, restrict the vesting period of the future interest, can be considered measuring lives.\textsuperscript{80} They then assert that this causal relation is implicit under the common law rule and that each gift has its own inherent perpetuity period, whether under the

\textsuperscript{72} Morris and Leach, \textit{supra} note 19, at 90.
\textsuperscript{73} Id.
\textsuperscript{74} Mechem, \textit{supra} note 5.
\textsuperscript{75} Id. at 974.
\textsuperscript{76} Leach, \textit{supra} note 46, at 1145; see also Morris and Leach, \textit{supra} note 19, at 91.
\textsuperscript{77} Mechem, \textit{supra} note 5, at 977-82.
\textsuperscript{78} Leach, \textit{supra} note 46, at 1143-44.
\textsuperscript{79} Morris and Wade, \textit{supra} note 4, at 495-501.
\textsuperscript{80} Id. at 496.
common law or wait and see. Thus, in the transition to wait and see, the
important lives are those lives in being that are causally related to the vesting
contingency; but as these gifts fail under the common law, they will not nec-
essarily confine vesting within the perpetuity period. It is thus necessary to
wait to see whether the interest does in fact vest within the perpetuity period
measured by reference to those causally related lives. Morris and Wade
state that this is a “clear common law principle, as stated in the textbooks.”81

Morris and Wade are quite right in stating that every gift has its own
built-in vesting period, and that there is certainly a difference between lives
which govern the vesting period and those which are totally extraneous and
unconnected with it. But they themselves admit that it is the initial certainty
requirement that compels the selection of causally related lives at common
law. Their conceptual jump from the latter premise to the conclusion that
the causal relation test is inherent under wait and see is curious. It may
well be that a sensible approach to wait and see requires the use of the causal
relation test82 or some variant thereof, but to contend that it is “inexorably
deducible from the common law” is apocryphal.

How will the causal relation test operate in practice? As Allan has
pointed out, it depends on the “elasticity” of the concept of causation that
is taken.83 For example, examine Case 3: T devises to “W for life, then
to the children of B who reach the age of 25.” Leach maintained that both
W and B should be the measuring lives. One might intuitively feel that
Leach is correct, but it is difficult to see how W’s life is causally related to
the vesting contingency, i.e., B’s children attaining the age of 25.84 Con-
sider the following case:

CASE 4: T devises property to the first son of A (a bachelor) to
imbibe 3 quarts of beer at one sitting.

Leach would certainly contend that A is the measuring life, but does A’s
life have any causal relation to the drinking by his son of 3 quarts of beer?

CASE 5: T devises property to such of A’s grandchildren that marry.
Suppose that at T’s death A and one child of A, B, are alive, and that B
has no children. Suppose also that A has another child, C, after T’s death.

81. Id. at 499. No citations pertaining to this clear common law principle are
supplied by Morris and Leach.
82. Kentucky’s wait and see statute contains the causal relation test which excludes
as measuring lives those “lives whose continuance does not have a causal relationship
to the vesting or failure of the interest.” KY. REV. STAT. § 381.216 (1972).
(1965).
84. One might also argue that B’s life is not causally connected with his children’s
attaining the age of 25, but this would be an extremely harsh construction of causation.
B is causally related to the vesting contingency in that for his children to reach a certain
age, they must first be brought into the world, and that’s where B comes in.
A then dies. Finally, suppose that C has children and then predeceases B. Morris and Wade would argue that B’s life is not causally related to the vesting of the interests of the children of C; that is, that B has nothing to do with the period within which C’s children must be born and marry. Such a construction could be fatal under a Pennsylvania-type statute that retains the all-or-nothing rule as to class gifts if at the expiration of 21 years after A’s death, C has children that are still living. Clearly, such a result is unduly harsh and restrictive and it seems unreasonable to exclude the children of C if in fact they are born and marry within 21 years of the death of A or B.

