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The Uniform Statutory Rule Against Perpetuities: Oregon Joins Up

Lawrence W. Waggoner

University of Michigan Law School, waggoner@umich.edu

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Uniform perpetuity reform is on the march, and Oregon has joined the parade. On January 1, 1990, the Uniform Statutory Rule Against Perpetuities (Uniform Act) became effective in Oregon. Although promulgated only three years ago, the Uniform Act has been enacted in over twenty percent of the states and appears to be on its way toward enactment in several others.
Prior to the adoption of the Uniform Act, Oregon followed the common-law Rule Against Perpetuities (common-law Rule).\(^4\) Noted for its unjust consequences, the common-law Rule disregards actual events and invalidates a contingent (nonvested) future interest merely on the grounds of what might happen. Regardless of what actually happens, an interest is invalid at common law if it is not certain to vest (or terminate) within twenty-one years after the death of a life in being at the creation of the interest.

Oregon practitioners and their clients will appreciate the fact that the Uniform Act not only eliminates the unjust consequences of the common-law Rule but also eliminates wasteful perpetuity litigation. Most of all, perhaps, Oregon practitioners will appreciate the fact that the Act does not require them to learn a complicated new scheme of perpetuity law.

I. OVERALL DESIGN OF THE UNIFORM ACT

In overall design, the Uniform Act achieves its several objectives by employing the so-called wait-and-see/deferred-reformation strategy of perpetuity reform.\(^3\) The Act contains three principal features insofar as donative transfers are concerned.\(^6\)

A. Preservation of Common-Law Validity

The common-law Rule has two sides — a validating side and an invalidating side. Injustice under the common-law Rule flows from the invalidating side. Under the validating side, a contingent (nonvested) interest is valid from the moment of creation if it is

the Board of Governors of the American College of Real Estate Lawyers, and the Joint Editorial Board for the Uniform Probate Code.

The Joint Editorial Board for the Uniform Probate Code also has voted to make the Uniform Act an official part of the Uniform Probate Code as Part 9 of Article II.

On March 8, 1990, the California Law Revision Commission voted to adopt a tentative recommendation for enactment of the Uniform Act in California, enactment also is supported by the Executive Committee of the Estate Planning, Trust and Probate Section of the State Bar of California.


5. Oregon practitioners and judges will find that the Official Comments to the Uniform Act contain a detailed, authoritative discussion of the Act, with illustrations. A less-detailed but still helpful section-by-section analysis is contained in Waggoner, The Uniform Statutory Rule Against Perpetuities, 21 REAL PROP. PROB. & TR. J. 569, 591-602 (1986).

6. Another principal feature of the Act is that it exempts commercial transactions from the Rule Against Perpetuities.
then certain to vest or terminate within twenty-one years after the
death of an individual then alive.

The Uniform Act continues the validating side of the com-
mon-law Rule. The Act sustains the validity of trusts or other
property arrangements that satisfy the common-law Rule.7 Put dif-
ferently, the Act does not impose a perpetuity scheme discordant
with accepted common-law practice.

Because of this central feature, considerable benefits accrue to
trusts or other property arrangements that satisfy the common-law
Rule. A straightforward benefit is that, from the moment of cre-
ation, the property arrangement is valid under the Act. In our mo-
 bile society, this is a significant benefit. For example, a
testamentary trust drawn by an Oregon lawyer in compliance with
accepted common-law practice not only will be valid in Oregon but
also will be valid if the client dies domiciled in (or owns land cov-
ered by the trust in) a common-law jurisdiction. Conversely, a tes-
tamentary trust drawn in compliance with accepted common-law
practice by a lawyer in a common-law jurisdiction also will be valid
if the client dies domiciled in (or owns land covered by the trust in)
Oregon or any other state that has adopted the Act.

