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Wait-and-See: The New American Uniform Act on Perpetuities

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compensated by money alone. Secondly, the House of Lords has emphasised that litigation should be prosecuted efficiently and has indicated that counsel should be treated more strictly than hitherto when they apply for amendments at trial. Finally, it would appear that limitation points cannot be pleaded for the first time in the course of a trial or, at any rate, not when the merits of the case have been fully considered.

The first of these three points is merely a gloss on the existing rule, but the second and third are entirely new. It will be interesting to see whether the second point, involving fresh emphasis on efficiency, gains momentum. A century or more's orthodoxy might then need major reconsideration. As for the third, it is correct in a sense to say that in both Atkinson and Kettleman, the real matter in dispute was litigated, even though the defendant's amendment in the latter case was disallowed. But this is true only if one accepts the distinction drawn by Lord Griffiths between the merits of a case and limitation points and his decision to admit late pleading of the latter much less freely.

N. H. Andrews.

SALVAGE—ADMIRALTY JURISDICTION—INLAND WATERS

The decision of Mr. Justice Sheen in The Goring [1986] 2 W.L.R. 219, which was the subject of a note by Mr. Yale on p. 14, ante, has been reversed by a majority ruling of the Court of Appeal (the Master of the Rolls dissenting), on the ground that the salvage took place in non-tidal waters: The Times, 2 March 1987. Leave to appeal to the House of Lords has been given. A further note will follow when a full report of the decision on appeal is available.

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WAIT-AND-SEE: THE NEW AMERICAN UNIFORM ACT ON PERPETUITIES

The wait-and-see version of perpetuity reform has gained a new champion in the United States. The National Conference of Commissioners on Uniform State Laws—the body responsible for promulgating uniform legislation, such as the Uniform Commercial Code, for recommended enactment by the federal states—recently approved a Uniform Statutory Rule Against Perpetuities. Shortly thereafter, the Uniform Act was endorsed by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers.
Among a number of unique features of the Uniform Act, the method used to delimit the waiting period deserves special notice. The waiting period, as anyone familiar with the wait-and-see reform movement knows, is the period of time allotted for the contingencies attached to an otherwise invalid property interest to work out harmlessly. In a step believed to be unprecedented, the waiting period adopted by the Uniform Act is a flat period of 90 years.

The 90-year period represents a reasonable approximation of—a proxy for—the period of time that would, on average, be produced by the traditional method of identifying and tracing a set of actual measuring lives and then tacking on a 21-year period following the death of the survivor. The 90-year period was derived from the assumption that the youngest measuring life, the one likely to live the longest, would usually determine the length of the waiting period, were actual measuring lives to be used. A statistical study prepared as part of the Drafting Committee's work suggests that the youngest measuring life, on average, would be about 6 years old. American government statistics indicate that the remaining life expectancy of a 6-year old is between 69 and 70 years. In the interest of arriving at an end number that is a multiple of five, the Committee utilized 69 years as an appropriate measure of the remaining life expectancy of a 6-year old, which—with the 21-year tack-on period added—yields a waiting period of 90 years.

The traditional assumption, followed in previous wait-and-see statutes, is that the waiting period must be delimited by reference to measuring lives, so that the waiting period expires 21 years after the death of the last surviving measuring life. (The flat 80-year period in section 1 of the Perpetuities and Accumulations Act 1964 and the flat 60-year period in California Civ. Code, s.715.6, are rules of initial validity, not the waiting period for wait-and-see.) Rather than calling into question the necessity or desirability of using measuring lives, the controversy has centred on who they should be and how the law should identify them. Two basic methods of identifying measuring lives have been advanced: (i) the *statutory-list method* (used in the Perpetuities and Accumulations Act 1964, s.3, a few other common-law jurisdictions, and the Restatement (Second) of Property (Donative Transfers) s.1.3 (1983)), and (ii) the *causal-relationship method* (used in Kentucky Rev. Stat., s.381.216 and the statutes of a few other common-law jurisdictions).

