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# PERPETUITIES: A PERSPECTIVE ON WAIT-AND-SEE\*

Lawrence W. Waggoner\*\*

Professor Dukeminier and I agree on most of the important points concerning perpetuity law and perpetuity reform. We agree that the Rule Against Perpetuities still serves a socially useful function of limiting dead hand control, and should not be abolished. We also agree that the common law Rule is needlessly harsh and should be softened. Finally, we agree on the type of reform that is most desirable—wait-and-see. Our only disagreement concerns the best method of marking off the wait-and-see perpetuity period—the period of time during which dispositions that would have been invalid under the common law Rule are to be given the chance to work themselves out. There are substantial parts of his argument on this latter point, set forth in *Perpetuities: The Measuring Lives*,<sup>1</sup> that I do not find convincing.

## I. WAIT-AND-SEE MEASURING LIVES: THE COMMON LAW PROCESS?

Professor Dukeminier's ultimate conclusion is that the only principled way suggested so far of measuring the wait-and-see perpetuity period is by reference to lives who are causally related to (can affect) any aspect of the vesting of the interest. All other sets of lives that have been advanced—his main target is the set of lives listed in the Restatement (Second) of Property<sup>2</sup>—are arbitrary and unprincipled. Professor Dukeminier's proposed set of lives is principled because it is derived from the common law Rule Against Perpetuities.

The common law Rule, as formulated by Gray, is that “[n]o 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>3</sup> The “life in being” to which Gray's formulation refers has traditionally and misleadingly been called the “measuring life.” The term “measuring life” suggests that there is a “perpetuity period” (of a life in being plus twenty-one years) that is measured off in time in each given case. This is not so. The true nature of the common law Rule is that it constitutes a mechanical test by which the validity or invalidity of an interest is

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1. Dukeminier, *Perpetuities: The Measuring Lives*, 85 Colum. L. Rev. 1648 (1985).

2. Restatement (Second) of Property (Donative Transfers) § 1.3(2) (1983).

3. J. Gray, *The Rule Against Perpetuities* § 201 (4th ed. 1942).

determined, once and for always, on the basis of the whole range of postcreation events that the facts existing at the creation of the interest make *possible*. The question under the common law Rule is not: *Who* is the "measuring life?" The question is: *Is* there a "measuring life?" For a person to be a measuring life at common law, there must be a *certainty that the vesting (in interest) or termination of the interest will occur no later than the twenty-first anniversary of that person's death*. To say this another way, a common law measuring life is a person for whom there is *no* chain of events that *might possibly* arise after the creation of the contingent interest that would allow the interest to remain in existence but still contingent beyond the twenty-first anniversary of the person's death. Only in the case of valid interests will there be such a person.<sup>4</sup> There is no such person in the case of invalid interests. Invalid interests are invalid, not because they might remain in existence and contingent beyond the twenty-first anniversary of the death of a *particular* measuring life, but rather because there is *no* measuring life that makes them valid. There is, in other words, no one for whom there is no invalidating chain of possible postcreation events. Since there is a common law measuring life only in the case of valid interests, the term "validating life" is a more appropriate term for the common law "measuring life," and the shift over to that term by Professor Dukeminier<sup>5</sup> and others<sup>6</sup> should, in time, promote a clearer understanding of the Rule at common law.

Thus the common law Rule's central test of validity—the real test, I shall call it—contains no mechanism for marking off a "perpetuity period" in each given case. Rather it sets forth a mechanism for testing the validity of an interest *in advance* of its actual vesting or termination. Understanding this point is crucial to appreciating how much the wait-and-see method of perpetuity reform constitutes a fundamental departure from the common law Rule. A wait-and-see rule against perpetuities, unlike the common law Rule, makes validity or invalidity turn on *actual* postcreation events. It thus requires that an actual period of time be measured off during which the contingencies attached to an interest are allowed to work themselves out to a final resolution. If this period of time is to be marked off by reference to lives in being at the creation of the interest plus twenty-one years, the lives in being under a wait-and-see rule are true "measuring lives."

Since a wait-and-see rule against perpetuities applies to interests

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4. There are, of course, cases where an interest can be declared valid without the need to locate a measuring life—where the interest must vest or terminate within 21 years of its creation. An example is an interest in favor of the testator's descendants living on the 21st anniversary of his death, if any. In most cases, however, a measuring life must be found if the interest is to be valid.

5. See, e.g., Dukeminier, *supra* note 1, at 1648; J. Dukeminier & S. Johanson, *Wills, Trusts, and Estates* 785 (3d ed. 1984).