Compliance with the common-law Rule confers another very
attractive benefit: It renders the trust or other property arrange-
ment invulnerable to any possible future reformation suit under the
Act's deferred-reformation feature. Only interests whose validity is
governed by the wait-and-see element are vulnerable to reformation
under the Act. Reformation is never necessary — or permitted —
for dispositions that are valid initially under the common-law
Rule.8

In estate-planning practice, then, every incentive remains to
comply with the common-law Rule, through the use of a standard
perpetuity saving clause, if appropriate, or one tailored to the par-
ticular trust or property arrangement. Oregon practitioners who
successfully draft for initial validity, as most do by far, can con-
tinue with business as usual. They need not learn a new and com-
plicated scheme of perpetuity law and they need not make any
adjustment in their forms or practice.9

7. Uniform Act, supra note 1, §§ 1(a)(1), 1(b)(1), 1(c)(1); Oregon enactment, supra
note 2, §§ 1(1)(a), 1(2)(a), 1(3)(a).
8. Uniform Act, supra note 1, § 3; Oregon enactment, supra note 2, § 3.
9. Though not required by the Uniform Act, an adjustment to current practice that
has fallen into use under the Act in some quarters is to adjust the standard perpetuity
B. Easy-to-Administer Wait-and-See Element

Injustice under the common-law Rule flows from its invalidating side. To eliminate that injustice, the Uniform Act alters the invalidating side by installing a workable wait-and-see element. To be sure, in the overall scheme of things, the wait-and-see element will apply infrequently. Most trusts or other property arrangements are initially valid and will continue to be drafted for initial validity under the Act. Only the somewhat exceptional case of a failure to ensure initial validity brings into play the wait-and-see element.

Wait-and-see is a salvage strategy for trusts or other property arrangements that would have been invalid at common law. Rather than invalidating such interests at creation (the result at common law), wait-and-see allows a period of time, called the permissible vesting period, during which the contingencies are permitted to work out harmlessly.10 Estate planners will notice that the wait-and-see strategy works in the nature of a perpetuity saving clause. Like a perpetuity saving clause, the wait-and-see strategy performs a margin-of-safety function. Wait-and-see in effect supplies a perpetuity saving clause to trusts or other property arrangements that failed to contain one in the first place.

Under the Uniform Act, the permissible vesting period is ninety years. Prior to the Act, conventional wisdom assumed that the permissible vesting period had to be measured on a case-by-case basis by using actual measuring lives (all of whom must have been in being at the creation of the interest) plus twenty-one years. Specifically, under the actual-measuring-lives approach, a group of persons — called the measuring lives — is identified. Once the group is identified, the lives of all its members are traced to see which one outlives the others and when that survivor dies. The permissible vesting period extends twenty-one years beyond the death of that last surviving measuring life.

From its inception, the actual-measuring-lives approach has

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been plagued by several problems, not the least of which was how to identify the measuring lives in individual cases.\(^\text{11}\) No satisfactory method ever emerged. Academic controversies raged over the issue. Rival methods were advanced. One method specified the measuring lives by a formula — those having a "causal relationship" to the vesting or failure of the interest in question. Because the meaning of "causal relationship" and its application to individual cases is uncertain,\(^\text{12}\) that method is a litigation breeder\(^\text{13}\) and was found unsatisfactory.\(^\text{14}\) Another method specified the measuring lives by statutory list — such as the transferor, the beneficiaries of the disposition, and the beneficiaries' parents and grandparents.\(^\text{15}\) Because a statutory list must apply to a virtually unimaginable variety of dispositions, the statutory-list method also was found unsatisfactory. An ambiguity-free formulation of the statutory-list method would have necessitated an exceedingly complex set of statutory provisions.\(^\text{16}\)

By abandoning the use of actual measuring lives and using in-

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11. Another problem plaguing the actual-measuring-lives approach was that of tracing. No matter how the measuring lives were to be identified, the lives of those actual individuals would have to be traced to determine which one was the longest survivor and when he or she died.

The tracing and identification problems were exacerbated by the premise, seemingly accepted under both methods, that the measuring lives cannot always remain a static group, assembled once and for all at the beginning. Instead, individuals who were once measuring lives must be dropped from the group if certain events happen (such as the individual's divorce, adoption out of the family, or assignment of his or her beneficial interest to another); conversely, individuals who were not among the initial group of measuring lives must be included later if certain events happen (such as marriage, adoption into the family, or receipt of another's beneficial interest by assignment or succession) and if they were living when the interest in question was created. This instability within the group of measuring lives heightens the potential for wasteful litigation at one point or another during the running of the permissible vesting period.


