Perpetuity Reform

Lawrence W. Waggoner
University of Michigan Law School, waggoner@umich.edu

Available at: https://repository.law.umich.edu/articles/382

Follow this and additional works at: https://repository.law.umich.edu/articles

Part of the Common Law Commons, Estates and Trusts Commons, Legislation Commons, and the State and Local Government Law Commons

Recommended Citation
After years of debate, perpetuity reform is still controversial. To be sure, there is agreement among virtually all of the commentators and experts in the field that the Rule Against Perpetuities is in need of reform. The disagreement, on the surface, centers on the methods of reform to be employed. At least three basic methods have been advanced: (1) specific statutory repair of discrete problem areas; (2) reformation; and (3) wait-and-see. Each method has its sponsors, and each has in one form or another been adopted as part of the law of a few states. These methods are not mutually exclusive, and some of the states have combined more than one of them in their statutes.

The most controversial of the reform methods is wait-and-see, which posits that a perpetuity violation should only occur if an interest actually remains contingent beyond the perpetuity period. The controversy surrounding the wait-and-see concept was rekindled when the American Law Institute adopted it as part of the Restatement (Second) of Property, only a few years after the 1971 decision of the Supreme Court of Pennsylvania in Pearson Estate misapplied an already inadequate statutory formulation of the concept. The wait-and-see controversy has, over the years, centered on the problem of the concept's workability—specifically, the uncertainty over how the measuring lives are to be determined.

Although the workability of wait-and-see and of the other methods of reform is an important matter, and is one that will be addressed in this Article, the main attention here has a rather different focus. For underlying the debate over the methods of reform lurks a largely unarticulated and perhaps largely unrecognized issue: Should reform reach all perpetuity violations or be restricted to

---

* © 1983 by Lawrence W. Waggoner. Portions of this Article have been adapted from L. Waggoner, Future Interests in a Nutshell (West 1981), and will subsequently appear in modified form in the forthcoming book, L. Waggoner & M. Fellows, Wills, Trusts and Future Interests (Little, Brown & Co.).

** Professor of Law, University of Michigan. I take special pleasure in thanking Olin Browder for having read and commented on an early draft of this Article. At the time, he did not know that the final product would appear in an issue dedicated to him on the occasion of his retirement.

1. Restatement (Second) of Property (Donative Transfers) § 1.4 (1983).
those that fall into discrete problem areas? With respect to the discrete problem areas, which in this Article are termed technical violation categories, the Rule defeats dispositions that are reasonable: The Rule violations rest on such unlikely possibilities as an elderly woman having additional children or the probate of an estate taking more than twenty-one years to complete. The original case for perpetuity reform, indeed the only case for reform that has been systematically presented, argues from the technical violation categories and rests on the Rule's "harshness" or "illogicality" in defeating such reasonable dispositions. This case is an argument for reversing the invalidity in the technical violation categories, but not for interfering with the normal operation of the Rule in all cases of perpetuity violation. Since the invalidity in the technical violation cases is so easily reversed by the specific statutory repair method of reform, it is a great curiosity that wait-and-see — the method of reform most ardently advocated — interferes with the normal operation of the Rule in all cases of violation. Part of the controversy surrounding the wait-and-see method may at bottom be traceable to this discrepancy.

The theme of this Article is that there is a respectable case for intercession in all cases of perpetuity violation. The case is grounded upon and is in fact an application of the theme of another article that John Langbein and I recently co-authored, entitled Reformation of Wills on the Ground of Mistake: Change of Direction in American Law? Pointing to the long-recognized reformation doctrine for non-probate transfers, that article advocates the forthright adoption of a similar doctrine for wills. Cases of well-proven mistake of law or fact in the formulation of the terms of gratuitous transfers invoke the fundamental principle of equity jurisprudence: preventing unjust enrichment. If mistakes are not corrected, unintended takers are enriched at the expense of the intended beneficiaries. In one respect, the application of this idea to the perpetuity area is easier than in the generalized cases of mistake that are the main focus of attention in the earlier article. Extrinsic evidence is hardly necessary to show that a perpetuity violation is the product of a mistake, but such evidence is frequently necessary to prove a mistake in other cases.

The application of the prevention-of-unjust-enrichment idea to the perpetuity area is easier, though more subtle, in another respect. Preventing unjust enrichment in generalized cases of mistake requires an open-ended remedy of reformation, to be applied by courts

on an ad hoc basis. Because perpetuity violations are relatively homogeneous, the method to be applied in the correction of the mistake can take a common and hence more automatic form. It need not, in fact, be framed overtly as a method of correcting a mistake but can be cast as a legislative reformulation of the Rule Against Perpetuities itself. This approach will be effective as long as it is understood that correction of mistake is the underlying objective of the reformulation, so that the reformulation is shaped by the legislature and administered by the courts in accordance with that objective.

Part I of this Article examines the common law Rule and identifies a paradox in the Rule's operation: The requirement of initial certainty, which is the Rule's central test of validity, is both the culprit that defeats reasonable dispositions in the technical-violation categories and the hero that makes the common law Rule workable. Part II details the discrete categories of technical violations and the specific statutory repair method of perpetuity reform that is designed to eliminate them. Part III examines the two basic methods of perpetuity reform that interfere with the normal operation of the Rule in all cases of Rule violation—reformation and wait-and-see. As we will see, some versions of both methods comport with the objective of preventing unjust enrichment of unintended takers at the expense of the intended beneficiaries. Unfortunately, until quite recently no American jurisdiction had adopted any of these versions. At long last, one state—Iowa—within the past few months enacted a statute that accords with the prevention-of-unjust-enrichment objective. The details of the new Iowa statute will be noted in Part III.

I. THE COMMON LAW RULE AND THE REQUIREMENT OF INITIAL CERTAINTY

As formulated by Professor John Chipman Gray, the Rule Against Perpetuities 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.” No single-sentence formulation of a body of law as complex as the Rule Against Perpetuities could be entirely complete and accurate. Gray's formulation is no exception, as he likely would have been the first to concede. Nevertheless, his formulation is considered by the courts to be the classic statement of

5. J. Gray, The Rule Against Perpetuities § 201 (4th ed. 1942). This formulation was first published in the second edition in 1906 and has been carried forward without change.
the Rule. And, more important for the purposes of this Article, it states rather clearly the requirement of initial certainty, which — paradoxically — is both at the heart of a workable Rule and at the root of the need to reform it. The requirement of initial certainty means that an interest is invalid if there exists at the commencement of the perpetuity period any possible chain of events that might subsequently arise that would allow the questioned interest to remain contingent beyond a life in being plus twenty-one years.\(^6\)

A. The Requirement of Initial Certainty as the Central Mechanism of an Adjustable and Workable Perpetuity Period

The perpetuity period is not defined in terms of a rigid period of time such as a fixed number of years. A fixed period would be rather easy to comply with, but its rigidity would make it unadjustable to a variety of family arrangements. The fact that the perpetuity period is defined instead in terms of a life in being plus twenty-one years means that the actual length of time that an interest can validly remain contingent varies from situation to situation. A flexible perpetuity period is clearly more desirable than a rigid, fixed number of years. But to have an adjustable period that is also workable there must be some mechanism for discerning what the period is in each situation. The requirement of initial certainty serves this important function: It provides a mechanically precise test for determining the life by which the period is measured in given cases.

It is, however, grossly misleading to speak as if there is a definite perpetuity period tied into a particular life in each given case. To satisfy the requirement of initial certainty, there must be a causal connection between the person's death and the interest's vesting or failure to vest no later than twenty-one years thereafter. In the case of valid dispositions, there will indeed be a particular life who has the requisite causal connection and is identified as the so-called measuring life.\(^7\) But there is no such life in the case of invalid interests. Invalid

---

6. Sometimes the Rule is depicted as requiring that an interest must vest within the perpetuity period. This is a loose and in fact an inaccurate statement of the Rule, as a moment's reflection reveals. The Rule does not and could not require a certainty that the interest will vest in due time; the certainty that the Rule does require, to use Gray's terminology, is that the interest will vest \textit{if at all} in due time. The phrase "if at all" means that what must be certain to happen within the perpetuity period is that there will be a resolution of the question whether or not the interest will ever vest. Thus the interests prohibited by the Rule are those that might remain contingent for too long a time. To satisfy the Rule, in other words, it must be certain that within the perpetuity period the interest will either vest or forever fail to vest.

7. 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 fail to vest within 21 years of its creation. But in most cases, a measuring life must be found.
interests are invalid, not because they might remain contingent beyond twenty-one years after the death of a particular measuring life, but rather because there is no measuring life that makes them valid. This is what is meant when it is said that invalidity under the Rule depends upon the existence, as of the commencement of the perpetuity period, of an invalidating chain of possible events. It is thus quite accurate to characterize the requirement of initial certainty, not as a mechanism for marking off a "perpetuity period" in each given case, but rather as a mechanism for testing the validity of an interest in advance of its actual vesting or failure to vest. This immensely important point must be understood, for — as developed further in Part III — it is crucial to appreciating that the wait-and-see method of perpetuity reform constitutes a fundamental departure from the common law Rule, not just a slight reformulation of the Rule, as some wait-and-see advocates have asserted. For this reason, the more accurate term, "validating life," will hereafter be used in this Article when discussing the Rule's common law context. The wait-and-see method of reform, in contrast, requires that a perpetuity period be marked off in each case where no validating life exists; thus the term "measuring life" is more apt and will be used in the context of wait-and-see.

The process for determining if a validating life exists under the common law Rule is to postulate the death of each person connected in some way to the transaction and ask the question: Is there with respect to this person an invalidating chain of possible events? If one person can be found for which the answer is No, that person is the validating life. As to that person there will be the requisite causal connection between his or her death and the questioned interest's vesting or failure to vest within twenty-one years thereafter.

---

8. Dispositions of property sometimes create more than one interest that is subject to the Rule. In such cases, the validity of each interest is treated as an individual matter. A measuring life that validates one interest might or might not validate the other interests. Since it is not necessary that the same measuring life be used for all interests created by a disposition, the search for a measuring life for each of the other interests must be undertaken.

9. Only persons who are connected in some way to the transaction have a chance of supplying the requisite causal connection demanded by the requirement of initial certainty. Such persons vary from situation to situation, but typically include the beneficiaries of the disposition, including the taker or takers of the questioned interest, and persons related to them by blood or adoption. There is no point in even considering the life of a person unconnected to the transaction — a person from the world at large who happens to be in being at the creation of the interest. No such person can fulfill the requirement of initial certainty because there will be an invalidating chain of possible events as to every unconnected person who might be proposed: All unconnected persons can immediately die after the creation of the questioned interest without causing any acceleration of the interest's vesting or failure to vest. 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.
To illustrate this process with a simple example, suppose that T devised property “to A for life, remainder to such of A’s children as attain twenty-one.” T was survived by his son (A), by his daughter (B), by A’s wife (W), and by A’s two children (X and Y). As noted above, the world at large is disregarded in analyzing if there is a validating life for the contingent remainder in favor of A’s children.

Once the inquiry is narrowed to persons connected in some way to the transaction, the first possible validating life that comes to mind is A. And it turns out that A does in fact fulfill the requirement of initial certainty. Because it is assumed that A’s death will terminate the possibility of any more children being born to him, it is impossible, no matter when A dies, for any of A’s children to reach twenty-one (or die under twenty-one) more than twenty-one years after his death. A is therefore the validating life for the contingent remainder in favor of his children.

None of the other persons who are connected to this transaction could serve as the validating life because an invalidating chain of possible events exists as to each one of them. This is of no conse-

10. To simplify the wording of some of the examples herein, they are put in the form of a transfer of legal interests in property, even though the major use of future interests today is in connection with trusts of securities (creating equitable interests in personal property).

11. This assumption is obviously accurate in almost all cases. Sperm banks, however, have raised the specter of the fertile male decedent. Thus, it could be argued that there is an invalidating chain of events even with respect to A: A child of his might be conceived and reach 21 or die under 21 more than 21 years after A’s death. The impact of this development on the Rule Against Perpetuities has been predicted or at least hoped to be nil. See 6 AMERICAN LAW OF PROPERTY § 24.22 (Supp. 1977).

12. Note the possibility of a child of A’s, though conceived during A’s lifetime, being born after A’s death. If this happened, the child could not reach his 21st birthday within 21 years of A’s death. The Rule is nevertheless satisfied because if this were to occur the length of the Rule would be extended to a life in being plus 21 years plus a period of gestation. See L. WAGGONER, FUTURE INTERESTS IN A NUTSHELL § 12.4 (1981) [hereinafter cited NUTSHELL]. The period of gestation is not a formal part of the perpetuity period, however. Thus if T’s devise had been “to A for life, remainder to such of A’s children as are living 21 years and 9 months after his death,” the validating life would still be A. B would not become the validating life. Even though she is the life tenant, an invalidating chain of events exists as to her: B might predecease A before any of A’s children have reached 21, A might subsequently (but before any of his children have reached 21) have another child, and the subsequently born child might reach 21 or die under 21 more than 21 years after B’s death.

13. In the above example, the validating life, A, happened to be the legatee of the preceding life estate. But he is not the validating life for that reason. The fact that a person happens to be the legatee of the preceding life estate does not guarantee that his death is certain to accelerate the vesting or failure to vest of the succeeding remainder interest, much less guarantee that one or the other will occur no later than 21 years after such person’s death. If the disposition had been “to B for life, remainder to such of A’s children as attain 21,” the validating life would still be A. B would not become the validating life. Even though she is the life tenant, an invalidating chain of events exists as to her: B might predecease A before any of A’s children have reached 21, A might subsequently (but before any of his children have reached 21) have another child, and the subsequently born child might reach 21 or die under 21 more than 21 years after B’s death.

14. The other persons who might be considered include W, X, Y and B. In the case of W, an invalidating chain of events is that she might predecease A, A might remarry and have a child by his new wife, and such child might reach 21 or die under 21 more than 21 years after B’s death. With respect to X and Y, an invalidating chain of events is that they might predecease A, A might later have another child, and that child might reach 21 or die under 21 more
sequence, because only one such person is required to establish the validity of a questioned interest.

B. Use of the Requirement of Initial Certainty in Planning

Lawyers who are knowledgeable in this area are able to work with the requirement of initial certainty in drafting dispositions that comply with reasonable client requests. Ideally, they test dispositions at the drafting stage to be sure that there is a validating life for each interest that is subject to the Rule.

On occasion, clients wish to take so-called maximum advantage of the perpetuity period so as to tie up the property for as long as legally possible. The requirement of initial certainty is adaptable to such a desire: The instrument may be drafted so as to gear the time when all interests must vest, if at all, to a designated life, typically the last surviving member of a group of individuals. In such cases, the validity of all interests is assured as long as the designated group is restricted to persons in being at the commencement of the perpetuity period and as long as proof of the deaths of such persons can reasonably be ascertained.

Knowledgeable lawyers gear the time when all interests must vest or fail to vest to a designated life even in cases where the client has no desire to tie up the property for as long as legally possible. Here we are talking about inserting a so-called saving clause into the instrument.

15. For example, a testamentary trust might be set up in which the trustee is directed to pay the net income to T’s descendants from time to time living, per stirpes, until the 21st anniversary of the death of T’s last surviving descendant who was living at T’s death, whereupon the corpus of the trust is to be divided among T’s then living descendants, per stirpes. This trust would probably be valid. Cf. Reagh v. Kelley, 10 Cal. App. 3d 1082, 89 Cal. Rptr. 425 (1970). However, the larger the designated group, the less connected the group is to the beneficiaries of the trust, and the more difficult it becomes to identify the members of the group initially and to trace their deaths, the less likely it is that the trust would be upheld. Perhaps the widest group of designated measuring lives that has been upheld was the group designated by the so-called royal lives clause in In re Villar, [1929] 1 Ch. 243 (C.A.). In Villar, the testator provided for the vesting of all interests in a trust “at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death.” [1929] 1 Ch. at 243. The Restatement declares that a royal lives clause and similar periods such as the lives of “those persons whose names appear in the City Directory . . . for the City of X” would be held invalid in a modern American court. Restatement of Property § 374 comment I (1944). Actual instances where a court has declared a trust invalid for this reason, however, are few.

The grounds for invalidity are likely to be put on the uncertainty involved rather than on a violation of the Rule as such. In In re Moore, [1901] 1 Ch. 936, the testator created a trust to endure until “twenty-one years from the death of the last survivor of all persons who shall be living at my death.” In a short opinion, the court held the gift “void for uncertainty. It is impossible to ascertain when the last life will be extinguished . . . Under these circumstances it is not, I think, necessary for me to consider whether the gift is void as transgressing the rule against perpetuity.” [1901] 1 Ch. at 938.
Perpetuity Reform

instrument. Saving clauses contain two components, the first of which may be called the **perpetuity-period component**. It expressly requires that the trust or other arrangement must terminate no later than twenty-one years after the death of the last survivor of a group of designated persons. The second component of saving clauses may be called the **gift-over component**. This 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 terminate earlier in accordance with its other terms.

It is important to note that regardless of what group of persons is designated in the perpetuity-period component, the members of the group are not necessarily the persons who would be the validating lives for the questioned interest in the absence of the saving clause. Without the saving clause, the questioned interest may in fact be invalid because of the existence of an invalidating chain of possible events with respect to every person who might be proposed as a validating life. By being designated in the saving clause, however, they become validating lives. The saving clause confers on the last surviving member of this group the requisite causal connection between his or her death and the vesting or failure to vest of all interests in the trust or other arrangement no later than twenty-one years thereafter.

Saving clauses are not usually intended to become operational. Their main purpose is to serve as a backstop to prevent inadvertent or merely technical perpetuity violations, such as those described next. Of course, if there is a reasonable likelihood that a saving

---

16. In some saving clause forms, the persons designated are “all beneficiaries of this trust [or other arrangement] who are in being at the time this instrument becomes effective for perpetuities purposes;” in other forms, they are “all of the descendants of the testator [or of some other appropriate person] who are in being at the time this instrument becomes effective for perpetuities purposes.” Other variations are of course possible, as long as the persons selected are restricted to persons in being at the time when the perpetuity period commences to run on the transfer. For testamentary transfers, this time is at the testator’s death; for inter vivos transfers, it ordinarily commences when the transfer becomes effective for purposes of property law generally. With respect to certain types of inter vivos transfers, such as revocable transfers, the commencement of the perpetuity period is postponed, typically to the time of the transferor’s death. The usual rule for interests created by the exercise of special or testamentary powers of appointment is that the perpetuity period commences when the power is created rather than when it is exercised. See NUTSHELL, supra note 12, §§ 12.5, 12.8, 14.3(a).

17. In some saving clause forms, the gift over is in favor of the testator’s “then living descendants per stirpes;” in other forms, appropriate to trusts only, the gift over is in favor of “the persons then entitled to the income of this trust, and in the same shares and proportions as they are so entitled.” Other variations, tailored to the special desires of the transferor, are, of course, also possible.
II. THE TECHNICAL VIOLATIONS AND THE SPECIFIC STATUTORY REPAIR METHOD OF REFORM

Although the requirement of initial certainty provides the central mechanism of an adjustable and workable perpetuity law and is not an obstacle to a skilled lawyer's implementation of reasonable client objectives, the requirement has caused difficulty. It presupposes that the only items that can be taken into account in determining the validity of a questioned interest are the contingencies attached to the interest and the facts existing when the Rule commences to run. If an invalidating chain of events is then possible, the interest is invalid without regard to the probability that this chain of events will or will not actually happen.

Although in some cases the invalidating chain of events almost certainly or at least possibly will happen, there are other cases where the invalidating chain of events will *almost certainly not* happen. One of Professor Leach's major contributions is that he identified discrete categories of the latter type, gave each category a name that still sticks,¹⁸ and used the names as his main weapons in waging a formidable campaign for perpetuity reform — calling in one article for an end to the Rule's "reign of terror,"¹⁹ and in a companion article for a “staying [of] the slaughter of the innocents.”²⁰

These categories, to use their Leachian names, are the fertile octogenarian, the administrative contingency, and the unborn widow.²¹ A further category can perhaps be added: certain age contingencies in excess of twenty-one, a category that sometimes but not always is the product of the fertile octogenarian. Almost any objective observer would deem the dispositions that become entangled in these categories to be reasonable ones. Such dispositions violate the Rule on technical grounds only, for the chain of possible events that renders them invalid is so unlikely to occur that it probably is recognizable only by lawyers schooled in the Rule's intricacies. In fact, a feature intrinsic to these categories is that the dispositions in ques-

²¹. The "precocious toddler" and "magic gravel pit" categories were added in the *Reign of Terror* article, supra note 19, at 731-32, though they are unlikely-to-be-created variants of the fertile octogenarian and the administrative contingency.
tion could have been prudently drafted by a Rule-wise lawyer immediately before the effective date of the transfer without changing their substance at all. The only difference is that the Rule-wise lawyer would have taken one of several measures available to him to assure their validity, any one of which almost certainly would turn out to be purely formalistic. One such measure is the inclusion of a saving clause. And because the saving clause would become operational only if a substantial part of the invalidating chain of events actually occurred — by definition an extremely remote possibility — the inclusion of a saving clause would be merely a formalistic step.