6. See, e.g., Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718, 1722 (1983).

that would be invalid under the common law Rule—that is, interests for which by definition no validating life exists<sup>7</sup>—the common law Rule does not, in my view, identify the lives to be used in measuring off the wait-and-see perpetuity period.<sup>8</sup> Professor Dukeminier says, however, that this position “confuses the search for a validating life with the discovery of same.”<sup>9</sup> The *process* by which Dukeminier searches for a validating life yields the lives to be used under wait-and-see. The process, he says, is to apply an intermediate test under which we assemble “all persons who can affect vesting” (which he defines as affecting vesting in *any* of its aspects) and to subject this group of persons to the real test. If no person in the group satisfies the real test, he says that the “wait-and-see doctrine tells you to wait out these lives [the lives that met his intermediate test] and see what actually happens.”<sup>10</sup>

Determining whether or not a validating life exists does not *require* the use of Dukeminier’s process. His process is *not* “the *only* realistic way perpetuities problems can be solved.”<sup>11</sup> Like most processes by which one solves legal problems, there are several ways of describing it. How one describes the common law process is idiosyncratic. It consists only of one’s own preference for describing it in a way that helps make the common law Rule more understandable (and, in the case of law teachers, promotes greater student understanding).

By all means, the process entails focusing attention on a manageable group of people and asking the question: 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? If there is, the interest is valid; if not, the interest is invalid. To what group is the focus of attention directed? Not to the world at large, certainly. The focus of attention is directed at only a very small fraction of the world’s population. We can so easily predict that people chosen at large—people who have no connection at all to the transaction—will always fail the real test that we can exclude them from consideration anew.<sup>12</sup> Excluding people from the world at

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7. I will have something to say later about Professor Dukeminier’s position, taken at the end of his article, that even valid interests at common law should be subject to wait-and-see. See *infra* pp. 1725–26.

8. Waggoner, *supra* note 6, at 1763–64 (criticizing Pennsylvania’s “wait-and-see” rule because it failed to demarcate the perpetuity period).

9. Dukeminier, *supra* note 1, at 1651. Professor Dukeminier responds to the position as it is formulated in Allan, *Perpetuities: Who Are the Lives in Being?*, 81 *Law Q. Rev.* 106, 107 (1965).

10. Dukeminier, *supra* note 1, at 1648.

11. *Id.* at 1651 (emphasis added).

12. Only persons who are connected in some way to the transaction have a chance of supplying the requisite causal connection demanded by the common law Rule. The common law does not formally exclude persons from the world at large from consideration, however. They are excluded from fresh consideration in new cases only because they were once considered, and it was found that there will always be an invalidating chain of possible postcreation events as to every unconnected person who might be

large from such consideration is sufficient to allow the real test to be focused on a manageable group—people who are connected in some way to the transaction. 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.<sup>13</sup> If there is a validating life, it will be in this group.

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, is to me a sufficient description of the common law process.<sup>14</sup> There is nothing in the common law process that requires constructing a precise formula and rigorously applying it—*presumably to the persons connected in some way to the transaction, not to the world at large*—to narrow down to a *finite* group the people entitled to be subjected to the real test. Such an endeavor, to me, is not worth the effort, and certainly is not *necessary* to solve perpetuities problems. If a precise formula is to be rigorously applied to the persons connected to the transaction, it might as well be the real test itself. This point alone should be enough to refute Dukeminier's claim that his set of measuring lives is principled by its "derivation" from "the" common law process.

## II. THE ALLOWABLE PERIOD UNDER WAIT-AND-SEE

In arguing about who the measuring lives should be and the method of identifying them, we should not lose sight of the basic purpose of wait-and-see: to grant interests that would have been invalid under the common law Rule a reasonable chance to be valid. The conventional assumption is that the period of time during which contingencies should be allowed to resolve themselves should be marked off by reference to measuring lives; the actual period is assumed to terminate twenty-one years after the death of the last surviving measuring life. Interests that would have been invalid under the common law Rule become invalid under wait-and-see only if they still remain in existence and contingent at the expiration of this period.

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proposed: any such unconnected person can immediately die after the creation of the questioned interest without causing any acceleration of the interest's vesting or termination. The life expectancy of any unconnected individual, or even the probability that one of a number of new-born babies will live a long life, is irrelevant.

13. If there is any doubt about a particular person, no harm is done by resolving the doubt in favor of putting him in the group, and subjecting him to the real test.

14. This is the way I described the process in Wagoner, *supra* note 6, at 1722–24.

A. *The Measuring-Lives-Plus-Twenty-One-Years Approach*

Who should the measuring lives be, and how should they be identified? Since they cannot be derived from the common law Rule or its processes,<sup>15</sup> the causal relationship formula, *as defined by Dukeminier or as defined otherwise*, has no preferred claim to principle. In truth, the wait-and-see method of perpetuity reform, regardless of who the measuring lives are and how they are identified, operates like a perpetuity saving clause.