13. The litigation-breeding character of the "causal-relationship" formula is demonstrated by the recent Rhode Island case of Fleet Nat'l Bank v. Colt, 529 A.2d 122 (R.I. 1987), where litigation arose some 66 years into the term of a trust to determine who the measuring lives were under a causal-relationship-type wait-and-see statute. The trust in the *Colt* case was upheld, but there would have been no need for the wasteful litigation had the case been governed by the Uniform Act. The Act's permissible vesting period is measured by a flat period of years rather than by reference to "causal-relationship" lives plus 21 years.

14. Nevada had a causal-relationship statute prior to repealing it and enacting the Uniform Act.\(^\text{16}\)

15. A similar list is set forth in *Restatement (Second) of Property* (Donative Transfers) § 1.3(2) (1983).

16. A draft of such a set of statutory provisions was prepared for the consideration of, but not adopted by, the Drafting Committee of the Uniform Act. The draft is set forth in
stead a permissible vesting period of a flat ninety years,\textsuperscript{17} the Uniform Act overcame the difficulties previously associated with the actual-measuring-lives approach. The ninety years is not an arbitrarily derived period. It is designed to represent a reasonable approximation of the average period of time reached were actual measuring lives to have been used,\textsuperscript{18} which also coincides with an approximation of the average margin-of-safety period provided by standard perpetuity saving clauses.\textsuperscript{19}

The use of a flat period of years eliminates the clutter that previously plagued the wait-and-see strategy — the problems of identifying, tracing, and possibly litigating the make-up of a sometimes-fluctuating group of measuring lives. The expiration of a permissible vesting period measured by a flat period of years is litigation-free, easy to determine, and unmistakable.

\textbf{C. The Deferred-Reformation Feature}

By design, the first two features of the Uniform Act not only

\begin{footnotesize}
\textsuperscript{17} Uniform Act, supra note 1, § 1(a)(2); Oregon enactment, supra note 2, § 1(1)(b).
\textsuperscript{18} Briefly, the derivation of the 90-year period is premised on the proposition that the youngest measuring life, which is the one likely to live the longest, normally would be the transferor's youngest descendant in being at the transferor's death. Using four hypothetical families deemed to be representative of actual families, it was determined that, on average, the transferor's youngest descendant in being at the transferor's death — assuming the transferor's death to occur between ages 60 and 90, which is when 73% of the population dies — is about 6 years old. Waggoner, supra note 16, ¶ 703.4, at 7-17. The remaining life expectancy of a 6-year-old is about 69 years. U.S. Bureau of the Census, Statistical Abstract of the United States: 1986, Table 108, at 69 (106th ed. 1985). The 69 years, plus the 21-year tack-on period, gives a permissible vesting period of 90 years. For further elaboration, see Waggoner, The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period, 73 CORNELL L. REV. 157 (1988).
\textsuperscript{19} The term "standard perpetuity saving clause" refers to one in which the descendants of the transferor (or of an ancestor of the transferor) in being at the creation of the trust (either by direct designation or by virtue of a designation of the beneficiaries of the trust then in being), plus 21 years, are used to measure a period of time that provides an adequate margin of safety in which to allow the contingencies in the trust's future interests to work out harmlessly. Almost all family-oriented trusts, at some point, create a beneficial interest in favor of a multiple-generation class such as the transferor's descendants or issue. If the transferor has no descendants or issue, a family-oriented trust likely will be for the benefit of a collateral line of descent (such as descendants of the transferor's parents). There is no reason to think that the age of the youngest descendant, on average, in a collateral line would be appreciably different from the age of the 6-year-old descendant of the transferor upon whose remaining life expectancy the 90-year permissible vesting period of the Uniform Act is built. See supra note 18.
\end{footnotesize}
eliminate the injustice inherent in the invalidating side of the common-law Rule but do so without litigation. The litigation-free character of these features is thus in accord with one of the main objectives of the Uniform Act, that is, elimination of perpetuity cases of the wasteful or nonpurposive variety.

