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In Re Lattouf’s Will and the Presumption of Lifetime Fertility in Perpetuity Law

LAWRENCE W. WAGGONER*

Adoption of children is an ever-present complication of class gifts and the Rule Against Perpetuities. Given this fact, any effort to find the presumption of lifetime fertility rebuttable is largely illusory. The author demonstrates that the gift in In Re Lattouf’s Will could have been sustained even in face of an irrebuttable presumption.

In Re Lattouf’s Will has become a somewhat celebrated decision in perpetuity law. It is the only perpetuity case to have allowed the presumption of lifetime fertility to be rebutted. One would have expected such a dramatic departure from traditional perpetuity doctrine to have led to the validity of the interest at issue. But this was not so: the testator’s disposition was nevertheless held to have violated the Rule Against Perpetuities.

There are two themes of this short discourse. First, holding the presumption of lifetime fertility to be rebuttable will seldom prevent invalidity, the result sought by the principal advocate of the rebuttable presumption, the late Professor Leach. Second, the Lattouf case is one in which a rebuttable presumption might

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have prevented invalidity, for the court overlooked an argument that could have upheld the interest at issue.

**Presumption of Lifetime Fertility**

Traditional perpetuity doctrine holds that all persons—regardless of their age or physical condition—are *conclusively* presumed to be capable of having children throughout their entire lifetime. The presumption cannot be rebutted even though, for example, the person in question was a man who has undergone a vasectomy, 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 by early English decisions, of which *Jee v. Audley*² is 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 aged 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."³

Professor Leach mounted a formidable campaign to shift the conclusive presumption to one that is rebuttable.⁴ The purpose was to nullify the now-famous "fertile octogenarian" type of case, which Leach correctly identified as one of the recurring instances where the Rule Against Perpetuities works harshly and illogically. A prototypical "fertile octogenarian" case might be as follows. T, a testator who at the time of his death was in his seventies, was a widower and had no children or other descendants. His closest blood relative was his fifty-eight-year-old sister, A, who had passed the menopause. A had two children, X and Y. X is married, is in his early thirties, and has one child. Y, in his mid-twenty-

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². 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).
³. *Id.* at 325-26, 29 Eng. Rep. at 1187.
⁴. *E.g.,* 6 AMERICAN LAW OF PROPERTY § 24.22 (A. Casner ed. 1952); Leach, Perpetuities: New Hampshire Defertilizes the Octogenarians, 77 HARV. L. REV. 279 (1963). The New Hampshire case that was the subject of Leach's Harvard Law Review article, *In re Bassett's Estate*, 104 N.H. 504, 190 A.2d 415 (1963), was in fact, not a perpetuity case; it was a trust termination case. Leach acknowledged this, but still ballyhooed the case as a great breakthrough. As a trust termination case, *Bassett* was hardly pathbreaking in allowing rebuttal of the presumption of lifetime fertility. In 4 A. SCOTT, THE LAW OF TRUSTS § 340.1, n.4 (3d ed. 1967), several trust termination cases predating *Bassett* are cited that reached the same conclusion where, as in *Bassett*, the evidence that the person in question was incapable of having natural-born children was uncontroversed. See RESTATEMENT (SECOND) OF TRUSTS § 340 comment e (1959).
ties, is unmarried. T’s property is bequeathed in trust, directing the trustee to pay the net income “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.”

As formulated by Professor John Chipman Gray, the common-law Rule Against Perpetuities states that “no 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.” Gray’s formulation, considered by the courts to be the classic statement of the Rule, expresses rather clearly the Rule’s requirement of initial certainty: If there exists at the commencement of the perpetuity period any possible chain of events that might subsequently arise that would result in the questioned interest’s remaining contingent beyond a life in being plus twenty-one years, the interest is invalid. The remainder interest in favor of A’s grandchildren fails this test. 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 linchpin in this invalidating chain of events is the acceptance of the possibility that A will have a child after T’s death. The acceptance of this possibility appears in turn to be dependent upon the conclusive character of the presumption of lifetime fertility. If the presumption were rebuttable and deemed to be rebutted by A’s having passed the menopause, the invalidating chain of events would vanish. The last survivor would be bound to be A, X or Y, all of whom were in being at T’s death. The requirement of initial certainty would have been met because the grandchildren’s interest would be certain to vest no later than at the death of lives in being.

