UNIFORM STATUTORY RULE AGAINST PERPETUITIES (1986/1990)

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(The 1990 Amendments are Indicated
by Underscore and Strikeout)

PREFATORY NOTE

The Uniform Statutory Rule Against Perpetuities (Statutory Rule) alters the Common-law Rule Against Perpetuities by installing a workable wait-and-see element. See Fellows, *Testing Perpetuity Reforms: A Study of Perpetuity Cases 1984-89*, 25 Real Prop., Prob., and Tr. J. 597 (1991); Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop., Prob., & Tr. J. 569 (1986).

Under the Common-law Rule Against Perpetuities (Common-law Rule), the validity or invalidity of a nonvested property interest is determined, once and for always, on the basis of the facts existing *when the interest was created*. Like most rules of property law, the Common-law Rule has two sides -- a validating side and an invalidating side. Both sides are evident from, but not explicit in, John Chipman Gray's formulation of the Common-law Rule:

> No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

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

With its validating and invalidating sides explicitly separated, the Common-law Rule is as follows:

> Validating Side of the Common-law Rule: A nonvested property interest is valid when it is created (initially valid) if it is then certain to vest or terminate (fail to vest) -- one or the other -- no later than 21 years after the death of an individual then alive.
>
> Invalidating Side of the Common-law Rule: A nonvested property interest is invalid when it is created (initially invalid) if there is no such certainty.

Notice that the invalidating side focuses on a lack of *certainty*, which means that invalidity under the Common-law Rule is *not* dependent on *actual* post-creation events but only on *possible* post-creation events. Since *actual* post-creation events are irrelevant at common law, even those that are known at the time of the lawsuit, interests that are likely to, and in fact would (if given the chance), vest well within the period of a life in being plus 21 years are nevertheless invalid if at the time of the interest's creation there was a possibility, no matter how remote, that they might not have done so. This is what makes the *invalidating* side of the Common-law Rule so harsh: It can invalidate interests on the ground of post-creation events that, though possible, are extremely unlikely to happen and in actuality almost never do happen, if ever. Reasonable

dispositions can be rendered invalid because of such remote possibilities as a woman, after menopause, giving birth to (or adopting) additional children (see Example (7) in the Comment to Section 1), the probate of an estate taking more than 21 years to complete (see Example (8) in the Comment to Section 1), or a married man or woman in his or her middle or late years later becoming remarried to a person born after the testator's death (see Example (9) in the Comment to Section 1). None of these dispositions offends the public policy of preventing people from tying up property in long term or even perpetual family trusts. In fact, each disposition seems quite reasonable and violates the Common-law Rule on technical grounds only.

The Wait-and-See Reform Movement. The prospect of invalidating such interests led some decades ago to thoughts about reforming the Common-law Rule. Since the chains of events that make such interests invalid are so unlikely to happen, it was rather natural to propose that the criterion be shifted from *possible* post-creation events to *actual* post-creation events. Instead of invalidating an interest because of what *might* happen, waiting to see what *does* happen seemed then and still seems now to be more sensible.

The Uniform Statutory Rule Against Perpetuities follows the lead of the American Law Institute's Restatement (Second) of Property (Donative Transfers) § 1.3 (1983) in adopting the approach of waiting to see what does happen. This approach is known as the wait-and-see method of perpetuity reform.

In line with the Restatement (Second), the Uniform Act does not alter the *validating* side of the Common-law Rule. Consequently, dispositions that would have been valid under the Common-law Rule, *including those that are rendered valid because of a perpetuity saving clause*, remain valid as of their creation. *The practice of lawyers who competently draft trusts and other property arrangements for their clients is undisturbed.*

Under the Uniform Act, as well as under the Restatement (Second), the wait-and-see element is applied only to interests that fall under the *invalidating* side of the Common-law Rule. Interests that would be invalid at common law are saved from being rendered *initially invalid*. They are, as it were, given a second chance: Such interests are valid if they actually vest within the permissible vesting period, and become invalid only if they remain in existence but still nonvested at the expiration of the permissible vesting period.

In consequence, the Uniform Act recasts the validating and invalidating sides of the Rule Against Perpetuities as follows:

> Validating Side of the Statutory Rule: A nonvested property interest is initially valid if, when it is created, it is then *certain* to vest or terminate (fail to vest) no later than 21 years after the death of an individual then alive. A nonvested property interest that is not *initially* valid is not necessarily invalid. Such an interest is valid if it vests within the permissible vesting period after its creation.
>
> Invalidating Side of the Statutory Rule: A nonvested property interest that is not *initially* valid becomes invalid (and, as explained later, subject to reformation to

make it valid) if it neither vests nor terminates within the permissible vesting period after its creation.

Shifting the focus from possible to actual post-creation events has great attraction. It eliminates the harsh consequences of the Common-law Rule's approach of invalidating interests because of what *might* happen, without sacrificing the basic policy goal of preventing property from being tied up for too long a time in very long term or even perpetual family trusts or other arrangements.

One of the early objections to wait-and-see should be mentioned at this point, because it has long since been put to rest. It was once argued that wait-and-see could cause harm because it puts the validity of property interests in abeyance -- no one could determine whether an interest was valid or not. This argument has been shown to be false. Keep in mind that the wait-and-see element is applied only to interests that would be invalid were it not for wait-and-see. Such interests, otherwise invalid, are always nonvested future interests. It is now understood that wait-and-see does nothing more than affect that type of future interest with an *additional* contingency. To vest, the other contingencies must not only be satisfied -- they must be satisfied within a certain period of time. *If* that period of time -- the permissible vesting period -- is easily determined, as it is under the Uniform Act, then the additional contingency causes no more uncertainty in the state of the title than would have been the case had the additional contingency been originally expressed in the governing instrument. It should also be noted that only the status of the affected future interest in the trust or other property arrangement is deferred. In the interim, the other interests, such as the interests of current income beneficiaries, are carried out in the normal course without obstruction.

The Permissible Vesting Period. Despite its attraction, wait-and-see has not been widely adopted. The greatest controversy over wait-and-see concerns how to determine the permissible vesting period, the time allotted for the contingencies attached to a nonvested property interest to be validly worked out to a final resolution.

The wait-and-see reform movement has always proceeded on the unexamined assumption that the permissible vesting period should be determined by reference to so-called measuring lives who are in being at the creation of the interest; the permissible vesting period under this assumption expires 21 years after the death of the last surviving measuring life. The controversy has raged over who the measuring lives should be and how the law should identify them. Competing methods have been advanced, rather stridently on occasion.

The Drafting Committee of the Uniform Act began its work in 1984 operating on the same basic assumption -- that the permissible vesting period was to be determined by reference to measuring lives. The draft presented to the Conference for first reading in the summer of 1985 utilized that method.

The Saving-Clause Principle of Wait-and-See. The measuring lives selected in that earlier draft were patterned after the measuring lives listed in the Restatement (Second), which adopts the saving-clause principle of wait-and-see. Under the saving-clause principle, the measuring

lives are those individuals who might appropriately have been selected in a well-drafted perpetuity saving clause.

A perpetuity saving clause typically contains two components, the *perpetuity-period component* and the *gift-over component*. The perpetuity-period component expressly requires interests in the trust or other arrangement to vest (or terminate) no later than 21 years after the death of the last survivor of a group of individuals designated in the governing instrument by name or class. The gift-over component expressly creates a gift over that is guaranteed to vest at the expiration of the period set forth in the perpetuity-period component, but only if the interests in the trust or other arrangement have neither vested nor terminated earlier in accordance with their other terms.

In most cases, the saving clause not only avoids a violation of the Common-law Rule; it also, in a sense, over-insures the client's disposition against the gift over from ever taking effect, because the period of time determined by the perpetuity-period component provides a margin of safety. Its length is sufficient to exceed -- usually by a substantial margin -- the time when the interests in the trust or other arrangement actually vest (or terminate) by their own terms. The clause, therefore, is usually a formality that validates the disposition without affecting the substance of the disposition at all.

In effect, the perpetuity-period component of the saving clause constitutes a privately established wait-and-see rule. Conversely, the principle supporting the adoption and operation of wait-and-see is that it provides, in effect, a saving clause for dispositions that violate the Common-law Rule, dispositions that had they been competently drafted would have included a saving clause to begin with. This is the principle embraced by the Uniform Act and the principle reflected in the Restatement (Second). The permissible vesting period under wait-and-see is the equivalent of the perpetuity-period component of a well-conceived saving clause.

The Uniform Act and the Restatement (Second) round out the saving clause by providing the near-equivalent of a gift-over component via a provision for judicial reformation of a disposition in case the interest is still in existence and nonvested when the permissible vesting period expires.

<u>The Permissible Vesting Period: Why the Uniform Act Foregoes the Use of Actual Measuring Lives and Uses a Proxy Instead</u>. The Uniform Act departs from and improves on the Restatement (Second) in a very important particular. The Uniform Act foregoes the use of *actual* measuring lives and instead marks off the permissible vesting period by reference to a reasonable approximation of -- a proxy for -- the period of time that would, *on average*, be produced through the use of a set of actual measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor. The proxy utilized in the Uniform Act is a flat period of 90 years. The rationale for this period is discussed below.

The use of a proxy, such as the flat 90-year period utilized in the Uniform Act, is greatly to be preferred over the conventional approach of using actual measuring lives plus 21 years. The conventional approach has serious disadvantages: Wait-and-see measuring lives are difficult to

describe in statutory language, and they are difficult to identify and trace so as to determine which one is the survivor and when he or she died.

Drafting statutory language that unambiguously identifies actual measuring lives under wait-and-see is immensely more difficult than drafting an actual perpetuity saving clause. An actual perpetuity saving clause can be tailored on a case-by-case basis to the terms and beneficiaries of each trust or other property arrangement. A statutory saving clause, however, cannot be redrafted for each new disposition. It must be drafted so that one size fits all. As a result of the difficulty of drafting such a one-size-fits-all clause, any list of measuring lives is likely to contain ambiguities, at least at the margin.