It has sometimes been said that these categories constitute “traps” or “pitfalls.” But these labels are not necessarily accurate if they are meant to suggest that the invalidating chain of events in all these cases was extremely unlikely to occur when the instrument was drafted and executed. The complicating factor is that certain types of instruments, notably wills and revocable trusts, may be drafted and executed long before the transfers they contain become subject to the Rule. When drafted and executed, the possible occurrence of the invalidating chain of events might not have been so unlikely — especially with respect to the fertile octogenarian, the unborn widow, and some cases of age contingencies in excess of twenty-one. At least its occurrence would not have been so unlikely if the possibility of the client’s death shortly thereafter had been contemplated — as it should have been, regardless of the client’s age or physical condition at the time of execution.

The point of noting this is to make it clear that it is unimportant whether or not in a particular case the client’s lawyer (or the transferor himself, if the instrument was home drawn) was actually entrapped into violating the Rule by a “pitfall.” The significant point insofar as perpetuity policy is concerned is that the invalidating chain of events is extremely unlikely to occur as of the time that the Rule commences to run.

The discrete categories mentioned above probably encompass all or nearly all of the situations likely to arise in contemporary times in which the invalidating chain of events is so unlikely to occur that the Rule violation can be said to be merely technical. The number of currently drafted technical violations that do not fall within one of these discrete categories is probably infinitesimal.

Therefore, if the only reason for perpetuity reform is the Rule’s harshness or illogicality with respect to technical violations, the most

22. See note 16 supra.
direct method of reform would be specific statutory repair, the basic thrust of which is to enact a series of laws that declare that the requirement of initial certainty in each discrete category has in fact been met. This approach alters some of the Rule's specific underlying assumptions without abandoning the requirement of initial certainty itself. Since the requirement is retained, the mechanical precision for determining the validating life is preserved. Furthermore, as we shall see, the legislative provision aimed at each technical violation (except one) constitutes an after-the-fact duplication or near duplication of the product that a Rule-wise lawyer, utilizing the requirement of initial certainty, could have provided for his client immediately before the transfer was effected.

Three jurisdictions — Florida, Illinois, and New York — have enacted a statutory provision aimed at each one of the categories. These jurisdictions, then, can be said to have adopted the specific statutory repair method. A few other states, by enacting provisions aimed at some but not all of the categories, have adopted parts of this method.

The following text focuses on each category, discussing first the technical violation and second the method of reversing it by specific statutory repair.

A. The Fertile Octogenarian


For purposes of the Rule Against Perpetuities, the common law conclusively presumes that all persons are capable of having children throughout their entire lifetimes, regardless of age or physical condition. Consider the following disposition in light of the common law presumption.

Example 1. T was a widower who had no children or other descendants and was in his seventies at the time of his death. His closest blood relative was his fifty-eight-year-old sister, A, who has two children, X and Y. X is married, is in his early thirties and has one child. Y is unmarried and in his mid twenties. T bequeathed part of his property in trust, directing the trustee to pay the net income therefrom "to my sister A for life, then to A's children for the life of the survivor, and upon the death of the last survivor of A and her children to pay the corpus of the trust to A's grandchildren."

If T's will had been drafted by a Rule-wise lawyer, the lawyer would have recognized the perpetuity violation in T's dispositive plan: The invalidating chain of possible events is that A will have a child, Z, conceived and born after T's death who will have a child
conceived and born more than twenty-one years after the death of the survivor of $A$, $X$, and $Y$. The Rule-wise lawyer, however, if he were engaged by $T$ shortly before $T$'s death, need not have been intimidated by this invalidating chain of possible events. The very same disposition, in substance, could have been drafted and its validity assured by either of two formalistic devices: (1) $A$'s children could have been designated by name rather than exclusively by class designation; or (2) a saving clause could have been inserted into the instrument.

In the absence of one or the other of these formalistic steps, however, the remainder interest in favor of $A$'s grandchildren is probably invalid. The invalidating chain of possible events would not be disregarded even if at the time of $T$'s death $A$ had passed the menopause and was infertile. The Rule's presumption that all persons are capable of having children throughout their entire lifetimes cannot be rebutted even though the person in question is a man who has undergone a vasectomy, or a woman who has undergone a complete hysterectomy or a tubal ligation, or a woman who has passed the menopause.

The conclusive presumption of lifetime fertility was established in early English decisions, of which *Jee v. Audley* is the best known and in which Sir Lord Kenyon, the Master of the Rolls, declared: "I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee [both age 70] to have children; but if this can be done in one case it may in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture."

Only one American common law decision has squarely rejected *Jee v. Audley* and held in a perpetuity case that the presumption is

---

23. The grandchildren's remainder interest is a class gift. All class gifts are subject to the Rule, and under the "all or nothing" rule of Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), are entirely invalid if the interest of any potential member of the class might vest too remotely.

24. If this course of action were chosen, the disposition would be changed to read: “to my sister $A$ for life, then to $A$'s children $X$ and $Y$ for the life of the survivor, and upon the death of the survivor of $A$, $X$ and $Y$ to pay the corpus of the trust to $A$'s grandchildren.”

25. 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).

rebuttable, not conclusive. In that case, *In re Lattouf's Will*, the presumption was rebutted because the person in question was a woman — although apparently in her normal child-bearing years — had undergone a complete hysterectomy. In contrast to the perpetuity area, there are other contexts in American law in which the presumption of lifetime fertility is held to be rebuttable and in fact rebutted either by the age of the person in question or by the person's physical condition. But as far as perpetuity cases go, *Lattouf* is the only one. The *Restatement of Property* squarely supports

---

27. 87 N.J. Super. 137, 208 A.2d 411 (1965). See also *In re Bassett Estate*, 104 N.H. 504, 190 A.2d 415 (1963), a trust termination case, see note 28 infra, where the court in dictum indicated that it would hold the presumption to be rebuttable even for purposes of the Rule Against Perpetuities.

28. There are at least two such areas: trust termination cases and charitable deduction cases under the federal tax laws.

**Trust termination.** One of the requirements for a trust to be ordered terminated prematurely, and the trust property to be distributed to the beneficiaries, is that all of the beneficiaries of the trust must join in the petition. Consequently, a trust that includes potential but presently unborn persons among its beneficiaries cannot be terminated prematurely. Numerous decisions in this setting have held that the presumption of lifetime fertility is rebuttable, and thus that evidence can be introduced for the purpose of showing that no additional beneficiaries will be born. Decisions are collected in 4 A. Scott, *The Law of Trusts* § 24.22, at 71-72 (1952) (written by Leach and Tudor). As will be pointed out later, however, the law in these two areas has more recently moved in the direction of perpetuity law (rather than the other way around) because the possibility of having children by adoption can seldom be shown to be extinct. See notes 35 & 37 infra and accompanying text.
the conclusive presumption,29 and there are many perpetuity cases, recent as well as not so recent, that have adhered to it.30

Although certain commentators have suggested that the solution to the so-called fertile octogenarian problem is to hold the unrealistic presumption to be rebuttable,31 as the Lattouf court did, it may be questioned if this would achieve the desired result. Even if the presumption were rebuttable, it could seldom be sufficiently rebutted to save a perpetuity violation as long as the requirement of initial certainty remains the test for validity. The most that could be established in most cases would be that it was unlikely, indeed perhaps even extremely unlikely, that the person in question could have more children. This is so even though in a given case it could be established that the birth of natural children was impossible.32 What the Lattouf court failed to consider was the possibility of having children by adoption. Since the trend in the law is strongly toward including adopted children in class gifts, at least in the absence of an expressly stated contrary intent,33 it is difficult to see how the Lattouf court could hold that the presumption of lifetime fertility had been rebutted in view of the fact that an infertile couple could easily adopt a child.34 Indeed, since even elderly people like A in example 1

30. E.g., Abram v. Wilson, 8 Ohio Misc. 420, 423, 220 N.E.2d 739, 742 (P. Ct. 1966) ("Obviously, . . . it is clearly possible for the testator's 75-year-old brother to have children . . . ."); Turner v. Turner, 260 S.C. 439, 445, 196 S.E.2d 498, 501 (1973) ("The possibility of childbirth is never extinct.").
32. A complete hysterectomy was regarded as sufficient by the Lattouf court, and in example 1 A's having gone through the menopause would undoubtedly be sufficient. Even as to natural children, however, medical science increasingly stands in the way. The success of in vitro fertilization procedures is well known; and, more recently, in vivo fertilizations (ovum transfers) have led to successful pregnancies in infertile women. See Lancet, July 23, 1983, at 223. Furthermore, can it be held that a man or woman who has undergone a sterilization procedure cannot have children, given the possibility of surgical reversal, or even — as occurred in Ochs v. Borelli, 187 Conn. 253, 445 A.2d 883 (1982), and cases cited therein — the possibility that the procedure was negligently performed and would turn out to be ineffective? For a somewhat dated but still pertinent discussion of this and related points, see Schuyler, The New Biology and the Rule Against Perpetuities, 15 UCLA L. Rev. 420 (1968).
33. Adopted children are presumptively included in class gifts in New Jersey, the jurisdiction in which Lattouf was decided, although this matter may have been in some doubt when the decision in Lattouf was rendered. See In re Thompson, 53 N.J. 276, 250 A.2d 393 (1969).
34. One would have expected the dramatic departure from traditional perpetuity doctrine effected by the Lattouf court, together with the court's questionable conclusion that the presumption was rebutted, to have led to validity of the interest in question. But this was not so. The court nevertheless held that the disposition violated the Rule. For an analysis of Lattouf, showing how the court could have upheld the disposition, see Waggoner, In re Lattouf's Will and the Presumption of Lifetime Fertility in Perpetuity Law, 20 San Diego L. Rev. — (1983) (in press).
probably cannot be excluded from adopting children based on their age alone, the possibility of adopting children is seldom extinct. It was noted earlier that there are other contexts of American law where a particular person’s ability to have a child is not conclusively presumed. Recent precedent in these areas has refused to disregard the possibility of a person having a child by adoption despite the person’s inability to have natural-born children.

If rejecting the conclusive presumption would do little to alleviate the problem, are there other, perhaps more promising solutions? Short of special legislation on the matter, and short of fundamentally changing the Rule itself so as to relax the requirement of initial certainty, there is a different approach adopted by some courts that could validate the offending interest in example 1. This approach is the constructional preference for validity, a principle holding that where an instrument is ambiguous—that is, where it is fairly susceptible to two or more constructions, one of which causes a Rule violation and the other of which does not—the construction that does not result in a Rule violation should be adopted. A court can

---

35. See, e.g., *In re Adoption of Christian*, 184 So. 2d 657 (Fla. Dist. Ct. App. 1966); Madsen v. Chasten, 7 Ill. App. 3d 21, 286 N.E.2d 505 (1972); *In re Haun*, 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972); Adoption of Tachick, 60 Wis. 2d 540, 210 N.W.2d 865 (1973). Cases are collected in Annots., 84 A.L.R. 3d 665 (1978); 56 A.L.R. 2d 823 (1957). See also H. KRAUSE, FAMILY LAW IN A NUTSHELL §15.3 (1977). The ages of the petitioners can, however, be considered in determining whether the adoption would be in the best interests of the child. See *Adoption of Randolph*, 68 Wis. 2d 64, 227 N.W.2d 634 (1975).

36. See note 28 supra.

37. For precedent in the charitable tax deduction area, see Rev. Rul. 74-410, 1974-2 C.B. 187 (possibility of a 60-year-old woman adopting one or more children is not so remote as to be negligible; charitable deduction denied); Rev. Rul. 71-442, 1971-2 C.B. 336 (possibility of a 56-year-old man adopting a child is not so remote as to be negligible; charitable deduction denied); Letter Rul. 8010011 (possibility of 60-year-old man adopting a child is not so remote as to be negligible; charitable deduction denied despite medical evidence that man’s age and physical condition was such that his ability to father a child was “near zero”).

For precedent in the trust termination area, see Clark v. Citizens & S. Natl. Bank, 243 Ga. 703, 257 S.E.2d 244 (1979) (per curiam). The Clark court held that the conclusive presumption was still followed in Georgia, but went on to indicate that even if the presumption were rebuttable it would not have been rebutted in this case; although there was uncontested medical evidence that the 59-year-old woman in question was no longer capable of bearing children, the possibility of her adopting a child was not extinct.

Leach anticipated the problem presented by the possibility of adoption, but nevertheless persevered in his criticism of the conclusive presumption in perpetuity law. His “answer” to the problem of adopted children was to change the subject: “Ay, there’s the rub. . . . This sort of thing is my reason for preferring statutory change on the cy pres principle, i.e., directing the court to reform the disposition to approximate the intention of the testator or settlor within the limits of the Rule.” Leach, supra note 31, at 282.

38. Cases supporting this principle of construction include Davis v. Rossi, 326 Mo. 911, 944, 34 S.W.2d 8, 21 (1930); *In re Estate of Schmitz*, 214 Neb. 28, 332 N.W.2d 666 (1983); Southern Bank & Trust Co. v. Brown, 271 S.C. 260, 266-67, 246 S.E.2d 598, 601 (1978). It is also supported by the RESTATEMENT OF PROPERTY § 375 (1944). A contrary view was declared by Gray, who asserted that a will or deed is to be construed without regard to the Rule Against Perpetuities, and then the Rule is to be “remorselessly” applied to the provisions so
apply this principle in appropriate fertile octogenarian cases by holding that the possibility of future children being born to or adopted by the person in question was so remote that the transferor never contemplated it and so did not intend to include such children in the class gift language even if they ultimately materialized. So construed, the requirement of initial certainty is met, and the interest is valid. 39 Since the relevant time for determining the intent of a testator is the time of execution of his will — not the time of his death (when the Rule commences to run on testamentary transfers) — this construction is ordinarily available to a court only if at the time the testator executed his will he had reason to expect that the person in question would not have additional children. 40 In such cases the fertile octogenarian category could properly be called a “trap” or “pitfall,” and the testator’s bequest could therefore be saved by the constructional preference for validity.

Yet some courts, without articulating their reasons, have been

39. See, e.g., Bankers Trust Co. v. Pearson, 140 Conn. 332, 99 A.2d 224 (1953) (testator was held to have meant children in being when he spoke of the children of his brother, age 55, and sisters, ages 52 and 57); Jeyner v. Duncan 299 N.C. 565, 264 S.E. 2d 76 (1980) (testator was held to have meant children in being when he spoke of the children of his 47-year-old son). This procedure has been rejected outright in England on the ground that class gifts are unambiguous and therefore extrinsic evidence is inadmissible for the purpose sought. See Ward v. Van Der Loeff, [1924] A.C. 653 (Visc. Cave); cf. In re Estate of Kalouse, 282 N.W.2d 98 (Iowa 1979). The RESTATEMENT OF PROPERTY § 377, comment c (1944), which supports the procedure, answers this point by asserting that it is proper in this situation to utilize the Rule itself as a basis for finding an ambiguity. Cf. L. Simes & A. Smith, THE LAW OF FUTURE INTERESTS § 1289 (2d ed. 1956).

40. Occasionally, though not often, there will be cases where this construction is appropriate even without finding an unlikelihood of further children being born or adopted as of the time the will was executed. In Southern Bank & Trust Co. v. Brown, 271 S.C. 260, 246 S.E.2d 598 (1978), T devised property in trust, directing the trustee as to the disposition of the income. As to the corpus, the trust was to terminate “upon the death of my last surviving grandchild,” whereupon the corpus “shall be divided into equal parts, one of which shall go to the issue of each of my twelve grandchildren [naming them] who die leaving issue then surviving.” T was survived by his three children and the twelve named grandchildren. The remainder interest in the corpus was held to be valid. The court conceded that the interest would be invalid if the trust was to terminate on the death of T’s last surviving grandchild whenever born. However, the fact that the beneficiaries of the trust corpus were the issue of the twelve named grandchildren, all of whom were living at T’s death, allowed the court to save the gift by construing “last surviving grandchild” to mean “last surviving of the twelve named grandchildren.”
unwilling to adopt such a construction even in apparently appropriate cases. It may be significant that the courts in these cases were able to find other ways of upholding the gifts, and one may speculate that the construction would have been adopted had another method not been available.41 A different explanation is that these courts sensed that although facts known to the testator suggested that he never contemplated the possibility of further children being born or adopted, those facts did not show that the testator intended to exclude such children in the unlikely event of their being born or adopted. But this explanation is not entirely persuasive, for if the testator was also apprised of the fact that their inclusion would cause an invalidity, it is almost certain that he would have excluded them. This application of the constructional preference for validity therefore seems justified. In fact, in example 1, its use would constitute an after-the-fact duplication of one of the validating formalistic devices that might have been used by a Rule-wise lawyer before the fact: the designation of A’s children by name rather than exclusively by class description.42

Suppose now that T’s will in example 1 had actually been drafted when T himself was much younger, when X and Y were small children, and when A was in her normal child-bearing years. It should be clear that the constructional method of avoiding a Rule violation would now not be properly available, even though at the time of the lawsuit it is known that no further children had been born to or adopted by A.43 The constructional preference for validity therefore holds out a solution to the so-called fertile octogenarian problem only when the testator had reason to expect that the person in question would not have additional children. In all other cases, even though at the date of the testator’s death no one would seriously expect that there was more than an exceedingly remote chance that further children would be born or adopted, the constructional preference is not properly available. Some other solution to the problem is needed. Specific statutory repair is one such solution.


42. See note 24 supra and accompanying text.

43. In the absence of any extrinsic evidence regarding T’s actual intention or knowledge of A’s plans, it would seem to be irrelevant whether or not A was then capable of having children. Even if she were not, the fact that she was in her normal child-bearing years would seem to mean that the possibility of adopting another child would not have been out of the question.
2. Statutory Repair of the Fertile Octogenarian Problem

A generalized provision, worded broadly enough to apply to all of the technical violation categories, has been adopted as part of the specific statutory repair statutes of Florida, Illinois, and New York. These statutes codify the constructional preference for validity by providing that in determining whether or not an interest violates the Rule, it shall be presumed that the transferor intended the interest to be valid. By lending statutory force to the constructional preference for validity, they should incline a court in an appropriate case to conclude that a transferor never intended to include after-born or after-adopted children in a class gift. This construction would constitute an after-the-fact duplication of one of the validating, yet formalistic, devices that might have been used before the fact by a Rule-wise lawyer: the designation of A’s children by name rather than exclusively by class.

For fertile octogenarian cases that are not saved by the codified constructional preference for validity, the Florida, Illinois and New York statutes overturn the conclusive presumption of lifetime fertility by declaring that evidence is admissible on whether or not a person is actually able to have a child at the time the perpetuity period commences. In addition, the Florida and New York statutes raise a rebuttable presumption that a male can have a child at age fourteen or older but not under that age, and that a female can have a child at age twelve or older, but not under that age nor over the age of fifty-five. The Illinois statute deems persons (male and female) age sixty-five or older and below thirteen to be incapable of having a child. The statutes of all three jurisdictions brush aside the problem of having children by adoption in a way not available to a common law court: They direct the possibility to be “disregarded.” The remainder interest in example I would thus be saved by these provisions because T’s sister, A, had passed the menopause at T’s death, even if she had still been in her normal child-bearing years when T actually executed his will.