Leach’s campaign against the conclusive presumption was largely ineffective. Section 377 of the Restatement of Property squarely supports the conclusive presumption, and there are

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5. J. Gray, The Rule Against Perpetuities § 201 (2d ed. 1906). The Rule first appeared in its present form in the second edition of his book, and was carried forward in subsequent editions without change.

6. 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.

7. Restatement (Second) of Property § 377 (1944) (“[i]n applying the Rule
many perpetuity cases, recent as well as not so recent, that have adhered to it.\textsuperscript{8} \textit{Lattouf} is the only American common law decision in a perpetuity case to have squarely held that the presumption is rebuttable. The court in \textit{Lattouf}, in a few conclusory sentences, brushed the traditional view aside:

Defendants-contestants rely upon the ancient legal presumption, often mentioned in our cases, that a woman is presumed legally capable of bearing children at any age. . . .

However, we are unwilling to follow the contestants in their reliance upon the ancient presumption. As was said in Trenton Banking Co. v. Hawley, 7 N.J. Super. 301, 307-308, 70 A.2d 896 (Ch. Div. 1950), the presumption should not, merely because of its antiquity, blind us to present realities and conceal demonstrable truth. . . . The hysterectomy, involving complete removal of Marie Endres' procreative organs, rendered her permanently sterile. It logically follows that she could bear no children other than the only child she had when testator died.\textsuperscript{9}

It is doubtful that allowing the presumption to be rebuttable, as Leach argued and as the \textit{Lattouf} court held, is a solution to the so-called fertile octogenarian problem. Even if the presumption were rebuttable, it could seldom be sufficiently rebutted to save a perpetuity violation as long as the requirement of initial \textit{certainty} remains the test for validity. Given the biological variables with the usual infertility conditions, the most that could be established in a majority of situations would be that it was unlikely, perhaps even extremely unlikely, that the person in question could have more children.\textsuperscript{10}

Should the impossibility of the birth of natural children be conclusively established, as in \textit{Lattouf},\textsuperscript{11} the initial certainty test for validity is still unsatisfied. What the \textit{Lattouf} court failed to consider was the possibility of having children by adoption. Since the trend is strongly toward the inclusion of adopted children in class gifts,\textsuperscript{12} it is difficult to see how the \textit{Lattouf} court could hold

\begin{itemize}
  \item Against Perpetuities, a man or woman is treated as capable of having children as long as life lasts\textsuperscript{''}).
  \item \textsuperscript{8} E.g., Turner v. Turner, 260 S.C. 439, 442, 196 S.E.2d 498, 501 (1973) ("[t]he possibility of childbirth," the court said, "is never extinct"); Abram v. Wilson, 8 Ohio Misc. 420, 423, 220 N.E.2d 739, 742 (1966) ("[o]bviously," the court said of the testator's 75-year-old brother, "it is clearly possible for [him] to have children . . . .").
  \item \textsuperscript{9} 87 N.J. Super. at 144, 208 A.2d at 415 (citations omitted).
  \item \textsuperscript{10} Medical science may sometimes stand in the way of establishing infertility. Can it be held, for example, that a man who has undergone a vasectomy cannot have children, given the possibility of surgical reversal? For further discussion of this and related points, see Schuyler, \textit{The New Biology and the Rule Against Perpetuities}, 15 U.C.L.A. L. Rsv. 420 (1968).
  \item \textsuperscript{11} A complete hysterectomy was regarded as sufficient by the \textit{Lattouf} court. 87 N.J. Super. at 144, 208 A.2d at 415. In the above hypothetical example, A's having gone through the menopause may also be sufficient.
  \item \textsuperscript{12} Adopted children are presumptively included in class gifts in New Jersey, the jurisdiction in which \textit{Lattouf} was decided, although this matter may have been
\end{itemize}
that the presumption had been rebutted in view of the fact that the adoption of children is hardly out of the question where as in Lattouf, the wife is in her normal childbearing years but sterile. Indeed, since even elderly people like A in the above example probably cannot be excluded from adopting children based on their age alone, the possibility of adopting children is seldom extinct.