Quite apart from the difficulty of drafting unambiguous and uncomplicated statutory language, another serious problem connected to the actual-measuring-lives approach is that it imposes a costly administrative burden. The Common-law Rule uses the life-in-being-plus-21-years period in a way that does not require the actual tracing of individuals' lives, deaths, marriages, adoptions, and so on. Wait-and-see imposes this burden, however, if measuring lives are used to mark off the permissible vesting period. It is one thing to write a statute specifying who the measuring lives are. It is another to apply the actual-measuring-lives approach in practice. No matter what method is used in the statute for selecting the measuring lives and no matter how unambiguous the statutory language is, actual individuals must be identified as the measuring lives and their lives must be traced to determine who the survivor is and when the survivor dies. The administrative burden is increased if the measuring lives are not a static group, determined once and for all at the beginning, but instead are a rotating group. Adding to the administrative burden is the fact that the perpetuity question will often be raised for the first time long after the interest or power was created. The task of going back in time to reconstruct not only the facts existing when the interest or power was created, but facts occurring thereafter as well may not be worth the effort. In short, not only would births and deaths have to be kept track of, but adoptions, divorces, and possibly assignments and devises, etc., also, over a long period of time. Keeping track of and reconstructing these events to determine the survivor and the time of the survivor's death imposes an administrative burden wise to avoid. The proxy approach makes it feasible to do just that.

The administrative burden of tracing actual measuring lives and the possible uncertainty of their exact make-up, especially at the margin, combine to make the expiration date of the permissible vesting period less than certain in each given case. By making perpetuity challenges more costly to mount and more problematic in result, this might have the effect of allowing dead-hand control to continue, by default, well beyond the permissible vesting period. Marking off the permissible vesting period by using a proxy eliminates this possibility. The date of expiration of the permissible vesting period under the proxy adopted by the Uniform Act -- a flat 90 years -- is easy to determine and unmistakable.

One final point. If the use of actual measuring lives plus 21 years generated a permissible vesting period that precisely self-adjusted to each situation, there might be objection to replacing the actual-measuring-lives approach with a flat period of 90 years, which obviously cannot replicate such a function. That is not the function performed by the actual-measuring-lives approach, however. That is to say, that approach is not scientifically designed to generate a

permissible vesting period that expires at a natural or logical stopping point along the continuum of each disposition, thereby mysteriously marking off the precise time before which actual vesting ought to be allowed and beyond which it ought not to be permitted. Instead, the actual-measuring-lives approach functions in a rather different way: It generates a period of time that almost always *exceeds* the time of actual vesting in cases when actual vesting ought to be allowed to occur. The actual-measuring-lives approach, therefore, performs a margin-of-safety function, and that is a function that *can* be replicated by the use of a proxy such as the flat 90-year period under the Uniform Act.

The following examples briefly demonstrate the margin-of-safety function of the actual-measuring-lives approach:

> Example (1) -- Corpus to Grandchildren Contingent on Reaching an Age in Excess of 21. G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren, remainder in corpus to G's grandchildren who reach age 30; if none reaches 30, to a specified charity.
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> Example (2) -- Corpus to Descendants Contingent on Surviving Last Living Grandchild. G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren for the life of the survivor, and on the death of G's last living grandchild, corpus to G's descendants then living, per stirpes; if none, to a specified charity.
>
> In both examples, assume that G's family is typical, with two children, four grandchildren, eight great-grandchildren, and so on. Assume further that one or more of the grandchildren are living at G's death, but that one or more are conceived and born thereafter.

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

The permissible vesting period, however, is measured by reference to the lives of individuals who must be in being at the creation of the interests. This means that the key players in these dispositions -- the after-born beneficiaries -- cannot be counted among the measuring lives. Since the after-born beneficiaries in both of these examples are members of the same or an older generation as that of the youngest of the measuring lives, the validity of these examples fits well within the policy of the Rule. See Waggoner, The Uniform Statutory Rule Against Perpetuities, 21 Real Prop., Prob., & Tr. J. 569, 579-90 (1986). In consequence, it is clear that a permissible vesting period measured by the lifetime of individuals in being at the creation of the interests plus 21 years is not scientifically designed to and does not in practice expire at the latest point when actual vesting should be allowed -- on the death of the last survivor of the after-born

beneficiaries. Because of its tack-on 21-year part, the period usually expires at some arbitrary time *after* that beneficiary's death. In Example (2), the period of 21 years following the death of the last survivor of the descendants who were in being at G's death is normally more than sufficient to cover the death of the last survivor of the grandchildren born after G's death.

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

Consequently, on this count, too, a flat 90-year period is to be preferred: It performs the same margin-of-safety function as the actual-measuring-lives approach, performs it more reliably, and performs it with a remarkable ease in administration, certainty in result, and absence of complexity as compared with the uncertainty and clumsiness of identifying and tracing actual measuring lives.

Rationale of the 90-year Permissible Vesting Period. The myriad problems associated with the actual-measuring-lives approach are swept aside by shifting away from actual measuring lives and adopting instead a 90-year permissible vesting period as representing a reasonable approximation of -- a proxy for -- the period of time that would, on average, be produced by identifying and tracing an actual set of measuring lives and then tacking on a 21-year period following the death of the survivor. The selection of 90 years as the period of time reasonably approximating the period that would be produced, on average, by using the set of actual measuring lives identified in the Restatement (Second) or the earlier draft of the Uniform Act is based on a statistical study published in Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 U. Miami Inst. on Est. Plan. Ch. 7 (1986). This study suggests that the youngest measuring life,[*] on average, is about 6 years old. The remaining

[*] The reference to the youngest measuring life is to the transferor's youngest descendant living when the trust or other property arrangement was created. See Table 1 at p. 7-17, 20 U. Miami Inst. on Est. Plan. (1986). The transferor's youngest then-living descendant is typically the youngest measuring life under a type of perpetuity saving clause routinely used by competent practitioners. As a commonly included beneficiary of a trust or descendant of a beneficiary, the transferor's youngest then-living descendant would typically be the youngest measuring life under the earlier draft of the Uniform Act. As a commonly included beneficiary of a trust, the transferor's youngest then-living descendant would also typically be the youngest measuring life under the Restatement (Second)'s list, as well as under one interpretation of the

life expectancy of a 6-year old is reported as 69.6 years in the U.S. Bureau of the Census, Statistical Abstract of the United States: 1986, Table 108, at p. 69. (In the Statistical Abstract for 1985, 69.3 years was reported.) In the interest of arriving at an end number that is a multiple of five, the Uniform Act utilizes 69 years as an appropriate measure of the remaining life expectancy of a 6-year old, which -- with the 21-year tack-on period added -- yields a permissible vesting period of 90 years.

The adoption of a flat period of 90 years rather than the use of actual measuring lives is an evolutionary step in the development and refinement of the wait-and-see doctrine. Far from revolutionary, it is well within the tradition of that doctrine. The 90-year period makes wait-and-see simple, fair, and workable. *Aggregate dead-hand control will not be increased beyond that which is already possible by competent drafting under the Common-law Rule.*

Seen as a valid approximation of the period that would be produced under the conventional survivor-of-the-measuring-lives-plus-21-years approach, and in the interest of making the law of perpetuities uniform, *jurisdictions adopting this Act are strongly urged not to adopt a period of time different from the 90-year period*.

Acceptance of the 90-year-period Approach under the Federal Generation-skipping Transfer Tax. Federal regulations, to be promulgated by the U.S. Treasury Department under the generation-skipping transfer tax, will accept the Uniform Act's 90-year period as a valid approximation of the period that, on average, would be produced by lives in being plus 21 years. See Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (as to be revised). When originally promulgated in 1988, this regulation was prepared without knowledge of the Uniform Act, which had been promulgated in 1986; as first promulgated, the regulation only recognized a period measured by actual lives in being plus 21 years. After the 90-year approach of the Uniform Act was brought to the attention of the U.S. Treasury Department, the Department issued a letter of intent to amend the regulation to treat the 90-year period as the equivalent of a lives-in-being-plus-21-years period. Letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990). For further discussion of the coordination of the federal generation-skipping transfer tax with the Uniform Act, see Comment G to Section 1, infra.

The 90-year Period Will Seldom be Used Up. Nearly all trusts (or other property arrangements) will terminate by their own terms long before the 90-year permissible vesting period expires, leaving the permissible vesting period to extend unused (and ignored) into the future long after the contingencies have been resolved and the property distributed. In the unlikely event that the contingencies have not been resolved by the expiration of the permissible vesting period, Section 3 requires the disposition to be reformed by the court so that all contingencies are resolved within the permissible period.

In effect, as noted above, wait-and-see with deferred reformation operates similarly to a traditional perpetuity saving clause, which grants a margin-of-safety period measured by the

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causal-relationship-to-vesting formula, whether the descendant's beneficial interest is or is not vested when it is created.

lives of the transferor's descendants in being at the creation of the trust or other property arrangement (plus 21 years).

No New Learning Required. The Uniform Act does not require the practicing bar to learn a new and unfamiliar set of perpetuity principles. The effect of the Uniform Act on the planning and drafting of documents for clients should be distinguished from the effect on the resolution of actual or potential perpetuity-violation cases. The former affects many more practicing lawyers than the latter.

With respect to the planning and drafting end of the practice, the Uniform Act requires no modification of current practice and no new learning. *Lawyers can and should continue to use the same traditional perpetuity-saving/termination clause, using specified lives in being plus 21 years, they used before enactment*. Lawyers should not shift to a "later-of" type clause that purports to operate upon the *later of* (A) 21 years after the death of the survivor of specified lives in being or (B) 90 years. As explained in more detail in Comment G to Section 1, such a clause is not effective. If such a "later-of" clause is used in a trust that contains a violation of the Common-law Rule, Section 1(a), by itself, would render the clause ineffective, limit the maximum permissible vesting period to 90 years, and render the trust vulnerable to a reformation suit under Section 3. Section 1(e), however, saves documents using this type of clause from this fate. By limiting the effect of such clauses to the 21-year period following the death of the survivor of the specified lives, Section 1(e) in effect transforms this type of clause into a traditional perpetuity-saving/termination clause, bringing the trust into compliance with the Common-law Rule and rendering it invulnerable to a reformation suit under Section 3.

Far fewer in number are those lawyers (and judges) who have an actual or potential perpetuity-violation case. An actual or potential perpetuity-violation case will arise very infrequently under the Uniform Act. When such a case does arise, however, lawyers (or judges) involved in the case will find considerable guidance for its resolution in the detailed analysis contained in the Comments, infra. In short, the detailed analysis in the Comments need not be part of the general learning required of lawyers in the drafting and planning of dispositive documents for their clients. The detailed analysis is supplied for the assistance in the resolution of an actual violation. Only then need that detailed analysis be consulted and, in such a case, it will prove extremely helpful.

A section-by-section summary of the Uniform Act follows:

Summary of the Uniform Statutory Rule Against Perpetuities

Section 1 sets forth the Statutory Rule Against Perpetuities (Statutory Rule). The Statutory Rule and the other provisions of the Act supersede the Common-law Rule Against Perpetuities (Common-law Rule) and replace any statutory version or variation thereof. See Section 9.