Lawyers often draft trusts that would violate the common law Rule were it not for the inclusion of a perpetuity saving clause. A frequently-used dispositive pattern requires grandchildren to arrive at an age or a series of ages in excess of twenty-one to be entitled to their full shares of corpus. Seldom will a grandchild actually reach the required age more than twenty-one years after the death of the survivor of the testator's children and grandchildren alive when the testator died. Yet, because of the *possibility* that this will happen, the common law Rule is violated, unless a perpetuity saving clause is put into the governing instrument, as it would be if the instrument were competently drafted.

A perpetuity saving clause contains two components, the *perpetuity-period component* and the *gift-over component*. The perpetuity-period component expressly requires the trust or other arrangement to terminate no later than twenty-one years after the death of the last survivor of a group of individuals designated in the governing instrument by name or class.<sup>16</sup> The gift-over component expressly creates a gift over that is guaranteed to vest at the termination of the period set forth in the perpetuity-period component, but only if the trust or other arrangement does not previously terminate in accordance with its other terms. In almost all cases, the trust or other arrangement does terminate earlier—much earlier, in fact—so that the period of time marked off by the perpetuity-period component is far from fully used up.<sup>17</sup> The client, as it were, is over-insured.

So it is, in my view, with wait-and-see. The wait-and-see perpetuity period should be ample enough to allow every reasonable opportunity for the disposition to work itself out. How long is reasonable? In most groups designated in a perpetuity saving clause, there will be found a

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15. See *supra* note 8 and accompanying text.

16. In the dispositive pattern whereby the grandchildren's interest is conditioned on reaching an age in excess of 21, the group designated in the saving clause might be the testator's descendants living at the testator's death; or, if greater assurance that young children will be included is desired, a wider group such as the descendants of the testator's parents or grandparents living at the testator's death might be designated.

17. According to a survey of perpetuity cases decided between 1956 and 1978, the vast majority of perpetuity violations were technical violations—fertile octogenarian, administrative contingency, or unborn-widow cases. Waggoner, *supra* note 6, at 1784 n.162. In technical violation cases, it is all but certain that the contingencies will resolve themselves far earlier than the expiration of the period of time marked off by the perpetuity-period component of the saving clause.

few young children, say of age ten or younger. If the survivor of the group lives into his or her seventies or early eighties—which is likely, since the key person is the one in the group who lives the longest—the addition of the twenty-one year period following the survivor's death brings the full period of time to about eighty to one hundred years. Since lawyers operating within the common law Rule can and do provide such a period of time for their clients' dispositions to work themselves out, it is hardly unprincipled for the law to grant a similar period of time to clients who unbeknownst to them and their families did not have expert counsel. This is the principle of the Restatement: the measuring lives listed in section 1.3(2) are lives that might appropriately have been selected in a well-drafted perpetuity saving clause.

Professor Dukeminier's attack on the Restatement's list centers to a great extent on ambiguities in its drafting. He has without doubt pointed out areas that need improvement if the wait-and-see perpetuity period is to be marked off by reference to a statutory list of measuring lives. I do not believe, however, that he has established his main purpose, which is to demonstrate that a statutory list of measuring lives cannot be drafted unambiguously.

Be that as it may, Dukeminier's article does not demonstrate that the causal relationship formula, translated by him into the statutory language of persons "who can affect the vesting of the interest,"<sup>18</sup> is the solution. It is difficult to understand and, in certain of its particulars, is arbitrary and ambiguous. In fact, the elegantly-phrased complaints Dukeminier lodges against the Restatement's list apply to a striking extent to his formula as well.

Professor Dukeminier's basic interpretation of this statutory language and of its predecessor version<sup>19</sup> is that it means persons who can affect—have a causal relationship to—*any* aspect of the vesting of the interest. I cannot imagine that a court or lawyer would, without knowing about (and being convinced by) Dukeminier's article, ever interpret this standard the way Dukeminier does. Consider the following often-discussed example, one I raise not because of its practical importance<sup>20</sup> but because it affords an opportunity to probe the overall coherence of Dukeminier's scheme in an uncomplicated setting with only two ascertained beneficiaries to keep in mind:

*Example 1.* G deeded real property "to A and his heirs, but if the property is used for nonresidential purposes, to X and his heirs."

Who does Professor Dukeminier say are the causal relationship measur-

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18. See Dukeminier, *supra* note 1, at 1713.

19. In an earlier article, Professor Dukeminier formulated the test to include persons who have a "causal relationship to the vesting or failure of the interest." See Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 Ky. L.J. 3, 61 (1960).

20. See *infra* note 48.

ing lives? Looking at his proposed statutory language, I would have expected Dukeminier to say that *A* is the only one who can affect the vesting of *X*'s interest; when the interests were created, after all, *A* alone controlled whether or not *X*'s interest will vest. *X* merely sits and hopes that *A* or *A*'s successors in interest will use the property for non-residential purposes. To my surprise, Dukeminier tells us that *X* but not *A* is on the list!