**Effect of Adoption**

As indicated above, in Lattouf itself, the court held the presumption not only to be rebuttable but—by ignoring the possibility of having children by adoption—also to have been rebutted. Despite this, the court still held that the interest in question vio-

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13. See, e.g., *In re Adoption of Tachick*, 60 Wis. 2d 540, 210 N.W.2d 865 (1973); *Madsen v. Chasten*, 7 Ill. App. 3d 21, 286 N.E.2d 505 (1972); *In re Adoption of Christian*, 184 So. 2d 657 (Fla. Dist. Ct. App. 1966); *In re Haun*, 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972). Cases are collected in Annot., 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 be considered, however, in determining whether the adoption would be in the best interests of the child. *In re Adoption of Randolph*, 68 Wis. 2d 36, 227 N.W.2d 634 (1975).

14. Precedent in the trust termination area holds that the capability of a particular person's having a child is not conclusively presumed. See case cited supra note 4. However, recent termination cases have refused to disregard the possibility of a person's having a child by adoption despite the person's inability to have natural-born children. See, e.g., *Clark v. Citizen's & S. Nat'l Bank*, 243 Ga. 703, 257 S.E.2d 244 (1979). 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 uncontroverted 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.

Professor Leach thought perpetuity law should also emulate tax treatment of the fertility presumption. See 6 AMERICAN LAW OF PROPERTY, supra note 4, § 24.22. But recent precedent in the tax area has refused to disregard the possibility of a person's having a child by adoption despite the person's inability to have natural-born children. See, e.g., Rev. Rul. 410, 1974-2 C.B. 187 (possibility of a 60-year-old woman's adopting one or more children is not so remote as to be negligible; charitable deduction denied); Rev. Rul. 442, 1971-2 C.B. 336 (possibility of a 55-year-old man's adopting a child is not so remote as to be negligible; charitable deduction denied).

Leach anticipated this problem, but nevertheless persevered in his criticism of the conclusive presumption in perpetuity law. This was his "answer" to the problem of adopted children: "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 4, at 282.
lated the Rule. If the possibility of having children by adoption is disregarded the court's conclusion was in error; further, unlike the more typical case exemplified by the hypothetical discussed previously, taking the possibility of having children by adoption into consideration does not necessarily destroy the argument for validity.15

To develop the argument, it is helpful to examine the facts of Lattouf and the court's analysis offered in support of its conclusion. The testator, Sarkis Lattouf, an eighty-year-old bachelor when he died, created a trust of the residue of his estate. The income from the trust was to be used in the discretion of the trustee for various specified purposes. As to the corpus, the will provided: "When the youngest child of my niece, Marie Endres, shall have attained, or would have attained the age of twenty-five (25) years, then the trust hereby created shall end, and the principal thereof . . . shall be equally . . . divided among my then living grandnephews and grandnieces."16 Surviving the testator were three sisters and forty-one nephews and nieces. Marie Endres, one of the surviving nieces, had one child, Linda. Linda was just short of three years and ten months old at the testator's death. Marie had undergone a complete hysterectomy prior to the testator's death, which the parties stipulated rendered her "incapable of bearing children when the will was executed and the testator died."17

Had the testator lived two months and a few days longer, so that Linda would have reached her fourth birthday by the time of his death, the contingent interest of the grandnephews and grandnieces in the corpus of the residuary trust would have unquestionably been valid. The twenty-fifth anniversary of Linda's birth would be certain to occur within twenty-one years of the testator's death. But the fact that Linda was two months and a few days short of her fourth birthday when the testator died was fatal, in the court's view. The court's analysis was brief, consisting of the following paragraphs:

We must look at the corpus provision of paragraph Seventh as of the date of testator's death. Would the trust corpus vest within a life in being plus 21 years? The answer is clearly no.

. . . .

The rule would be violated were we to take Linda as the measuring life. . . . Linda was born December 1, 1958; Lattouf died September 26, 1962, so that the child . . . was at least two months short of age 4. Accord-

15. There is, incidentally, no indication in the opinion that the argument for validity presented here was rigorously made to the court, and so, the court's decision ought not to be taken as a rejection of it.
16. 87 N.J. Super. at 141, 208 A.2d at 413.
17. Id. at 143, 208 A.2d at 415.
ingly, had she died immediately after the execution of the will and Lattouf's death, more than 21 years would expire before she "would have attained" age 25.

So, too, were we to take Marie Endres as the measuring life. Had she died immediately after Lattouf, the trust would not have vested within her life and 21 years thereafter.