While all three statutes confer validity on the remainder interest, they differ with respect to a subsidiary question: What happens if part or all of the extremely unlikely invalidating chain of events as-

associated with the fertile octogenarian problem (the occurrence of which the statutes deemed to be impossible) actually happens? Suppose, for instance, that in example 1 A adopts a child (Z) after T’s death and that Z in due course has children of his own? On one point, there is no disagreement: None of the statutes would reverse the validity that the statutes previously conferred on the remainder interest. The disagreement concerns the entitlement of persons who were deemed by the statutes not to be able to exist — Z and Z’s children — to become beneficiaries. Is Z entitled to become an income beneficiary, and are Z’s children entitled to participate in the remainder interest as members of the class of A’s grandchildren?

In this connection, recall that in example 1 there would have been two validating, yet formalistic steps available to a Rule-wise lawyer acting before the fact: designating A’s children by name rather than exclusively by class or inserting a saving clause into the instrument. While either of these devices would have achieved the primary purpose of validating the remainder interest, the effect of each would differ on the subsidiary question. The designation of A’s children (X and Y) by name would have excluded Z, though not necessarily his children. A saving clause would have allowed both Z and his children to participate.

A similar difference appears in the statutes. The Illinois statute — if it is interpreted as suggested by one of its drafters, Professor Schuyler — comes close to duplicating the device of designating A’s children by name. Schuyler argues that “future unexpected occurrences cannot, under the Statute, be allowed to alter the construction that resulted in the validity of an otherwise invalid gift.” The construction that resulted in the validity of the remainder interest in example 1 depended upon the possibility of Z’s adoption (and thus also Z’s children entering the class of A’s grandchildren) being disregarded. Thus, both Z and Z’s children would be excluded under this interpretation of the Illinois statute.

The Florida and New York statutes may come closer to duplicating the step of inserting a saving clause. The statutory provisions in


48. Whether or not Z’s children would have been excluded by this device depends on how the remainder interest would have been described. If it would have been in favor of “the children of X and Y,” Z’s children would have been excluded; if in favor of “A’s grandchildren,” any of Z’s children who had come into being before the death of the survivor of X and Y ought to have been included.

49. Schuyler, supra note 45, at 46.
these states apply only for purposes of determining the validity of a disposition under the Rule Against Perpetuities, and so Z and perhaps Z's children would be entitled to become beneficiaries.50

This possible difference between the Illinois and the Florida and

---

50. The Illinois statute is also open to this interpretation, for it begins with the phrase “In determining whether an interest violates the rule against perpetuities: . . . ” ILL. REV. STAT. ch. 30, § 194(c) (1979). The Florida and New York statutes are stronger, however. They provide that the provisions regarding births and adoptions do “not apply for any purpose other than that of determining the validity of a disposition under the rule against perpetuities [when; where; where] such validity depends on the ability of a person to have a child at some future time.” FLA. STAT. § 689.22(3)(d)(2) (1981); N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e)(4) (McKinney Supp. 1982-83).

The New York and Florida statutory provisions, and perhaps the Illinois provision also, are therefore worded broadly enough to allow a court to include both Z and his children as beneficiaries. Nevertheless, while the New York Law Revision Commission Report on § 9-1.3(e) clearly indicates that Z would be entitled to become an income beneficiary, the Report raises doubts about the entitlement of Z’s children. The Report states:

On this question the Commission believes that if the natural or adopted child had a valid interest under the instrument to begin with, there is no sound reason for invalidating that interest on the basis of subsequent events. In other words, the fact that another interest, which was questionable under the rule against perpetuities, has been “mistakenly” determined to be valid, is no reason to invalidate an interest whose validity was not in question from the outset. This approach again is reflected in the English Act as well as in the recent Ontario statute. Perpetuities & Accumulations Act 1964, § 2(2); Ont.Stat. c. 113, § 7(3).

NEW YORK LAW REVISION COMM., 1972 ANNUAL REPORT, LEG. DOC. No. 65, 195th Sess. (1972), reprinted in 1972 N.Y. SESSION LAWS 3213, 3234 (McKinney). This statement clearly supports Z’s entitlement to become an income beneficiary. The income interest in favor of A’s children was a “valid interest . . . to begin with.” By focusing attention on the validity of the interest to begin with (i.e., validity without the necessity of applying the statute), however, the Report leaves by negative implication a suggestion that Z’s children would not be allowed to participate in the remainder interest. The Report further confuses the matter by indicating that the Commission’s approach “is reflected in the English Act as well as the recent Ontario statute.” In point of fact, the cited provisions of the English and Ontario statutes appear to be inconsistent with one another on the question of the entitlement of Z’s children. The English statute provides that “the persons interested in the property comprised in the disposition” shall “so far as may be just” be placed “in the position they would have held” if the validity of the interest had not been decided by assuming that no after-born or after-adopted child would materialize. Perpetuities & Accumulations Act, 1964, ch. 55, § 2(2). Z’s children as well as Z are “persons interested in the property comprised in the disposition.” The Ontario statute, however, provides only that, where a child who was deemed unable to exist materializes, “such child” may be ordered by the court to receive the right that he “would have had.” Act of July 8, 1966, ch. 113, sec.7(3), 1966 Ont. Stat. 561, 573 (1966) (codified as amended at ONT. REV. STAT. ch. 374, § 7(3) (1980)). Literally interpreted, the Ontario statute would allow Z but not his children to be a beneficiary.

Once it is accepted that Z can become an income beneficiary, it makes little sense to exclude Z’s children from participation in the remainder interest. To make this point, recast example J so as to attach a contingency of survivorship to the grandchildren’s remainder interest: “income to A for life, then to A’s children for the life of the survivor, then corpus to such of A’s grandchildren as are living on the death of A’s last surviving child.” At T’s death, A had two children, X and Y. A adopts Z after T’s death. Allowing Z to become an income beneficiary permits the trust to continue for more than 21 years after the deaths of the lives in being (A, X and Y). During this post-21-year period, the interests of the children of X and Y remain contingent — the death of any one of them causes them to lose their interest in favor of the others who survive Z. Since this type of rearrangement of the interests can continue on during this post-21-year period, no damage would be done to public policy by allowing Z’s children to become class members also, and great damage to family harmony might occur by excluding them.
Michigan Law Review

New York statutes take on added significance in one situation. These statutes direct courts to disregard the possible occurrence of one chain of events that might not actually be so unlikely — the adoption of a child by a person who is in the normal child-bearing years but who is incapable of having a natural-born child. If this were the case in example 1, a Rule-wise lawyer acting before the fact probably would have used a saving clause instead of designating A’s children by name. The Florida and New York statutes duplicate one feature of that device, for a saving clause would also permit inclusion of the after-adopted child and his children as beneficiaries. The statutes fail to duplicate another feature of the saving clause, however. A saving clause would become operational to terminate the trust if — and this is unlikely — the after-adopted child outlived by more than twenty-one years the persons designated as the validating lives in the clause’s perpetuity-period component. Under the Florida and New York statutes, if interpreted as suggested, no such qualification would be imposed. The validity conferred on the remainder interest by the statutes would not be reversed, nor would the income and remainder interests be divested in favor of any gift over, no matter how long such after-adopted child might live.51

B. The Administrative Contingency

1. The Administrative Contingency Problem.

This category refers to the performance by a fiduciary (an executor, a trustee) of some administrative function, the completion of which may, but is extremely unlikely to, take more than twenty-one years. Typical examples are the completion of the probate of a will, the settlement of an estate, the payment of debts or taxes, the sale of estate assets, or the delivery of trust corpus on the termination of a trust.52

Example 2. T devised real property “to such of my grandchildren,


52. Property interests do not necessarily raise the administrative contingency problem simply because they are geared to the happening of some event external to the family. Where there is no one who can be said to be under a legal obligation to complete the task and where it is not so dramatically unlikely that the event will occur more than 21 years after the creation of the interest in question, the invalidity that results may be equally disturbing, but the solutions employed to deal specifically with the administrative contingency problem are usually inappropriate. An example of such a property interest is an open class gift that is contingent on survivorship of World War II. See Brownell v. Edmunds, 209 F.2d 349 (4th Cir. 1953); cf. Grynberg v. Amerada Hess Corp., 342 F. Supp. 1314, 1322 (D. Colo. 1972) ("[A]s a matter of practical business judgment," the court said in dictum, "it is difficult to conceive of an oil field which would be operated without realizable profit for 21 years beyond a life in being . . . ."); Monarski v. Greb, 407 Ill. 281, 95 N.E.2d 433 (1950).
born before or after my death, as may be living upon final distribution of my estate.” T is survived by children and grandchildren.

The grandchildren’s interest is invalid, by the majority view. The invalidating chain of possible events is that the final distribution of T’s estate will not occur within twenty-one years of T’s death, and that after T’s death grandchildren will be conceived and born who will survive or fail to survive the final distribution of T’s estate more than twenty-one years after the deaths of T’s children and grandchildren who are living at T’s death.

As example 2 illustrates, the term “administrative contingency” is somewhat misleading. It does not refer to the possibility that the administrative task will never be completed. If it did, all interests to take effect in possession upon the completion of the task would be contingent and invalid. But in fact, such gifts are upheld. Rather, it is accepted as certain that the task will be completed, presumably because of the fiduciary’s legal obligation to do so; the uncertainty is that the task might not be completed within the perpetuity period. Thus, as in example 2, the administrative contingency problem commonly arises because the interest is contingent on survivorship of the administrative function. Such dispositions have the completely rational objective of preventing the actual distribution of property to the estate of a dead person, thereby avoiding unnecessary expenses of administration and possible double estate taxation.

Rule-wise lawyers would hardly be deterred by the Rule from accomplishing this objective. Either of two validating, yet formalistic devices could be used: inserting a saving clause or requiring survivorship of the earlier of the twenty-one-year period following T’s death or final dis-

53. There have been such instances. See In re Estate of Hostetter, 75 Ill. App. 3d 1020, 394 N.E.2d 77 (1979) (25 years); Haddock v. Boston & Me. R.R., 146 Mass. 155, 15 N.E. 495 (1888) (63 years between death and probate of will); Garrett Estate, 372 Pa. 438, 94 A.2d 357 (per curiam), cert. denied, 345 U.S. 996 (1953) (23 years).

54. Cases are collected in 6 AMERICAN LAW OF PROPERTY § 24.23 n.2 (1952).

55. But see Miller v. Weston, 67 Colo. 534, 189 P. 610 (1920) (en banc), where the court held that a bequest to A “on the admission of this will to probate” is contingent on the probate of the will and invalid because probate “may never happen.” The court was unwilling to accept probate as a certainty even if “probate is required by law to be made.” In effect, the perpetuity requirement of initial certainty did not allow the possibility of the law’s being disobeyed to be ignored!

56. Concerns over double estate taxation, under the federal estate tax at least, may be somewhat overdrawn. The reason is that I.R.C. § 2013 (1976) provides for a credit against the estate tax of a second decedent in the amount of the estate tax imposed on the estate of the prior decedent. If the two decedents die within two years of one another, the amount of the credit is 100% of the prior decedent’s estate tax attributable to the inclusion of the transferred property. The credit is 80% of this amount if the second decedent dies between two and four years after the death of the prior decedent, 60% if the second death occurs between four and six years, 40% for deaths between six and eight years, and 20% for deaths between eight and ten years.
distribution of T's estate.\textsuperscript{57}

In the absence of a validating device, however, administrative contingency cases pose the problem of survivorship of a period of time that may exceed twenty-one years. The perpetuity problem raised by such conditions is the same as the one raised by conditions of survivorship of an age in excess of twenty-one. The condition probably causes an invalidity unless the legatees can themselves be their own validating lives.\textsuperscript{58} At the drafting stage, it is only possible to rely on the legatees being their own validating lives if the legatees are to be individually named or are to be the children of the testator or of a person or persons who are then dead.\textsuperscript{59}

A minority of courts has devised an escape from the administrative contingency problem. Since the administrative function is to be performed by a fiduciary, these courts hold that the fiduciary's obligation is not only to complete the task, but to do so within a reasonable time, and that a reasonable time is less than twenty-one years.\textsuperscript{60}

\textsuperscript{57} Such clauses should not be used if the bequest is designed to qualify for the estate tax marital deduction. \textit{See} I.R.C. \textsuperscript{\$} 2056(b)(3) (1976).

\textsuperscript{58} It is well established, though sometimes overlooked, that in appropriate cases the legatees of the questioned interest can be their own validating lives. \textit{See}, \textit{e.g.}, Rand \textit{v.} Bank of Cal., 236 Or. 619, 388 P.2d 437 (1964). This is an especially useful principle in cases where an interest is contingent on reaching an age in excess of 21 or is contingent on survivorship of a particular point in time that does or may exceed 21 years after the interest was created or after the death of a person in being at the date of creation. Suppose, for example, that T devised real property "to such of A's children as attain 25." Suppose further that A predeceased T and that at T's death, A had three living children, at least one of whom was under four. The executory interest in favor of A's children does not violate the Rule. A's children are their own validating lives. Each one of A's children will either reach the age of 25 or fail to do so within his own lifetime. To say this another way, we will know no later than at the time of the death of each child whether or not that child survived to the required age.

\textsuperscript{59} For example, suppose that T devised property "to such of my children as may be living upon final distribution of my estate." T is survived by children. The children's interest is valid. Since no children will be born to T after his death, his children are their own measuring lives.

When the questioned interest is in favor of a class that is not closed at the testator's death, the administrative contingency problem can also arise even if there is no condition of survivorship. Let us take a variation of example 2 to illustrate this point. Suppose that the gift were in favor of T's great-grandchildren instead of his grandchildren. The interest would be invalid even if the phrase "as may be living" were omitted. A great-grandchild could be conceived and born before the completion of the probate of T's estate and more than 21 years after the death of the survivor of T's children and those of T's grandchildren who were living at T's death. Note, however, that the invalidity here is due to the fact that the class of great-grandchildren could not only increase after the testator's death but could also increase after the death of lives in being at his death. If this class cannot increase after lives in being, the absence of a condition of survivorship will save a gift in favor of a class though it is not closed at the testator's death. To illustrate this, let us return to the original facts of example 2, where the gift was in favor of T's grandchildren. Now, suppose that the phrase "as may be living" were omitted. This would make the grandchildren's interest valid because no new members could join the class after the death of the survivor of T's children, all of whom were of course "in being" at T's death.

\textsuperscript{60} \textit{See}, \textit{e.g.}, Belfield \textit{v.} Booth, 63 Conn. 299, 27 A. 585 (1893); Asche \textit{v.} Asche, 42 Del. Ch. 545, 216 A.2d 272 (1966); Brandenburg \textit{v.} Thorndike, 139 Mass. 102, 28 N.E. 575 (1885); cf.
The difficulty with this minority view is that, while there may be an obligation to complete fiduciary tasks expeditiously, it is a fiction to say that there is always a violation of a fiduciary duty when the settlement of an estate takes more than twenty-one years. While rare, there can be cases where protracted and successive litigation over a multitude of issues legitimately ties up an estate for a very long time. Even on a case-by-case basis it would seem to be impossible to conclude with the certainty required by the Rule and on the basis of the facts existing when the interest was created that no such delay will properly arise.

Depending on the language employed, the principle of construction favoring validity may be available as a method of avoiding invalidity. For example, if a condition of survivorship is ambiguous on the point, it would probably be construed to relate to the death of the testator or of the life tenant rather than to the completion of the administrative task, such as the final distribution of the estate. Indeed this construction has on occasion been adopted even when the language unambiguously related to the estate’s final distribution.

Despite the existence of precedent supporting one or the other of these two salvage devices, the administrative contingency problem has not been solved. Most courts would probably still conclude that bequests such as T’s in example 2 violate the Rule and are therefore invalid.

2. Statutory Repair of the Administrative Contingency Problem.

The Florida and New York statutes overcome the problem by erecting a presumption that the transferor intended that administrative contingencies occur, if at all, within twenty-one years of the instrument’s effective date. The statute thus duplicates one of the before-the-fact formalistic devices that could have been used by T’s lawyer in example 2: expressly requiring survivorship of the earlier

---

61. See note 38 supra and accompanying text.
62. See RESTATEMENT OF PROPERTY § 374 comment f (1944).
63. See Malone v. Herndon, 197 Okla. 26, 168 P.2d 272 (1945), where a will providing that on the death of the life tenant leaving issue surviving him, the “trust estate shall be paid over, delivered and conveyed to such issue living at the time of said payment, delivery and conveyance” was construed to require survivorship of the life tenant.
64. See Prime v. Hyne, 260 Cal. App. 2d 397, 67 Cal. Rptr. 170 (1968), for an example of a recent decision that rejected the notion that the fiduciary’s duty guarantees that an estate will be distributed within 21 years of the decedent’s death.
65. FLA. STAT. § 689.22(5)(c) (1981); N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(d) (McKinney 1967).
of the twenty-one-year period following $T$'s death or final distribution of $T$'s estate. The Illinois statute takes a somewhat different route in reaching the same result. By erecting a presumption that administrative contingencies must occur, if at all, within the perpetuity period, it seems to codify the minority view that a fiduciary's obligation is to complete his task in less than twenty-one years.

C. The Unborn Widow

1. The Unborn Widow Problem.

The desire to benefit the surviving spouse of an income beneficiary is apparently common among some donors. Consider the following example.

_Example 3._ $T$'s family consists of his son ($A$), his two grandchildren ($X$ and $Y$), and $A$'s wife ($W$). $T$ bequeathed property in trust, the income to be paid "to my son $A$ for life, then to $A$'s widow for her life, and upon the death of the survivor of $A$ and his widow, the corpus shall be delivered to $A$'s then living descendants."

A Rule-wise lawyer would have recognized that an unnamed "widow" (or "widower") of an individual who was himself alive and married at the commencement of the perpetuity period cannot serve as the validating life. She (or he) might turn out to be someone who was conceived and born after the creation of the interest, no matter how improbable that possibility actually is. Thus, if the questioned interest is subject to the Rule, and if no other validating life can be located, the interest is probably invalid. In the case of $T$'s disposition, this would be the remainder interest in favor of $A$'s descendants. The invalidating chain of possible events is that $A$'s widow will not be $W$, but will instead be someone who was born after $T$'s

67. See note 60 supra and accompanying text.
69. See, e.g., Easton v. Hall, 323 Ill. 397, 154 N.E. 216 (1926); Chenoweth v. Bullitt, 224 Ky. 698, 6 S.W.2d 1061 (1928); Restatement of Property § 370, comment k, illustration 3 (1944). The possibility of an after-born widow does not always create a perpetuity violation. The legatees of the remainder interest following the widow's death may be their own validating lives. This would be the case if in example $J$ the contingent remainder were in favor of named individuals ($X$ and $Y$, perhaps) or a class that was closed at $T$'s death (the children of $T$'s predeceased daughter, $B$). Furthermore, if the remainder was not contingent on survivorship, the fact that it was still subject to open at $T$'s death would not invalidate it if the class could not increase beyond lives in being. For example, in the absence of a condition precedent of survivorship, a remainder in favor of $T$'s grandchildren would be valid in example $J$. See Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962). But one in favor of $T$'s great-grandchildren would be invalid.
death and who will outlive by more than twenty-one years A, W, X and Y, and that descendants of A will be born or die before the death of A’s widow but after the twenty-one-year period following the deaths of A, W, X and Y.

The Rule-wise lawyer would hardly be stymied by the unborn widow problem. There are several ways that T’s proposed plan could have been validated. A’s wife W could have been designated by name rather than by the phrase “A’s widow.” If this was unacceptable to T because he preferred to provide for the possibility of A’s widow being someone other than W, the income interest in favor of A’s “widow” could have been made contingent on her having been in being at T’s death. The more likely maneuver, however, would be to draft the bequest exactly as it was in example 3, but with a saving clause added to insure its validity. This approach would provide for the possibility of T’s widow being someone other than W and someone who was conceived and born after T’s death. The saving clause would almost certainly not become operational. Even in the unlikely event that A’s widow was born after T’s death, she is unlikely to survive by more than twenty-one years the last surviving person among those designated in the perpetuity-period component of the saving clause.

Even if none of these validating steps were taken at the drafting stage, there is still a chance that a court would uphold the descendants’ remainder interest by invoking the principle of construction favoring validity. When the language of the instrument fairly allows, some courts have construed T’s reference to A’s “widow” as referring only to the person to whom A was married when the will was executed or when T died. So construed, A’s widow could not be after-born, and thus the validating lives in example 3 would be A and W. However this procedure is not always used by courts, so its

70. The disposition would be changed to read “to my son A for life, then to W for her life, and upon the death of the survivor of A and W, the corpus shall be delivered to A’s then living descendants.”