Why is *X* on Dukeminier's list? Because Dukeminier announces that the beneficiary or the beneficiaries of the interest in question *always* have a causal relationship to the vesting of the interest. This treatment of the beneficiary or the beneficiaries of the interest in question is, in fact, a key feature of Professor Dukeminier's whole structure.<sup>21</sup> But the causal relationship that *X* has to the vesting of his interest eludes me.<sup>22</sup>

Professor Dukeminier's reasoning perhaps comes from his understanding of an example that accompanies his announcement of this proposition.<sup>23</sup> He implies that *B* is the validating life for *B*'s interest in the gift "to *A* for life, then to *A*'s children for their lives, then to *B*." *B*, of course, in this example has no causal relationship to any identifiable aspect of vesting because his interest is already vested. If, nevertheless, *B* is the validating life for *B*'s own interest, Dukeminier must always put the beneficiaries of the questioned interest on his list. One of his major claims for his list, after all, is that it includes *all* validating lives. If this is in fact Dukeminier's reasoning, it is fallacious. *B*'s interest is initially valid in this case, not because *B* is the validating life, but because the common law Rule is *inapplicable* to interests that are already vested as of their creation.<sup>24</sup> No validating life is needed in such cases.

Perhaps Dukeminier's position is not based on this fallacy at all—

21. See Dukeminier, *supra* note 1, at 1661. I agree with Professors Dukeminier and Maudsley that the beneficiary of the contingent interest in question *should* be a wait-and-see measuring life *because* "it makes no sense to strike down a contingent interest during the life of the donee of the contingent interest." See *id.* at 1678 (citing R. Maudsley, *The Modern Law of Perpetuities* 130 (1979)). What I do not understand is how the causal-relationship formula leads to that result in all cases.

22. Consider another case where Dukeminier puts *X* on his causal relationship list of measuring lives: *T* died, survived by his child, *A*, and by *A*'s 26-year-old child, *X*. *T*'s will devised property "to *A* for life, then to *A*'s children who attain 25." Despite the fact that *X* himself as of *T*'s death had already fulfilled the condition of reaching the stated age, Dukeminier says he has a causal relationship to the vesting of his interest. Dukeminier, *supra* note 1, at 1666-67 (*Case 6*). Yet *X* (or his successor in interest) is certain to share in the class gift no matter what he does or when he dies. The size of his share and that of the other class members is not yet fixed, but *X* has no causal relationship to that aspect of the vesting of his interest or the interest of any other class member. *X* merely sits and waits to see if his parents have any more children and, if they do, if such children reach the stated age.

23. Dukeminier, *supra* note 1, at 1661 n.38.

24. See Restatement of Property § 370 & comment g (1944); 5 R. Powell, *The Law of Real Property* ¶ 779[1] (1984); L. Simes & A. Smith, *The Law of Future Interests* § 1235 (2d ed. 1956).

but on another. There are parts of his discussion that suggest that he bases it on the ability of *X* to transfer his interest.<sup>25</sup> Note that Professor Dukeminier related the aspect of vesting, as to which the beneficiary always has a causal relationship, to vesting *in interest*.<sup>26</sup> As Professor Dukeminier points out, “[a] gift to an individual vests *in interest* only when the beneficiary is ascertained and all conditions precedent are satisfied.”<sup>27</sup> *X*’s interest is subject to an unsatisfied condition precedent—that the property be used for nonresidential purposes. Since *X* has no power to affect *that* aspect of the vesting of his interest, Professor Dukeminier must think that *X*’s power relates to the *other* aspect of vesting in interest—the requirement that the beneficiary be “ascertained.” Dukeminier’s perception may be, then, that in *Example 1* the executory interest is contingent not only because it is subject to an unsatisfied condition precedent, but also because it is in favor of an unascertained beneficiary: it is in favor of an unascertained beneficiary because *X* has the power to transfer it either to another individual (whose identity cannot now be known) or to an unascertained class (in part) by, say, conveying or devising his executory interest “to *Y* for life, remainder to *Y*’s heirs.”

If this is Dukeminier’s reasoning, it is also fallacious. The requirement that the beneficiary be “ascertained” refers to being ascertained *by the terms of the creating instrument itself*.<sup>28</sup> In *Example 1*, *G*’s deed put the contingent interest into the hands of an ascertained beneficiary. *X* was the ascertained beneficiary from the moment of the creation of the interest. If this were not so, we would have to say that *no* future interest is vested in interest, not even one that is not subject to an unsatisfied condition precedent. In the disposition “to *A* for life, remainder to *B*,” we would have to say that *B*’s ability to transfer his interest to another prevents his indefeasibly-vested remainder from vesting in interest! The truth is that the power of an *ascertained* beneficiary to determine who the ultimate taker of the property is through his power to transfer it to another is *not* a power to affect the vesting of the interest—not, at least, in any heretofore known meaning of the term.