As our cases have uniformly held, a future interest must vest, if at all, within a period measured by a life in being when the interest was created, plus 21 years. The nine-month period tacked on in case of an existing pregnancy has no application in the circumstances of this case. Marie Endres was not pregnant. She could not be, nor, of course, could the infant Linda. Although plaintiff's counsel claimed at oral argument that consideration should be given to this extra term of gestation, he has now abandoned the argument, and necessarily so.

Accordingly, we conclude that the trust failed because it was in violation of the rule.18

The procedure for determining whether an interest violates the Rule Against Perpetuities18 is to postulate the death of each person who is connected in some way to the transaction and ask: Is there with respect to this person an invalidating chain of possible events? In order for the answer to be negative, so that the person is the measuring (or validating) life, there must be a certainty that the vesting or failure of the interest will occur no later than twenty-one years after that person's death. If there is no such certainty, that person cannot be the measuring (or validating) life. This was essentially the procedure followed by the court in Lattouf. The court postulated the death of Linda and of her mother Marie, and properly concluded that with respect to both there was an invalidating chain of possible events. Since Marie was deemed incapable of having children, Linda was taken by the court to be the youngest of her children. Linda being two months and a few days short of her fourth birthday at the testator's death, the disposition in effect constituted a direction to pay the corpus of the trust to such of the testator's grandnephews and grandnieces as were living twenty-one years and two months20 after his death. Should both Marie and Linda die during the two-month period following the testator's death, the vesting or failure of the interest in the corpus would occur more than twenty-one years later.

18. Id. at 145, 208 A.2d at 415-16 (citations omitted).
20. For the sake of convenience, the period is subsequently referred to as a 21-year-and-2-month period rather than a period of 21 years, 2 months, and a few days.
The court's error was in limiting its search for measuring lives to Linda and Marie. A wider search would have revealed that a group of measuring lives arguably exists for which there is no invalidating chain of possible events. The class of legatees—the grandnieces and grandnephews that survive the twenty-one-year-and-two-month period following the testator's death—implicitly contains three categories: 1. the grandnieces (including Linda) and grandnephews who were living at the testator's death; 2. any grandnieces and grandnephews who were born after the testator's death but who were in gestation at his death; and 3. any grandnieces and grandnephews who are conceived and born after the testator's death (hereafter referred to as after-born).

If measuring lives can be found for each of these three categories, the class gift ought to be valid. Measuring lives for the first and the second categories are easy. The grandnieces and grandnephews who fall into these two categories are their own measuring lives.\footnote{It is well established, though sometimes overlooked, that in appropriate cases the legatees of a questioned interest can be their own measuring lives. \textit{E.g.}, Rand v. Bank of Cal., 236 Or. 619, 629-27, 388 P.2d 437, 440 (1964). This is especially useful principle in cases where an interest is contingent on reaching an age in excess of 21 years or, as in \textit{Lattouf}, is contingent on survivorship of a period in gross that exceeds 21 years. To give an example, suppose that a testator devised real property "to such of A's children as are living on the twenty-fifth anniversary of my death." A predeceased the testator. At the testator's death, A had three living children. The executory interest in favor of A's children does not violate the Rule because A's children are their own measuring lives. Each one of A's children will either survive the twenty-five-year period in gross 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 the required period in gross. The only difference between this example and the \textit{Lattouf} case is that the principle that the legatees can be their own measuring lives is sufficient by itself to uphold the interest of all the class members. In \textit{Lattouf}, since there are possible after-born grandnieces and grandnephews, the principle upholds only the interests of the members of the class who were in being at the testator's death. Because of the all-or-nothing rule pertaining to class gifts, these gifts cannot be found partly valid and partly invalid. Consequently, measuring lives must be found for the potential after-born members if the class gift is to be upheld.}

It is the third category, the one composed of the potentially after-born grandnieces and grandnephews, that presents the difficulty. These potential class members cannot serve as their own measuring lives. Some other group must be found to validate the gift to this category if the gift to the entire class is to be saved. Such a group exists, but its recognition depends upon the court's willingness to accept the proposition that a viable child cannot be conceived \emph{and} born all within a two-month period; that is, that there is no conclusive presumption of instantaneous birth. If the court would accept the impossibility of births of viable children...
occurring within two months of conception, then the measuring lives for the third category are the mothers of the potential after-born grandnieces and grandnephews—the nieces and wives of the nephews. If a child cannot be born viable within two months of its conception, then it follows that any after-born grandniece or grandnephew would have to be born more than two months after the testator’s death. And from that it follows that such after-born’s mother (a life in being) could not die more than twenty-one years prior to the expiration of the twenty-one-year-and-two-month term.22