No perpetuity reform can eliminate purposive perpetuity cases. When the actual post-creation events do not resolve the contingencies within the permissible vesting period, litigation becomes unavoidable. Thus, application of the third principal feature of the Act — the deferred-reformation feature — will require litigation (or court approval of a settlement). But application of the deferred-reformation feature will be infrequent, and when it happens the litigation will be of the purposive variety. Under the deferred-reformation feature, a contingent (nonvested) future interest (or power of appointment) that is subject to the wait-and-see element and that does not work out validly within the ninety-year period becomes invalid but is subject to reformation to make it valid.²⁰

Application of the deferred-reformation feature will be infrequent. Of the fraction of trusts and other property arrangements that are incompetently drafted, and thus fail to meet the common-law requirements for initial validity,²¹ almost all of them will have terminated by their own terms long before a right to reformation arises. If, against the odds, a right to reformation does arise, it will be found easier than perhaps anticipated to determine how best to reform the disposition.²² The court is given two criteria with which to work: (i) the transferor's manifested plan of distribution, and (ii) the allowable ninety-year period. Because governing instruments are where transferors manifest their plans of distribution, the imaginary horror of courts being forced to probe the minds of long-dead transferors will not materialize.²³

²⁰. Uniform Act, supra note 1, § 3; Oregon enactment, supra note 2, § 3.
²¹. Remember that reformation is permitted only for dispositions that would have been invalid at common law. A disposition that complies with the common-law Rule is permitted fully to run its course without the interference of a reformation suit, even if the term of the trust exceeds 90 years. In other words, if a reformation suit is brought, a defense against it would be that the disposition did not violate the common-law Rule in the first place.
²². Note that reformation under Section 3 is mandatory, not up to the discretion of the court. Consequently, as noted in the Official Comment to Section 3, the common-law doctrine of infectious invalidity is superseded by the Act.
²³. The Official Comment to section 3 of the Uniform Act authoritatively discusses and illustrates the manner in which trusts or other property arrangements should be reformed. See also infra text accompanying notes 32, 33.
The theory of the Act is to defer the right to reformation until reformation becomes truly necessary. The basic rule is that the right to reformation does not arise until there is an invalidity, which does not occur until the expiration of the ninety-year permissible vesting period. Because almost all trusts and other property arrangements will have terminated by their own terms long before the expiration of the ninety years, the deferred approach to reformation substantially reduces the potential number of reformation suits and thereby limits perpetuity litigation to purposive cases. It also is consistent with the saving-clause principle embraced by the Act. Deferring the right to reformation until the permissible vesting period expires is the only way to grant every reasonable opportunity for the donor's disposition to work itself out without premature interference.\(^2\)

II. SAMPLE RECENT PERPETUITY CASES

To bring the above features of the Uniform Act into concrete focus, I propose now to examine a few recent perpetuity cases. The cases arose in non-Uniform Act jurisdictions. As I shall demonstrate, the cases would not have arisen had they been governed by the Act, for the Act basically establishes a "judicial hands-off" approach on perpetuity questions. The Act provides a nearly litigation-free environment insofar as perpetuity matters are concerned.

A. Merrill v. Wimmer\(^2\) — A Case of Injustice and Wasteful Perpetuity Litigation

The Facts. The facts of Merrill v. Wimmer present a type of perpetuity violation thought to be quite common — an age contingency in excess of twenty-one relating to grandchildren.

Newell M. Merrill died, leaving a will that created a residuary trust. The terms of the trust were that the income was to be divided among Newell’s three children — Judith, Dennis, and Walter — during the term of the trust. The trust was to terminate, in part, "when my youngest grandchild reaches the age of twenty-five (25) years."

\(^2\) At the same time, the Act is not inflexible. It grants the right to reformation before the expiration of the 90-year permissible vesting period when it becomes necessary to do so or when there is no point in waiting that period out. The details of this feature of the reformation section are discussed in the Official Comment to section 3 of the Uniform Act, supra note 1, and in Waggoner, supra note 5, at 597-98.

\(^2\) 481 N.E.2d 1294 (Ind. 1985).
Newell was survived by his three adult children — Judith, Dennis, and Walter — and by seven grandchildren ranging in ages from eleven to twenty-nine.

The Holding. The court held that Newell’s residuary trust violated the Rule Against Perpetuities and was invalid, causing the estate to pass by intestate succession. The ground for the invalidity was that it was possible that Newell’s youngest grandchild might be born after Newell’s death (and hence would not himself or herself be a life in being) and might reach age twenty-five more than twenty-one years after the death of the last survivor of Newell’s three children and seven grandchildren who were lives in being.