Perhaps Professor Dukeminier’s position is based on neither of the above explanations, but rather on a point unarticulated in his article and that I have been unable to deduce. Whatever it is based on, his argument that the causal relationship formula is easy to understand and

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25. See Dukeminier, *supra* note 1, at 1673 n.59.

26. *Id.* at 1661.

27. *Id.* (emphasis rearranged).

28. See Restatement of Property § 157 comments i, p, s, v (1936); *id.* § 158 comment b; 1 American Law of Property § 4.33 (A. Casner ed. 1952) (“A person is said to have an indefeasibly vested remainder if the remainder which he has is certain to take effect in possession or enjoyment at the termination of all prior estates. It is not necessary that it take effect in the original remainderman himself, but it must be certain to take effect in his transferee or successor in interest.”); 2A R. Powell, *supra* note 24, ¶¶ 272[3][C], 272[6]; L. Simes & A. Smith, *supra* note 24, §§ 142, 147, 152.

apply is brought into doubt. To me, and I would think to others, the natural meaning of the proposed statutory language—persons “who can affect the vesting of the interest”<sup>29</sup>—is that it refers to persons who can produce a change in some aspect of the vesting of the interest that was not already settled at the time of the gift.<sup>30</sup> The only aspect of the vesting of X’s interest that was not settled at the time of the gift was the condition precedent. A, not X, has a causal relationship to *that* aspect of the vesting of X’s interest.

Why is A not on Dukeminier’s list? Dukeminier concedes that A does, initially, control the condition precedent to the vesting of X’s interest. Even so, A cannot be a measuring life because of a subsidiary rule that Dukeminier announces: “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.”<sup>31</sup> Thus, in a case like *Example 1*, A, as the owner of the fee simple subject to an executory limitation, is excluded from the list of measuring lives because he is a member of an unascertainable class.<sup>32</sup> Explaining this “rule,” Dukeminier points to the fact that a member of such a class cannot be a validating life under the common law Rule, and says that “[t]he reasons . . . apply with equal force under wait-and-see.”<sup>33</sup> Here, then, is the reason A must be excluded: “If such persons could be [wait-and-see] measuring lives, it would be impossible to say when the perpetuities period ends.”<sup>34</sup> Dukeminier elaborates—and qualifies—this point:

[W]here a person (*other than the beneficiary of the contingent interest in question*) has the power to affect the identity of the beneficiaries or a condition precedent, *and the power to affect vesting can*

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29. Dukeminier, *supra* note 1, at 1713 (emphasis added).

30. Professor Dukeminier’s position might be more understandable if the proposed statutory language referred to persons “who affect or can affect the vesting of the interest.” Under *this* statutory language, one could, I suppose, claim that X—by being an ascertained beneficiary when his interest was created—*then affected* an aspect of the vesting of his interest. Once the interest was created in him as an ascertained beneficiary, however, X no longer had this effect on the vesting of his interest, and arguably should be immediately “removed” from the measuring-life list by Dukeminier’s rule that “[a] person is removed from the list of measuring lives when the person ceases to be able to affect vesting.” Dukeminier, *supra* note 1, at 1673. Returning to Dukeminier’s proposed statutory language, perhaps it is not vesting in interest at all, but vesting *in possession* that X is thought to be able to affect. The argument might be that X’s ability to transfer his interest constitutes an ability to affect the person in whom the interest vests in possession, if and when it does vest in possession. This argument is also questionable, however, because it depends on a previously unknown usage of the term “vest in possession.” The standard usage of the term “vest in possession” refers to the interest’s becoming possessory *by the terms of the creating instrument*, not to the person who happens to *own* the interest if and when the interest becomes possessory.

31. *Id.* at 1661 (emphasis added) (citing *In re Moore*, [1901] 1 Ch. 936).

32. *Id.* at 1705–06.

33. *Id.* at 1661.

34. *Id.*

*be exercised by a successor in interest not identifiable within the perpetuities period, all persons who can exercise the power are excluded as measuring lives . . . . If they could be included, it would be impossible to say when the perpetuities period ends.*<sup>35</sup>

Ponder the logic of this. Dukeminier is saying that, despite *A*'s rather spectacular causal relationship to the vesting of *X*'s interest, *A* must be excluded because his successor or successors in interest, when and if they take over, will be able to control the use of the property and thereby affect vesting in exactly the same way *A* can initially. If *A* were not excluded from being a measuring life, it would be *impossible* to say when the perpetuity period ends.