The English Solution

Great Britain apparently grew weary of the measuring life controversy and enacted wait and see legislation which specifies those individuals that may be used as measuring lives. The statute is very complex and in an effort to cover every conceivable case, it includes many lives that are quite inappropriate with the result that the waiting period is unnecessarily extended. On the other hand, the statute in some cases excludes clearly relevant lives and the waiting period is thus unnecessarily restricted. In de-

85. Morris and Wade, supra note 4, at 498.
86. Professor Dukeminier, the draftsman of the Kentucky wait and see-cy pres statute (see supra note 82), also rejects the strict construction by Morris and Wade. See Dukeminier, supra note 4, at 66-67; Allan, supra note 83, at 114.
88. Id. § 3(5) provides that the following shall be measuring lives:
   (a) The person by whom the disposition was made;
   (b) a person to whom or in whose favour the disposition was made, that is to say—
       (i) in the case of a disposition to a class of persons, any member or potential member of the class;
       (ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied,
       (iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;
       (iv) in the case of a special power of appointment exercisable in favour of one person only, that person or, where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;
       (v) in the case of any power, option or other right, the person on whom the right is conferred;
   (c) a person having a child or grandchild within sub-paragraphs (i) to (iv) of paragraph (b) above, or any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent fall within those sub-paragraphs;
   (d) any person on the failure or determination of whose prior interest the disposition is limited to take effect.
89. Morris and Wade, supra note 4, at 501-08.
90. Id.
fense of the statute, it may be argued that it minimizes the uncertainty which the wait and see doctrine undoubtedly introduces by clearly dictating the measuring lives, but this writer feels that the convenience of certainty has been achieved at too high a price. Of course, those who subscribe to the “universal life” approach of Simes or the “effective life” approach of Allan must, of necessity, be in favor of some type of detailed provision on measuring lives.91

**The Restricted Wait and See Approach**

In addition to the broad Pennsylvania-type wait and see statute, some states have opted for a restricted wait and see statute which also takes the uncertainty out of the measuring life problem. For example, the Massachusetts statute, enacted in 1954, provides:

In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this section an interest which must terminate not later than the death of one or more persons is a life estate even though it may terminate at an earlier time.92

Identical statutes have also been enacted in Connecticut, Maine, and Maryland.93

This restricted wait and see statute makes explicit the necessary wait and see period: it requires that the validity of the gift be determined on the basis of facts existing at the end of the life estate(s).94 One example should suffice:

**CASE 6:** T devises property to A (a bachelor) for life, remainder to A’s children that attain the age of 25.

In the hypothetical example, it is necessary to wait until A’s death to determine the validity of the remainder on the basis of facts then existing. At that time, if all of A’s children were born before T’s death, or all the children are at least 4 years old, the remainder is valid. The remainder would fail if any child born after T’s death is less than 4 years old at A’s death.

The restricted wait and see statute should present little difficulty in interpretation and application but, as it appellation indicates, it is restricted

91. Assuming, of course, they are generally in favor of the wait and see doctrine.
94. The statute also covers interests that do not technically follow a life estate, but are limited to take effect after the termination of some life or lives in being. If the reader desires more examples, see Leach, supra note 1, at 1359.
in scope. The future interest must be "limited to take effect at or after the
determination of one or more life estates in or lives of, persons in being." Thus, a devise by "T "to his issue living when the magic gravel pit is worked out" will still fail under the statute. But, on the other hand, the statute will cover the vast majority of cases.

CONCLUSION

The wait and see doctrine serves the policy objective of balancing the
desires of the present and future generations, and does so without producing
the unnecessarily arbitrary and capricious results that occur under the ortho-
dox Rule Against Perpetuities. Admittedly the selection of appropriate
measuring lives for perpetuities purposes is going to cause some uncertainty
until clarified by judicial interpretation. Yet this is a proper forum for the
resolution of this problem as it is virtually impossible to draft legislation that
"anticipates every twist and turn of an admittedly abstract expression of pub-
lic policy on dead-hand control of wealth."95 Furthermore, if the statutes
are to be construed to achieve sensible results, clearly the approaches of
Simes and Allan are going to have to be soundly rejected. In the final anal-
ysis, Professor Leach is probably correct when he says:

If my friend Simes and I were construing that statute, we wouldn't
have any trouble making it work well rather than badly; we
wouldn't let it produce capricious results; and in the first case that
came before us we would lay down our fairly comprehensive views
as to application of the act as guide lines to the bar. Why should
we doubt that the Pennsylvanina court is as smart as we are? But,
I'll agree, it's going to take litigation to establish the principles.96

THOMAS W. SCHMITT

95. Lynn, Reforming The Rule Against Perpetuities: Choosing The Measuring
96. Leach, supra note 1, at 1352.