In actual fact, Newell’s trust was a quite reasonable one. Common experience tells us that parents routinely live to see all their children reach the age of twenty-five. It is very likely that Judith, Dennis, and Walter, who were in being at Newell’s death, all will live to celebrate the twenty-fifth birthday of their youngest child (Newell’s youngest grandchild). It is even more likely that the twenty-fifth birthday of Newell’s youngest grandchild will occur during the life of (or within twenty-one years after the death of) at least one of the three children and seven grandchildren who were alive at Newell’s death, the youngest of whom was then eleven years old.

To say this in “perpetuity language,” it is very likely that the remainder interests would vest within a life in being, and it is a near certainty that they would vest within a life in being plus twenty-one years.

The point is that Newell Merrill’s intent was totally defeated, not because the terms of his trust were unreasonable, but because he happened to pick a lawyer who failed to insert an appropriate perpetuity saving clause into his will. The court itself acknowledged as much, by noting: “The generally recognized method of avoiding total defeat of the testator’s general plan is by means of a savings clause in the will itself, which unfortunately was not provided here.”26 The failure to provide an appropriate perpetuity saving clause was the fatal feature of Newell’s residuary trust, not the terms of the trust itself.

The Uniform Act. Had Newell Merrill’s trust contained a perpetuity saving clause, the trust would have been valid under the Act. In the absence of such a clause, the Act would have provided

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26. 481 N.E.2d at 1298-99 n.2.
the trust the advantages of one. Without litigation, the easy-to-ad- minister permissible vesting period would have assured that his in- tent would not have been defeated.

No Merrill-type trust, created under Oregon law on or after January 1, 1990, will ever disgrace the Oregon state reports.

B. Pound v. Shorter27 — Another Case of Injustice and Wasteful Perpetuity Litigation

The Facts. Pound v. Shorter entails the classic unborn-widow problem, a problem much discussed in the perpetuity literature. Elizabeth Shorter died in 1929. Her will created a trust to pay the income to her son for life, then income to her son’s wife for her life, then corpus to the descendants of Elizabeth’s brother and sister. The son died in 1987, survived by his wife. The trustee filed a petition to determine the validity of the trust under the common-law Rule Against Perpetuities, followed in Georgia.

The Holding. The court upheld the trial court’s determination that Elizabeth’s trust violated the common-law Rule because it was possible that the son’s wife might not have been in being in 1929, when the trust was created.

The actual facts were that the son married in 1953 and died in 1987. The son’s wife was in fact “in being” in 1929, when his mother, Elizabeth, died.28 Thus, the court defeated Elizabeth Shorter’s intention on the ground of a remotely possible post-creation event that at the time of the lawsuit was known not to have happened.

If Elizabeth’s will had only included a standard perpetuity saving clause, her intention would not have been defeated. More importantly, no lawsuit questioning the trust’s validity would have been necessary.

The Uniform Act. The Uniform Act would have provided Elizabeth Shorter’s trust the advantages of a perpetuity saving clause. Her estate would not have been subject to costly litigation and her intention would have been carried out unchallenged.

After January 1, 1990, the Uniform Act ensures that no unap-

27. 377 S.E.2d 854 (Ga. 1989).
28. The court’s opinion does not indicate this, but a letter from one of the attorneys in the case to Professor Waggoner states that she was in being in 1929, when the testatrix died. Letter from J. Warren Ott, of the Atlanta law firm of King & Spaulding, to Lawrence Waggoner (July 13, 1989).
pealing cases such as *Pound v. Shorter* ever will appear in the Oregon state reports. Nor will such a case appear in the Georgia reports, for Georgia—the state whose supreme court decided the *Pound* case—subsequently enacted the Uniform Act.

C. Estate of Anderson v. Deposit Guaranty National Bank—

A Just Result, but At the Cost of Wasteful Litigation

*The Facts.* The facts of *Estate of Anderson v. Deposit Guaranty National Bank* are quite simple enough. Charles Anderson's will, drafted by a lawyer, created a trust to last for twenty-five years from the date of the admission of the will to probate. The income was to be used for the education of the descendants of Charles' father. The trust was to terminate at the end of the twenty-five-year period, at which time the trust corpus was payable to Charles' nephew, Howard Davis, or, if Howard was not then living, to the heirs of Howard's body.