Why does the same point not exclude *X* also? Why does placing parentheses around the phrase "the beneficiary of the contingent interest in question" make the impossibility disappear? There is no answer. The truth is that no such "impossibility" exists in the first place. Dukeminier's point is not even convincing as a ground for excluding *A*'s successor or successors in interest (that is, those of them who were alive at the creation of the interest). The perpetuity period could easily be said to terminate twenty-one years after the death of the survivor of the *last known* measuring life.<sup>36</sup> This aside, Dukeminier's point hardly justifies excluding *A* himself. Note that Dukeminier recognizes a further rule that "[a] person is removed from the list of measuring lives when the person ceases to be able to affect vesting."<sup>37</sup> Why, in view of *this* rule, should *A* not be a causal relationship measuring life, at least if he continued to own the fee interest throughout his lifetime?

Illogical and arbitrary as the "rule" excluding *A* as a causally related measuring life is, even more disturbing is the fact that Professor Dukeminier does not suggest that this arbitrary rule be codified in his proposed statute; he apparently assumes that his conclusion is so indisputable that no litigation over the matter would be necessary. But announcing a rule in a law review article does not make it law.

Professor Dukeminier announces other rules without proposing that they be codified, even though his announced rule is not the only reasonable way of deciding the question. One such rule was just mentioned: a person is "removed" from the list of measuring lives when the person ceases to be able to affect vesting. Since it would be absurd to remove a person from the measuring-life list because of his death, even though death may render him no longer able to affect vesting, Professor Dukeminier must be talking about the person losing his ability to affect vesting during the person's lifetime. Is it so clear that such

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35. *Id.* at 1673 n.59 (emphasis added).

36. There may be reasons for excluding the successors in interest of a measuring life who were alive at the creation of the interest from becoming measuring lives themselves. The supposed "impossibility" of determining the end of the wait-and-see perpetuity period is not one of them, however.

37. Dukeminier, *supra* note 1, at 1673.

a person should be "removed" from the measuring-life list? There are other plausible ways of handling the situation. One of them is to treat the person as having died when the ability to affect vesting ceased. If the person were the last living measuring life, the consequence of the latter rule would be to start the running of the twenty-one year part of the wait-and-see period. The application of Dukeminier's rule might mark the period's instantaneous expiration. But Dukeminier would leave this matter to litigation rather than proposing statutory language to settle it in advance.

The questions go on and on. The bottom line is that the simple one-sentence statute that Dukeminier touts as *the* solution to wait-and-see<sup>38</sup> leaves so many questions in doubt that, as Dukeminier says of the Restatement, it "contains enough puzzles to keep perpetuities lawyers in court (and in fees!) for years."<sup>39</sup>

#### B. *The Cost and Administrative Burden of the Measuring-Lives-Plus-Twenty-One-Years Approach*

There is a problem with wait-and-see that has not yet been mentioned. It springs from this immensely important point: *The common law Rule uses the life-in-being-plus-twenty-one-years period in a way that does not require the actual tracing of individuals' lives, deaths, marriages, divorces, births, adoptions in and adoptions out of the family, and so on.* Wait-and-see does require this, however, at least if the allowable period is to be marked off by reference to measuring lives. The administrative burden of tracing a somewhat rotating group of measuring lives,<sup>40</sup> along with the problems of who the measuring lives should be and how to identify them, raises a fundamental question deserving of serious consideration: should actual measuring lives be used at all?

It is one thing to write a law review article arguing about the "proper" principle or method of identifying the measuring lives under wait-and-see; it is one thing to list the measuring lives on a classroom blackboard, whoever they are and however they are identified; and it is one thing to write a restatement of the law or a statute specifying who the measuring lives are. It is quite another to apply the measuring-lives approach in actual practice. No matter what method is used in the statute for selecting the measuring lives, no matter how unambiguous the statutory language is, and no matter how many questions are covered, actual individuals must be identified as the measuring lives, and they must be traced to determine who the survivor is and when the survivor dies. The administrative burden and cost are increased if the measur-

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38. *Id.* at 1713.

39. *Id.* at 1694.

40. Professor Dukeminier, as well as the Restatement, provides for the adding and dropping of measuring lives because of events occurring after the creation of the interest. See Dukeminier, *supra* note 1, at 1672-73; Restatement (Second) of Property (Donative Transfers) § 1.3 comment e (1983).

ing lives are not a finite group, determined once and for all when the interest was created, but instead are a rotating group, to some extent at least. Further increasing the administrative burden and cost is the fact that the perpetuities question will often be raised for the first time long after the interest was created. The task of going back in time to reconstruct not only the facts existing when the interest was created but facts occurring thereafter as well, while far from impossible, may not be worth the candle. In short, depending on what rules are adopted for adding and removing measuring lives from the list, not only would births and deaths have to be monitored, but also adoptions, divorces, marriages, and possibly assignments and devises, and so on, over a fairly long period of time. Keeping track of and reconstructing these events so as to determine the survivor of the measuring lives and the time of that individual's death is not simply a costly administrative burden that is best avoided, if it is feasible to do so. By making perpetuity challenges more costly to mount and more problematical in result, such requirements might allow dead hand control to continue—by default—beyond what the law nominally authorizes.