Section 1(a) deals with nonvested property interests. Subsections (b) and (c) deal with powers of appointment.

Paragraph (1) of subsections (a), (b), and (c) codifies the validating side of the Common-law Rule. In effect, paragraph (1) of each of these subsections provides that a nonvested property interest or a power of appointment that is valid under the Common-law Rule Against Perpetuities is valid under the Statutory Rule and can be declared so at its inception; in such a case, nothing would be gained and much would be lost by invoking a permissible vesting period during which the validity of the interest or power is in abeyance.

Paragraph (2) of subsections (a), (b), and (c) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by Section 1(a)(1), 1(b)(1), or 1(c)(1), and hence would have been invalid under the Common-law Rule, is nevertheless valid if it does not actually remain nonvested when the 90-year permissible vesting period expires (or, in the case of a power of appointment, if the power ceases to be subject to a condition precedent or is no longer exercisable when the 90-year permissible vesting period expires).

Section 2 defines the time when, for purposes of the Act, a nonvested property interest or a power of appointment is created. The period of time allowed by Section 1 (Statutory Rule Against Perpetuities) is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 5, with certain exceptions, provides that the Uniform Act applies only to nonvested property interests and powers of appointment created on or after the effective date of the Act.

Section 2(b) provides that, if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest (or a property interest subject to a power of appointment described in Section 1(b) or 1(c)), the time of creation of the nonvested property interest or the power of appointment is postponed until the power to become unqualified beneficial owner ceases to exist. This is in accord with existing common law.

Section 2(c) provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable trust. Arguably, at common law, each transfer starts the period of the Rule running anew as to that transfer. This difficulty is avoided by subsection (c).

Section 3 directs a court, upon the petition of an interested person, to reform a disposition within the limits of the 90-year permissible vesting period, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: First, when a nonvested property interest or a power of appointment becomes invalid under the Statutory Rule; second, when a class gift has not but still might become invalid under the Statutory Rule and the time has arrived when the share of a class member is to take effect in possession or enjoyment; and third, when a nonvested property interest can vest, but cannot do so within the 90-year permissible vesting period. It is anticipated that the circumstances requisite to reformation under this section will rarely arise, and consequently that this section will seldom need to be applied.

Section 4 identifies the interests and powers that are excluded from the Statutory Rule Against Perpetuities. This section is in part declaratory of existing common law. All the exclusions from the Common-law Rule recognized at common law and by statute in the state are preserved.

In line with long-standing scholarly commentary, Section 4(1) excludes nondonative transfers from the Statutory Rule. The Rule Against Perpetuities is an inappropriate instrument of social policy to use as a control on such arrangements. The period of the Rule -- a life in being plus 21 years -- is suitable for donative transfers only.

Section 5 provides that the Statutory Rule Against Perpetuities applies only to nonvested property interests or powers of appointment created on or after the Act's effective date. Although the Statutory Rule does not apply retroactively, Section 5(b) authorizes a court to exercise its equitable power to reform instruments that contain a violation of the state's former Rule Against Perpetuities and to which the Statutory Rule does not apply because the offending property interest or power of appointment was created before the effective date of the Act. Courts are urged in the Comment to consider reforming such dispositions by judicially inserting a saving clause, since a saving clause would probably have been used at the drafting stage of the disposition had it been drafted competently.

UNIFORM STATUTORY RULE AGAINST PERPETUITIES (1986/1990)

SECTION 1. STATUTORY RULE AGAINST PERPETUITIES.

(a) [Validity of Nonvested Property Interest.] A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

(2) the interest either vests or terminates within 90 years after its creation.

(b) [Validity of General Power of Appointment Subject to a Condition Precedent.] A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(1) when the power is created, the condition precedent is certain to be satisfied or becomes impossible to satisfy no later than 21 years after the death of an individual then alive; or

(2) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) [Validity of Nongeneral or Testamentary Power of Appointment.] A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

(2) the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) [Possibility of Post-death Child Disregarded.] In determining whether a nonvested property interest or a power of appointment is valid under subsection (a)(1), (b)(1), or (c)(1), the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) [Effect of Certain "Later-of" Type Language.] If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

COMMENT

A. General Purpose

B. Section 1(a)(1): Nonvested Property Interests that are Initially Valid

C. Section 1(a)(2): Wait-and-See – Nonvested Property Interests whose Validity is Initially in Abeyance

1. The 90-Year Permissible Vesting Period

2. Technical Violations of the Common-Law Rule

D. Sections 1(b)(1) and 1(c)(1): Powers of Appointment that are Initially Valid

E. Sections 1(b)(2) and 1(c)(2): Wait-and-See -- Powers of Appointment whose Validity is Initially in Abeyance

F. The Validity of the Donee's Exercise of a Valid Power

G. Section 1(e): Effect of Certain "Later-of" Type Language; Coordination of Generation-skipping Transfer Tax Regulations With Uniform Act

H. Subsidiary Common-Law Doctrines: Whether Superseded by this Act

Common-Law Rule Against Perpetuities Superseded. As provided in Section 9, this Act supersedes the common-law Rule Against Perpetuities (Common-law Rule) in jurisdictions previously adhering to it (or repeals any statutory version or variation thereof previously in effect in the jurisdiction). The Common-law Rule (or the statutory version or variation thereof) is replaced by the Statutory Rule Against Perpetuities (Statutory Rule) set forth in this section and by the other provisions in this Act.

Subsidiary Doctrines Continue in Force Except to the Extent the Provisions of Act Conflict with Them. The courts in interpreting the Common-law Rule developed several subsidiary doctrines. In accordance with the general principle of statutory construction that statutes in derogation of the common law are to be construed narrowly, a subsidiary doctrine is superseded by this Act only to the extent the provisions of the Act conflict with it. A listing and discussion of such subsidiary doctrines, such as the constructional preference for validity, the all-or-nothing rule for class gifts, and the doctrine of infectious invalidity, appears later, in Part G of this Comment.

Application. Unless excluded by Section 4, the Statutory Rule Against Perpetuities (Statutory Rule) applies to nonvested property interests and to powers of appointment over property or property interests that are nongeneral powers, general testamentary powers, or general powers not presently exercisable because of a condition precedent.

The Statutory Rule does not apply to vested property interests (e.g., X's interest in Example (23) of this Comment) or to presently exercisable general powers of appointment (e.g., G's power in Example (19) of this Comment; G's power in Example (1) in the Comment to Section 2; A's power in Example (2) in the Comment to Section 2; X's power in Example (3) in the Comment to Section 2; A's noncumulative power of withdrawal in Example (4) in the Comment to Section 2).

A. GENERAL PURPOSE

Section 1 sets forth the Statutory Rule Against Perpetuities (Statutory Rule). As explained above, the Statutory Rule supersedes the Common-law Rule Against Perpetuities (Common-law Rule) or any statutory version or variation thereof.

The Common-law Rule's Validating and Invalidating Sides. The Common-law Rule Against Perpetuities is a rule of initial validity or invalidity. At common law, a nonvested property interest is either valid or invalid as of its creation. Like most rules of property law, the Common-law Rule has both a validating and an invalidating side. Both sides are derived from John Chipman Gray's formulation of the Common-law Rule:

> No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

J. Gray, The Rule Against Perpetuities § 201 (4th ed. 1942). From this formulation, the validating and invalidating sides of the Common-law Rule are derived as follows:

> Validating Side of the Common-law Rule. A nonvested property interest is valid when it is created (initially valid) if it is then certain to vest or terminate (fail to vest) -- one or the other -- no later than 21 years after the death of an individual then alive.
>
> Invalidating Side of the Common-law Rule. A nonvested property interest is invalid when it is created (initially invalid) if there is no such certainty.

Notice that the invalidating side focuses on a lack of certainty, which means that invalidity under the Common-law Rule is not dependent on actual post-creation events but only on possible post-creation events. Actual post-creation events are irrelevant, even those that are known at the time of the lawsuit. It is generally recognized that the invalidating side of the Common-law Rule is harsh because it can invalidate interests on the ground of possible post-creation events that are extremely unlikely to happen and that in actuality almost never do happen, if ever.

The Statutory Rule Against Perpetuities. The essential difference between the Common-law Rule and its statutory replacement is that the Statutory Rule preserves the Common-law Rule's overall policy of preventing property from being tied up in unreasonably long or even perpetual family trusts or other property arrangements, while eliminating the harsh potential of the Common-law Rule. The Statutory Rule achieves this result by codifying (in slightly revised form) the validating side of the Common-law Rule and modifying the invalidating side by adopting a wait-and-see element. Under the Statutory Rule, interests that would have been initially valid at common law continue to be initially valid, but interests that would have been initially invalid at common law are invalid only if they do not actually vest or terminate within the permissible vesting period set forth in Section 1(a)(2). Thus, the Uniform Act recasts the validating and invalidating sides of the Rule Against Perpetuities as follows:

> Validating Side of the Statutory Rule: A nonvested property interest is initially valid if, when it is created, it is then certain to vest or terminate (fail to vest) -- one or the other -- no later than 21 years after the death of an individual then alive. The validity of a nonvested property interest that is not initially valid is in abeyance. Such an interest is valid if it vests within the permissible vesting period after its creation.
>
> Invalidating Side of the Statutory Rule: A nonvested property interest that is not initially valid becomes invalid (and subject to reformation under Section 3) if it neither vests nor terminates within the permissible vesting period after its creation.

As indicated, this modification of the invalidating side of the Common-law Rule is generally known as the wait-and-see method of perpetuity reform. The wait-and-see method of perpetuity

reform was approved by the American Law Institute as part of the Restatement (Second) of Property (Donative Transfers)
§§ 1.1-1.6 (1983). For a discussion of the various methods of perpetuity reform, including the wait-and-see method and the Restatement (Second)'s version of wait-and-see, see Waggoner, Perpetuity Reform, 81 Mich.L.Rev. 1718 (1983).

B. SECTION 1(a)(1): NONVESTED PROPERTY INTERESTS THAT ARE INITIALLY VALID

Nonvested Property Interest. Section 1(a) sets forth the Statutory Rule Against Perpetuities with respect to nonvested property interests. A nonvested property interest (also called a contingent property interest) is a future interest in property that is subject to an unsatisfied condition precedent. In the case of a class gift, the interests of all the unborn members of the class are nonvested because they are subject to the unsatisfied condition precedent of being born. At common law, the interests of all potential class members must be valid or the class gift is invalid. As pointed out in more detail later in this Comment, this so-called all-or-nothing rule with respect to class gifts is not superseded by this Act, and so remains in effect under the Statutory Rule. Consequently, all class gifts that are subject to open are to be regarded as nonvested property interests for the purposes of this Act.