Charles Anderson, a childless bachelor, died in 1984. He had a brother and a sister, but they predeceased him. Charles was survived by his brother's four children and six grandchildren; and by his sister's child and four grandchildren. In all, fifteen descendants of Charles' parents survived Charles.

*Violation of Common-law Rule.* Charles' trust violated the common-law Rule Against Perpetuities. The reason was that the contingent remainder in the corpus might not vest within a life in being plus twenty-one years because all fifteen of the surviving descendants might die within four years after Charles' death!

*The Actual Holding.* The Supreme Court of Mississippi expressed grave impatience with the fact that the common-law Rule would strike down this quite reasonable trust. The court took two bold steps to avoid that result: The court judicially adopted the wait-and-see method, using causal-relation lives; and the court

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29. 541 So. 2d 423 (Miss. 1989).
30. The use of the "causal-relationship" formula may breed litigation in future Mississippi perpetuity cases. See supra note 13. Nevertheless, a judicial adoption of wait-and-see cannot be expected to forego the use of actual measuring lives to measure the permissible vesting period.

A striking feature of the *Anderson* case is how closely the facts fit the rationale of the 90-year period of the Uniform Act. The youngest measuring life under the actual-measuring-lives approach to wait-and-see and under standard perpetuity saving clauses is likely to be the transferor's youngest descendant living at the transferor's death (or, in the *Anderson* case, the youngest descendant of the transferor's parents). See Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period,* 73 Cor-
sanctioned reformation by means of judicially inserting a perpetuity saving clause into the instrument.

The Mississippi Supreme Court is to be commended for developing a solution that upheld Charles’ trust without any change in its terms. Charles’ intent was not defeated or altered in any way. Case-by-case adjudication had its costs, however: the cost of the lawsuit and the appeal all the way to the state supreme court.

Uniform Act. Had the Anderson case been governed by the Uniform Act, Charles Anderson’s quite reasonable trust would have gone into effect as he intended, the trust would now be using the income for the education of the descendants of his father as he intended (without any possible deduction of lawyer’s fees to pay for both sides of a perpetuity challenge), and at the end of the twenty-five year period the corpus would be distributed.

After January 1, 1990, no Oregon lawyers will collect fees to argue different sides of a case such as Anderson. No Oregon court ever will hear of a perpetuity problem in such a trust.

D. Arrowsmith v. Mercantile-Safe Deposit and Trust Co. —
A Case of Injustice and Wasteful Perpetuity Litigation;
A Possible Future Reformation Suit

The Facts. Arrowsmith v. Mercantile-Safe Deposit and Trust Co. is a more complicated case than the others. George H.C. Arrowsmith died in 1983, leaving a will dated July 29, 1982. George's
1982 will, drafted by a lawyer, expressly revoked all prior wills and exercised a testamentary power of appointment over some $7 million in assets of an irrevocable inter-vivos trust created by his mother in 1953.

By his will, George exercised his power of appointment by creating a trust. Most of the corpus of that trust was to be held for George's three children — Edith Ann (born in 1959), Jeffrey (born in 1961), and Stephen (born in 1962). At George's death, therefore, Edith Ann was about twenty-four years old, Jeffrey was about twenty-two, and Stephen was about twenty-one. None had children of their own.

George's trust did not grant the children a right to the income from their respective shares. Rather, the trustee was given the discretionary power to pay the income to them or accumulate it; and the trustee also was given the discretionary power to invade the corpus of each child's share for the child's support and maintenance.

Upon the death of each child, that child's share was to be divided among that child's then-living descendants, per stirpes; if none was then living, then to that child's then-living brothers or sisters, with the share of any deceased brother or sister going to that sibling's then-living descendants, per stirpes.

The Actual Holding. The Maryland court invoked the common-law Rule Against Perpetuities and held the remainder interests in the corpus of each child's share to be invalid. In addition, the trustee's discretionary powers over income and corpus also were invalid. In result, the court held that George's trust was entirely invalid, and the property was ordered distributed outright to each child in one-third shares. George's intention was fully defeated.