Were Professor Dukeminier's approach adopted in full, the administrative cost of wait-and-see would be magnified enormously. Professor Dukeminier sees a previously unrealized blessing in his causal relationship formula: the search for a validating life can be abandoned, he says, so that wait-and-see is applied to every disposition of property creating a future interest to which the Rule Against Perpetuities is applicable<sup>41</sup> (which is nearly every disposition that creates a future interest). Since dispositions of property that contain a *violation* of the common law Rule are exceptional, the adoption of Professor Dukeminier's notion would impose an administrative burden far greater than necessary. Measuring lives, under Dukeminier's approach, would have to be initially identified; they would have to be traced, not only to determine when they die, but also to determine if any event happened during their lives to cause their removal from the list; and the situation would have to be monitored to determine if events dictated the addition of measuring lives to the list—and this administrative burden would have to be performed with respect to nearly every inter vivos or testamentary trust or other property arrangement creating a future interest. Needless to say, I find Professor Dukeminier's idea on this point unappealing, even conceding the fact that Dukeminier's causal relationship formula, as he interprets it, produces a narrower and therefore somewhat easier-to-trace set of measuring lives in most cases than does the Restatement's list. Far wiser, I believe, is the Restatement's approach of preserving the initial validity of interests that do not violate the common law Rule.<sup>42</sup> There is no doubt in my mind

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41. See Dukeminier, *supra* note 1, at 1711–13.

42. See Restatement (Second) of Property (Donative Transfers) § 1.3(1) (1983); accord Waggoner, *supra* note 6, at 1769–71, 1778–79.

that wait-and-see should be restricted to interests for which no validating life exists.

*C. A Different Solution: A Fixed Period of Years*

The costly administrative burden of wait-and-see, even if limited to interests that flunk the common law test of initial validity, coupled with the myriad of other problems associated with the measuring-lives approach, leads me to raise another way of marking off the wait-and-see perpetuity period—by reference to a fixed period of years. The period selected could be viewed as an approximation of—a proxy for—the period of time that would, on average, be produced by reference to a set of measuring lives plus the twenty-one year period following the death of the survivor. If the period of time that would be produced is approximately the same either way, the fixed-period-of-years approach, in one dramatic step, sweeps away the problems of drafting unambiguous statutory language, of covering innumerable sets of questions, and of litigating unanswered questions; it also avoids the administrative burden of tracing a somewhat rotating set of measuring lives. Far easier to understand than a statutory list of, or formula for identifying, measuring lives, it provides, in short, the benefit of wait-and-see without the costs that have seemed necessarily to accompany it.

As a proxy for the period that would, on average, be produced by measuring lives plus twenty-one years, a figure no higher than one hundred years and no lower than eighty years would be preferred. In almost all cases, the contingencies would in actuality be resolved far earlier, so that the full period would seldom actually be used up. Clients who hired less than expert counsel would be as over-insured, as it were, as their luckier counterparts, but no more so.<sup>43</sup> Aggregate dead-hand control would not be increased beyond what is already possible by competent drafting under the common law Rule.<sup>44</sup>

The matter of individual arbitrariness raises different questions. Would allowing a fixed period of years, rather than a period of time that adjusts on a case-by-case basis to the longevity of the measuring lives, be intolerably arbitrary, even if the period were a proxy for the *average* period produced by the measuring-lives-plus-twenty-one-years approach? There are reasons for thinking not.

A wait-and-see perpetuity period marked off by measuring lives plus twenty-one years is arbitrary to begin with. If for no other reason, the twenty-one year part of the period makes it so. Twenty-one years is tacked on after the death of the survivor of the measuring lives in *all*

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43. See *supra* note 17 and accompanying text.

44. Through the use of a saving clause or otherwise, lawyers can already mark off what amounts to a wait-and-see perpetuity period of 80 to 100 years. See *supra* p. 1719. If a period of 80 to 100 years were codified as the actual wait-and-see perpetuity period, lawyers might be reluctant to use the flat period in their saving clauses because of the danger that the law of a state that had not enacted the same period of years might apply.

cases, even though few dispositions that *violate* the common law Rule gear vesting or possession or anything else to a *twenty-one year period* (via an age contingency or otherwise) that commences running at some point in the later stages of the disposition. Thus:

*Example 2.* *T* died, bequeathing property “to *A* for life, then to *A*’s children who reach thirty-five; if none, to” a specified charity. *T* was survived by his child, *A*, and by *A*’s two minor children, *X* and *Y*.

Both the Restatement and Dukeminier’s causal relationship formula would put *A*, *X*, and *Y* on the list of measuring lives. Is the period marked off by the lifetime of the survivor of the measuring lives plus twenty-one years anything but an arbitrary period during which to allow *all* of *A*’s children (including those born after *T*’s death, if any) to reach *thirty-five*?