Section 1(a)(1) Codifies the Validating Side of the Common-law Rule. The validating side of the Common-law Rule is codified in Section 1(a)(1) (and, with respect to powers of appointment, in Sections 1(b)(1) and 1(c)(1)).

A nonvested property interest that satisfies the requirement of Section 1(a)(1) is initially valid. That is, it is valid as of the time of its creation. There is no need to subject such an interest to the waiting period set forth in Section 1(a)(2), nor would it be desirable to do so.

For a nonvested property interest to be valid as of the time of its creation under Section 1(a)(1), there must then be a certainty that the interest will either vest or terminate -- an interest terminates when vesting becomes impossible -- no later than 21 years after the death of an individual then alive. To satisfy this requirement, it must be established that there is no possible chain of events that might arise after the interest was created that would allow the interest to vest or terminate after the expiration of the 21-year period following the death of an individual in being at the creation of the interest. Consequently, initial validity under Section 1(a)(1) can be established only if there is an individual for whom there is a causal connection between the individual's death and the interest's vesting or terminating no later than 21 years thereafter. The individual described in subsection (a)(1) (and subsections (b)(1) and (c)(1) as well) is often referred to as the "validating life," the term used throughout the Comments to this Act.

Determining Whether There is a Validating Life. The process for determining whether a validating life exists is to postulate the death of each individual connected in some way to the transaction, and ask the question: Is there with respect to this individual an invalidating chain of possible events? If one individual can be found for whom the answer is No, that individual can

serve as the validating life. As to that individual there will be the requisite causal connection between his or her death and the questioned interest's vesting or terminating no later than 21 years thereafter.

In searching for a validating life, only individuals who are connected in some way to the transaction need to be considered, for they are the only ones who have a chance of supplying the requisite causal connection. Such individuals vary from situation to situation, but typically include the beneficiaries of the disposition, including the taker or takers of the nonvested property interest, and individuals related to them by blood or adoption, especially in the ascending and descending lines. There is no point in even considering the life of an individual unconnected to the transaction -- an individual from the world at large who happens to be in being at the creation of the interest. No such individual can be a validating life because there will be an invalidating chain of possible events as to every unconnected individual who might be proposed: Any such individual can immediately die after the creation of the nonvested property interest without causing any acceleration of the interest's vesting or termination. (The life expectancy of any unconnected individual, or even the probability that one of a number of new-born babies will live a long life, is irrelevant.)

> Example (1) -- Parent of Devisees as the Validating Life. G devised property "to A for life, remainder to A's children who attain 21." G was survived by his son (A), by his daughter (B), by A's wife (W), and by A's two children (X and Y).
>
> The nonvested property interest in favor of A's children who reach 21 satisfies Section 1(a)(1)'s requirement, and the interest is initially valid. When the interest was created (at G's death), the interest was then certain to vest or terminate no later than 21 years after A's death.
>
> The process by which A is determined to be the validating life is one of testing various candidates to see if any of them have the requisite causal connection. As noted above, no one from the world at large can have the requisite causal connection, and so such individuals are disregarded. Once the inquiry is narrowed to the appropriate candidates, the first possible validating life that comes to mind is A, who does in fact fulfill the requirement: Since A's death cuts off 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 be alive and under the age of 21 beyond 21 years after A's death. (See the discussion of subsection (d), below.)
>
> A is therefore the validating life for the nonvested property interest in favor of A's children who attain 21. None of the other individuals who is connected to this transaction could serve as the validating life because an invalidating chain of possible post-creation events exists as to each one of them. The other individuals 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 be alive and under the age of 21 beyond the 21-year period following W'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 be alive and under 21 beyond the 21-year period following the death of the survivor of X and Y. As to B, she suffers from the same invalidating chain of events as exists with respect to X and Y. The fact that none of these other individuals can serve as the validating life is of no consequence, however, because only one such individual is required for the validity of a nonvested interest to be established, and that individual is A.

The Rule of Subsection (d). The rule established in subsection (d) plays a significant role in the search for a validating life. Subsection (d) declares that the possibility that a child will be born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purposes of determining the validity of an interest (or power of appointment) under paragraph (1) of subsection (a), (b), or (c). The rule of subsection (d) does not apply, for example, to questions such as whether or not a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest -- as a member of a class or otherwise. Neither subsection (d), nor any other provision of this Act, supersedes the widely accepted common-law principle, sometimes codified, that a child in gestation (a child sometimes described as a child en ventre sa mere) who is later born alive is regarded as alive at the commencement of gestation.

The limited purpose of subsection (d) is to solve a perpetuity problem caused by advances in medical science. The problem is illustrated by a case such as Example (1), above -- "to A for life, remainder to A's children who reach 21." When the Common-law Rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common-law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of deceased pregnant women long enough to develop the fetus to viability (see Detroit Free Press, July 31, 1986, at 5A; Ann Arbor News, Oct. 30, 1978, at C5 (AP story); N.Y. Times, Dec. 6, 1977, at 30; N.Y. Times, Dec. 2, 1977, at B16) -- advances in medical science unanticipated when the Common-law Rule was in its developmental stages -- having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 1(a)(1) on the interest of A's children in the above example. The rule of subsection (d), however, does insure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that subsection (d) subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With subsection (d) in place, the third component of the common-law perpetuity period is unnecessary and has been

jettisoned. The perpetuity period recognized in paragraph (1) of subsections (a), (b), and (c) has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in Example (1) it in fact turns out that A does leave sperm on deposit at a sperm bank and if in fact A's wife does become pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift. Cf. Restatement (Second) of Property (Donative Transfers) Introductory Note to Ch. 26 at pp. 2-3 (Tent. Draft No. 9, 1986). Without trying to predict how that matter will be settled in the future, the best way to handle the problem from the perpetuity perspective is subsection (d)'s rule requiring the possibility of post-death children to be disregarded.

Recipients as Their Own Validating Lives. It is well established at common law that, in appropriate cases, the recipient of an interest can be his or her own validating life. See, e.g., Rand v. Bank of California, 236 Or. 619, 388 P.2d 437 (1964). Given the right circumstances, this principle can validate interests that are contingent on the recipient's reaching an age in excess of 21, or are contingent on the recipient's surviving a particular point in time that is or might turn out to be in excess of 21 years after the interest was created or after the death of a person in being at the date of creation.

> Example (2) -- Devisees as Their Own Validating Lives. G devised real property "to A's children who attain 25." A predeceased G. At G's death, A had three living children, all of whom were under 25.
>
> The nonvested property interest in favor of A's children who attain 25 is validated by Section 1(a)(1). Under subsection (d), the possibility that A will have a child born to him after his death (and since A predeceased G, after G's death) must be disregarded. Consequently, even if A's wife survived G, and even if she was pregnant at G's death or even if A had deposited sperm in a sperm bank prior to his death, it must be assumed that all of A's children are in being at G's death. A's children are, therefore, their own validating lives. (Note that subsection (d) requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death must be disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual.) Each one of A's children, all of whom under subsection (d) are regarded as alive at G's death, will either reach the age of 25 or fail to do so within his or her own lifetime. To say this another way, it is certain to be known no later than at the time of the death of each child whether or not that child survived to the required age.

Validating Life Can Be Survivor of Group. In appropriate cases, the validating life need not be individualized at first. Rather the validating life can initially (i.e., when the interest was created) be the unidentified survivor of a group of individuals. It is common in such cases to say that the members of the group are the validating lives, but the true meaning of the statement is that the validating life is the member of the group who turns out to live the longest. As the court said in Skatterwood v. Edge, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1697), "for let the lives be

never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once."

Example (3) -- Case of Validating Life Being the Survivor of a Group. G devised real property "to such of my grandchildren as attain 21." Some of G's children are living at G's death.

The nonvested property interest in favor of G's grandchildren who attain 21 is valid under Section 1(a)(1). The validating life is that one of G's children who turns out to live the longest. Since under subsection (d), it must be assumed that none of G's children will have post-death children, it is regarded as impossible for any of G's grandchildren to be alive and under 21 beyond the 21-year period following the death of G's last surviving child.

Example (4) -- Sperm Bank Case. G devised property in trust, directing the income to be paid to G's children for the life of the survivor, then to G's grandchildren for the life of the survivor, and on the death of G's last surviving grandchild, to pay the corpus to G's great-grandchildren then living. G's children all predeceased him, but several grandchildren were living at G's death. One of G's predeceased children (his son, A) had deposited sperm in a sperm bank. A's widow was living at G's death.

The nonvested property interest in favor of G's great-grandchildren is valid under Section 1(a)(1). The validating life is the last surviving grandchild among the grandchildren living at G's death. Under subsection (d), the possibility that A will have a child conceived after G's death must be disregarded. Note that subsection (d) requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death is disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual. Thus in this example, by disregarding the possibility that A will have a conceived-after-death child, G's last surviving grandchild becomes the validating life because G's last surviving grandchild is deemed to have been alive at G's death, when the great-grandchildren's interests were created.

Example (5) -- Child in Gestation Case. G devised property in trust, to pay the income equally among G's living children; on the death of G's last surviving child, to accumulate the income for 21 years; on the 21st anniversary of the death of G's last surviving child, to pay the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to X Charity. At G's death his child (A) was 6 years old, and G's wife (W) was pregnant. After G's death, W gave birth to their second child (B).

The nonvested property interests in favor of G's descendants and in favor of X Charity are valid under Section 1(a)(1). The validating life is A. Under subsection (d), the possibility that a child will be born to an individual after the

individual's death must be disregarded for the purposes of determining validity under Section 1(a)(1). Consequently, the possibility that a child will be born to G after his death must be disregarded; and the possibility that a child will be born to any of G's descendants after their deaths must also be disregarded.

Note, however, that the rule of subsection (d) does not apply to the question of the entitlement of an after-born child to take a beneficial interest in the trust. The common-law rule (sometimes codified) that a child in gestation is treated as alive, if the child is subsequently born viable, applies to this question. Thus, subsection (d) does not prevent B from being an income beneficiary under G's trust, nor does it prevent a descendant in gestation on the 21st anniversary of the death of G's last surviving child from being a member of the class of G's "then-living descendants," as long as such descendant has no then-living ancestor who takes instead.

