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A REJOINDER BY PROFESSOR WAGGONER

Lawrence W. Waggoner

Since the patience of the reader and the space in this issue of the Law Review are nearing their limits, I wish to publish only two points in response to what Professor Dukeminier has written. These points further support my position that Dukeminier's proposed statute would lead almost anyone to conclude that *A*, not *X*, is the causal relationship measuring life in *Example 1* of my article.¹ By implication, these points, along with the others made in my article, corroborate my overall thesis: Professor Dukeminier's proposed one-sentence statute² cannot be counted a responsible way of identifying the measuring lives for wait-and-see, *if indeed measuring lives are to be used at all*;³ the exact meaning of persons "who can affect the vesting of the interest" is disputable and the various subsidiary rules Dukeminier announces need rethinking, clarifying, and codifying.

First. The first point relates to my conclusion that the natural meaning of the proposed statutory language—persons "who can affect the vesting of the interest"—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 date of the gift.⁴ This interpretation, which I now believe Professor Dukeminier agrees would exclude *X* as a causally-related measuring life,⁵ is not only a defensible interpretation of the language of the proposed statute.⁶ It is consistent with the purported linkage (attributed to the formula by Dukeminier) to the search for a validating life at common law. Since the common law Rule Against Perpetuities is not concerned about aspects of vesting that are satisfied at the date of the gift, a common law validating life must always have a causal relationship to some aspect of the vesting of the interest that was *unsatisfied at the date of the gift*.⁷

1. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 Colum. L. Rev. 1714, 1719 (1985).

2. See Dukeminier, *Perpetuities: The Measuring Lives*, 85 Colum. L. Rev. 1648, 1713 (1985) ("No interest is good unless it vests within twenty-one years after the death of all persons in being when the interest is created who can affect the vesting of the interest.").

3. Recall that the use of measuring lives, determined under a causal relationship formula or otherwise, produces an allowable wait-and-see perpetuity period that is arbitrary. Waggoner, *supra* note 1, at 1726–27.

4. Waggoner, *supra* note 1, at 1721–22. For Professor Dukeminier's commentary on this interpretation, see Dukeminier, *A Response by Professor Dukeminier*, 85 Colum. L. Rev. 1730, 1733 n.12 (1985) [hereinafter cited as *Dukeminier Response*].

5. It would also exclude *X* in the example in Waggoner, *supra* note 1, at 1720 n.22.

6. To me, the phrase persons who "can affect" the vesting of the interest is the equivalent of referring to persons who "can do" something—affect vesting—in the future.

7. For example, as indicated in Waggoner, *supra* note 1, at 1720 & n.24, all of the

Second. The rule that Professor Dukeminier says excludes *A* from the list of causally-related measuring lives—despite *A*'s spectacular causal relationship to the vesting of *X*'s interest—is said to have been laid down, not by Dukeminier, but by Lord Chief Baron Macdonald in the famous case of *Thellusson v. Woodford*.⁸ The exact nature of the uncertainty rule that was laid down by that decision is this: Despite the fact that the terms of a governing instrument purport to guarantee that a contingent interest is certain to vest or terminate within the lifetime of (or within twenty-one years after the death of) the survivor of a group of people *designated* in the governing instrument, *all of whom are in being at the date of the gift*, the interest cannot be upheld if the designated group is such that it would be impracticable to determine the survivor of the group.⁹ This is the rule, even though the survivor of the group

authorities agree that the common law Rule is *inapplicable* to an interest that is vested when it is created; no validating life exists or is needed in such cases. See Restatement of Property § 370 comment g (1944) (“The rule . . . applies to interests which are ‘subject to an unfulfilled condition precedent.’”); T. Bergin & P. Haskell, Preface to Estates in Land and Future Interests 180–81 (2d ed. 1984) (“If the future interest is vested in interest at the time of its creation, the rule against perpetuities does not affect it; the rule is concerned only with future interests which are contingent at the time of their creation.”); 5A R. Powell, The Law of Real Property ¶ 779[1] (1985); L. Simes & A. Smith, The Law of Future Interests § 1235 (2d ed. 1956). See also J. Dukeminier & S. Johanson, Wills, Trusts, and Estates 785 (3d ed. 1984):

The Rule against Perpetuities is a rule against *contingent* interests that may *remain* contingent for too long a period of time. . . . In determining the validity of an interest, we . . . look at *what might happen after* the date the instrument creating the interest becomes effective [T]he measuring lives are those that permit you to prove that the interest is valid. The Rule would be initially more comprehensible if we spoke of “validating lives” rather than “measuring lives” Any person now alive may be used as a measuring [validating] life if you can demonstrate that the contingency *will necessarily be resolved during* that person's life *or upon, or within 21 years after*, that person's death. What you are looking for is some life in existence at the creation of the interest by which you can prove that the interest *will* timely vest or fail.

Id. (emphasis rearranged). In 6 American Law of Property § 24.3 (A. Casner ed. 1952), Professor Leach states:

The Rule against Perpetuities is a rule invalidating interests which *vest too remotely* [Thus] a gift to A for life, remainder to A's children for their lives, remainder to B in fee is valid, although the life estates in A's children may last longer than the period of perpetuities; B's remainder is vested at once

Id. (emphasis added). Although Professor Leach does not *explicitly* say that *B*'s remainder interest is valid *because* the common law Rule is *inapplicable* to interests that are vested at once, Leach cites as authority for the validity of *B*'s interest § 205 of Professor Gray's book and § 370 of the Restatement of Property (1944), both of which *do* explicitly say this. Note also that Professor Leach rests the validity of *B*'s interest on the fact that it is “vested at once,” *not* on any notion that a common law measuring (validating) life is needed to make it valid and that *B* fills that role.

8. 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (1805); see Dukeminier Response, *supra* note 4, at 1735–36

9. This is the only common law uncertainty rule I know of and the only one mentioned in the following authorities: Restatement (Second) of Property (Donative Transfers) § 1.3(1) comment a (1983); Restatement of Property § 374 & comment l (1944); 6

could, theoretically speaking, be regarded as a validating life. *This* rule is not the reason why *X*'s interest in my *Example 1* would be invalid at common law; *X*'s interest would be invalid at common law because there is no validating life, theoretically speaking or otherwise.¹⁰ The uncertainty rule, however, *would* have been the reason why *X*'s interest would be invalid at common law if *G*'s deed had said: "to *A* and his heirs, but to *X* and his heirs if the property is used for nonresidential purposes within twenty-one years after the death of all persons in being at the date of the gift."

Since the common law never adopted wait-and-see, *Thellusson v. Woodford* is not a wait-and-see precedent. A common law rule, in my judgment, will be carried over to wait-and-see only when the underlying reason for the rule applies. It does not apply where there is an ascertained beneficiary who has control over a condition precedent. The underlying reason does not even apply to the above variation of the *Example 1* deed. In neither case would treating *A* as a causally-related measuring life make it impossible, impracticable, or even mildly challenging to say when the allowable wait-and-see perpetuity period ends. The period would end twenty-one years after *A*'s death.¹¹

American Law of Property, supra note 7, § 24.13; 5 R. Powell, supra note 7, ¶ 766[5]; L. Simes & A. Smith, supra note 7, § 1223.

10. Note that the condition precedent in *G*'s deed in my *Example 1* can be controlled by *all* of *A*'s successors in interest, including those *not* in being at the date of the gift.

11. Whether or not *A*'s successors in interest who were in being at the date of the gift should be excluded by a special rule from the list of measuring lives is a separate question. See Waggoner, supra note 1, at 1723 & n.36 .