*Example 3.* *T* died, bequeathing property “to *A* for life, then to *A*’s children for the life of the survivor, then to *A*’s issue then living, per stirpes; if none, to” a specified charity. *T* was survived by his child, *A*, and by *A*’s two minor children, *X* and *Y*.

*A*, *X*, and *Y* are measuring lives, whether the Restatement or Dukeminier’s causal relationship formula is followed. Is the period marked off by the lifetime of the survivor of the measuring lives plus twenty-one years anything but an arbitrary period during which to allow the gift to *A*’s issue to take effect in possession? The arbitrariness of the wait-and-see perpetuity period is seldom noticed, but not because it does not exist. The arbitrariness is seldom noticed because the period of time is ample enough to allow dispositions like those above to work themselves out to a final resolution long before the period expires. It is expected that all of *A*’s children born after *T*’s death in *Example 2* will reach thirty-five (or die under that age) before the twenty-first anniversary of the death of the survivor of the measuring lives. In *Example 3*, all of *A*’s children born after *T*’s death will most likely die, making the gift to *A*’s issue vest in possession, before the twenty-first anniversary of the death of the survivor of the measuring lives. Because the period over-insures the dispositions, as it were, the arbitrariness of the period itself is largely hidden from view.<sup>45</sup> A *proxy* for this period is no more “arbitrary” than the period itself.

In another respect, moreover, a fixed period of years actually is less arbitrary than the measuring-lives-plus-twenty-one-years approach. Suppose in either of the above examples that one testator, *T*<sub>1</sub>, happens to die a month before his first grandchild, *X*, is conceived. A second testator, *T*<sub>2</sub>, dies a month after *X* is conceived. *X* can be a measuring

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45. The common law Rule’s use of the period of a life in being plus 21 years is much different. At common law, the “period” never terminates at an arbitrary time with respect to an ongoing disposition because no perpetuity period is marked off in time for all cases. For *valid* interests, there is in a sense such a period, but it is never arbitrary because, by definition, such interests are *certain* to vest or terminate *within* the period.

life for  $T_2$ 's disposition but not for  $T_1$ 's identical disposition.  $T_1$ 's only measuring life is  $A$ . The likely survivor of  $T_2$ 's measuring lives is  $X$ . Since  $X$  is likely to outlive  $A$  by twenty or more years, the two dispositions, though identical, can end up with wait-and-see perpetuity periods that substantially differ, if the perpetuity period is marked off by reference to measuring lives. A fixed period of years gives the same period to the identical dispositions of both testators.

To be sure, cases can rightly be posed that show that a fixed period of years would allow some families to continue trusts through (or into) more generations than other families. Considering the great benefits of the period-of-years approach, I doubt that this "advantage" to families with shorter longevities is troublesome enough to reject the approach out of hand.

### III. CONCLUSION

No system for marking off the wait-and-see perpetuity period is perfect. The Restatement's list of measuring lives contains ambiguities that need to be worked on if that approach is followed. Professor Dukeminier's causal relationship formula for identifying the measuring lives raises equally perplexing problems. Many perpetuity scholars, to say nothing of nonexperts in perpetuity lore, would find his basic interpretation of the formula baffling in certain of its particulars. Moreover, if his approach were followed, a whole set of subsidiary questions would have to be considered. Quite apart from the fact that such questions would not necessarily be decided the way he decides them in his article, the codification of the answers to these questions would raise anew the challenge of drafting statutory subsidiary rules unambiguously. The resulting statute would of necessity be more complicated than the one-sentence version Professor Dukeminier proposes.<sup>46</sup> The drafting rules of the National Conference of Commissioners on Uniform State Laws do not permit the range of subsidiary rules he proposes to be placed in the Act's comments; they must be in the statute itself to constitute law.<sup>47</sup>

All things considered, and without claiming perfection for it or that it is the only realistic solution, it seems to me that the period-of-years approach is worth serious consideration. Its simplicity, understandability, efficiency in administration, and fairness in the aggregate and in the individual case are benefits that point to marking off the wait-and-see perpetuity period by reference to a fixed period of years somewhere between eighty and one hundred years.<sup>48</sup>

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46. See Dukeminier, *supra* note 1, at 1713.

47. National Conference of Commissioners on Uniform State Laws, *Drafting Rules for Uniform or Model Acts* 16 (July 1983) ("Comments should not be used as a substitute for . . . any substantive provision in an Act."); accord *id.* at 6-7 (Drafting Rule 13).

48. A shorter period of time, such as 40 years, might be imposed for certain special situations such as options in gross and, perhaps, for the executory interest in *Example 1*,

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supra p. 1719; accord Dukeminier, supra note 1, at 1706. I use *Example 1* only as a convenient one to probe Dukeminier's causal relationship formula and his interpretation of it.