Different Validating Lives Can and in Some Cases Must Be Used. Dispositions of property sometimes create more than one nonvested property interest. In such cases, the validity of each interest is treated individually. A validating life that validates one interest might or might not validate the other interests. Since it is not necessary that the same validating life be used for all interests created by a disposition, the search for a validating life for each of the other interests must be undertaken separately.

Perpetuity Saving Clauses and Similar Provisions. Knowledgeable lawyers almost routinely insert perpetuity saving clauses into instruments they draft. Saving clauses contain two components, the first of which is the perpetuity-period component. This component typically requires the trust or other arrangement to terminate no later than 21 years after the death of the last survivor of a group of individuals designated therein by name or class. (The lives of corporations, animals, or sequoia trees cannot be used.) The second component of saving clauses is 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 has not terminated earlier in accordance with its other terms.

It is important to note that regardless of what group of individuals is designated in the perpetuity-period component of a saving clause, the surviving member of the group is not necessarily the individual who would be the validating life for the nonvested property interest or power of appointment in the absence of the saving clause. Without the saving clause, one or more interests or powers may in fact fail to satisfy the requirement of paragraph (1) of subsections (a), (b), or (c) for initial validity. By being designated in the saving clause, however, the survivor of the group becomes the validating life for all interests and powers in the trust or other arrangement: The saving clause confers on the last surviving member of the designated group the requisite causal connection between his or her death and the impossibility of any interest or power in the trust or other arrangement remaining in existence beyond the 21-year period following such individual's death.

Example (6) -- Valid Saving Clause Case. A testamentary trust directs income to be paid to the testator's children for the life of the survivor, then to the testator's grandchildren for the life of the survivor, corpus on the death of the testator's last living grandchild to such of the testator's descendants as the last living grandchild shall by will appoint; in default of appointment, to the testator's then-living descendants, per stirpes. A saving clause in the will terminates the trust, if it has not previously terminated, 21 years after the death of the testator's last surviving descendant who was living at the testator's death. The testator was survived by children.

In the absence of the saving clause, the nongeneral power of appointment in the last living grandchild and the nonvested property interest in the gift-in-default clause in favor of the testator's descendants fail the test of Sections 1(a)(1) and 1(c)(1) for initial validity. That is, were it not for the saving clause, there is no validating life. However, the surviving member of the designated group becomes the validating life, so that the saving clause does confer initial validity on the nongeneral power of appointment and on the nonvested property interest under Sections 1(a)(1) and 1(c)(1).

If the governing instrument designates a group of individuals that would cause it to be impracticable to determine the death of the survivor, the common-law courts have developed the doctrine that the validity of the nonvested property interest or power of appointment is determined as if the provision in the governing instrument did not exist. See cases cited in Restatement (Second) of Property (Donative Transfers) (1983), Reporter's Note No. 3 at p. 45. See also Restatement (Second) of Property (Donative Transfers) § 1.3(1) Comment a (1983); Restatement of Property § 374 and Comment l (1944); 6 American Law of Property § 24.13 (A. Casner ed. 1952); 5A R. Powell, The Law of Real Property Para. 766[5] (1985); L. Simes & A. Smith, The Law of Future Interests § 1223 (2d ed. 1956). If, for example, the designated group in Example (6) were the residents of X City (or the members of Y Country Club) living at the time of the testator's death, the saving clause would not validate the power of appointment or the nonvested property interest. Instead, the validity of the power of appointment and the nonvested property interest would be determined as if the provision in the governing instrument did not exist. Since without the saving clause the power of appointment and the nonvested property interest would fail to satisfy the requirements of Sections 1(a)(1) and 1(c)(1) for initial validity, their validity would be governed by Sections 1(a)(2) and 1(c)(2).

The application of the above common-law doctrine, which is not superseded by this Act and so remains in full force, is not limited to saving clauses. It also applies to trusts or other arrangements where the period thereof is directly linked to the life of the survivor of a designated group of individuals. An example is a trust to pay the income to the grantor's descendants from time to time living, per stirpes, for the period of the life of the survivor of a designated group of individuals living when the nonvested property interest or power of appointment in question was created, plus the 21-year period following the survivor's death; at the end of the 21-year period, the corpus is to be divided among the grantor's then-living descendants, per stirpes, and if none, to the XYZ Charity. If the group of individuals so designated is such that it would be

impracticable to determine the death of the survivor, the validity of the disposition is determined as if the provision in the governing instrument did not exist. The term of the trust is therefore governed by the 90-year permissible vesting period of paragraph (2) of subsections (a), (b), or (c) of the Statutory Rule.

Additional references. Restatement (Second) of Property (Donative Transfers) § 1.3(1) (1983), and the Comments thereto; Waggoner, Perpetuity Reform, 81 Mich. L. Rev. 1718, 1720-1726 (1983).

C. SECTION 1(a)(2): WAIT-AND-SEE -- NONVESTED PROPERTY INTERESTS WHOSE VALIDITY IS INITIALLY IN ABEYANCE

Unlike the Common-law Rule, the Statutory Rule Against Perpetuities does not automatically invalidate nonvested property interests for which there is no validating life. A nonvested property interest that does not meet the requirements for validity under Section 1(a)(1) might still be valid under the wait-and-see provisions of Section 1(a)(2). Such an interest is invalid under Section 1(a)(2) only if in actuality it does not vest (or terminate) during the permissible vesting period. Such an interest becomes invalid, in other words, only if it is still in existence and nonvested when the permissible vesting period expires.

1. The 90-Year Permissible Vesting Period

Since a wait-and-see rule against perpetuities, unlike the Common-law Rule, makes validity or invalidity turn on actual post-creation events, it requires that an actual period of time be measured off during which the contingencies attached to an interest are allowed to work themselves out to a final resolution. The Statutory Rule Against Perpetuities establishes a permissible vesting period of 90 years. Nonvested property interests that have neither vested nor terminated at the expiration of the 90-year permissible vesting period become invalid.

As explained in the Prefatory Note, the permissible vesting period of 90 years is not an arbitrarily selected period of time. On the contrary, the 90-year period represents a reasonable approximation of -- a proxy for -- the period of time that would, on average, be produced through the use of an actual set of measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor.

2. Technical Violations of the Common-Law Rule

One of the harsh aspects of the invalidating side of the Common-law Rule, against which the adoption of the wait-and-see element in Section 1(a)(2) is designed to relieve, is that nonvested property interests at common law are invalid even though the invalidating chain of possible events almost certainly will not happen. In such cases, the violation of the Common-law Rule could be said to be merely technical. Nevertheless, at common law, the nonvested property interest is invalid.

Cases of technical violation fall generally into discrete categories, identified and named by Professor Leach in Perpetuities in a Nutshell, 51 Harv. L. Rev. 638 (1938), as the fertile octogenarian, the administrative contingency, and the unborn widow. The following three examples illustrate how Section 1(a)(2) affects these categories.

Example (7) -- Fertile Octogenarian Case. G devised property in trust, directing the trustee to pay the net income therefrom "to A for life, then to A's children for the life of the survivor, and upon the death of A's last surviving child to pay the corpus of the trust to A's grandchildren." G was survived by A (a female who had passed menopause) and by A's two adult children (X and Y).

The remainder interest in favor of G's grandchildren would be invalid at common law, and consequently is not validated by Section 1(a)(1). There is no validating life because, under the common law's conclusive presumption of lifetime fertility, which is not superseded by this Act (see Part H, below), A might have a third child (Z), conceived and born after G's death, who will have a child conceived and born more than 21 years after the death of the survivor of A, X, and Y.

Under Section 1(a)(2), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the grandchildren's remainder interest will become invalid under Section 1(a)(2) is negligible.

Example (8) -- Administrative Contingency Case. G devised property "to such of my grandchildren, born before or after my death, as may be living upon final distribution of my estate." G was survived by children and grandchildren.

The remainder interest in favor of A's grandchildren would be invalid at common law, and consequently is not validated by Section 1(a)(1). The final distribution of G's estate might not occur within 21 years of G's death, and after G's death grandchildren might be conceived and born who might survive or fail to survive the final distribution of G's estate more than 21 years after the death of the survivor of G's children and grandchildren who were living at G's death.

Under Section 1(a)(2), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. Since it is almost certain that the final distribution of G's estate will occur well within this 90-year period, the chance that the grandchildren's interest will be invalid is negligible.

Example (9) -- Unborn Widow Case. G devised property in trust, the income to be paid "to my son A for life, then to A's spouse for her life, and upon the death of the survivor of A and his spouse, the corpus to be delivered to A's then living

descendants." G was survived by A, by A's wife (W), and by their adult children (X and Y).

Unless the interest in favor of A's "spouse" is construed to refer only to W, rather than to whoever is A's spouse when he dies, if anyone, the remainder interest in favor of A's descendants would be invalid at common law, and consequently is not validated by Section 1(a)(1). There is no validating life because A's spouse might not be W; A's spouse might be someone who was conceived and born after G's death; she might outlive the death of the survivor of A, W, X, and Y by more than 21 years; and descendants of A might be born or die before the death of A's spouse but after the 21-year period following the death of the survivor of A, W, X, and Y.

Under Section 1(a)(2), however, the remote possibility of the occurrence of this chain of events does not invalidate the descendants' remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the descendants' remainder interest will become invalid under the Statutory Rule is small.

Age Contingencies in Excess of 21. Another category of technical violation of the Common-law Rule arises in cases of age contingencies in excess of 21 where the takers cannot be their own validating lives (unlike Example (2), above). The violation of the Common-law Rule falls into the technical category because the insertion of a saving clause would in almost all cases allow the disposition to be carried out as written. In effect, the Statutory Rule operates like the perpetuity-period component of a saving clause.

Example (10) -- Age Contingency in Excess of 21 Case. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

The remainder interest in favor of A's children who reach 30 is a class gift. At common law, the interests of all potential class members must be valid or the class gift is totally invalid. Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817). This Act does not supersede the all-or-nothing rule for class gifts (see Part G, below), and so the all-or-nothing rule continues to apply under this Act. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would be invalid at common law and consequently is not validated by Section 1(a)(1).

Under Section 1(a)(2), however, the possibility of the occurrence of this chain of events does not invalidate the children's remainder interest. The interest becomes invalid only if an interest of a class member remains nonvested 90 years after G's death.

Although unlikely, suppose that at A's death Z's age is such that he could be alive and under the age of 30 at the expiration of the allowable waiting period. Suppose further that at A's death X or Y or both is over the age of 30. The court, upon the petition of an interested person, must under Section 3 reform G's disposition. See Example (3) in the Comment to Section 3.