71. The disposition would be changed to read “to my son A for life, then to his widow for her life if she was a person in being at my (T’s) death, and upon the death of the last surviving income beneficiary, the corpus shall be delivered to A’s then living descendants.”

72. Still, some care should be devoted to the drafting of the saving clause’s gift-over component. See McGovern, Perpetuities Pitfalls and How Best to Avoid Them, 6 REAL PROP. PROB. & TR. J. 155, 159 (1971). Note further McGovern’s suggestion that another way of carrying out T’s intent would be to confer a special power of appointment on A. Id. at 159-60.

73. See note 38 supra and accompanying text.

74. See Willis v. Hendry, 127 Conn. 653, 20 A.2d 375 (1941) (T’s will referred to “the wife of my said son”); In re Will of Friend, 283 N.Y. 200, 28 N.E.2d 377 (1940) (T’s will referred to “the widow of my said son Sol”).
appearance in a few cases does not constitute a full-scale remedy for the unborn widow problem.

2. Statutory Repair of the Unborn Widow Problem.

Various remedies for the unborn widow problem are available by specific statutory repair. The Florida, Illinois, and New York statutes declare that where an instrument creates an interest in the "spouse" of another person, it is presumed that the transferor intended to refer to a person who was living on the date that the Rule commences to run.\(^7\) As applied to example 3, this provision duplicates after-the-fact one of the validating devices that a Rule-wise lawyer might have used before the fact: making the income interest of A's widow contingent on her having been "in being" at T's death.\(^7\) A somewhat different approach is followed in California, where the statute declares that an unnamed "spouse" of a person who was himself in being at the commencement of the perpetuity period is "deemed a 'life in being'. . . whether or not [such spouse actually] was then in being."\(^7\) No difference in result between the two approaches would occur unless the improbable happens — unless A's widow is actually conceived and born after T's death. A truly after-born widow could still become an income beneficiary in California, a result that would duplicate one feature of the formalistic before-the-fact step of adding a saving clause. Under a saving clause, a truly after-born widow would still become an income beneficiary. But another feature of the saving clause approach is not duplicated. In the unlikely event that the after-born widow should outlive by more than twenty-one years the persons designated as the validating lives in the clause's perpetuity-period component, the clause would become operational: The trust would terminate, and the property would be distributed to the persons designated in the clause's gift-over component. The California statute contains no such qualification. By deeming even an after-born widow to be a life in being, the validity of the disposition would not be reversed, nor would any gift over become operational, regardless of how long the after-born widow lived.

\(^7\) FLA. STAT. \$ 689.22(5)(b) (1981); ILL. REV. STAT. ch. 30, \$ 194(c)(1)(C) (1979); N.Y. EST. POWERS & TRUSTS LAW \$ 9-1.3(c) (McKinney 1967).

\(^7\) See note 71 supra and accompanying text.

\(^7\) CAL. CIV. CODE \$ 715.7 (West 1982).
D. Age Contingencies in Excess of Twenty-One

1. The Problem of Age Contingencies in Excess of Twenty-One.

Many donors instinctively feel that a twenty-one-year-old person is not mature enough prudently to handle a sudden influx of wealth. Ages of twenty-five, thirty, thirty-five or even forty are thought more appropriate. This feeling, which is hardly irrational, sometimes translates into a requirement of survivorship to an age in excess of twenty-one. If the beneficiaries of such an interest can serve as their own validating lives, an age contingency in excess of twenty-one will not cause a perpetuity violation. But the Rule-wise lawyer can rely on this for validity only if the beneficiaries of the interest are to be individually named or are to be the testator's own children or the children of parents who are then dead. If the parent or parents are then alive and might survive the testator, age contingencies in excess of twenty-one are likely to lead to a perpetuity violation.

Example 4. T devised property in trust to pay the income to A for life. After A's death, the corpus is to be equally divided among such of A's children as reach twenty-five. (Appropriate provisions are made for the disposition of the income of the trust if upon A's death one or more

78. The strength of this sentiment is indicated by the progression of events that has occurred with respect to trusts that are set up for a child during his minority and that are designed to qualify for the annual exclusion under the federal gift tax law. The annual exclusion is available only for the transfer of present interests in property; the transfer of future interests does not qualify. I.R.C. § 2503(b) (Supp. V 1981). Prior to 1954, trusts set up for minors that did not confer on the minor a right to the income or corpus of the trust constituted a gift of a future interest for which no exclusion was allowed. Yet these were the very type of trusts that donors wanted to establish. In 1954, Congress provided some relief to such donors by enacting § 2503(c), a special provision allowing the annual exclusion for such trusts if certain conditions are met. One of these conditions is that the trust corpus and any accumulated income must "pass to the donee on his attaining the age of 21 years." I.R.C. § 2503(c) (1976). Although donors took advantage of § 2503(c), they sought to extend such trusts beyond the age of 21. One way of doing so was to provide that the beneficiary could, upon reaching 21, permit the term of the trust to be extended. This method, in fact, is authorized by Treas. Reg. § 25.2503-4(b) (1958). But even this did not satisfy donors. They sought instead to provide that if the beneficiary does not demand the property from the trustee on his 21st birthday or within a limited period of time thereafter the trust would automatically continue on past 21.

The Service originally ruled that trusts that so provided did not qualify for the annual exclusion, see Rev. Rul. 60-218, 1960-1 C.B. 378, but later bowed to the desires of donors on this point and ruled that such trusts do qualify. See Rev. Rul. 74-43, 1974-1 C.B. 285. More recently, another device has emerged by which donors can obtain the annual exclusion for trusts that continue on past age 21: the so-called Crummey Trust, named after the case that spawned the device, Crummey v. Commissioner, 397 F.2d 82 (9th Cir. 1968). The Crummey device is to grant to the beneficiary of the trust a right to demand the immediate payout of each new contribution into the trust, but only for a limited time. The Service has recognized the underlying validity of the Crummey Trust device, see Rev. Rul. 73-405, 1973-2 C.B. 321, but still polices whether the terms of the trust or the conduct of the donor make the demand right illusory in a given case. See Rev. Rul. 83-108, 1983-50 I.R.B. 14; Rev. Rul. 81-7, 1981-1 C.B. 474; Letter Rul. 8004172; Letter Rul. 7946007.

79. See note 58 supra.
of his children are under twenty-five.) $T$ is survived by $A$ and by $A$’s two children, $X$ and $Y$.

The interest in favor of $A$’s children who reach twenty-five is probably invalid: After $T$’s death $A$ might have a child who might reach twenty-five or die under twenty-five more than twenty-one years after the death of the survivor of $A$, $X$ and $Y$.

Consider four variations of this example: (1) when the will was executed $A$ was beyond the normal child-bearing years; (2) when $T$ died, but not when the will was executed, $A$ was beyond the normal child-bearing years; (3) when $T$ died $A$ was not beyond the normal child-bearing years but $X$ and $Y$ had already been born; and (4) when $T$ died $A$ was not beyond the normal child-bearing years and was then childless.

Separating the example into these variations exposes the fact that variations one and two are, at bottom, fertile octogenarian problems. The possibility that $A$ will have a child after $T$’s death in variations one and two is as remote as it is in the more standard fertile octogenarian problem illustrated by example 1.

But the third and fourth variations of example 4 are not the product of the fertile octogenarian problem; consequently, they constitute a separate category. Although there is room for disagreement on the point, the invalidity of the remainder interest in the third variation could be categorized as a merely technical violation. The invalidating chain of events is predicated on the concurrence of two events: $A$’s having a child after $T$’s death and such after-born child’s reaching twenty-five or dying under twenty-five more than twenty-one years after the death of the survivor of $A$ and those of his brothers and sisters who were in being at $T$’s death. While the possibility of an after-born child is not virtually out of the question, as it is in the first two variations, the occurrence of the other necessary event in the invalidating chain — that the after-born child reaches twenty-five or dies under twenty-five more than twenty-one years after the deaths of not only $A$ but also of $X$ and $Y$ (his siblings living at $T$’s death) — would in most cases be unlikely enough to justify labelling the perpetuity violation as merely technical.

It could even be argued, though less confidently, that the invalidity in the fourth variation is also especially harsh. Though the invalidating chain of events here — an after-born child’s reaching twenty-five or dying under twenty-five more than twenty-one years after the

---

80. As such, the first variation, though not the second, could be made valid by the constructional device of construing the interest to include only $X$ and $Y$, who would then serve as their own validating lives. See note 39 supra and accompanying text.
death of $A$ — is not so fantastic that its occurrence is virtually out of the question, it is still perhaps unlikely enough to put the situation into the category of technical violation.

The extent to which the perpetuity violation in example 4 is merely technical can be tested by shifting the perspective to that of a Rule-wise lawyer advising $T$ immediately before $T$'s death. Without the slightest doubt, the Rule-wise lawyer in variations one and two would have used a formalistic step to confer validity on the remainder interest, simply adding a saving clause, or designating $X$ and $Y$ by name rather than by class (so that $X$ and $Y$ could serve as their own validating lives).

Similarly, in variations three and four, the Rule-wise lawyer would not need to caution $T$ to permit $A$'s children to take their shares at age twenty-one. The addition of a saving clause would have allowed a Rule-wise lawyer to draft the disposition as $T$ wanted it. Of course, the likelihood that the saving clause would become operational is greater in the fourth variation than in the third, and in both variations it increases somewhat as the age at which the contingency is set rises. Consequently, more than normal care in drafting the saving clause would be justified in such cases. Nevertheless, it is far more likely than not that the saving clause would turn out to be nothing more than a formalistic device designed to confer validity on an otherwise reasonable disposition.

2. *Statutory Repair of Age Contingencies in Excess of Twenty-One.*

The specific statutory repair method deals with perpetuity violations associated with age contingencies in excess of twenty-one by

---

81. If the income beneficiary is to be a child of the client, a professionally competent attorney might for tax reasons have recommended a substantive change in the client's proposed disposition. He might have recommended that the grandchildren's interest be made to vest at the child's death, with possession postponed as to the share of any grandchild who is then under the designated age. The purpose of this would be to qualify the trust for the grandchild exclusion under the generation-skipping tax. Under I.R.C. §§ 2613(b)(5)(A), 2613(b)(6) (1976), any generation-skipping transfer (up to a maximum limit of $250,000 per deemed transferor) is excluded from the tax to the extent that the transferees are grandchildren of the grantor. Although the Code does not expressly so provide, the Joint Conference Committee Report indicates that the exclusion is available only "where the property vests in the grandchild (i.e., the property interests will be taxable in the grandchild's estate) as of the time of the termination . . . even where the property continues to be held in trust for the grandchild's benefit . . ." S. Rep. No. 1236, 94th Cong., 2d Sess. 618, reprinted in 1976 U.S. Code Cong. & Ad. News 4118, 4256 (1976). Proposed Treasury Regulation § 26.2613-4(a) also so provides: "[The grandchild] exclusion is available only if the property would be includable in all events in the grandchild's federal gross estate if the grandchild died at any time after the generation-skipping transfer." 46 Fed. Reg. 120, 127 (1981) (to be codified at 26 C.F.R. pt. 26) (proposed Jan. 2, 1981).

82. See note 58 supra.
lowering the age contingency to twenty-one, thus validating the affected interest. The Florida, Illinois, and New York statutes provide that where an interest would be invalid because it is made to depend upon any person attaining or failing to attain an age in excess of twenty-one years, the age contingency shall be reduced to twenty-one years as to any or all persons subject to such contingency. These statutes constitute a form of the reformation method of perpetuity reform described in Part III. However, because these statutes are meant to apply to a specific type of violation and because they require a specific type of reform (instead of leaving the reform's nature to judicial discretion), they are listed here as part of the specific statutory repair method.

As noted earlier, perpetuity violations associated with age contingencies in excess of twenty-one are not all alike. As illustrated by the first and second variations of example 4, some are clearly technical violations, more properly classified as fertile octogenarian cases. Other violations, like the third and fourth variations of example 4, are not truly fertile octogenarian cases and to the extent that they constitute technical violations at all they fall into a separate category.

The Florida and New York statutes recognize the proper classification of age contingencies in excess of twenty-one that are in truth fertile octogenarian cases. The statutory provisions requiring a reduction of the age contingency to twenty-one do not apply to such cases; they apply only when the interest would be invalid "except for this [subsection; section]," which presumably means that the age is not reduced if the interest is rendered valid by another statutory provision. The violations occurring in the first and second variations of example 4 would therefore be treated as fertile octogenarian cases and be saved either by the codified constructional preference for validity or by the statutory provision relating more directly to the fertile octogenarian. Eliminating the technical violations without...
reducing the age contingency is an eminently justifiable result in both variations, for it duplicates after-the-fact the result that could have been achieved before T's death if a Rule-wise lawyer had taken either of two formalistic steps: (1) designating A's children, X and Y, by name rather than by class description; or (2) inserting a saving clause into T's will.87

Bafflingly, the Illinois statute draws a distinction between the first and the second variations of example 4. The provision requiring a reduction of the age contingency yields only to the provision that codifies the constructional preference for validity. Thus the technical violation in the first variation of example 4 would be treated as a fertile octogenarian case and eliminated without disturbing T's disposition as written. However, the statute does not allow the second variation to be treated as a fertile octogenarian case, even though that is in truth what it is. The Illinois statute unnecessarily requires that the age be reduced to twenty-one even though A had passed the menopause by the time of T's death. The statute explicitly requires that the provision reducing the age contingency to twenty-one is to be applied before the provision declaring that persons above sixty-five and below thirteen are incapable of having a child.88 This, therefore, counts as an instance where the particular version of the specific statutory repair method adopted by one state fails to provide for an after-the-fact duplication of the product a Rule-wise lawyer might have produced for his client by resort to formalistic devices. The important point to note, however, is that the Florida and New York statutes demonstrate that this is not a necessary feature of the specific statutory repair method, and thus is not properly an objection to the method as such.

When the age contingency is not in truth a fertile octogenarian case, as in the third and fourth variations of example 4, different considerations apply. The violation in such cases is not so easily put into the technical category, for the possibility that the invalidating chain of events will actually happen is not utterly fantastic. Perhaps in recognition of this fact, the statutory method of conferring validity on such dispositions — requiring that the age contingency be reduced to twenty-one — departs from the basic technique of the specific statutory repair method, which is to legislate that the

87. The same problem discussed earlier, see notes 47-51 supra and accompanying text, could arise here: What happens in the unlikely event that after T's death A adopts a child, Z? Since the earlier discussion of whether Z would be entitled to participate as an income beneficiary in example I applies to the question whether Z would be entitled to participate in the remainder interest in example 4, it is not repeated.

invalidating chain of events is to be disregarded for purposes of the Rule. Nevertheless, as argued earlier, the actual occurrence of the invalidating chain of events is improbable enough — more so in the third variation but enough so in the fourth — to have led many, if not all, Rule-wise lawyers acting on $T$'s behalf immediately before the transfer to feel comfortable in assuring the validity of the remainder interest by inserting a saving clause rather than by disturbing the age contingency. In all likelihood a saving clause would turn out to be purely formalistic; to trigger it, one of $A$'s children would have to reach twenty-five or die under twenty-five more than twenty-one years after the death of the survivor of the persons designated in the saving clause's perpetuity-period component. The validating maneuver prescribed by the statutes — reducing the age contingency to twenty-one — thus fails to approximate after the fact the maneuver that could prudently have been used to avoid a violation in the first place.

III. INTERFERING WITH THE NORMAL OPERATION OF THE RULE IN ALL CASES OF PERPETUITY VIOLATION

Eliminating the technical violations is one thing: The dispositions that become entangled in the technical violations are reasonable and could have been carried out as desired if only they had been drafted by a Rule-wise lawyer immediately before the transfer was effected. Interfering with the normal operation of the Rule in all cases of perpetuity violation is altogether another matter. Yet, although the case for perpetuity reform is usually built upon the harshness or illogicality of the Rule with respect to the technical violations, two of the three methods of reform — reformation and wait-and-see — cure far more. Furthermore, except for New York, even the states that have adopted the specific statutory repair method have combined it with either a reformation or a wait-and-see provision.\textsuperscript{89}

\textsuperscript{89} The Florida statute is combined with a wait-and-see provision. FLA. STAT. § 689.22(2)(a) (1981).

In Illinois, the statute in effect injects a saving clause into all trusts that still contain a perpetuity violation after applying the specific statutory repair provisions. The terms of the saving clause are mandated by the statute. The perpetuity-period component consists of the lives of "all the beneficiaries of the instrument who were living at the date when the period of the rule against perpetuities commenced to run" plus 21 years. The gift-over component directs that all income interests existing at the time of the termination are to be commuted actuarially, the present value thereof to be paid out of principal to the beneficiaries of these interests. The remaining principal is to be distributed to the heirs of the maker of the creating instrument as if the maker had died at the time of trust termination (unless the trust was created by the exercise of a power of appointment, in which case the principal is distributed as if the power had not been exercised). ILL. REV. STAT. ch. 30, § 195 (1982).

California's statute specifically eliminates only the unborn widow technical violation cate-
It seems apparent that once perpetuity reform is pursued, the desire to interfere with the normal operation of the Rule in all cases of violation is quite strong. Yet, when it comes to perpetuity violations where there is an invalidating chain of events that is not so unlikely to occur that the possibility can be dismissed as frivolous, the case for interceding is not self-evident. It must be put on some ground different from the Rule's harshness or illogicality.

Surprisingly, no one seems to have constructed a systematic case justifying interference with the normal operation of the Rule in all cases. If one is to be made, it should begin by recasting the argument for the elimination of the technical violations. While it is true that the requirement of initial certainty does make the Rule work harshly or illogically with respect to these categories, a somewhat different case for their elimination can be persuasively advanced. The client's lawyer (or the transferor himself, when the instrument is home drawn) has — by drafting a disposition that violates the Rule Against Perpetuities — made a mistake. As a result, persons who the transferor did not intend to receive the property stand to gain from the mistake at the expense of the intended beneficiaries. Therefore a justification for eliminating the technical violations is — to borrow terminology from the law of restitution — the prevention of the unjust enrichment of unintended takers.

90. One wait-and-see proponent remarked that "it [would be] wrong" not to intercede in the case of all violations. Dukeminier, Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L. J. 1, 58 (1960).

91. Where the actual intention of the donor of a gratuitous inter vivos transfer can be shown by clear and convincing evidence to be at odds with the intention expressed in the instrument of transfer, the law of restitution corrects the donor's unilateral mistake (usually by reforming the instrument) so as to prevent the unjust enrichment of the unintended takers. See 4 G. PALMER, THE LAW OF RESTITUTION ch. 18 (1978). No such general reformation doctrine is recognized in the case of wills, but it has been argued that it should be. See Langbein & Waggoner, supra note 3.

It could be said that the prevention-of-unjust-enrichment argument is nothing more than an elegant way of expressing the more pedestrian-sounding contention that the testator's intent should be given effect insofar as it is possible to do so. Shifting the emphasis from the donor to the recipients, however, appropriately stresses the fact that unless corrective action is taken someone will receive a windfall purely as a result of a mistake, usually on the part of the donor's lawyer. At least one recent case has recognized both aspects of this problem. Stowe v. Smith, 184 Conn. 194, 441 A.2d 81 (1981), involved an action by an intended beneficiary against an attorney for the attorney's having made a mistake in preparing the testatrix's will in accordance with her instructions. The Supreme Court of Connecticut held that the complaint stated a cause of action for breach of a third-party beneficiary contract:

A promise to prepare a will pursuant to the instructions of a testatrix states a direct obligation to render a performance beneficial to her, i.e., the creation of a document which would enable her upon her death to effect the transfer of her assets to the beneficiaries named in her instructions. . . . [But,] if the defendant thwarted the wishes of the testatrix, an intended beneficiary would also suffer an injury in that after the death of the
If this argument has force with respect to the technical violations, it also has force with respect to other perpetuity violations. The client's lawyer (or the transferor himself, when the instrument is home drawn) has — by failing to recognize the existence of an invalidating chain of events, even one that was not so unlikely to occur or indeed one that was virtually certain to occur — also made a mistake. The mistake here might be of a different magnitude from those that lead to technical violations — perhaps one that even suggests complete ignorance of the Rule Against Perpetuities. But there is not always this difference. Pains were taken earlier to point out that the technical violations do not necessarily result from the client's lawyer (or the transferor himself) having been entrapped by a "pitfall."\(^{92}\)

Attempting to compare the magnitude of the mistake between a technical violation and other violations is beside the point anyway. Even if technical and nontechnical violations result from mistakes of different magnitudes, they both unjustly enrich unintended takers at the expense of the intended takers. Prevention of the unjust enrichment that would otherwise result from a mistake in violating the Rule is thus the justification for making perpetuity reform affect all, not just some, perpetuity violations.