Intrinsic to the actual-measuring-lives approach, however, are identification and tracing problems. If the statutory-list method is used, the measuring lives are difficult to describe in statutory language that is both uncomplicated and unambiguous. The statutory language
necessary to adopt the causal-relationship method is not so difficult to
draft as it is to apply to actual cases. No matter how the measuring lives
are identified, the lives of actual individuals must be traced so as to
determine which one is the survivor and when he or she died. The
tracing and identification problems are exacerbated by the fact that it
seems to be accepted under both methods that the measuring lives
cannot be a static group, assembled once and for always at the
beginning. Instead, individuals who were once measuring lives must be
dropped from the group on the happening of certain events (such as
the individual's divorce, adoption out of the family, or assignment of
his or her beneficial interest to another) and, conversely, individuals
who were not among the initial group of measuring lives must be
allowed to join that group 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. The proxy method eliminates the
problems of identifying and tracing a rotating group of measuring lives
so intrinsic to the actual-measuring-lives approach. The expiration of a
waiting period measured by a flat period of 90 years is easy to
determine and unmistakable.

The Drafting Committee considered possible grounds for resisting
the replacement of the actual-measuring-lives approach, despite the
gain in administrative simplicity that would result from adopting a flat
period of years. One such ground was the idea that the use of actual
measuring lives—especially if determined by the causal-relationship
method—generates a waiting period that self-adjusts to each situation,
somehow extending the dead hand no further than necessary in each
case. A flat period of years obviously cannot replicate a self-adjusting
function. The concern proved to be unfounded, however: a little
inspection revealed that this is not the function performed by the
actual-measuring-lives approach. Although that approach produces a
waiting period whose length differs from one case to another, the use
of actual measuring lives does not generate a waiting period that
expires at a natural or logical stopping point along the continuum of
each disposition, thereby pinpointing the time before which actual
vesting ought to be allowed and beyond which it ought not to be
permitted. Instead, the actual-measuring-lives approach—whether the
measuring lives are determined by statutory list or causal-relationship
formula—functions in a rather different way: it generates a period of
time that almost always exceeds the time of actual vesting in cases in
which actual vesting ought to be permitted. The actual-measuring-
lives approach, therefore, performs a margin-of-safety function, which
is a function that can be replicated by the use of a proxy such as the flat
90-year period under the Uniform Act.
The following examples briefly demonstrate the margin-of-safety function of the actual-measuring-lives approach:

Example (1)—Corpus to grandchildren contingent on reaching an age in excess of 21. G died, bequeathing property in trust, income in equal shares to G’s children for the life of the survivor, then in equal shares to G’s grandchildren, remainder in corpus to G’s grandchildren who reach age 30; if none reaches 30, to a specified charity.

Example (2)—Corpus to descendants contingent on surviving last living grandchild. G died, bequeathing property in trust, income in equal shares to G’s children for the life of the survivor, then in equal shares to G’s grandchildren for the life of the survivor, and on the death of G’s last living grandchild, corpus to G’s descendants then living, per stirpes; if none, to a specified charity.

In both examples, assume that G’s family is typical, with two children, four grandchildren, eight great-grandchildren, and so on. Assume further that one or more of the grandchildren are living at G’s death, but that one or more are conceived and born thereafter. All of the grandchildren living at G’s death were then under the age of 30.

As is typical of cases that violate the common-law Rule Against Perpetuities and to which wait-and-see applies, these dispositions contain two revealing features: (i) they include beneficiaries born after the trusts were created, and (ii) in the normal course of events, the final vesting of the interests will coincide with the death of the youngest of these after-born beneficiaries (as in Example (2)) or with some event occurring during the lifetime of that youngest after-born beneficiary (such as reaching a certain age in excess of 21, as in Example (1)).