D. SECTIONS 1(b)(1) AND 1(c)(1): POWERS OF APPOINTMENT THAT ARE INITIALLY VALID

Powers of Appointment. Sections 1(b) and 1(c) set forth the Statutory Rule Against Perpetuities with respect to powers of appointment. A power of appointment is the authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in or powers of appointment over property. Restatement (Second) of Property (Donative Transfers) § 11.1 (1986). The property or property interest subject to a power of appointment is called the "appointive property."

The various persons connected to a power of appointment are identified by a special terminology. The "donor" is the person who created the power of appointment. The "donee" is the person who holds the power of appointment, i.e., the powerholder. The "objects" are the persons to whom an appointment can be made. The "appointees" are the persons to whom an appointment has been made. The "takers in default" are the persons whose property interests are subject to being defeated by the exercise of the power of appointment and who take the property to the extent the power is not effectively exercised. Restatement (Second) of Property (Donative Transfers) § 11.2 (1986).

A power of appointment is "general" if it is exercisable in favor of the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate. A power of appointment that is not general is a "nongeneral" power of appointment. Restatement (Second) of Property (Donative Transfers)
§ 11.4 (1986).

A power of appointment is "presently exercisable" if, at the time in question, the donee can by an exercise of the power create an interest in or a power of appointment over the appointive property. Restatement (Second) of Property (Donative Transfers)
§ 11.5 (1986). A power of appointment is "testamentary" if the donee can exercise it only in the donee's will. Restatement of Property § 321 (1940). A power of appointment is "not presently exercisable because of a condition precedent" if the only impediment to its present exercisability is a condition precedent, i.e., the occurrence of some uncertain event. Since a power of appointment terminates on the donee's death, a deferral of a power's present exercisability until a future time (even a time certain) imposes a condition precedent that the donee be alive at that future time.

A power of appointment is a "fiduciary" power if it is held by a fiduciary and is exercisable by the fiduciary in a fiduciary capacity. A power of appointment that is exercisable in an individual capacity is a "nonfiduciary" power. As used in this Act, the term "power of

appointment" refers to "fiduciary" and to "nonfiduciary" powers, unless the context indicates otherwise.

Although Gray's formulation of the Common-law Rule Against Perpetuities does not speak directly of powers of appointment, the Common-law Rule is applicable to powers of appointment (other than presently exercisable general powers of appointment). The principle of subsections (b)(1) and (c)(1) is that a power of appointment that satisfies the Common-law Rule Against Perpetuities is valid under the Statutory Rule Against Perpetuities, and consequently it can be validly exercised, without being subjected to a waiting period during which the power's validity is in abeyance.

Two different tests for validity are employed at common law, depending on what type of power is at issue. In the case of a nongeneral power (whether or not presently exercisable) and in the case of a general testamentary power, the power is initially valid if, when the power was created, it is certain that the latest possible time that the power can be exercised is no later than 21 years after the death of an individual then in being. In the case of a general power not presently exercisable because of a condition precedent, the power is initially valid if it is then certain that the condition precedent to its exercise will either be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then in being. Subsections (b)(1) and (c)(1) codify these rules. Under either test, initial validity depends on the existence of a validating life. The procedure for determining whether a validating life exists is essentially the same procedure explained in Part B, above, pertaining to nonvested property interests.

> Example (11) -- Initially Valid General Testamentary Power Case. G devised property "to A for life, remainder to such persons, including A's estate or the creditors of A's estate, as A shall by will appoint." G was survived by his daughter (A).
>
> A's power, which is a general testamentary power, is valid as of its creation under Section 1(c)(1). The test is whether or not the power can be exercised beyond 21 years after the death of an individual in being when the power was created (G's death). Since A's power cannot be exercised after A's death, the validating life is A, who was in being at G's death.
>
> Example (12) -- Initially Valid Nongeneral Power Case. G devised property "to A for life, remainder to such of A's descendants as A shall appoint." G was survived by his daughter (A).
>
> A's power, which is a nongeneral power, is valid as of its creation under Section 1(c)(1). The validating life is A; the analysis leading to validity is the same as applied in Example (11), above.
>
> Example (13) -- Case of Initially Valid General Power Not Presently Exercisable Because of a Condition Precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such

child's estate or creditors, as A's first born child shall appoint." G was survived by his daughter (A), who was then childless.

The power in A's first born child, which is a general power not presently exercisable because of a condition precedent, is valid as of its creation under Section 1(b)(1). The power is subject to a condition precedent -- that A have a child -- but this is a contingency that under subsection (d) is deemed certain to be resolved one way or the other within A's lifetime. A is therefore the validating life: The power cannot remain subject to the condition precedent after A's death. Note that the latest possible time that the power can be exercised is at the death of A's first born child, which might occur beyond 21 years after the death of A (and anyone else who was alive when G died). Consequently, if the power conferred on A's first born child had been a nongeneral power or a general testamentary power, the power could not be validated by Section 1(c)(1); instead, the power's validity would be governed by Section 1(c)(2).

E. SECTIONS 1(b)(2) AND 1(c)(2): WAIT-AND-SEE -- POWERS OF APPOINTMENT WHOSE VALIDITY IS INITIALLY IN ABEYANCE

Under the Common-law Rule, a general power not presently exercisable because of a condition precedent is invalid as of the time of its creation if the condition might neither be satisfied nor become impossible to satisfy within a life in being plus 21 years. A nongeneral power (whether or not presently exercisable) or a general testamentary power is invalid as of the time of its creation if it might not terminate (by irrevocable exercise or otherwise) within a life in being plus 21 years.

Sections 1(b)(2) and 1(c)(2), by adopting the wait-and-see method of perpetuity reform, shift the ground of invalidity from possible to actual post-creation events. Under these subsections, a power of appointment that would have violated the Common-law Rule, and therefore fails the subsection (b)(1) or (c)(1) tests for initial validity, is nevertheless not invalid as of the time of its creation. Instead, its validity is in abeyance. A general power not presently exercisable because of a condition precedent is invalid only if in actuality the condition neither is satisfied nor becomes impossible to satisfy within the 90-year permissible vesting period. A nongeneral power or a general testamentary power is invalid only if in actuality it does not terminate (by irrevocable exercise or otherwise) within the 90-year permissible period.

Example (14) -- General Testamentary Power Case. G devised property "to A for life, then to A's first born child for life, then to such persons, including the estate or the creditors of the estate of A's first born child, as A's first born child shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

Since the general testamentary power conferred on A's first born child fails the test of Section 1(c)(1) for initial validity, its validity is governed by Section 1(c)(2). If

A has a child, such child's death must occur within 90 years of G's death for any provision in the child's will purporting to exercise the power to be valid.

Example (15) -- Nongeneral Power Case. G devised property "to A for life, then to A's first born child for life, then to such of G's grandchildren as A's first born child shall appoint; in default of appointment, to the children of G's late nephew, Q." G was survived by his daughter (A), who was then childless, by his son (B), who had two children (X and Y), and by Q's two children (R and S).

Since the nongeneral power conferred on A's first born child fails the test of Section 1(c)(1) for initial validity, its validity is governed by Section 1(c)(2). If A has a child, such child must exercise the power within 90 years after G's death or the power becomes invalid.

Example (16) -- General Power Not Presently Exercisable Because of a Condition Precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint after reaching the age of 25; in default of appointment, to G's grandchildren." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

The power conferred on A's first born child is a general power not presently exercisable because of a condition precedent. Since the power fails the test of Section 1(b)(1) for initial validity, its validity is governed by Section 1(b)(2). If A has a child, such child must reach the age of 25 (or die under 25) within 90 years after G's death or the power is invalid.

Fiduciary Powers. Purely administrative fiduciary powers are excluded from the Statutory Rule under Sections 4(2) and (3), but the only distributive fiduciary power that is excluded is the power described in Section 4(4). Otherwise, distributive fiduciary powers are subject to the Statutory Rule. Such powers are usually nongeneral powers.

Example (17) -- Trustee's Discretionary Powers Over Income and Corpus. G devised property in trust, the terms of which were that the trustee was authorized to accumulate the income or pay it or a portion of it out to A during A's lifetime; after A's death, the trustee was authorized to accumulate the income or to distribute it in equal or unequal shares among A's children until the death of the survivor; and on the death of A's last surviving child to pay the corpus and accumulated income (if any) to B. The trustee was also granted the discretionary power to invade the corpus on behalf of the permissible recipient or recipients of the income.

The trustee's nongeneral powers to invade corpus and to accumulate or spray income among A's children are not excluded by Section 4(4), nor are they initially valid under Section 1(c)(1). Their validity is, therefore, governed by Section 1(c)(2). Both powers become invalid thereunder, and hence no longer exercisable, 90 years after G's death.

It is doubtful that the powers will become invalid, because the trust will probably terminate by its own terms earlier than the expiration of the permissible 90-year period. But if the powers do become invalid, and hence no longer exercisable, they become invalid as of the time the permissible 90-year period expires. Any exercises of either power that took place before the expiration of the permissible 90-year period are not invalidated retroactively. In addition, if the powers do become invalid, a court in an appropriate proceeding must reform the instrument in accordance with the provisions of Section 3.

F. THE VALIDITY OF THE DONEE'S EXERCISE OF A VALID POWER

The fact that a power of appointment is valid, either because it (i) was not subject to the Statutory Rule to begin with, (ii) is initially valid under Sections 1(b)(1) or 1(c)(1), or (iii) becomes valid under Sections 1(b)(2) or 1(c)(2), means merely that the power can be validly exercised. It does not mean that any exercise that the donee decides to make is valid. The validity of the interests or powers created by the exercise of a valid power is a separate matter, governed by the provisions of this Act. A key factor in deciding the validity of such appointed interests or appointed powers is determining when they were created for purposes of this Act. Under Section 2, as explained in the Comment thereto, the time of creation is when the power was exercised if it was a presently exercisable general power; and if it was a nongeneral power or a general testamentary power, the time of creation is when the power was created. This is the rule generally accepted at common law (see Restatement (Second) of Property (Donative Transfers) § 1.2, Comment d (1983); Restatement of Property § 392 (1944)), and it is the rule adopted under this Act (except for purposes of Section 5 only, as explained in the Comment to Section 5).

Example (18) -- Exercise of a Nongeneral Power of Appointment. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of M's descendants (except G). The trust was created by the will of G's mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his brother B's children for the life of the survivor, and upon the death of B's last surviving child, to pay the corpus of the trust to B's grandchildren. B predeceased M; B was survived by his two children, X and Y, who also survived M and G.