As attractive as the prevention-of-unjust-enrichment argument is for extending the scope of perpetuity reform beyond the technical violations, there still remains the challenge of doing so without sacrificing the benefits of the requirement of initial certainty. The specific statutory repair method eliminates the harshest consequences of the requirement of initial certainty but preserves its beneficial aspects by limiting the scope of reform to technical violation cases. The Rule remains workable and adjustable to a variety of family situations because the central mechanism for locating the validating life — the requirement of initial certainty — is basically left undisturbed. But once it is accepted that all violations — nontechnical as well as technical ones — are to be addressed by the reform method, the easy route of aiming a specific statutory provision at a series of discrete

---

\(^{92}\) For instance, example I would be a fertile octogenarian case even if A was not beyond her normal child-bearing years when 7's will was executed. Furthermore, if A had been beyond her normal child-bearing years when 7's will was executed, thus evoking the "pitfall" label, see text accompanying note 22 supra, the magnitude of the mistake made by 7's lawyer (assuming that 7's will was drawn by a lawyer) is not trivial. As R.E. Megarry points out, the technical violations, (he was speaking specifically of the administrative contingency, but his remarks apply to all the technical violations), are "so highly stressed by all the books and teachers, that [the lawyer] who does not know [them] must be expected to know little or nothing of the rest of the rule [against perpetuities]." 81 L.Q. Rev. 478, 481 (1965).
targets is no longer tenable. Consequently, it is not enough that the reformation method and the wait-and-see method apply to nontechnical as well as to technical violations. They must also be tested for their ability to preserve the efficiency and workability of the common law Rule provided by the requirement of initial certainty.

The prevention-of-unjust-enrichment argument supplies still another perspective on perpetuity reform. If preventing the unjust enrichment that would otherwise result from a mistake in violating the Rule is the justification for perpetuity reform, the technique of reform and not just its scope should be shaped accordingly. The technique of reform should strive to correct the drafter’s mistake while adhering as closely as possible to the transferor's intent as set forth in the original scheme of disposition. There would be little point in reforming the Rule to prevent the unjust enrichment of the set of takers who traditionally would benefit from an invalidity — typically the transferor’s residuary legatees or his heirs — if the technique of reform simply results in enriching a different set of unintended takers. The only way to avoid unnecessarily enriching any set of unintended takers is to shape the technique of reform so that it grants every appropriate opportunity for the property to go to the intended takers. An effective method of testing whether or not every such opportunity has been granted is to ask if the technique of reform duplicates or nearly duplicates after the fact the result that could have been achieved before the fact by a Rule-wise lawyer acting on the transferor’s behalf. We have already observed that in all but one of the technical violation categories, the specific statutory repair method serves this goal well. The basic technique of that method — legislatively declaring that certain discrete invalidating chains of events are to be disregarded — is suitable to the fertile octogenarian, the administrative contingency, and the unborn widow categories; it allows the disposition to stand as written in cases where one or more steps, all of which would almost certainly turn out to be purely formalistic, would have been available to a Rule-

93. This is not always so. See NUTSHELL, supra note 12, at § 12.10.

94. The one exception is where the specific statutory repair method lowers age contingencies to 21. See text following note 88 supra. As we will see, the reformation method and the wait-and-see method have the capacity to accommodate the transferor’s intent better in the case of age contingencies in excess of 21 than the specific statutory repair method does. The basic technique of the specific statutory repair method — declaring that the invalidating chain of events is to be disregarded — would accommodate the transferor’s intent even better, but this approach is not followed because it would do so in some cases at the expense of violating the policy underlying the Rule Against Perpetuities itself. In consequence, the specific statutory repair method is forced to depart from its basic technique and order a lowering of the age to 21, even though this technique fails to grant every appropriate opportunity for the property to go to the intended takers. See note 104 infra and accompanying text.
wise lawyer acting on the eve of the transfer to render the disposition valid. But insofar as nontechnical violations are concerned, the basic technique of the specific statutory repair method is obviously not suitable. A legislative declaration that all invalidating chains of events are to be disregarded would amount to a repeal of the Rule Against Perpetuities, a result that is not the goal of perpetuity reform. In fact, other techniques are employed by both the reformation and the wait-and-see methods. Furthermore, because these methods are usually put forward as a means of addressing all perpetuity violations, they must be tested with respect to both technical and nontechnical violation cases to determine if they will actually yield an after-the-fact duplication or near duplication of the result that could have been achieved by a Rule-wise lawyer acting for the transferor on the eve of the transfer.

In short, it is not enough that the reformation and wait-and-see methods address all perpetuity violations, which under the prevention-of-unjust-enrichment rationale defines the preferred scope of reform. Two other criteria need to be considered. First, the technique of reform used by these methods should preserve the benefits of the requirement of initial certainty, which means that the technique of

95. It could be argued that in certain instances the specific statutory repair method goes too far in allowing the disposition to stand as written. Under some versions of the method the transferor's intent is granted greater latitude after the fact than could have been achieved before the fact. In consequence, the public policy underlying the Rule itself is arguably violated. The problem arises when part or all of one of the extremely unlikely chains of events actually happens. If, for instance, $A$ in example 3 is survived by a widow who was conceived and born after $T$'s death, the California statute not only allows the widow to become an income beneficiary but also confers validity on the succeeding remainder interest irrespective of whether or not the after-born widow turns out to live more than 21 years beyond the death of $A$ and anyone else who might have been included in the group designated in the perpetuity-period component of a saving clause. See text following note 77 supra.

The California treatment of this problem is not, however, intrinsic to the specific statutory repair method as such. The other specific statutory repair jurisdictions, in fact, follow a different route, for they would exclude the unborn widow from participating as an income beneficiary. See notes 75-76 supra and accompanying text. This solution is, of course, subject to a different objection — that it does not grant as much after-the-fact latitude to the transferor's intent as could have been achieved before the fact by the use of a saving clause. Under a saving clause, the unborn widow would be entitled to participate as an income beneficiary, but should she outlive by more than 21 years the last survivor of the persons designated in the clause's perpetuity-period component the trust would terminate and the property would vest in the persons designated in the clause's gift-over component.

It must be conceded that this exposes a weakness in the specific statutory repair method's handling of certain of the technical violation categories. The method forces legislatures to choose between granting too much or too little latitude to the transferor's intent; the choice of granting just the right amount cannot be accommodated by the method. But the weakness is minor because of the rarity of the actual occurrence of such extremely unlikely events. This observation should also argue for choosing the "too much" latitude option, because the unlikely events will happen so rarely that no great harm would be done to society. In contrast, fairly significant harm might be done to the testator's plan and family if persons such as $A$'s unborn widow were excluded.
reform must provide some mechanism for determining the measuring life so that the reformed Rule remains an adjustable and workable instrument of social policy. Second, it should strive to provide an after-the-fact duplication or near duplication of the result that could have been achieved before the fact by a competently advised transferor. Some of the existing versions of both the reformation and the wait-and-see methods meet these additional criteria. Unfortunately, these versions have not been adopted by American courts, either on their own or as a matter of interpretation of statutes worded broadly enough to accommodate their adoption. The versions that have actually been adopted fall short with respect to one or the other of these additional criteria.

A. Reformation

Without legislative authorization or direction, the courts in four states — Hawaii, Mississippi, New Hampshire, and West Virginia — have held that they have the power to reform instruments that contain a perpetuity violation. In five other states — California, Idaho, Missouri, Oklahoma, and Texas — the legislatures have enacted statutes conferring this power on the courts or directing the courts to reform defective instruments.

From one perspective, the reformation method can easily be said to preserve the workability of the Rule because it does not alter the

96. See In re Estate of Chun Quan Yee Hop, 52 Hawaii 40, 469 P.2d 183 (1970); Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891); Berry v. Union Natl. Bank, 262 S.E.2d 766 (W. Va. 1980). Since the instruments that were reformed in all these cases were wills, it is interesting to note that the courts in none of these cases explained why, in the face of the general principle that wills cannot be reformed to correct a testator's mistake, the adoption of a reformation doctrine in perpetuity cases is justified. See Langbein & Waggoner, supra note 3, at 548-49.

97. CAL. CIV. CODE § 715.5 (West 1982); IDAHO CODE § 55-111 (1948); MO. REV. STAT. § 442.555 (1978); OKLA. STAT. tit. 60, §§ 75-78 (1981); TEX. REV. CIV. STAT. ANN. art. 1291b (Vernon 1980). The Texas statute was given such a restrictive interpretation in Foshee v. Republic Natl. Bank, 617 S.W.2d 675 (Tex. 1981), that it is questionable if Texas can be counted as a state that has legislatively adopted the reformation method of perpetuity reform. The Texas Supreme Court in Foshee seems to have held the reformation statute to be applicable only in cases where there is "a general intent to create a charitable trust." 617 S.W.2d at 679 (emphasis added). Since no such intent was ascertained in that case, the testatrix's will was not reformed, and a perpetuity violation was held to have occurred. Two judges dissented on the ground that the reformation statute should have been applied. In addition, statutes in nine other states — Alaska, Iowa, Kentucky, Nevada, New Mexico, Ohio, Vermont, Virginia, and Washington — authorize reformation in combination with the wait-and-see method of perpetuity reform, so that it comes into operation only if a perpetuity violation arises after a period of waiting. See Act of Apr. 22, 1983, S.F. 435, 1983 Iowa Legis. Serv. 90 (West) (to be codified at IOWA CODE § 558.68); KY. REV. STAT. § 381.216 (1972); Act of May 19, 1983, ch. 388, 1983 Nev. Stat. 927 (to be codified at NEV. REV. STAT. ch. 111); OHIO REV. CODE ANN. § 2131.08(c) (Page Supp. 1982); VT. STAT. ANN. tit. 27, § 501 (1975); VA. CODE § 55-13.3(B) (Supp. 1982); WASH. REV. CODE § 11.98.030 (1981); see also note 118 infra.
Rule at all. The Rule is left intact, and the disposition is altered to conform to it. More needs to be said about this point later, however.

Insofar as the other goal of reform is concerned, the judicial opinions and the legislative provisions purport to adopt a principle of reformation that is consistent with the theme developed above: The technique of reform should be shaped to grant every appropriate opportunity for the property to go to the intended beneficiaries. One court, for example, said that "where there is a general and a particular intent, and the particular one cannot take effect, the words shall be so construed as to give effect to the general intent." 98 Another held that "any interest which would violate the Rule Against Perpetuities shall be reformed within the limits of that rule to approximate most closely the intention of the creator of the interest." 99 A third described the reformation principle as "a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor." 100

Appearances would suggest, therefore, that reformation is ideally suited to prevent the unnecessary unjust enrichment that would otherwise result from a perpetuity violation. Unfortunately, the experience in actual cases is so limited that it is hard to predict how a court in a jurisdiction that has adopted this method would actually go about reforming perpetuity violations. Furthermore, the little experience that does exist is not as encouraging as the above pronouncements lead one to expect. All the cases that have arisen so far have been of one general type — contingencies in excess of twenty-one years — and all of the courts have simply ordered a reduction of the age or period in gross to twenty-one. 101 This uniformity of result is not the product of specific and restrictive statutes and has been achieved by courts avowedly operating under an open-ended reformation doctrine designed to carry out the transferor's intent as closely as possible.

These reformation efforts are unduly narrow. Professor Browder has suggested a more appropriate technique — judicial insertion of a

101. See cases cited in note 96 supra. See also Estate of Ghiglia, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974), where the court in the only significant case to arise under a reformation statute was confronted with a remainder interest in favor of the testator's grandchildren who were living when the youngest grandchild reached 35. In applying the California reformation statute, the court validated the class gift by lowering the age from 35 to 21.
saving clause into the instrument. This method would allow reformation to achieve its full potential for preventing unjust enrichment by providing an after-the-fact duplication of a professionally competent product. Such a technique would have been especially suitable in the cases that have already arisen, for it probably would have allowed the dispositions in all of them to have been rendered valid without disturbing the transferor's intent at all. The courts' reduction to twenty-one prevents the unjust enrichment of the set of takers who would benefit from an invalidity but it also unnecessarily benefits a different set of unintended takers. The insertion of a saving clause into the instrument.


103. From the facts reported in the opinion of each of the cited cases, the circumstances were such that at the time of the testator's (or testatrix's) death it was virtually certain that the age contingencies (or period in gross) could have been preserved by the use of a saving clause without the clause's gift-over component becoming operative. Indeed, even at the time the will was executed the class of beneficiaries that presented the perpetuities violation had living members who could have been designated as the measuring lives in the perpetuity-period component of such a clause. Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891): Remainder to vest in T's grandchildren when the youngest reached 40. T was survived by a 45-year-old unmarried daughter and a 35-year-old son (married for 15 years) with five children. The will had been executed five years earlier and a codicil had been executed one year before T's death.

Estate of Ghiglia, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974): Remainder to vest in T's grandchildren when the youngest reached 35. When the will was executed T had a 47-year-old daughter with two children and a 45-year-old son with two children. T died six years later at which time the grandchildren were all adults.

Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962): Remainder to vest in T's grandchildren when the youngest reached 25 but not later than 35 years from the date of the will. When the will was executed T had an 18-year-old married daughter with no children and a 21-year-old married daughter with three children (ages two and a half, one and a half, three months). T died three years later. (This decision was further marred by the fact that there was no need to reform the will in order to save the remainder interest from invalidity. The details of this point are set forth in O. Browder & L. Waggoner, Family Property Transactions: Future Interests 437-38 (3d ed. 1980).)

Berry v. Union Natl. Bank, 262 S.E.2d 766 (W. Va. 1980): Remainder to vest in descendants of the brothers and sisters of T's husband 25 years after T's death. The opinion does not state the number of descendants living at T's death. However, since there were three brothers and three sisters (all married) and the will was executed after T's husband had died, it would appear safe to assume that there were descendants living when the will was executed and at T's death.

In re Estate of Chun Quan Yee Hop, 52 Hawaii 40, 469 P.2d 183 (1970): Remainder to vest in T's issue at the later of the death of his wife or 30 years after his death. When T died he had no less than 85 issue, including 16 sons and daughters. The will had been executed one year before his death.

104. This point was made by Gray as part of his general opposition to Edgerly v. Barker, the first decision that adopted reformation as a method of perpetuity reform. See J. Gray, supra note 5, at § 872, where in reference to Edgerly he noted:

The testator meant to give to those of his grandchildren who reached forty; the Court gives the property to those of the grandchildren who reach twenty-one. There may be six grandchildren who reach twenty-one and only one who reaches forty. In such case shares would be given to five persons whom the testator never meant to have it. There may be some answer to this, but it is a real and a very serious objection, and deserves an answer, and it gets none from the New Hampshire Court. The case is dealt with throughout as if the only question were whether the same persons should get the property at forty or at
clause, however, is consistent with the prevention-of-unjust-enrichment analysis, for this technique grants every appropriate opportunity for the property to go to the intended beneficiaries. Furthermore, it would also be a suitable technique in the other technical violation cases — the fertile octogenarian, the unborn widow, and the administrative contingency. We demonstrated earlier that a saving clause is one of the formalistic devices that a Rule-wise lawyer might have used before the fact to assure initial validity in these cases. Insofar as nontechnical violations are concerned, the saving clause technique also grants every appropriate opportunity for the property to go to the intended beneficiaries. Here, however, it may unavoidably result in benefiting a set of unintended takers — the persons designated by the court in the saving clause's gift-over component. Obviously the court should formulate the gift-over, keeping in mind the possibility that it might become operational, and try on a case-by-case basis to come as close to the set of intended beneficiaries as possible.105

How would the saving-clause technique of reformation fare when tested under the other criterion for an ideal method of perpetuity reform — that of preserving the workability of the Rule? It is of course true, as noted earlier, that the central mechanism for locating the validating life — the requirement of initial certainty — is undisturbed under this (or any other) reformation technique. But further comment on this point is warranted. The requirement of initial certainty is a mechanism for determining if validating lives exist naturally by virtue of the existing terms of the disposition and the facts existing at the commencement of the perpetuity period. The persons who are designated as the validating lives in the perpetuity-period component of a saving clause artificially fulfill the requirement of initial certainty. The only reason that such persons have the requisite causal connection to the vesting or failure to vest of the interests is that the causal connection was conferred upon them by their having been designated in the clause's perpetuity-period component. The requirement of initial certainty provides no mechanism to guide a court in making its selection of lives for the perpetuity-period component of a saving clause that is to be inserted after the fact. All that is needed to satisfy the requirement of initial certainty

105. Some illustrations can be found in Browder, supra note 102, at 24-30. Compare the Illinois statute described in note 89 supra, where a uniform saving clause (including the gift-over component), rather than one developed on a case-by-case basis, is prescribed for all trusts that, after applying the specific statutory repair provisions, still contain a perpetuity violation.
is that the persons must have been in being at the commencement of
the perpetuity period and the group must not be so large that proof
of their deaths cannot reasonably be ascertained. The world is, of
course, full of groups that fit these two criteria. But this does not
mean that no narrowing principle exists for guiding the courts in
making their selection. The principle to be adopted is the same one
that ought to guide lawyers in drafting such a clause before the fact:
The group selected should be appropriate to the facts and the dispo-
sition. While this principle does not rise to the level of mechanical
precision of the requirement of initial certainty, the exact make-up
of the group in each case would be settled by litigation in which,
conceivably, the question might be regarded as one of fact on which
expert testimony would be presented. Because judicial determina-
tion of the precise content of the clause to be inserted is available to
the interested parties at any time and because judicial adoption of
the principle just set forth would guide lawyers in marshalling evi-
dence and framing legal arguments, the saving clause technique of
reformation is a workable method of perpetuity reform.

Under the criteria developed so far, the saving clause technique
of reformation is an acceptable method of perpetuity reform. It cov-
eers both technical and nontechnical violations. It is workable. And it
grants every appropriate opportunity for the property to go to the
intended beneficiaries. Unfortunately, although the reformation
technique that has actually been employed by the courts — reducing
age contingencies to twenty-one — does prevent the unjust enrich-
ment of one set of unintended takers, it unnecessarily benefits a dif-
ferent set of unintended takers.

B. Wait-and-See

The most controversial of the reform methods is “wait-and-see.”
The general idea of wait-and-see is that a perpetuity violation should
only occur if an interest actually remains contingent beyond the
perpetuity period. This method, then, embraces an entirely different
approach to perpetuity reform: In appearance, it fundamentally al-
ters the Rule itself by abandoning the requirement of initial
certainty.

The first adoption of the wait-and-see idea occurred in a Penns-
ylania statute enacted in 1947. Shortly after this statute was en-
acted, Professor Leach not only hailed the wait-and-see concept it

106. See note 15 supra.
107. 20 PA. CONS. STAT. ANN. § 6104(b) (Purdon 1975).
embodied as the ideal method of perpetuity reform, but through his writings became such a devoted proponent of it that it has come to be identified with him. But the wait-and-see concept was not without its detractors, notably Professor Simes. Indeed, the pros and cons of wait-and-see were the subject of rather heated debate in the law reviews during the 1950's and early 1960's. This controversy aside, the stark truth is that judicial adoption of the wait-and-see concept is in a strict sense virtually nonexistent and from 1947

111. The Reporter for the Restatement (Second) of Property stated in a recent speech that "existing judicial support for [the Restatement Second's] wait-and-see formulation of the Rule Against Perpetuities is slight." Casner, Restatement (Second) of Property as an Instrument of Law Reform, 67 Iowa L. Rev. 87, 97 (1981) (footnote omitted). In fact, judicial support for the Restatement (Second)'s formulation, or for the wait-and-see concept in any form, is virtually nonexistent.