Is the above argument for validity destroyed if the possibility of having children by adoption is not disregarded? Unlike the more typical case discussed earlier, there are reasons with respect to the facts of Lattouf for suggesting not. This problem has two aspects. First, there is the possibility of a child’s acquiring the status of grandnephew or grandniece by being adopted into the class by a niece or nephew after the testator’s death. In such cases, the final order of adoption will be issued either during or after the two-month period following the testator’s death. If it is issued afterward, identifying measuring lives presents no difficulty: They would be the adopting niece or nephew. As to any child adopted during the two-month period, such child would have to have been born or at least in gestation at the testator's death, and so could be his or her own measuring life.23

22. Using the mothers as the measuring lives for the after-born grandnieces and grandnephews is predicated upon their mothers having been alive at the testator’s death. For the sake of technical completeness, there must also be taken into account the possibility that the mothers of some of the after-born grandnieces and grandnephews might not be in being at the testator's death but rather might themselves be conceived and born thereafter. The proposition that all mothers of viable children must live more than two months beyond the date of conception solves this problem also. The measuring lives for any children of an after-born niece or nephew would be the mothers of such after-born nieces and nephews—the testator's sisters. Any sister of the testator who had an after-born niece or nephew could not die more than 21 years prior to the 21-year-and-2-month term. (If the testator had been survived by one or more brothers, the measuring lives would then include the brothers' wives; and in the case of an after-born wife, the wife's mother; and so on.) To take account of the possibility of a nephew (who was in being at the testator's death) marrying a woman who was conceived and born after the testator's death (who would then give birth to an after-born grandniece or grandnephew), the woman's mother would be the measuring life; and one could also note that any such nephew who married an after-born wife would himself have to live for more than two months after the testator's death, and so could not die more than 21 years before the twenty-fifth anniversary of Linda's birth.

23. See Restatement (Second) of Property § 1.3 comment e (Tent. Draft No. 92).
The other aspect of the problem posed by adoptions concerns Marie herself. Her sterility notwithstanding, it was clearly possible for her to adopt children after the testator's death. As argued earlier, this possibility should have prevented the court from concluding that the presumption of lifetime fertility had been rebutted. Would holding that Marie was capable of having additional children (if only by adoption) destroy the above argument for validity? Keep in mind that the remainder interest in the corpus was contingent on survivorship of the time when Marie's "youngest" child becomes or would have become twenty-five. Treating Linda as Marie's "youngest" child is crucial to the argument for validity, for it enabled the time of required survivorship to be translated into a twenty-one-year-and-two-month period in gross. But holding that Marie was still capable of having children (by adoption) would not necessitate treating any child other than Linda as Marie's "youngest" for purposes of construing the testator's disposition. No matter how many children Marie might later adopt, Linda was Marie's youngest child at the time of the testator's death. Admittedly, class gifts that are contingent on survivorship to the time when a person's youngest child reaches a certain age are usually construed to refer to the time when the youngest whenever born (or adopted) reaches the designated age,\(^2\) and sometimes such gifts are construed to relate to the time when the youngest of all existing class members reaches the aged.

\(2\), 1979) ("a child that may be later adopted [can be] a measuring life as long as such [child] was alive when the period of the rule begins to run"). See also id. illustration 6. Unfortunately, there is New Jersey precedent that could be read as saying that an adopted child is considered to come into being on the effective date of the order of adoption, irrespective of the child's actual date of birth or conception. See In re Estate of Markowitz, 126 N.J. Super. 140, 312 A.2d 901 (1979) (the court said: "Born when? . . . Regardless of the time when an adopted child is physically born, he or she does not come into existence as a child of the adoptive parent (in the sense that the law equates the relationship of a natural-born child with that of an adopted child) until the effective date of the order of adoption"). Id. at 145, 312 A.2d at 904. If this notion were applied for perpetuity purposes, there would arise an invalidating chain of possible events, for there would then be the possibility of instantaneous "births" followed by the death of the adopting niece or nephew, all occurring during the two-month period after the testator's death. Markowitz, however, was not a perpetuity case, and there is reason for thinking that for perpetuity purposes the Restatement (Second) rule would be followed. The issue in Markowitz was whether a child who was adopted by the testator after his will was executed but born before the execution of the will was covered by a pretermitted heir statute that granted an intestate share to children "born" after the date of execution of the will. The court, in holding that an adopted child is deemed to be "born" on the date of adoption, was merely deciding the time when an adopted child becomes part of—or is "born" into—the adopting family, not when such a child comes into being for purposes of the Rule Against Perpetuities.

24. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 646 (2d ed. 1956); 5 AMERICAN LAW OF PROPERTY, supra note 4, § 22.44.
designated age. But there is ample precedent—outside of New Jersey, at least—supporting the idea that if either of these constructions would result in a perpetuity violation, as it would in *Lattouf*, the word “youngest” should be construed to refer to the youngest living at the testator’s death, in order to uphold the gift.

Professor Samuel M. Fetters published an article in 1976, in which he also concluded that the *Lattouf* disposition ought to have been upheld. Though the problem of adopted children was not addressed, the Fetters argument concerning *Lattouf* was generally similar to the one advanced above.

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26. L. Simes & A. Smith, *supra* note 24, at 95; 5 American Law of Property, *supra* note 4, § 22.44. This is simply an application of the general constructional preference for validity. See L. Waggoner, *Future Interests in a Nutshell*, § 12.9 (1981). In *Lattouf* itself, the court specifically rejected the trial court’s construction of “youngest” as meaning the youngest living at the testator’s death. 87 N.J. Super. at 143, 208 A.2d at 414-15. But the court did so in apparent ignorance of the fact that this construction would have facilitated upholding the gift. Further supporting the adoption of this construction is the fact that the court specifically found that the testator knew of Marie’s hysterectomy when he executed his will. *Id.* at 144, 208 A.2d at 415. Given this knowledge, it would not be unreasonable to conclude that the testator had Linda in mind when he used the words “youngest child of my niece, Marie.” See L. Waggoner, *supra* note 25, § 12.13(a).


28. The Fetters argument is not identical to mine, but the differences do not seem significant enough to warrant discussion in the text. Among the differences is the fact that the Fetters article identifies the nieces and nephews as the measuring lives, rather than—as I did—the nieces and the nephews’ wives. See Fetters, *supra* note 27, at 317-18. Similarly, though the possibility of an after-born niece or nephew is handled in the Fetters article by identifying the testator’s sisters as the measuring lives, it is strongly implied that the brothers would be included in the group of measuring lives if the testator had been survived by brothers. See *id.* at 318-19. I, on the other hand, would prefer to restrict the group of measuring lives for all after-born children to their mothers. See *supra* note 22. Oddly, in connection with a different example, the Fetters article used only the mothers of after-born children as the measuring lives. Fetters, *supra* note 27, at 329-30.

Although the Fetters article does not address the point, there is a problem with including the fathers (a nephew, and a brother) in the group of measuring lives: it is possible for a man to father a child and die within the two-month period following the testator’s death. The answer to this problem may very well be the proposition that where an actual pregnancy exists, the period of the Rule is extended to a life in being plus 21 years plus the actual period of gestation. *See, e.g.*, *Restatement of Property* § 374 (1944); 6 American Law of Property, *supra* note 4, § 24.15. It is sometimes said, however, that the correct formulation of the significance of an actual pregnancy is rather more narrow: the significance merely is that a child “thereafter born alive is deemed to be in being when begotten . . . .” L. Simes & A. Smith, *supra* note 21, § 1224. Oddly enough, the Fetters article states
The main theme of the Fetters article, however, is much broader: it is that there should be accepted the absolute proposition that the period-in-gross part of the perpetuity period is not twenty-one years but rather twenty-one years “plus an additional period in gross of less than five months to account for the minimum human gestation period.”29 This is true, the article contends, because the argument for validity in Lattouf can be extended to support the hypothesis that whenever there is a period in gross that exceeds twenty-one years by no more than the “minimum human gestation period,” which the article identifies as “no less than four and one half calendar months,”30 there will always be measuring lives that will validate the disposition.