Uniform Act. The application of the Uniform Act to this case is simplicity itself. No immediate litigation would have been required, and more than likely no litigation ever would be required. The trust would have gone into effect as written, with the discretionary powers of the trustee fully operable for up to sixty years.\(^{32}\)

Remember the ages of George's children at his death: Edith

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32. At common law, and under the Uniform Act, the perpetuity period begins running when George's mother created the original trust, in 1953. *Uniform Act, supra* note 1, § 2; *Oregon enactment, supra* note 2, § 2. Under the Uniform Act, this would mean that, as of George's death in 1983, sixty years would remain of the permissible vesting period before any interest or power in the trust would become invalid and subject to reformation.
was twenty-four, Jeffrey was twenty-two, and Stephen was twenty-one. Add sixty years to their ages and you get age eighty-four for Edith, age eighty-two for Jeffrey, and age eighty-one for Stephen. Edith’s share would be valid and distributed to her descendants if she dies at age eighty-four or under; Jeffrey’s share would be valid and distributed to his descendants if he dies at eighty-two or under; Stephen’s share would be valid and distributed to his descendants if he dies at eighty-one or under.

If all three children die at or under these ages, *no court contact at all would be required under the Uniform Act.* Statistically speaking, each child is more likely than not to die under these ages, given that life expectancy now is seventy-five years on average. This is not to suggest, of course, that it is not possible for one, two, or all three of these children to live beyond their low eighties.

**Deferred Reformation Under the Uniform Act.** Because there is a possibility in this case that judicial intervention really would become necessary, I now turn to that possibility to see how the deferred-reformation feature of the Uniform Act would operate. Suppose, then, that Stephen lives beyond eighty-one. A reformation suit then would be in order as to Stephen’s share.

How would the court reform? The reformation section of the Uniform Act requires the court to be guided by the transferor’s “manifested plan of distribution.” Transferors manifest their plans of distribution in the language of the instrument. The written terms of the trust will provide the guidance as to how to reform “in the manner that most closely approximates the transferor’s manifested plan of distribution,” within the constraint of vesting all interests within the permissible vesting period.

One of the advantages of a Uniform Act is that the Official Comments give guidance to courts in a variety of cases. As to a case such as *Arrowsmith,* the court would find considerable guidance in those Comments. In fact, Example (2) in the Comment to section 3 is nearly exactly on point. The Court will find that Stephen is like “Z” in that example. Working under that example, the court should be willing to approve the following modifications to the terms of Stephen’s share:

1. the court will eliminate the trustee’s discretionary power over the income and corpus as of the expiration of the permissible

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33. *Uniform Act,* supra note 1, § 3; *Oregon enactment,* supra note 2, § 3.
vesting period, probably substituting for Stephen a vested right to the income for the remainder of his life; and

(2) the court will vest the remainder interest in the corpus of Stephen’s share in his descendants, per stirpes, who are living as of the expiration of the permissible vesting period, with possession delayed until Stephen dies (which should not be very many more years).

III. Conclusion

The Uniform Act eliminates the injustice caused by the common-law’s approach of invalidating interests because of what might happen, shifts the test of invalidity to what actually happens, and creates a nearly litigation-free environment insofar as perpetuity matters are concerned. Under the Uniform Act, dispositions such as involved in Merrill v. Wimmer, Pound v. Shorter, Estate of Anderson, and Arrowsmith disappear from the adjudicative scene. Like the Merrill, Pound, and Anderson trusts, most trusts, by far, will terminate by their own terms far short of the expiration of the vesting period permitted by the Act and never will need to be litigated. This limits perpetuity litigation to the purposive variety, which for the most part confines perpetuity litigation to those few cases in which the permissible vesting period actually is exceeded and reformation is truly necessary.34

The Uniform Act achieves the objective of eliminating wasteful, nonpurposive perpetuity litigation. This is one of the Act’s great strengths. Under the wait-and-see/deferred-reformation approach of the Uniform Act, almost none of the perpetuity cases that have ever been litigated in this country would have been litigated.

34. Under the Act, events might cause the Arrowsmith trust to be this type of a case in the future; but the actual round of litigation that arose in that case was premature and would not have arisen under the Uniform Act. An occasional purposive case with perpetuity overtones also can arise in a different context. An example would be where the constructional preference for validity plays a part in resolving an ambiguity that would have had to be resolved no matter what perpetuity law or perpetuity reform is in effect.