The decision most frequently cited by the proponents of the concept as having adopted wait-and-see is Merchants Natl. Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953), where the New Hampshire court (as an alternative ground of decision) upheld a future interest on the ground that at the time of the litigation the interest had in fact vested within the perpetuity period. Since at the time of the interest's creation it did not meet the requirement of initial certainty, the decision constitutes a marked departure from the traditional view. The decision falls short of constituting clear acceptance of the wait-and-see concept because of the court's failure to indicate what it would have done if at the time of the suit it had still been uncertain whether or not the interest would vest in due time. The wait-and-see concept would require the court to refuse to decide the interest's validity until the question of vesting was resolved. The court's opinion — especially its comment that "when a decision is made at a time when the events have happened, the court should not be compelled to consider only what might have been and completely ignore what was" — leaves open the possibility that the court would have declared the interest invalid because of the possibility at the time of the lawsuit of its vesting beyond the perpetuity period. 98 N.H. at 232, 97 A.2d at 212. (Recall also that in an earlier decision, Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891), the New Hampshire court reformed an interest to conform with the Rule, and might have utilized that method in Merchants had the interest not already vested at the time of the lawsuit.)

In addition to Merchants Natl. Bank v. Curtis, other decisions cited by the Reporter of the Restatement (Second) of Property as having judicially adopted the wait-and-see concept are Grynberg v. Amerada Hess Corp., 342 F. Supp. 1314 (D. Colo. 1972), Story v. First Natl. Bank & Trust Co., 115 Fla. 436, 156 So. 101 (1934), Phelps v. Shropshire, 254 Miss. 777, 183 So. 2d 158 (1966), Warner v. Whitman, 353 Mass. 468, 233 N.E.2d 14 (1968), and In re Frank, 480 Pa. 116, 389 A.2d 536 (1978). See Restatement (Second) of Property (Donative Transfers) § 1.4, at 70-72 (1983). But, like Merchants Natl. Bank v. Curtis, the Grynberg, Phelps, Warner, and Frank cases all involved situations in which at the time of the suit it was known that the questioned interest had in fact vested within the perpetuity period. Furthermore, the Phelps opinion displayed such confusion over several concepts in perpetuity law that its value is questionable. See note 153 infra. Grynberg, though decided by the federal district court in Colorado, was merely a diversity case that applied Mississippi law as enunciated in Phelps, so it does not represent the acceptance of wait-and-see in another jurisdiction. Warner decided that Massachusetts' restricted wait-and-see statute was to be retroactively applied, and Frank was governed by the Pennsylvania wait-and-see statute. Story would constitute a rather clear adoption of the wait-and-see concept, since the court did in fact refuse to invalidate a gift.
through 1979 only four states enacted statutes similar to the Pennsylvania legislation: Kentucky (1960), Ohio (1967), Vermont (1957), and Washington (1959). The controversy over wait-and-see, as well as the concept itself, seemed to have died out. But recently the concept was rejuvenated and the controversy was rekindled when Professor Leach’s colleague, Professor Casner (as Reporter for the project), was able in 1979 to persuade the members of the American Law Institute to accept the wait-and-see idea as part of the Restatement (Second) of Property. The specific version of the concept that the ALI accepted is much different from and much improved over the Pennsylvania statute, which had engendered most of the controversy. In fact, as we shall see, it meets the criteria developed in this Article for an ideal method of perpetuity reform. How many, if any, courts or legislatures will actually be prompted by the ALI’s action to adopt its or any other version of wait-and-see remains to be seen. There has been no judicial move toward adoption.

because of events that might have happened but in fact had not yet occurred at the time of the suit. But the court prefaced its discussion with the comment that the common law Rule Against Perpetuities “prevails in Florida,” and there is no indication in the opinion that the court was aware that it had in any way departed from the common law Rule when it refused to find a perpetuity violation “because of a contingency that may never arise.” Florida has since enacted a perpetuity statute, FLA. STAT. § 689.22 (1981), so the Story decision presumably no longer represents the law in Florida.

In contrast to this handful of cases, Professor Powell — who was the Reporter for the first Restatement of Property and who opposed the adoption of the wait-and-see concept as part of the Restatement (Second) of Property — wrote: “One segment of authority, not stressed by Professor Casner, is the judicial attitude shown in recent years concerning the [traditional] ‘possibilities’ approach. A search, by the Ex-Reporter, as to decisions of the last twenty years, (1957-1977) turned up 44 decisions from 25 jurisdictions, quoting with approval the [traditional] ‘possibilities’ approach. . . . Not a single case, decided in these twenty years, used the [wait-and-see] ‘actualities’ approach.” RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) app. 143 (Tent. Draft No. 1, 1978) (Commentary of Ex-Reporter Richard R. Powell on Revision Proposed by Reporter Casner) (emphasis in original).

112. KY. REV. STAT. § 381.216 (1972); OHIO REV. CODE ANN. § 2131.08 (Page Supp. 1982); VT. STAT. ANN. tit. 27, § 501 (1975); WASH. REV. CODE §§ 11.98.010-0.20 (1981) (applies to trusts only). As discussed infra at note 149, four other states — Connecticut (1955), Maine (1955), Maryland (1960), and Massachusetts (1954) — have adopted a much more restricted version of the concept.


114. The specific version actually adopted is also much improved over the version that was initially submitted to the Institute but not adopted. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 (Tent. Draft No. 1, 1978).

115. In cases decided after promulgation of the Restatement (Second), one court squarely rejected wait-and-see, Robroy Land Co. v. Prather, 24 Wash. App. 511, —, 601 P.2d 992, 995 (1979) (the Washington wait-and-see statute, WASH. REV. CODE §§ 11.98.010-0.20 (1981), applies only to trusts, and was therefore inapplicable in this case, which involved a right of first refusal to purchase real property), revd. on other grounds, 95 Wash. 2d 66, 622 P.2d 367 (1980) (en banc); another found it unnecessary to reach the issue because the court was able to uphold the questioned interest by applying the conventional principle of construction favoring validity, Joyner v. Duncan, 299 N.C. 565, 576, 582, 264 S.E.2d 76, 86, 89 (1980); and a federal court sitting in diversity described wait-and-see as “the modern approach” but adhered to South
legislative front, there has been more recent activity, but with mixed results. Perplexingly, the Alaska, Nevada, New Mexico, and Virginia legislatures ignored the ALI's improved version and enacted inferior wait-and-see statutes.\footnote{116} Iowa, to its great credit, enacted a statute patterned closely on the provisions of the \textit{Restatement (Second)}.\footnote{117}

How does the wait-and-see concept test under the criteria developed earlier? In scope, it accords with the prevention-of-unjust-enrichment argument by interceding in all cases of perpetuity violation, not just the technical cases. \textit{A}s it is with respect to the other two criteria that the wait-and-see concept runs into difficulty. Obviously, the concept's abandonment of the requirement of initial certainty raises the necessity of developing an alternative means of locating the measuring life if the Rule is to remain workable. Less obvious, but still troubling, is the wait-and-see method's ability to prevent unnecessary unjust enrichment by granting every appropriate opportunity for the property to go to the intended beneficiaries.

\textbf{1. The Pennsylvania Version of Wait-and-See.}

\textit{a. The failure to demarcate a true and predictable wait-and-see perpetuity period.} The Pennsylvania statute, enacted in 1947, provides:

\begin{quote}
Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void.\footnote{118}
\end{quote}

\footnote{118} Carolina's traditional \textit{“what-might-happen”} approach, \textit{Klugh v. United States}, 588 F.2d 45, 50 n.2 (4th Cir. 1978).


\footnote{118} 20 \textit{PA. CONS. STAT. ANN.} § 6104(b) (Purdon 1975). The Alaska, Kentucky, Nevada, New Mexico, Ohio, Vermont, and Virginia statutes are nearly identical; the Washington statute is worded differently but appears to amount to the same thing in substance. One substantive difference between the Pennsylvania statute and the others concerns the statutory disposition of interests that are still contingent and therefore void after waiting for the appropriate period. Under the Pennsylvania statute, if the void interest follows a valid defeasible interest, the defeasible interest becomes absolute; in all other cases, the void interest \textit{“shall vest in the person or persons entitled to the income at the expiration of the [perpetuity] period . . .”} 20 \textit{PA. CONS. STAT. ANN.} § 6105 (Purdon 1975). The other statutes direct the court to reform the disposition within the limits of the Rule \textit{“to approximate most closely the intention of the creator of the interest.”} 1983 Alaska Sess. Laws — (to be codified at \textit{ALASKA STAT.} § 34.27.010); \textit{KY. REV. STAT.} § 381.216 (1972); Act of May 19, 1983, ch. 388, sec. 4, 1983 Nev. Stat. 927, 928 (to be codified at \textit{NEV. REV. STAT.} ch. 111) (\textit{The Nevada statute uses the following slightly different language: “A court shall reform any interest found to violate the rule as modified [by wait-and-see] so as to approximate as nearly as feasible the intention of the creator of the interest and to comply with the rule.”}) 1983 N.M. Laws 246; \textit{OHIO REV. CODE ANN.}}
This statute operates on the basis of a major fallacy: There is no such thing as "the period allowed by the common law rule against perpetuities as measured by actual rather than possible events." There is, in fact, not even in all cases such a thing as a perpetuity period measured by possible events. As stressed earlier, there is a perpetuity period only with respect to valid interests. Invalid interests are not invalid because they might remain contingent beyond twenty-one years following the death of some identifiable measuring life; they are invalid because there is no life that can be identified that makes them valid. The Pennsylvania statute, therefore, purports to invoke a period for waiting that just does not exist. The genius of the common law Rule is that it is eminently workable without the demarcation of a true "perpetuity period": The requirement of initial certainty is not a mechanism for demarcating a "perpetuity period" but rather is a mechanism for testing the validity of an interest in advance of its actual vesting or failure to vest. Under the wait-and-see modification, an interest's validity depends on the time of actual vesting or failure to vest; and for wait-and-see to be workable, there truly does need to be a "perpetuity period," and hence some method for demarcating it by reference to "measuring lives" in the true sense (not "validating lives").

The great deficiency of the Pennsylvania statute is its failure to provide a mechanism for demarcating the "wait-and-see perpetuity period." The originators of the statute apparently did not understand this, for they described the statute as being "intended to dis-
To commentators who in one way or another pointed up this deficiency, Leach’s reaction was to call them “anti-reformists” and to suggest that they were “trying to make the statute look bad.” Frank Jones tellingly replied: “Well, it is bad — the statute, that is, [but not] because the ‘anti-reformists’ have taken the trouble to demonstrate its deficiencies.”

The toll of so palpable a deficiency has now finally been felt: The first and (so far) only significant case to have arisen under the Pennsylvania or any other similar wait-and-see statute is Pearson Estate, a case that fully demonstrates the way in which the statute seriously undermines the workability of the Rule Against Perpetuities. At issue in the Pearson case was a testamentary trust that was created by the testator’s confusingly written home drawn will. The court construed the terms of the trust to be as follows: The income was to be paid to the testator's brothers and sisters for their lives, apparently with cross remainders until the death of the last one; upon the death of the last surviving brother or sister, the income was to be paid to the testator's nieces and nephews until the death of the last surviving niece or nephew; upon the death of the last surviving niece or nephew, the income was to be paid to the testator's grandnieces and grandnephews until the death of the last surviving granddaughter or grandson; and so on until there were no more income beneficiaries, at which time the corpus of the trust was to be delivered to charitable organizations. At his death in 1967, the testator was survived by six brothers and sisters, thirteen nephews and nieces, and twenty-nine grandnephews and grandnieces. Apparently at the time of the lawsuit, these survivors were all still living, and no additional members of any of the classes had been born. Although the court did not disclose the ages or medical conditions of the brothers and sisters, it did say that they were “advanced in years” and would be “fertile octogenarians” if they had any further

121. Pearson Estate, 442 Pa. 172, 186, 275 A.2d 336, 342 (1971) (quoting the Report of the Joint State Government Commission). Even recently, the Reporter for the Restatement (Second) of Property, which adopts wait-and-see, described the wait-and-see concept as “a slight change in the formulation of the Rule.” Casner, supra note 111, at 97. The change in formulation may be slight, but, as Professor Mechem tellingly noted, “The idea of ‘wait-and-see’ was wholly foreign to the common-law Rule. . . . [I]t is an almost wholly different scheme having only an external resemblance to the common law concept. . . . [This fact] is significant in view of the eagerness with which its exponents insist it is only a modification of the common-law Rule. . . .” Mechem, A Brief Reply to Professor Leach, 108 U. Pa. L. Rev 1155, 1157 (1960).

122. Leach, supra note 108, at 1143.


The court, noting that "we are squarely confronted, for the first time, with the controversial 'wait and see' version of the Rule Against Perpetuities," held (a) the income interest of the testator's brothers and sisters and the succeeding income interest of the testator's nephews and nieces are valid because they comply with the common law Rule in its traditional form; (b) "[t]he remainder over to charity may or may not be valid depending upon (1) whether the interest is contingent; and (2) even if contingent, whether any of the preceding interests run afoul of the Rule; however, in accordance with both Quigley's Estate and the 'wait and see' rule, we will not now determine the validity of the interest to charity;" and (c) "[i]n the same manner, we will discuss, but not determine, the legality of . . . any [income] interest to follow the [income] interest of the nephews and nieces." Since the Pearson case constituted the debut of the wait-and-see modification in actual operation, one would have expected the Pennsylvania court to have seized the opportunity to get the controversial concept off to a good start. Unfortunately, the court did just the opposite. No attempt at all was made to develop a principle or standard by which the "measuring lives" for demarcating the "wait-and-see perpetuity period" are to be ascertained in future cases. This is not to say that the court did not discuss the question of measuring lives. It did, but it did so only in the context of the actual disposition that it had before it, leaving unstated the principle by which it arrived at the conclusions reached.

The court's analysis of the measuring lives question proceeded as follows. In discussing the interests whose validity could not yet be decided — the interests following the income interests in favor of the testator's brothers, sisters, nieces, and nephews — the court said that

125. 442 Pa. at 182, 191, 275 A.2d at 340, 344.
126. 442 Pa. at 185, 275 A.2d at 341.
127. 442 Pa. at 189, 275 A.2d at 344. Since the testator's parents predeceased him, no additional brothers and sisters could later be born, and consequently these interests satisfied the requirement of initial certainty because they were certain to vest within lives in being — the brothers and sisters.
128. Quigley's Estate, 329 Pa. 281, 198 A. 85 (1938), symbolizes a doctrine recognized in Pennsylvania and a few other jurisdictions by which the validity of future interests will not ordinarily be adjudicated until the time when they are entitled to become possessory. This doctrine, which has little to commend it and is not followed in the great majority of jurisdictions, was in place in Pennsylvania long before the wait-and-see statute was enacted.
129. 442 Pa. at 188, 275 A.2d at 343.
130. 442 Pa. at 188, 190, 275 A.2d at 343-44.
it foresaw that "three possible situations could occur by waiting and seeing."

First, no additional nieces and nephews will be born: if this should happen, then the income interest in favor of the grandnephews and grandnieces would be valid;

Second, no additional grandnieces and grandnephews will be born: if this should happen, then the income interest in favor of the great-grandnieces and great-grandnephews would be valid; and

Third, additional nieces and nephews will be born: if this should happen, then the interests in favor of the grandnieces and grandnephews would be invalid.

The court concluded: "Since which of the three situations will eventuate is unpredictable, it is necessary that the 'wait and see' rule be applied." 131

The court's failure to articulate any principle by which the measuring lives were ascertained in this case and by which they are to be ascertained in future cases is even more disappointing because the literature yields at least three different principles for demarcating a "wait-and-see perpetuity period." 132 The Pearson court puts us in the uncomfortable position of trying to deduce a principle from what it actually did. Making such a deduction is hazardous because the quality of the court's opinion is such that its failure to adopt or even to discuss a particular principle may not signify that the court rejected it. It may only signify that the court did not consider it. Consequently, the most that can be said with confidence is that the court's approach is either consistent or inconsistent with a particular principle.

The literature offers no principle for demarcating a wait-and-see perpetuity period that rises to the level of mechanical precision inherent in the common law mechanism. At best, the various definitions of the measuring lives for wait-and-see purposes leave room for doubt at the fringe. But the mechanical precision inherent in the common law mechanism, the requirement of initial certainty, is unusual in the law generally. Most legal principles leave room for doubt at the fringe. Law is workable if it provides interested parties with an opportunity to have their rights adjudicated according to legal principles that give lawyers a sufficiently definite focus for intelligently marshalling evidence and framing legal arguments so that

---
131. 442 Pa. at 191, 275 A.2d at 344.
132. These principles include the notions that anyone in the world can serve as a wait-and-see measuring life, see text accompanying note 133 infra; that the perpetuity period is to be measured by lives having a "reasonable relation to the gift," see notes 134-37 infra and accompanying text; and that the perpetuity period must be measured by lives having "a causal relationship to the vesting of a future interest," see notes 138-39 infra and accompanying text.
courts can decide cases consistently. As far as the workability of the Pennsylvania version of the wait-and-see modification is concerned, it is the failure of both the statute and the Pearson decision to adopt a principle that is most troubling.

This is not to suggest that the wait-and-see modification would become workable no matter which principle argued in the literature was adopted. Indeed, the first “principle” deserves comment only for the purpose of rejecting it. This is the notion that anyone in the world can serve as a wait-and-see measuring life. That is to say, in a given case — after waiting until an interest has vested — its validity is established if a search turns up someone, somewhere, who was alive both when the interest was created and twenty-one years before it vested. Not even the wait-and-see proponents support this notion, but unfortunately the Pearson court did not expressly put it to rest. Nevertheless, the court’s identification of the measuring lives in the Pearson case itself is clearly inconsistent with any such notion.

Philip Brégy argued that the wait-and-see perpetuity period is to be measured by the lives of those persons who have a “reasonable relation to the gift.” Professor Leach said that this principle “makes sense to me and, I predict, will make sense to the Pennsylvania courts.” But the Pennsylvania court did not choose the “reasonable relationship” lives in the Pearson case. While the principle that the lives must have a “reasonable relation to the gift” is not as mechanically precise as the common law’s requirement of initial certainty, it is quite similar to the principle that the group selected should be appropriate to the facts and the disposition, which we earlier suggested was a workable way to choose validating lives for the perpetuity-period component under the reformation method’s saving clause technique. Thus, while there is room for argument at the fringe, it would seem — and the examples set forth by Mr. Brégy in his book suggest — that the reasonable-relationship lives would include all the beneficiaries of the trust who were alive when the testa-

---

133. See, e.g., Dukeminier, supra note 90, at 62-63.
134. P. Brégy, INTESTATE, WILLS AND ESTATES ACTS OF 1947 § 4, at 5269 (1949). Mr. Brégy was Associate Research Consultant to the Commission that drafted the Pennsylvania statute.
135. Leach, supra note 108, at 1145.
136. Earlier in this Article, in discussing the common law Rule, a similarly-described group was mentioned — “persons connected in some way to the transaction.” See note 9 supra and accompanying text. That was for the purpose of narrowing the world at large down to persons worthy of being tested under the requirement of initial certainty for an invalidating chain of possible events. It was never thought that “persons connected in some way to the transaction” defined a precise group of individuals.
137. See text following note 106 supra.
tor died. Consequently, consistency with the "reasonable relation to the gift" standard would have required the Pearson court to declare that the income interest in favor of the grandnieces and grandnephews would be valid if, upon waiting and seeing, it turned out that the death of the last surviving niece or nephew (even if such person were born after the testator's death) occurred within twenty-one years of the death of the last survivor among the six brothers and sisters, the thirteen nephews and nieces, and the twenty-nine grandnephews and grandnieces who were living at the testator's death. Quite possibly, the spouses of all of these people who were living when the testator died could also be counted as measuring lives under this standard.

Perhaps the narrowest reading of the statute, and the one that appearances would suggest comes closest to selecting the persons who are the validating lives under the traditional common law approach to the Rule, is that the measuring lives must have a "causal relationship to the vesting or failure of the interest." This "causal relationship to the vesting" principle is expressly incorporated into the Kentucky and the recently enacted Alaska, Nevada, and New Mexico wait-and-see statutes, which are otherwise quite similar to the Pennsylvania statute. Although this standard appears to come closer to the mechanical precision inherent in the common law's requirement of initial certainty, the fact that it truly does not rise to that level of precision and may in some cases be difficult to apply has been asserted by a wait-and-see proponent. Be that as it may, it does seem that the Pearson court's identification of the nieces and nephews as the measuring lives for the income interest in favor of

---

138. Ky. Rev. Stat. § 381.216 (1972) ("In determining whether an interest would violate the rule against perpetuities the period of perpetuities shall be measured by actual rather than possible events; Provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest."); 1983 Alaska Sess. Laws — (to be codified at Alaska Stat. § 34.27.010); Act of May 19, 1983, ch. 388, sec. 4, 1983 Nev. Stat. 927, 928 (to be codified at Nev. Rev. Stat. ch. 111); 1983 N.M. Laws 246.