G's power and his appointment are valid. The power and the appointed interests were created at M's death when the power was created, not on G's death when it was exercised. See Section 2. G's power passes Section 1(c)(1)'s test for initial validity: G himself is the validating life. G's appointment also passes Section 1(a)(1)'s test for initial validity: Since B was dead at M's death, the validating life is the survivor of B's children, X and Y.

Suppose that G's power was exercisable only in favor of G's own descendants, and that G appointed the identical interests in favor of his own children and grandchildren. Suppose further that at M's death, G had two children, X and Y, and that a third child, Z, was born later. X, Y, and Z survived G. In this case, the remainder interest in favor of G's grandchildren would not pass Section 1(a)(1)'s test for initial validity. Its validity would be governed by Section 1(a)(2), under which it would be valid if G's last surviving child died within 90 years after M's death.

If G's power were a general testamentary power of appointment, rather than a nongeneral power, the solution would be the same. The period of the Statutory Rule with respect to interests created by the exercise of a general testamentary power starts to run when the power was created (at M's death, in this example), not when the power was exercised (at G's death).

Example (19) -- Exercise of a Presently Exercisable General Power of Appointment. G was the life income beneficiary of a trust and the donee of a presently exercisable general power of appointment over the succeeding remainder interest. G exercised the power by deed, directing the trustee after his death to pay the income to G's children in equal shares for the life of the survivor, and upon the death of his last surviving child to pay the corpus of the trust to his grandchildren.

The validity of G's power is not in question: A presently exercisable general power of appointment is not subject to the Statutory Rule Against Perpetuities. G's appointment, however, is subject to the Statutory Rule. If G reserved a power to revoke his appointment, the remainder interest in favor of G's grandchildren passes Section 1(a)(1)'s test for initial validity. Under Section 2, the appointed remainder interest was created at G's death. The validating life for his grandchildren's remainder interest is G's last surviving child.

If G's appointment were irrevocable, however, the grandchildren's remainder interest fails the test of Section 1(a)(1) for initial validity. Under Section 2, the appointed remainder interest was created upon delivery of the deed exercising G's power (or when the exercise otherwise became effective). Since the validity of the grandchildren's remainder interest is governed by Section 1(a)(2), the remainder interest becomes invalid, and the disposition becomes subject to reformation under Section 3, if G's last surviving child lives beyond 90 years after the effective date of G's appointment.

Example (20) -- Exercises of Successively Created Nongeneral Powers of Appointment. G devised property to A for life, remainder to such of A's descendants as A shall appoint. At his death, A exercised his nongeneral power by appointing to his child B for life, remainder to such of B's descendants as B shall appoint. At his death, B exercised his nongeneral power by appointing to his child C for life, remainder to C's children. A and B were living at G's death. Thereafter, C was born. A later died, survived by B and C. B then died survived by C.

A's nongeneral power passes Section 1(c)(1)'s test for initial validity. A is the validating life. B's nongeneral power, created by A's appointment, also passes Sections 1(c)(1)'s test for initial validity. Since under Section 2 the appointed interests and powers are created at G's death, and since B was then alive, B is the validating life for his nongeneral power. (If B had been born after G's death, however, his power would have failed Section 1(c)(1)'s test for initial validity; its validity would be governed by Section 1(c)(2), and would turn on whether or not it was exercised by B within 90 years after G's death.)

Although B's power is valid, his exercise may be partly invalid. The remainder interest in favor of C's children fails the test of Section 1(a)(1) for initial validity. The period of the Statutory Rule begins to run at G's death, under Section 2. (Since B's power was a nongeneral power, B's appointment under the common-law relation back doctrine of powers of appointment is treated as having been made by A. If B's appointment related back no further than that, of course, it would have been validated by Section 1(a)(1) because C was alive at A's death. However, A's power was also a nongeneral power, so relation back goes another step. A's appointment -- which now includes B's appointment -- is treated as having been made by G.) Since C was not alive at G's death, he cannot be the validating life. And, since C might have more children more than 21 years after the deaths of A and B and any other individual who was alive at G's death, the remainder interest in favor of his children is not initially validated by Section 1(a)(1). Instead, its validity is governed by Section 1(a)(2), and turns on whether or not C dies within 90 years after G's death.

Note that if either A's power or B's power (or both) had been a general testamentary power rather than a nongeneral power, the above solution would not change. However, if either A's power or B's power (or both) had been a presently exercisable general power, B's appointment would have passed Sections 1(a)(1)'s test for initial validity. (If A had the presently exercisable general power, the appointed interests and power would be created at A's death, not G's; and if the presently exercisable general power were held by B, the appointed interests and power would be created at B's death.)

Common-Law "Second-look" Doctrine. As indicated above, both at common law and under this Act (except for purposes of Section 5 only, as explained in the Comment to Section 5), appointed interests and powers established by the exercise of a general testamentary power or a nongeneral power are created when the power was created, not when the power was exercised. In applying this principle, the common law recognizes a so-called doctrine of second look, under which the facts existing on the date of the exercise are taken into account in determining the validity of appointed interests and appointed powers. E.g., Warren's Estate, 320 Pa. 112, 182 A. 396 (1930); In re Estate of Bird, 225 Cal.App.2d 196, 37 Cal. Rptr. 288 (1964). The common-law's second-look doctrine in effect constitutes a limited wait-and-see doctrine, and is therefore subsumed under but not totally superseded by this Act. The following example, which is a

variation of Example (18) above, illustrates how the second-look doctrine operates at common law and how the situation would be analyzed under this Act.

> Example (21) -- Second-look Case. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of G's descendants. The trust was created by the will of his mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his children for the life of the survivor, and upon the death of his last surviving child, to pay the corpus of the trust to his grandchildren. At M's death, G had two children, X and Y. No further children were born to G, and at his death X and Y were still living.
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> The common-law solution of this example is as follows: G's appointment is valid under the Common-law Rule. Although the period of the Rule begins to run at M's death, the facts existing at G's death can be taken into account. This second look at the facts discloses that G had no additional children. Thus the possibility of additional children, which existed at M's death when the period of the Rule began to run, is disregarded. The survivor of X and Y, therefore, becomes the validating life for the remainder interest in favor of G's grandchildren, and G's appointment is valid. The common-law's second-look doctrine would not, however, save G's appointment if he actually had one or more children after M's death and if at least one of these after-born children survived G.
>
> Under this Act, if no additional children are born to G after M's death, the common-law second-look doctrine can be invoked as of G's death to declare G's appointment then to be valid under Section 1(a)(1); no further waiting is necessary. However, if additional children are born to G and one or more of them survives G, Section 1(a)(2) applies and the validity of G's appointment depends on G's last surviving child dying within 90 years after M's death.

Additional References. Restatement (Second) of Property (Donative Transfers) § 1.2, Comments d, f, g, and h; § 1.3, Comment g; § 1.4, Comment l (1983).

G. SECTION 1(e): EFFECT OF CERTAIN "LATER-OF" TYPE LANGUAGE; COORDINATION OF GENERATION-SKIPPING TRANSFER TAX REGULATIONS WITH UNIFORM ACT

Effect of Certain "Later-of" Type Language. Section 1(e) was added to the Uniform Act in 1990. It primarily applies to a non-traditional type of "later-of" clause (described below). Use of that type of clause might have produced unintended consequences, which are now rectified by the addition of Section 1(e).

In general, perpetuity saving or termination clauses can be used in either of two ways. The predominant use of such clauses is as an override clause. That is, the clause is not an integral part of the dispositive terms of the trust, but operates independently of the dispositive terms; the

clause provides that all interests must vest no later than at a specified time in the future, and sometimes also provides that the trust must then terminate, but only if any interest has not previously vested or if the trust has not previously terminated. The other use of such a clause is as an integral part of the dispositive terms of the trust; that is, the clause is the provision that directly regulates the duration of the trust. Traditional perpetuity saving or termination clauses do not use a "later-of" approach; they mark off the maximum time of vesting or termination only by reference to a 21-year period following the death of the survivor of specified lives in being at the creation of the trust.

Section 1(e) applies to a non-traditional clause called a "later-of" (or "longer-of") clause. Such a clause might provide that the maximum time of vesting or termination of any interest or trust must occur no later than the later of (A) 21 years after the death of the survivor of specified lives in being at the creation of the trust or (B) 90 years after the creation of the trust.

Under the Uniform Act as originally promulgated, this type of "later-of" clause would not achieve a "later-of" result. If used as an override clause in conjunction with a trust whose terms were, by themselves, valid under the Common-law Rule, the "later-of" clause did no harm. The trust would be valid under the Common-law Rule as codified in Section 1(a)(1) because the clause itself would neither postpone the vesting of any interest nor extend the duration of the trust. But, if used either (1) as an override clause in conjunction with a trust whose terms were not valid under the Common-law Rule or (2) as the provision that directly regulated the duration of the trust, the "later-of" clause would not cure the perpetuity violation in case (1) and would create a perpetuity violation in case (2). In neither case would the clause qualify the trust for validity at common law under Section 1(a)(1) because the clause would not guarantee that all interests will be certain to vest or terminate no later than 21 years after the death of an individual then alive.** In any given case, 90 years can turn out to be longer than the period produced by the specified-lives-in-being-plus-21-years language.

Because the clause would fail to qualify the trust for validity under the Common-law Rule of Section 1(a)(1), the nonvested interests in the trust would be subject to the wait-and-see element of Section 1(a)(2) and vulnerable to a reformation suit under Section 3. Under Section 1(a)(2), an interest that is not valid at common law is invalid unless it actually vests or terminates within 90 years after its creation. Section 1(a)(2) does not grant such nonvested interests a permissible vesting period of either 90 years or a period of 21 years after the death of the survivor of specified lives in being. Section 1(a)(2) only grants such interests a period of 90 years in which to vest.

** By substantial analogous authority, the specified-lives-in-being-plus-21-years prong of the "later-of" clause under discussion is not sustained by the separability doctrine (described in Part H of the Comment to Section 1). See, e.g., Restatement of Property § 376 Comments e and f and illustration 3 (1944); Easton v. Hall, 323 Ill. 397, 154 N.E. 216 (1926); Thorne v. Continental Nat'l Bank & Trust Co., 305 Ill. App. 222, 27 N.E.2d 302 (1940). The inapplicability of the separability doctrine is also supported by perpetuity policy, as described in the text above.