If it is correct that there will always be measuring lives to support the validity of a period in gross that exceeds twenty-one years by no more than the minimum human gestation period, then perhaps it is defensible—though in my judgment not very helpful—to translate the point into the absolute proposition that the perpetuity period in gross is twenty-one years plus an additional period in gross of less than five months, to account for the minimum human gestation period. In fact, however, the argument for validity in Lattouf does not by itself support the hypothesis that there will always be measuring lives to validate a period in gross that exceeds twenty-one years by no more than the minimum human gestation period. The validity of that hypothesis requires the acceptance of several untested propositions in addition to the idea that a child cannot be conceived and born viable within a two-month period.

The example that serves to demonstrate this comes from the article itself: A conveys land to the B Corporation in fee simple, “but if the land is ever used for business purposes within twenty-one years and two months from this date, then to X and his heirs.” The article contends that X’s executory interest is valid because if X is not alive or en ventre when the land is conveyed,

the proposition this way. Fetters, supra note 27, at 311-13. The narrow formulation, however, would not allow the use of the fathers as the measuring lives for their after-born children.

My preference for restricting the measuring lives for after-born children to their mothers is based solely on the fact that doing so avoids an argument over which of the above formulations is the “correct” one. I would have no difficulty in accepting the broader formulation as the “correct” one. In fact, it might become necessary to rely on the broader formulation if medical science some day succeeds in saving a child in cases where the mother died within two months of conception. Cf. N.Y. Times, Dec. 2, 1977, at B16, col. 1; N.Y. Times, Dec. 6, 1977, at 30, col. 5 (unsuccessful attempt to try to save a four-month-old fetus by maintaining the dead mother’s body functions with mechanical life-support apparatus).

30. Fetters, supra note 27, at 309 n.1.
then the minimum gestation period must be subtracted from the contingency period of twenty-one years and two months.\textsuperscript{31} Therefore, according to Fetters, the executory interest in $X$ or his heirs will vest or fail within the twenty-one year period required by the Rule.

Assuming that the successors in interest of a grantee can be used as measuring lives (a proposition that to my knowledge is itself untested), there is a possible chain of events overlooked by the above analysis, which arises because of the erroneous assumption that $X$’s successor in interest will be human. There are other possibilities, two of which are that the executory interest might pass under $X$’s will to an existing charity, or in the absence of a valid will it might escheat to the state. Since $X$’s death might occur during the first two months following the date of the conveyance, at which time his executory interest might pass to such a non-human successor in interest, $X$’s executory interest cannot be deemed valid by reference to the relatively finite group of measuring lives suggested by the Fetters article—$X$ and such of his human legatees (or his human heirs) and their mothers or more

\textsuperscript{31} The executory interest in $X$ clearly is contingent. Furthermore, $X$’s interest is transmissible, which means that he need not survive the contingency for his interest to vest. If he were to die, his contingent executory interest would pass to his testamentary or intestate successor . . . .

All that is required for validity under the Rule Against Perpetuities is that the nonvested interest vest, if at all, within twenty-one years of some life in being at the creation of the interest. Let us take another look at $X$. If he were to die the day after the deed of transfer, which must be contemplated under the all possibilities test of the Rule, as we have seen, his executory interest would remain contingent for more than twenty-one years. But if $X$ were to die within the first two months of the transfer, his contingent executory interest would pass to someone. Again, we know not who that successor to $X$’s interest might be. There are, however, only two possibilities concerning that person’s life that bear any relevance to the validity or invalidity of $X$’s interest. The successor to $X$’s contingent interest was either alive at the date of the deed or he was not. If he was alive, or \textit{en ventre sa mere}, he will either survive the contingency or fail to survive the contingency within his own lifetime. If the successor to $X$’s interest was not alive or not \textit{en ventre} at the date of the deed, then he will have to have been born more than the minimum gestation period thereafter. The interest must now vest, if at all, in him or his successor in interest less than twenty-one years thereafter, because the minimum gestation period must be subtracted from the gross period of contingency to account for the time that elapsed while a life in being at the date of the deed continued to live for a minimum gestation period. It is, therefore, impossible for the interest to vest remotely. If there are any other possibilities in the arrangement of births, deaths and actual periods of gestation to cause this gift to vest beyond lives in being and twenty-one years, I must confess that I am unable to perceive them.

Fetters, \textit{supra} note 27, at 328-29 (footnote omitted).
remote maternal ancestors as were in being at the date of the conveyance.