139. See Maudsley, Perpetuities: Reforming the Common-Law Rule—How to Wait and See, 60 Cornell L. Rev. 355, 374-76 (1975). Maudsley gives this example:

Take the example . . .: "to such of the grandchildren of A as shall attain the age of 21." Assume that A and Mrs. A are still alive and that they have three married children, X, Y, and Z, and infant grandchildren. Who is causally connected with the vesting? A is only connected in the sense that he is the father of X, Y, and Z; the date at which the grandchildren attain the age of 21 is independent of A's death. If A is included, presumably so is Mrs. A. Presumably also, A's and Mrs. A's parents are included, if living. What of X, Y, and Z? They are causally connected with the date at which their own children attain the age of 21, but not with the date at which their nieces and nephews do. What of the living infant grandchildren? Their lives are obviously related to the date at which their own interests will vest, but not to the date at which the interests will vest in their brothers and sisters and their cousins, unless the possibility that any one of them might be the first to attain the age of 21 and thus close the class is a sufficient causal connection. Id. at 374 (footnotes omitted). See also note 151 infra.
the grandnieces and grandnephews is consistent with this "causal relationship to the vesting" principle. Unfortunately, though, as noted above, the Pearson court refrained from expressly embracing this or any other principle by which the measuring lives are to be ascertained under the Pennsylvania statute. Thus, the uncertainty over how the wait-and-see perpetuity period is to be demarcated was not resolved by Pearson.

But uncertainty about how the measuring lives are to be ascertained is not the only defect of the wait-and-see concept; it also injects uncertainty into the state of the title. The central idea of the concept is that facts occurring after an interest is created are to be taken into account in determining its validity. Consequently, under a wait-and-see regime, there is a period of time following the creation of an interest during which all the factors that are to be taken into account are not knowable, and the interest's validity cannot be adjudicated. To be more specific, courts operating under a wait-and-see regime would be required to react exactly as the Pearson court did in one respect: refuse to decide the validity of future interests that have not yet vested but that can still possibly vest within the wait-and-see perpetuity period. Not knowing the mechanism for demarcating the waiting period — the position the Pearson court leaves us in — aggravates this problem by making it uncertain when the uncertainty over the state of the title will finally become resolvable.

But there are several opportunities for diminishing the seriousness of this problem. The first, partly taken advantage of by the Pearson court and partly not, is to be careful to limit the wait-and-see concept to its proper sphere of operation, and only refuse to adjudicate the validity of interests that fail to satisfy the requirement of initial certainty. Obviously, if the major purpose of perpetuity reform is to prevent unjust enrichment of unintended takers, it is preferable for the validity of such interests to be uncertain than for their invalidity to be certain. But it would be unfortunate indeed if a court operating under a wait-and-see regime were to refuse to adjudicate the validity of an interest that was valid under the requirement of initial certainty on the fallacious ground that the new law requires that we wait to see if what is bound to happen actually happens. Raising the specter of such a misdirected result might be

---

140. This point, occasionally made by wait-and-see proponents, loses considerable power with respect to the technical violation categories when the wait-and-see result is compared to the result achieved by the specific statutory repair method of reform rather than to the result under the common law Rule.

141. The nearly universal view of wait-and-see proponents is that the wait-and-see modification applies only to interests that violate the Rule in its traditional form. See, e.g., 6 AMERI-
dismissed as far-fetched were it not for the fact that the Pearson decision shows that the danger is real.

The Pearson court, despite appearances to the contrary, did not wholly restrict the wait-and-see modification to its proper sphere. Recall that the court held that the remainder interest in the income in favor of the testator’s nieces and nephews was unaffected by the wait-and-see modification; this interest was held to be valid because it was certain to vest no later than at the deaths of the brothers and sisters, all of whom were in being at the testator’s death. This was proper, and it indicates that the court understood what the proper sphere of the wait-and-see modification was. The court also held that the remainder interests that succeeded the one in favor of the nieces and nephews violated the common law Rule, and were therefore subject to the wait-and-see modification. This also was proper. Finally, however, the court held that the wait-and-see modification applied to the remainder interest in the corpus in favor of the charitable organizations. This was not proper, for the court reached this conclusion without first deciding if the charitable remainder violated the Rule in its traditional form. The issue preliminary to this matter, which the court acknowledged but refused to pass on, was whether the charitable remainder was contingent or vested. If it were vested, then of course it would have been valid on the ground that it was not even subject to the Rule in the first place. If, on the other hand, the interest were contingent, it appears that the nature of the contingency was such that the interest would have violated the Rule in its traditional form, and would properly have been subjected to the wait-and-see modification. There is nothing contained in the Pennsylvania wait-and-see statute (or in any other similar statute) that justifies refusing to decide whether an interest is contingent or

---

142. If the court had addressed this issue, the analysis ought to have proceeded as follows. The trust declared: “When the Trust Fund has fulfilled its obligation to the [income beneficiaries], and thereby spent its usefulness of the legal requirements, the estate shall be awarded to benevolent organizations, educational Institutions, and Charities . . . .” 442 Pa. 172, 178, 275 A.2d 336, 338 (1971) (footnote omitted). The question would therefore seem to be whether the charitable remainder was to take effect upon the termination of the income interests in the trust (in which case the interest could have been adjudged to have been vested, for the reason that the income interests were bound to terminate because there was bound to be a perpetuity violation at some point in the future, even under the wait-and-see modification) or upon the last surviving income beneficiary’s dying without being survived by any descendant of the testator’s parents (an uncertain event that might not be resolved within the perpetuity period). Since the actual language is open to either construction, one would expect a court operating under the traditional approach to the Rule to have decided the question in favor of validity. See NUTSHELL, supra note 12, at § 12.9.
vested. All the information pertinent to the resolution of this question is known from the beginning. And, in fact, the Pennsylvania statute itself expressly declares that the wait-and-see modification "shall not apply to . . . [i]nterests which would not have been subject to the common law rule against perpetuities." 143 The Pearson court's refusal to address this question therefore amounts to a clearly unwarranted extension of the wait-and-see modification beyond its proper sphere. And, in view of the court's other holding that the income interest in favor of the nieces and nephews was valid because it complied with the common law Rule, it appears that this unwarranted extension is attributable to a mishandling of the wait-and-see concept by the court rather than to a deliberate decision on the court's part that the wait-and-see concept applies even to interests that are valid at common law.

The Pearson court performed somewhat more admirably in taking advantage of another opportunity to control the problem of uncertainty over the state of the title. Since the court was asked to rule on the validity of future interests that had not yet vested, it was forced to choose between merely saying that the ultimate validity of the interests cannot be determined because we must wait to see what happens in the future, or going further and specifying the various possible future events that we are required to await. Which choice to pursue is a question that does not seem to have been directly posed by either side in the great debate over wait-and-see, but in reading over that literature it appears that the opponents of the concept envisioned the courts refusing to decide and nothing more, 144 while the major proponent of the concept, Professor Leach, seemed to envision the courts identifying the various chains of events that would render the interests valid and/or conversely the various chains of events that would render them invalid. 145 Although the Pearson court did not discuss this question either, it did (at least as to the noncharitable interests) rather clearly adopt the latter approach.

If courts are willing to grant an early adjudication of the validating and invalidating chains of events, and they should be, the uncertainty over the state of the title caused by the wait-and-see modification is considerably diminished. Since only interests that are already contingent (or subject to open) are properly affected, this approach merely adds additional specified contingencies that must

143. 20 PA. CONS. STAT. ANN. § 6104(b)(1) (Purdon 1975).
144. See, e.g., Simes, supra note 109, at 184-90.
occur in order for the intended beneficiaries to take.\textsuperscript{146} Early judicial designation of the validating and invalidating chains of events can be likened to the function performed by the perpetuity-period component of a saving clause. Making such an adjudication obtainable puts the practice under wait-and-see in somewhat the same posture as would the adoption of the saving clause technique under the reformation method. Of course, the saving clause technique contemplates early adjudication of both components of a saving clause— the gift-over component as well as the perpetuity-period component. Under the wait-and-see method, early adjudication of the validating and invalidating chains of events does not answer in advance who takes the property in case an invalidating chain of events happens. In Pennsylvania, the statute itself answers this question: In most cases the property goes to “the person or persons entitled to the income at the expiration of the [wait-and-see perpetuity] period.”\textsuperscript{147} The other wait-and-see statutes direct a reformation of the instrument if and when this happens,\textsuperscript{148} and so the adjudication of the equivalent of the gift-over component must await the actual occurrence of an invalidating chain of events. Although this leaves the state of the title uncertain to that extent, it is a much less serious uncertainty; the more important uncertainty, which is not being able to find out what invalidity depends upon, is removed by early adjudication of the validating and invalidating chains of events.

Early adjudication of the validating and invalidating chains of events is crucial but not sufficient to the workability of the wait-and-see concept. The availability of such an adjudication must be accompanied by the adoption of some principle for the determination of these chains of events, and this in turn requires the square adoption of either the reasonable relationship lives standard or the causal relationship lives standard. Although neither standard rises to the level of mechanical precision inherent in the common law’s require-

\textsuperscript{146} Indeed, if early judicial designation of the validating and invalidating chains of events becomes the mode, and if the measuring lives are to be restricted to those who have a causal relation to vesting, the wait-and-see concept as so administered amounts to nothing more than an expansion of the common law separability principle. See Nutshell, supra note 12, at § 12.11. Under the traditional principle of separability an interest that is expressly subject to alternative contingencies is entitled to separate treatment, so that if one chain of events happens the interest is valid but if another chain of events happens the interest is invalid. The wait-and-see concept, if administered as described, merely extends the separability principle so that alternative contingencies are entitled to separate treatment under the Rule even if they are not expressly separated but are merely contained implicitly in the contingency attached to a given interest. See Fletcher, A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting, 20 STAN. L. REV. 459 (1968).

\textsuperscript{147} 20 PA. CONS. STAT. ANN. § 6105 (Purdon 1975).

\textsuperscript{148} See note 118 supra.
ment of initial certainty, both provide a sufficiently definite focus around which lawyers would be able to shape their legal arguments intelligently and courts would be able to decide cases consistently. Insofar as the workability of the concept is concerned, the great deficiency of the Pennsylvania version of wait-and-see is — in addition to the failure to restrict wait-and-see to its proper sphere of operation, interests that violate the common law Rule — the failure to adopt one or the other of these standards.

b. **The failure to prevent unnecessary unjust enrichment.** The controversy over wait-and-see has always centered on the workability of the concept, focusing almost exclusively on the uncertainty of the waiting period and of the state of the title in the meantime. Little attention has been paid to the concept’s ability to preserve the transferor’s intent as much as possible.

The assumption has been that it is adequate to this task, if only the mechanics of its operation could be made more predictable. The failure to address the problem may have been due in part to the absence of a rationale for intercession in all cases of perpetuity violation, not just in the technical cases. That rationale, as worked out above, is the prevention-of-unjust-enrichment.

---

149. The point was alluded to in the *Perpetuity Handbook,* supra note 110, at 6-7. The Handbook also noted that in addition to the states that have enacted a Pennsylvania-type wait-and-see statute, four other states — Connecticut, Maine, Maryland, and Massachusetts — have enacted a much more restricted version of the wait-and-see concept. *Id.* at 22; see *Conn. Gen. Stat.* § 45-95 (1981); *Me. Rev. Stat. Ann.* tit. 33, § 101 (1964); *Md. Est. & Trusts Code Ann.* § 11-103(a) (1974); *Mass. Ann. Laws* ch. 184A, § 1 (Michie/Law. Co-op. 1977); cf. *Fla. Stat.* § 689.22(2)(a)(1981). These statutes are not discussed in text for the reason that they fall so markedly short of the goal of preventing unnecessary unjust enrichment. The Massachusetts statute is typical, and provides:

§ 1. Basis of Determining Validity of Interest; “Life Estate”.

In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this section an interest which must terminate not later than the death of one or more persons is a “life estate” even though it may terminate at an earlier time. Choosing the termination of one or more life estates in favor of persons in being at the commencement of the perpetuity period as the end of the waiting period may make wait-and-see more workable than the unrestricted Pennsylvania-type version; but this benefit is achieved at the expense of failing even to remedy all of the technical violation cases. While it does reverse the automatic invalidity in standard fertile octogenarian cases (such as example 1) and in standard unborn widow cases (such as example 3), it does not do so in standard administrative contingency cases (such as example 2); cf. *Second Natl. Bank v. Harris Trust & Sav. Bank,* 29 Conn. Supp. 275, 283 A.2d 226 (Super. Ct. 1971). Nor does it provide relief in age-contingency-in-excess-of-21 cases. The statutes, in fact, further provide that if at the end of the restricted wait-and-see perpetuity period, an interest would be invalid because it is “contingent upon any person attaining or failing to attain an age in excess of twenty-one, the age contingency shall be reduced to twenty-one as to all persons subject to the same age contingency.” *Conn. Gen. Stat.* § 45-96 (1981); *Me. Rev. Stat. Ann.* tit. 33, § 102 (1964); *Md. Est. & Trusts Code Ann.* § 11-103(b) (1974); *Mass. Ann. Laws* ch. 184A, § 2 (Michie/Law. Co-op. 1977).
ment argument, which also argues for shaping the technique of reform in such a way that every appropriate opportunity is granted for the property to go to the intended takers. This, in turn, leads to testing the technique of reform to see if it provides for an after-the-fact duplication or near duplication of the result that could have been achieved for the transferor on the eve of the transfer by a Rule-wise lawyer.

Testing wait-and-see under this criterion again centers the problem on the waiting period, but not from the perspective of its uncertainty. It refocuses attention on who the wait-and-see measuring lives are to be, and on how they are to be used in identifying the validating and invalidating chains of events. Looking at the latter question first, it is clear that early adjudication of the validating and invalidating chains of events did much to relieve the uncertainty of the state of the title in the Pearson case. But this does not mean that the validating and invalidating chains of events were well-conceived. The court did not use the causal relationship lives — assuming that they were the lives the court was working with — for the purpose of demarcating a true wait-and-see perpetuity period. For this reason, far less than every appropriate opportunity for the property to go to the intended beneficiaries was granted. The court’s invalidating chain of events for the grandnieces’ and grandnephews’ income interest was the birth of additional nieces or nephews. The court did not seem to recognize the possibility of saying that even if there were after-borns, the interest would still be valid if the last surviving niece or nephew turned out to be one who was living at the testator’s death. But even recognition of this outcome as a validating event does not use the causal relationship lives for the purpose of demarcating a true wait-and-see perpetuity period. This would have required the court to say that the period was defined by the lives of the measuring lives — the nieces and nephews who were living at the testator’s death — plus twenty-one years: The validating chain of events, then, would have been the last surviving niece or nephew (whether after-born or not) turning out to die within twenty-one years of the death of the last surviving member of the group of nieces and nephews living at the testator’s death.

But even if used to demarcate a true wait-and-see perpetuity period, the causal relationship lives are not adequate fully to prevent unnecessary unjust enrichment of unintended takers. Only the reasonable relationship lives fulfill this objective: They, not the causal relationship lives, are the people who would likely have been selected by a Rule-wise lawyer in drafting the perpetuity-period com-
ponent of a saving clause. To illustrate, suppose this case of an age contingency in excess of twenty-one: devised property in trust, directing the trustee to pay the net income therefrom to life, then to’s children; the corpus of the trust was to be distributed to such of’s children as reached thirty. was survived by and by’s young children, and . Confined to the causal relationship lives, a court granting an early judicial designation of the validating and invalidating chains of events would, according to the architect of the causal relationship standard, Professor Dukeminier, declare that the class gift would be valid if at’s death all of his children have reached the age of nine or if those of his children who are then under nine were all alive at T’s death; but if at’s death he has a child under nine who was not alive at T’s death the class gift would be invalid. (The Pearson court might mishandle the causal relationship lives and say that the class gift would be invalid if A had any after-born children.) The lives of and , the children of who were living at T’s death, could not be used because they have no causal relation to the vesting or failure of the interest of A’s after-born child who had not reached nine by the time of A’s death. This means that A is the only causal relationship life in this example. The reasonable relationship lives, however, would certainly include

150. The everyone-in-the-world-who-was-alive-at-the-creation-of-the-interest standard is inappropriate (among other reasons) because such persons could not have been used in the perpetuity-period component of a savings clause. See In re [1901] 1 Ch. 936; note 15 supra. Among the other reasons why this standard is inappropriate are that it was not what was intended by the wait-and-see proponents, that it would be chaotic if adopted, and that it is certainly not adaptable to the approach of early judicial designation of the chains of events that would render the interest valid and those that would render it invalid.

151. See Dukeminier, supra note 90, at 65. This case is to be distinguished from a case where T devises property to the grandchildren of who reach 21. At T’s death he is survived by and by’s child . After T’s death, A has another child, . Then dies. Later, has two children, and (grandchildren of A) but Y dies shortly thereafter. Subsequently X dies, survived by M and N. Y cannot be used as a measuring life because he was not in being at T’s death. But X validates the interest of A’s grandchildren because his life is not only causally related to the vesting or failure of his own child’s interest but to the the interest of Y’s children also. The theory is that “[X]’s death may close the class.” Thus “[so long as [X] lives the class may stay open under the applicable class-closing rules; thus the continuance of [X]’s life prevents vesting.” This theory, which is correct in my view, is attributed to Professor Dukeminier. See Perpetuity Handbook, supra note 110, at 7 & n.1. Compare Maudsley’s treatment of this example in note 139 supra.

To explore this point a bit further, suppose this case: T devised property in trust, with directions as to the disposition of the income; a proportionate part of the corpus is to be distributed to such of A’s children as reach 30. T was survived by A and by A’s two children, X and Y. Neither X nor Y had reached 30 by the time of T’s death. After T’s death, a third child (Z) was born to A. Subsequently, X reached the age of 30, closing the class to future-born members. When X reached 30, Z was under the age of nine. Under the causal relation to the vesting standard, the class gift is apparently invalid. A and Y cannot be measuring lives because neither’s death can any longer close the class, and consequently there is no causal relation between their deaths and Z’s reaching 30.

152. It is not reported if Professor Dukeminier mentioned the possibility of A’s spouse also
Thus allowing the court to declare as the validating chain of events all after-born children reaching thirty within twenty-one years of the death of the survivor of a group that would include $X$ and $Y$ (and, of course, also include $A$ and possibly those of the spouses of $A$, $X$, and $Y$ who were living at $T$’s death). This demarcates a wait-and-see perpetuity period that is the equivalent of the perpetuity-period component of a saving clause likely to have been inserted by a Rule-wise lawyer acting for the transferor on the eve of the transfer. The technique of reform thus grants every appropriate opportunity for the property to go to the intended beneficiaries, thereby preventing unnecessary unjust enrichment of unintended takers.

2. The Restatement (Second)’s Version of Wait-and-See.

The experience under the Pennsylvania statute hardly augurs for wider adoption of the wait-and-see concept. The Pearson court mishandled the concept on so many counts that it even draws into question the competence of courts in general to administer such a disturbance of settled law without more guidance than the Pennsylvania statute contains.\(^1\)\(^5\) Furthermore, the guidance that the statute does contain purports to invoke the nonexistent “period allowed by the common law rule against perpetuities as measured by actual rather than possible events,” which makes it likely that a court

---

\(^1\)\(^5\) It could be charged that the validating and invalidating chains of events suggested by Dukeminier do not even take full advantage of the causal relationship life ($A$): The class gift in favor of $A$’s children might still turn out to be valid, even if at $A$’s death there was an after-born child under the age of nine. It is true that the interest of that child could not vest within 21 years of $A$’s death; but it could fail to vest within that 21-year period, thereby validating the class gift as a whole. Professor Dukeminier, however, was explicating the Kentucky wait-and-see statute, which like all the others save the Pennsylvania statute, calls for a reformation of the disposition in the case of an invalidity. Thus, Dukeminier’s exposition further suggests that, if an after-born under nine existed at $A$’s death, the class gift would then be reformed by lowering the age contingency to 21. Given the improbability (in the normal case) that the after-born child would die within 21 years of $A$’s death, the Dukeminier solution is not an unreasonably restrictive use of the causal relationship life ($A$) in this case, with one exception: the reformation should not lower the age contingency to 21, but rather to the age that the after-born child will reach 21 years after $A$’s death. Cf. Restatement (Second) of Property (Donative Transfers) ¶ 1.5 comment e, illustration 5 (1983).