By tradition, the waiting period is measured by the lives of individuals who must be in being at the creation of the interests. In both of the above examples, on the facts given, the youngest measuring life—the one likely to live the longest and therefore determine the length of the waiting period—is G’s youngest grandchild in being at G’s death. That grandchild, it should be noted, is undoubtedly the youngest measuring life under either the statutory-list or the causal-relationship method. The key players in these dispositions, however, are the after-born grandchildren, for the youngest of them is likely to live longer than the youngest measuring life. Because the after-born grandchildren are not counted among the measuring lives, the expiration of a waiting period measured in the traditional fashion cannot be thought to coincide with the latest point when actual vesting should be allowed—in the above cases, on the death of the last survivor of G’s grandchildren, the youngest of whom is after-born. It is the tack-on 21-year part of the waiting period that almost always extends the period sufficiently so that it expires at some arbitrary time after that
beneficiary's death and thereby validates the dispositions. In Example (2), the period of 21 years following the death of the last survivor of the grandchildren who were in being at G's death is normally more than sufficient to cover the death of the last survivor of the grandchildren born after G's death.

Thus the actual-measuring-lives approach performs a margin-of-safety function. A proxy for this period performs this function just as well. In fact, in one respect it performs it more reliably because, unlike the actual-measuring-lives approach, the flat 90-year period cannot be cut short by irrelevant events. The supposition that the tack-on 21-year part of the period is usually ample to cover the births, lives, and deaths of the after-born beneficiaries (when it is appropriate to do so) relies on the measuring lives living out their statistical life expectancies. They are not guaranteed to live that long, however. Though unlikely, they might all die prematurely, thus cutting the waiting periods short—possibly too short, even, to cover these post-creation events. Plainly, no rational connection exists between the premature deaths of the measuring lives and the time properly allowable, in Example (1), for the youngest after-born grandchild to reach 30 or, in Example (2), for the death of that youngest after-born grandchild to occur. A flat period eliminates the possibility of a waiting period cut short by irrelevant events.

Another question raised by a 90-year waiting period is whether it authorises excessive dead-hand control. Any concern that it does must be put in a proper perspective: First, the Uniform Act does not authorise an increase in aggregate dead-hand control beyond that which is already possible under the full rigour of the common-law Rule Against Perpetuities by the common practice of utilising perpetuity saving clauses. In fact, it now seems to be agreed that the waiting period under wait-and-see operates much like a perpetuity saving clause. Dispositions such as those in Examples (1) and (2) are routinely created and are validated by such clauses. No demonstrated harm seems to have befallen society as a result—even though the period of time generated by a perpetuity saving clause can easily exceed 90 years, as can the period of time generated by a waiting period measured by actual measuring lives plus 21 years, whether the causal-relationship or statutory-list method is used. Second, the fact that the waiting period under the wait-and-see element of the Uniform Act is 90 years does not mean that vesting in all trusts or other property arrangements will be postponed for the full 90 years, or even come close to being postponed for that long. As with a perpetuity saving clause, final vesting in most trusts or other property arrangements will occur far earlier, so that the perpetuity-period component of the clause or its near equivalent, the 90-year waiting period under the Uniform
Act, extends unused into the future long after the interests have vested and the trust or other arrangement has been distributed. If excessive dead-hand control is a problem, then, it is not the Uniform Act that is or would be the root cause, but the common-law Rule itself, especially the feature of the common-law Rule that allows the use of perpetuity saving clauses to validate otherwise invalid interests such as those in Examples (1) and (2), above.

For all of the above reasons, which are elaborated in greater detail in an article on the Uniform Act published in 21 Real Property, Probate & Trust Journal 569 (1987), the Drafting Committee of the Uniform Act came to believe that a flat 90-year waiting period is to be preferred over the other approaches: without authorising dead-hand control beyond that which is routinely invoked by competent drafting, the 90-year waiting period performs the same margin-of-safety function as the actual-measuring-lives approach, performs it more reliably, and performs it with a remarkable ease in administration, certainty in result, and absence of complexity as compared with the uncertainty and clumsiness of identifying and tracing actual measuring lives.

Adopting a flat period of 90 years rather than using actual measuring lives is an evolutionary step in the refinement of the wait-and-see doctrine. Far from revolutionary, it is well within the tradition of that doctrine. The 90-year period makes wait-and-see simple, fair, and workable. The unique approach of the Uniform Act deserves serious consideration wherever perpetuity reform is undertaken.

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