If the measuring lives suggested by the Fetters article are insufficient to uphold X's executory interest, are there other ways of arguing for its validity? The search for measuring lives could be shifted from X and his successors in interest to the B Corporation. If it is acceptable to look behind a corporate entity to the humans who own or control it (an untested proposition), then the measuring lives could be the corporate officers who have authority during the twenty-one-year-and-two-month period to decide whether the land is or is not to be used for business purposes. Such persons comprise a relatively finite group. The argument would of course be that all such persons would either be in being at the date of the conveyance or after-born, and if after-born they would have had a mother or more remote maternal ancestor who was in being at the date of the conveyance and who lived more than two months thereafter.

But recall that the Fetters hypothesis is that no matter what the disposition, there will always be measuring lives to uphold a period in gross that exceeds twenty-one years by no more than the minimum human gestation period. Suppose A's conveyance is changed so that the contingency does not require a human act: "to the B Corporation in fee simple, but if the Huron River dries up within twenty-one years and two months from this date, then to X and his heirs."

We now seem to be forced to focus on the humans controlling or owning a non-human entity even though their decisions or actions have nothing to do with the occurrence of the event described in the contingency. We could continue to focus on the B Corporation or we could focus again on X's successor in interest. Perhaps validity could be established by adding to the Fetters-suggested group of measuring lives, the persons who during the twenty-one-year-and-two-month period occupy, say, the position of chief executive officer of the B Corporation or of any non-human entity to which the executory interest might pass within two months of the conveyance. Looking behind a non-human entity to the humans occupying certain positions within it is more attenuated here than it was in the original case, where the B Corporation's fee would be divested if the land should be used for business purposes. In that case, the measuring lives—the officers of B Corporation from time to time empowered to make the decision about the use of the land—have a causal connection to the happening of the contingency.

Perhaps ultimately the validity of X's executory interest re-
quires the abandonment of the B Corporation or X's successor in interest as the source of measuring lives, and a shift to the entire population of the world in being at the date of the conveyance. The argument for validity, in other words, would be as follows: If all the people in the world should die within two months of the conveyance, the executory interest will fail within lives in being; any people who are alive during the twenty-one-year period following the first two months will either have been in being at the date of the conveyance or will have been after-born, and if they are after-born they will of necessity have had a mother or some other maternal ancestor who was alive at the date of the conveyance and who lived more than two months thereafter. Acceptance of this line of reasoning would require a court to overcome a principle that has become part of standard perpetuity doctrine, which is that the measuring lives must be reasonable in number. The purpose underlying this principle is that the job of tracing an unreasonably large group of persons so as to determine when the last member died would be difficult, expensive, and perhaps impossible. But of course in this case this underlying purpose is inapposite because there is no need to trace the measuring lives, and thus no need to insist on the reasonable-in-number restriction.

My basic point about the Fetters hypothesis is not that it is necessarily wrong or logically flawed. It is, however, more dubitable than the argument for validity in Lattouf because its acceptance requires inquiry into so many areas that perpetuity courts have never had occasion to decide. The argument for validity in Lattouf is itself dubitable because its acceptance requires courts to consider for the first time whether for perpetuity purposes a viable child's mother is to be deemed to be certain to live for at least two months beyond the date of conception. It would be extravagant, indeed, to suggest that the Fetters hypothesis is entitled to be accepted as established perpetuity doctrine.

Conclusion

This short discourse on the Lattouf case and the presumption of lifetime fertility ends where it began, on a somewhat modest note. It is often easy to label a rule, developed at an earlier time,

32. E.g., RESTATEMENT OF PROPERTY § 374 (1944); RESTATEMENT (SECOND) OF PROPERTY § 1.3 (Tent. Draft No. 2, 1979); In re Moore, [1901] 1 Ch. 936.
as anachronistic. The conclusive presumption of lifetime fertility is such a rule. But the strong tendency is toward the inclusion of adopted children in class gifts. Even elderly people probably cannot be excluded from adopting children based on their age alone, and it certainly is far from unlikely that a sterile person in his normal child-bearing years will adopt a child. Surely any court inclined to make a shift to a rebuttable presumption must come to grips with the problem of adoption and not ignore it as the court did in *Lattouf*. Furthermore, any court that does come to grips with the problem ought to conclude that making such a shift would be a largely illusory maneuver. Even in the peculiar fact situation of the *Lattouf* case, the argument that I advanced in favor of validity is at no point dependent upon the rebuttability of the presumption of lifetime fertility.