\(^1\)\(^5\) Another decision that raises suspicions about courts’ ability to administer wait-and-see is Phelps v. Shropshire, 254 Miss. 777, 183 So. 2d 158 (1966), where the Mississippi court became so confused that it applied the wait-and-see label to the conventional separability doctrine, see NUTSHELL, supra note 12, at ¶ 12.11, and described the “possibilities” approach to the Rule as being “analogous to” the wait-and-see concept. Furthermore, the confusion extended beyond mere terminology, for the court seemed to fail to appreciate the fact that the construction of the will that the court adopted entitled the same group of people to the property whether there was a perpetuity violation or not.
would — as the Pearson court presumably did — incline toward the causal relationship lives for adjudicating the validating and invalidating chains of events, for the reason that in appearance they come close to the common law validating lives. The causal relationship lives seem likely to be selected for another reason: The causal relationship standard seems to yield a more predictable group of persons in given cases, leaving less room for argument at the fringe than the reasonable relationship standard; it thus seems to come closer than the other standard to preserving the mechanical precision inherent in the common law's requirement of initial certainty. The selection of the causal relationship lives, as argued earlier, would be unfortunate because the reasonable relationship lives more adequately fulfill the objective of preventing the unnecessary unjust enrichment of unintended takers.

Considering that the Restatement (Second) adopts such a remarkably improved version of wait-and-see, it is a great curiosity that in its Introductory Note it suggests that the Pennsylvania experience has been quite satisfactory.154 The Restatement (Second) contains considerably more guidance than the Pennsylvania statute does as to how the wait-and-see concept is to be administered. In fact, it meets all the criteria developed so far for an ideal method of perpetuity

---

154. Restatement (Second) of Property (Donative Transfers) 14 (1983). When the Pearson case was brought up from the floor during the 1978 debates, the speaker, Professor Lusky — an opponent of wait-and-see — charged the Reporter with having “overlooked” Pearson. The Reporter, Professor Casner, countered: “It [Pearson] is cited in here [i.e., in the Restatement (Second)].” 1978 A.L.I. Proc. 261. Professor Casner was technically correct: Pearson is cited in the tentative drafts and in the final product. See Restatement (Second) of Property (Donative Transfers) 110 (Tent. Draft No. 1, 1978); Restatement (Second) of Property (Donative Transfers) 119 (Tent. Draft No. 2, 1979); Restatement (Second) of Property (Donative Transfers) 88 (1983). But it is cited as part of the Statutory Note to § 1.5, which is the section that authorizes reformation of the instrument in cases where an interest “fails because it does not vest or cannot vest within the period of the rule against perpetuities.” The Pennsylvania statute contains a provision that directs the disposition of property where a perpetuity violation has actually occurred. See note 118 supra. The Pearson opinion did mention this provision, but it hardly construed it, though the Restatement (Second)’s Statutory Note lists it as having construed the provision.

In the place in the Restatement (Second) where a discussion of or at the very least a citation to Pearson is appropriate, it is totally ignored. Section 1.4, not § 1.5, is the section of the Restatement (Second) that adopts the wait-and-see method of perpetuity reform. Yet no mention of Pearson appears in the Statutory Note to § 1.4, even though the Pennsylvania statute that was in fact construed in Pearson is of course cited therein. See Restatement (Second) of Property (Donative Transfers) 63-66 (1983). Nor is Pearson mentioned in the Reporter’s Note to § 1.4. See id. at 66-80. The Reporter in his Note chose instead to draw attention to In re Frank, 480 Pa. 116, 389 A.2d 536 (1978). See Restatement (Second) of Property (Donative Transfers) 71-72 (1983). Frank is not a particularly significant wait-and-see case because it did nothing other than hold that the traditional second look doctrine for interests created by the exercise of special or testamentary powers of appointment was applicable also to gifts in default of a power’s exercise. For a discussion of the second look doctrine, its applicability to gifts in default, and the Frank case, see NUTSHELL, supra note 12, at § 14.3(b).
reform, including the two upon which the Pennsylvania experience faltered — that of demarcating a true and predictable wait-and-see perpetuity period and that of preventing unnecessary unjust enrichment by granting every appropriate opportunity for the property to go to the intended beneficiaries. *It achieves these objectives by paralleling the saving clause technique of the reformation method, though it nowhere acknowledges that this is in fact the procedure followed.*

As adopted at the American Law Institute’s 1979 meeting, section 1.4 of the *Restatement (Second)* sets forth a general formulation of the wait-and-see principle that is deceptively similar to, but much improved over, the formulation in the Pennsylvania statutory provision.

§ 1.4 The Vesting Requirement with Respect to Donative Transfers

Except as provided in § 1.6 [which applies to charitable gifts], a donative transfer of an interest in property fails, if the interest does not vest, if it ever vests, within the period of the rule against perpetuities.

The first point to notice about this formulation is that, unlike the Pennsylvania statute, there is no incorporation in section 1.4 of the nonexistent “period allowed by the common law rule against perpetuities as measured by actual rather than possible events.” There is only a reference to “the period of the rule against perpetuities,” a term that is defined internally — in section 1.1 — as “21 years after lives in being (the measuring lives) at the time the period of the rule begins to run.” The *Restatement (Second)* therefore includes a self-contained demarcation of a true wait-and-see perpetuity period.

The next point is that subsection (1) of section 1.3 limits the wait-and-see concept to its proper sphere of operation by providing that interests that meet the requirement of initial certainty are valid, and can be so declared by a court without waiting to see that what is bound to happen does in fact happen.

§ 1.3 The Measuring Lives With Respect to Donative Transfers

(1) If an examination of the situation with respect to a donative transfer as of the time the period of the rule against perpetuities begins to run reveals a life or lives in being within 21 years after whose deaths the non-vested interest in question will necessarily vest, if it ever vests, such life or lives are the measuring lives for purposes of the rule against perpetuities so far as such non-vested interest is concerned and such non-vested interest cannot fail under the rule. A provision that terminates a non-vested interest if it has not vested within 21 years

155. The Reporter for the *Restatement (Second)* made a rather offhand acknowledgement of this fact in a recent lecture. He stated that “it is possible to write in a wait-and-see approach in any jurisdiction by inserting an appropriate savings clause.” Casner, *supra* note 111, at 99. More directly, he noted that “[t]he adoption of the wait-and-see approach means that there is implied in every case an appropriate savings clause.” *Id.*
after the death of the survivor of a reasonable number of persons named in the instrument of transfer and in being when the period of the rule begins to run is within this subsection.

As to interests that violate the common law Rule, and to which the wait-and-see concept is properly applicable, the Restatement (Second) designates the reasonable relationship lives as the lives that are to be used for demarcating the wait-and-see perpetuity period; but, rather than leave room for argument at the fringe about who these persons are in given cases, which would be inevitable if a “reasonable relationship to the gift” standard were explicitly adopted, subsection (2) of section 1.3 contains a specific enumeration of such persons as the wait-and-see measuring lives:

(2) If no measuring life with respect to a donative transfer is produced under subsection (1) [of § 1.3], the measuring lives for purposes of the rule against perpetuities as applied to the non-vested interest in question are:

(a) The transferor if the period of the rule begins to run in the transferor’s lifetime; and

(b) Those individuals alive when the period of the rule begins to run, if reasonable in number, who have beneficial interests vested or contingent in the property in which the non-vested interest in question exists and the parents and grandparents alive when the period of the rule begins to run of all beneficiaries of the property in which the non-vested interest exists, and

(c) The donee of a nonfiduciary power of appointment alive when the period of the rule begins to run if the exercise of such power could affect the non-vested interest in question.

A child in gestation when the period of the rule begins to run who is later born alive is treated as a life in being at the time the period of the rule begins and, hence, may be a measuring life.

Section 1.5 follows up by authorizing the court to reform the instrument if a perpetuity violation actually occurs:

§ 1.5 Consequences of the Failure of an Interest Under the Rule Against Perpetuities in a Donative Transfer

If under a donative transfer an interest in property fails because it does not vest or cannot vest within the period of the rule against perpetuities, the transferred property shall be disposed of in the manner which most closely effectuates the transferor’s manifested plan of distribution, which is within the limits of the rule against perpetuities.

156. The new Iowa wait-and-see statute, which in general is modeled on the Restatement (Second), substitutes an even broader group: Instead of the beneficiaries and “the parents and grandparents” of the beneficiaries, the Iowa statute designates the beneficiaries and “the grandparents of all such beneficiaries and the issue of such grandparents . . . .” Act of Apr. 22, 1983, S.F. 433, 1983 Iowa Legis. Serv. 90 (West) (to be codified at Iowa Code § 558.68(2)(b)(2)).
The Restatement (Second)’s version of wait-and-see tests exceedingly well under the criterion of preserving the benefits of the requirement of initial certainty by providing a workable substitute for it. Notice, first of all, that the requirement of initial certainty is not abandoned altogether, as long as the application of wait-and-see is kept to its proper sphere — to interests that fail to satisfy the requirement. If the Restatement (Second) were adopted, every incentive would remain at the planning stage to draft dispositions that do not violate the common law Rule. Once a disposition is effected, adjudication of whether or not as of the date of its creation a property interest is certain to vest if at all within a life in being plus twenty-one years would be available. Section 1.3(1) should successfully prevent a court from blundering on this crucial point, as the Pennsylvania court did in Pearson when it refused to decide if the charitable interest violated the traditional Rule on the ground that we must wait to see what happens in the future. As to interests that by their original terms do not meet the requirement of initial certainty (the proper sphere of wait-and-see), the specific enumeration of the measuring lives in section 1.3(2) not only makes the wait-and-see concept workable but it virtually preserves the mechanical precision inherent in the requirement of initial certainty. Both of the general standards that have been proposed, the reasonable relationship standard and the causal relationship standard, while workable in the sense that either one provides a sufficiently definite focus around which lawyers would be able to shape their legal arguments and courts would be able to decide cases consistently, fall short of the ease and predictability that mechanical precision embodies. The Restatement (Second)’s specific enumeration, however, allows the wait-and-see perpetuity period to be flexible and to function as efficiently and predictably as the common law Rule itself. At any time that the validity of an offending interest comes to be adjudicated, the court, in the same lawsuit that declared the violation, ought to be willing to apply section 1.3(2)’s specific enumeration so as to identify the measuring lives by name (to the extent possible)\(^\text{157}\) and to settle whether

\textbf{Footnote:}\n\begin{itemize}
\item \text{157.} It may not in all cases be possible to make an early designation of all of the measuring lives by name. As comment e to § 1.3 recognizes, some persons — even though they are living when the Rule starts to run — may not become beneficiaries until some time later. An example of such a person is a child who becomes a beneficiary by virtue of being adopted into that status. The Restatement (Second) clearly contemplates that such a child is to be regarded as a measuring life if such child was actually alive when the Rule commenced running. The comment further declares that the parents and grandparents of such an adopted beneficiary are to be determined as if the adopted child is a natural-born child of the adopting parents. Consequently such adopting parents (and their parents) if not for some other reason already measuring lives could become measuring lives after the commencement of the perpetuity period.
\end{itemize}
or not they are a group "reasonable in number." The court should also undoubtedly be willing to designate the validating and invalidating chains of events. Since the Restatement (Second)'s version of wait-and-see is rather easy to understand, the chances that the validating and invalidating chains of events constructed by the court would not in a given case reflect a translation of the measuring lives into a true wait-and-see perpetuity period is markedly reduced.

The Restatement (Second)'s version of wait-and-see fares equally well when tested under the other criterion that characterizes an ideal method of perpetuity reform, that of preventing the unnecessary unjust enrichment of unintended takers. In effect, the Restatement (Second) automatically interjects a well-conceived saving clause into every instrument effecting a gratuitous disposition of property that contains a perpetuity violation. The perpetuity-period component of the clause is the wait-and-see perpetuity period — the length of the lifetime of the longest living member of the group of wait-and-see measuring lives enumerated in section 1.3(2), plus the twenty-one year period following the death of that person. Granted, the resultant uniformity of the perpetuity-period component sacrifices the ad hoc tailoring of that component that might occur under the saving clause technique of the reformation method. But the lives specifically enumerated in section 1.3(2) approximate closely enough the persons likely to be selected on a case-by-case basis that they go about as far in preventing the unnecessary unjust enrichment of unintended takers as reasonably can be expected. As applied to the technical violation cases, the Restatement (Second)'s version of wait-and-see — viewed as the equivalent of interjecting into every offend-


159. The new Iowa statute goes even further in this direction by adopting an even broader group of wait-and-see measuring lives. See note 156 supra.
ing disposition a well-conceived saving clause — avoids the unjust enrichment of unintended takers by providing an after-the-fact duplication of one of the formalistic devices that a Rule-wise lawyer might have used before the fact to have assured complete validity in the first place. In the nontechnical violation cases, the Restatement (Second) grants every appropriate opportunity for the property to go to the intended beneficiaries. If the interest still does not vest within the wait-and-see perpetuity period, the enrichment of unintended takers becomes unavoidable. The Restatement (Second) then fills out the saving clause by providing for the functional equivalent of the clause’s gift-over component — the reformation authorized by section 1.5. The gift-over component is not uniform, but rather is to be tailored on a case-by-case basis to come as close as possible to “the transferor’s manifested plan of distribution,” thereby holding the unavoidable enrichment of unintended takers to a minimum.

C. Countervailing Considerations?

The case for interfering with the normal operation of the Rule in all cases of perpetuity violation is persuasive. It is built upon the idea that all Rule violations, not just the technical ones, are the product of a mistake that if allowed to stand will result in unjust enrichment of unintended takers at the expense of the intended beneficiaries. The reformation method and the Restatement (Second)’s version of the wait-and-see method constitute workable approaches to perpetuity reform that either retain the requirement of initial certainty or provide a workable substitute for it that preserves its beneficial aspects.

Are there any countervailing considerations? Since the repeal of the Rule Against Perpetuities is not presently the goal of perpetuity reform, a complete reversal of the invalidity of all offending interests is not in order. Thus the basic technique employed by the specific statutory repair method — directing that the possibility of the occurrence of the invalidating chain of events be disregarded — is inapposite. Neither the reformation method nor the wait-and-see method purport to do anything of the sort. Both methods, in fact, allow no further tying up of property than the common law Rule itself authorizes. No interests may remain contingent beyond the current outer limit of lives in being plus twenty-one years.

160. Complete repeal (for trusts where the trustee has the power to sell) has been carried out in Wisconsin, Wis. Stat. § 700.16 (1981-82), and proposed in the Canadian province of Manitoba, Manitoba Law Reform Commission, Report on the Rules Against Accumulations and Perpetuities 60 (1982).
It could be argued that there is something troubling about all this maneuvering to prevent the unjust enrichment of unintended takers in the nontechnical cases. In the technical violation cases, except where age contingencies or the like are unnecessarily lowered to twenty-one, all three methods of reform can be described as putting into place an after-the-fact duplication or near duplication of one of the devices that a Rule-wise lawyer might have used in each case immediately before the effective date of the transfer to have assured validity in the first place. This tenet would seem to apply also to perpetuity violations outside the technical violation area. If the case for interfering with the normal operation of the Rule is grounded on mistake, the method of reform should to the extent possible seek to correct the mistake by the same means that a Rule-wise lawyer would have used to avoid the mistake in the first place.

In the technical violation categories, correcting the mistake requires the duplication of a merely formalistic step. When it comes to correcting the mistake in cases of nontechnical violations, the change is not “merely formalistic;” it is “substantive.” A Rule-wise lawyer faced with a proposed plan that would blatantly violate the Rule might well have urged his client to rethink the substance of his proposed plan. The revised plan that the client would have settled upon with the help of his lawyer is unknowable after the fact. This is true in the technical violation cases also, except that there the choice is between a number of almost certainly formalistic revisions, including the insertion of a saving clause. Here the choice is not merely formalistic, and the range of possibilities is much wider and more open-ended. Some transferors would shorten their dispositions. Other transferors would seek to go as far as possible, using a saving clause that would certainly or almost certainly turn out to be operational.

Take the testator in the *Pearson* case as an example.\(^{161}\) If he had been competently advised immediately before his death, he might have changed his disposition so as to give the income by name to his six brothers and sisters for their lives, then by name to his thirteen nephews and nieces for their lives (since it was unlikely that there would be any more nephews and nieces), then the corpus to such of his siblings’ descendants as survive the last surviving income beneficiary, and if none survives to the charitable organizations. Such a trust would have been completely valid — the validating lives would be the nineteen income beneficiaries — and would have come close

\(^{161}\) See note 124 *supra* and accompanying text.
enough to his original dispositive plan that he might have accepted it. On the other hand, his desire to extend the trust as long as legally possible may have been strong, in which case the trust may have been drafted as originally intended, but with a saving clause added that used as validating lives (in the perpetuity-period component) the six brothers and sisters, the thirteen nephews and nieces, and the twenty-nine grandnephews and grandnieces (and perhaps their spouses also) who were living at his death, with a further twenty-one-year period tacked on after the death of the last surviving member of this group. The gift-over component in the saving clause might have been in favor of such of the descendants of his brothers and sisters who are living at the end of this period, and if none to the charities.

The wait-and-see method of reform, particularly the Restatement (Second)'s version of it, duplicates the latter choice only. And the version of the reformation method that calls for the insertion of a saving clause does the same. To be sure, the effect would be to tie up the property longer than if all clients were competently advised immediately before the transfer was effected. But this consequence is hardly worrisome enough to justify rejecting the saving clause version of reformation or the Restatement (Second)’s version of wait-and-see. Since most perpetuity violations are probably technical ones, the longer tying up of property in the nontechnical case is not that significant. Furthermore, as noted above, while the tying up of property might be longer than would actually have occurred had all transferors been competently advised immediately before the transfer, it cannot be longer than the common law Rule Against Perpetuities now authorizes. Finally, the saving clause version of the reformation method and the Restatement (Second)’s saving clause version of the wait-and-see method safeguard the validity of reasonable age contingencies without unnecessarily reducing them to twenty-one.

IV. Conclusion

The case for perpetuity reform that has heretofore been advanced argues from the harshness or illogicality of the Rule with respect to the technical violations. But this rationale does not adequately jus-
tify the reformation and wait-and-see methods of reform, both of which interfere with the normal operation of the Rule in all cases of perpetuity violation — nontechnical as well as technical.

This Article advances a rather different case for perpetuity reform. All perpetuity violations, technical and nontechnical, result from mistakes that will unjustly enrich unintended takers if the mistakes go uncorrected. The objective of reform, then, should be to prevent such unjust enrichment, so far as would have been legally possible at the drafting stage of the disposition. This rationale justifies interfering with the normal operation of the Rule in all cases of perpetuity violation, which is the scope of reform effected by the reformation and wait-and-see methods. The prevention-of-unjust-enrichment rationale has an additional important implication. It favors particular versions of reformation and wait-and-see that except in Iowa have so far not been adopted — the saving clause version of reformation and the *Restatement (Second)*'s version of wait-and-see. And the prevention-of-unjust-enrichment rationale argues against versions of reformation and wait-and-see that have been adopted — reduction of age contingencies (or periods in gross) to twenty-one, in the case of the reformation method; and, in the case of the wait-and-see method, the use of the so-called causal relation lives to measure the wait-and-see perpetuity period. It is distressing that most of the several legislatures that have recently enacted wait-and-see statutes ignored the *Restatement (Second)*'s version in favor of the Kentucky version, which invokes the causal relation lives. It is more distressing, given the Pennsylvania experience with the *Pearson* case, that the Virginia legislature adopted a Pennsylvania-style statute, which specifies no principle at all for identifying measuring lives.

With the theory of reform properly focused on the prevention of unjust enrichment, courts in jurisdictions that have adopted the reformation method should reform offending dispositions by injecting a saving clause into the instrument. And legislatures contemplating perpetuity reform should emulate the Iowa experience and enact wait-and-see statutes modelled on the *Restatement (Second)*.