The operation of Section 1(a), as outlined above, is also supported by perpetuity policy. If Section 1(a) allowed a "later-of" clause to achieve a "later-of" result, it would authorize an improper use of the 90-year permissible vesting period of Section 1(a)(2). The 90-year period of Section 1(a)(2) is designed to approximate the period that, on average, would be produced by using actual lives in being plus 21 years. Because in any given case the period actually produced by lives in being plus 21 years can be shorter or longer than 90 years, an attempt to utilize a 90-year period in a "later-of" clause improperly seeks to turn the 90-year average into a minimum.

Set against this background, the addition of Section 1(e) is quite beneficial. Section 1(e) limits the effect of this type of "later-of" language to 21 years after the death of the survivor of the specified lives, in effect transforming the clause into a traditional perpetuity saving/termination clause. By doing so, Section 1(e) grants initial validity to the trust under the Common-law Rule as codified in Section 1(a)(1) and precludes a reformation suit under Section 3.

Note that Section 1(e) covers variations of the "later-of" clause described above, such as a clause that postpones vesting until the later of (A) 20 years after the death of the survivor of specified lives in being or (B) 89 years. Section 1(e) does not, however, apply to all dispositions that incorporate a "later-of" approach. To come under Section 1(e), the specified-lives prong must include a tack-on period of up to 21 years. Without a tack-on period, a "later-of" disposition, unless valid at common law, comes under Section 1(a)(2) and is given 90 years in which to vest. An example would be a disposition that creates an interest that is to vest upon "the later of the death of my widow or 30 years after my death."

Coordination of the Federal Generation-skipping Transfer Tax with the Uniform Statutory Rule. In 1990, the Treasury Department announced a decision to coordinate the tax regulations under the "grandfathering" provisions of the federal generation-skipping transfer tax with the Uniform Act. Letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990) (hereinafter Treasury Letter).

Section 1433(b)(2) of the Tax Reform Act of 1986 generally exempts ("grandfathers") trusts from the federal generation-skipping transfer tax that were irrevocable on September 25, 1985. This section adds, however, that the exemption shall apply "only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985." The provisions of Section 1433(b)(2) were first implemented by Temp. Treas. Reg. § 26.2601-1, promulgated by T.D. 8187 on March 14, 1988. Insofar as the Uniform Act is concerned, a key feature of that temporary regulation is the concept that the statutory reference to "corpus added to the trust after September 25, 1985" not only covers actual post-9/25/85 transfers of new property or corpus to a grandfathered trust but "constructive" additions as well. Under the temporary regulation as first promulgated, a "constructive" addition occurs if, after 9/25/85, the donee of a nongeneral power of appointment exercises that power "in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years. If a power is exercised by creating another power it will be

deemed to be exercised to whatever extent the second power may be exercised." Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988).

Because the Uniform Act was promulgated in 1986 and applies only prospectively, any "grandfathered" trust would have become irrevocable prior to the enactment of the Uniform Act in any state. Nevertheless, the second sentence of Section 5(a) extends the wait-and-see approach to post-effective-date exercises of nongeneral powers even if the power itself was created prior to the effective date of the Uniform Act in any state. Consequently, a post-effective-date exercise of a nongeneral power of appointment created in a "grandfathered" trust could come under the provisions of the Uniform Act.

The literal wording, then, of Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988), as first promulgated, could have jeopardized the grandfathered status of an exempt trust if (1) the trust created a nongeneral power of appointment, (2) the donee exercised that nongeneral power, and (3) the Uniform Act is the perpetuity law applicable to the donee's exercise. This possibility arose not only because the donee's exercise itself might come under the 90-year permissible vesting period of Section 1(a)(2) if it otherwise violated the Common-law Rule and hence was not validated under Section 1(a)(1). The possibility also arose in a less obvious way if the donee's exercise created another nongeneral power. The last sentence of the temporary regulation states that "if a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised."

In late March 1990, the National Conference of Commissioners on Uniform State Laws (NCCUSL) filed a formal request with the Treasury Department asking that measures be taken to coordinate the regulation with the Uniform Act. By the Treasury Letter referred to above, the Treasury Department responded by stating that it "will amend the temporary regulations to accommodate the 90-year period under USRAP as originally promulgated [in 1986] or as amended [in 1990 by the addition of subsection (e)]." This should effectively remove the possibility of loss of grandfathered status under the Uniform Act merely because the donee of a nongeneral power created in a grandfathered trust inadvertently exercises that power in violation of the Common-law Rule or merely because the donee exercises that power by creating a second nongeneral power that might, in the future, be inadvertently exercised in violation of the Common-law Rule.

The Treasury Letter states, however, that any effort by the donee of a nongeneral power in a grandfathered trust to obtain a "later-of" specified-lives-in-being-plus-21-years or 90-years approach will be treated as a constructive addition, unless that effort is nullified by state law. As explained above, the Uniform Act, as originally promulgated in 1986 or as amended in 1990 by the addition of Section 1(e), nullifies any direct effort to obtain a "later-of" approach by the use of a "later-of" clause.

The Treasury Letter states that an indirect effort to obtain a "later-of" approach would also be treated as a constructive addition that would bring grandfathered status to an end, unless the attempt to obtain the later-of approach is nullified by state law. The Treasury Letter indicates that an indirect effort to obtain a "later-of" approach could arise if the donee of a nongeneral power successfully attempts to prolong the duration of a grandfathered trust by switching from a

specified-lives-in-being-plus-21-years perpetuity period to a 90-year perpetuity period, or vice versa. Donees of nongeneral powers in grandfathered trusts would therefore be well advised to resist any temptation to wait until it becomes clear or reasonably predictable which perpetuity period will be longer and then make a switch to the longer period if the governing instrument creating the power utilized the shorter period. No such attempted switch and no constructive addition will occur if in each instance a traditional specified-lives-in-being-plus-21-years perpetuity saving clause is used.

Any such attempted switch is likely in any event to be nullified by state law and, if so, the attempted switch will not be treated as a constructive addition. For example, suppose that the original grandfathered trust contained a standard perpetuity saving clause declaring that all interests in the trust must vest no later than 21 years after the death of the survivor of specified lives in being. In exercising a nongeneral power created in that trust, any indirect effort by the donee to obtain a "later-of" approach by adopting a 90-year perpetuity saving clause will likely be nullified by Section 1(e). If that exercise occurs at a time when it has become clear or reasonably predictable that the 90-year period will prove longer, the donee's exercise would constitute language in a governing instrument that seeks to operate in effect to postpone the vesting of any interest until the later of the specified-lives-in-being-plus-21-years period or 90 years. Under Section 1(e), "that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives."

Quite apart from Section 1(e), the relation-back doctrine generally recognized in the exercise of nongeneral powers stands as a doctrine that could potentially be invoked to nullify an attempted switch from one perpetuity period to the other perpetuity period. Under that doctrine, interests created by the exercise of a nongeneral power are considered created by the donor of that power. See, e.g., Restatement (Second) of Property, Donative Transfers § 11.1 comment b (1986). As such, the maximum vesting period applicable to interests created by the exercise of a nongeneral power would apparently be covered by the perpetuity saving clause in the document that created the power, notwithstanding any different period the donee purports to adopt.

H. SUBSIDIARY COMMON-LAW DOCTRINES: WHETHER SUPERSEDED BY THIS ACT

As noted at the beginning of this Comment, the courts in interpreting the Common-law Rule developed several subsidiary doctrines. This Act does not supersede those subsidiary doctrines except to the extent the provisions of this Act conflict with them. As explained below, most of these common-law doctrines remain in full force or in force in modified form.

Constructional Preference for Validity. Professor Gray in his treatise on the Common-law Rule Against Perpetuities declared that a will or deed is to be construed without regard to the Rule, and then the Rule is to be "remorselessly" applied to the provisions so construed. J. Gray, The Rule Against Perpetuities § 629 (4th ed. 1942). Some courts may still adhere to this proposition. Colorado Nat'l Bank v. McCabe, 143 Colo. 21, 353 P.2d 385 (1960). Most courts, it is believed, would today be inclined to adopt the proposition put by the Restatement of Property § 375 (1944), which is 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. Cases supporting this view include Southern Bank & Trust Co. v. Brown, 271 S.C. 260, 246 S.E.2d 598 (1978); Davis v. Rossi, 326 Mo. 911, 34 S.W.2d 8 (1930); Watson v. Goldthwaite, 184 N.E.2d 340, 343 (Mass. 1962); Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979); Drach v. Ely, 703 P.2d 746 (Kan. 1985).

The constructional preference for validity is not superseded by this Act, but its role is likely to be different. The situation is likely to be that one of the constructions to which the ambiguous instrument is fairly susceptible would result in validity under Section 1(a)(1), 1(b)(1), or 1(c)(1), but the other construction does not necessarily result in invalidity; rather it results in the interest's validity being governed by Section 1(a)(2), 1(b)(2), or 1(c)(2). Nevertheless, even though the result of adopting the other construction is not as harsh as it is at common law, it is expected that the courts will incline toward the construction that validates the disposition under Section 1(a)(1), 1(b)(1), or 1(c)(1).

Conclusive Presumption of Lifetime Fertility. At common law, all individuals -- regardless of age, sex, or physical condition -- are conclusively presumed to be able to have children throughout their entire lifetimes. This principle is not superseded by this Act, and in view of new advances in medical science that allow women to become pregnant after menopause by way of test-tube fertilization (see Sauer, Paulson & Lobo, A Preliminary Report on Oocyte Donation Extending Reproductive Potential to Women Over 40, 323 N. Eng. J. Med. 1157 (1990)) and the widely accepted rule of construction that adopted children are presumptively included in class gifts, the conclusive presumption of lifetime fertility is not unrealistic. Since even elderly individuals probably cannot be excluded from adopting children based on their ages alone, the possibility of having children by adoption is seldom extinct. See, generally, Waggoner In re Lattouf's Will and the Presumption of Lifetime Fertility in Perpetuity Law, 20 San Diego L. Rev. 763 (1983). Under this Act, the main force of this principle is felt in Example (7), above, where it prevents a nonvested property interest from passing the test for initial validity under Section 1(a)(1).

Act Supersedes Doctrine of Infectious Invalidity. At common law, the invalidity of an interest can, under the doctrine of infectious invalidity, be held to invalidate one or more otherwise valid interests created by the disposition or even invalidate the entire disposition. The question turns on whether the general dispositive scheme of the transferor will be better carried out by eliminating only the invalid interest or by eliminating other interests as well. This is a question that is answered on a case-by-case basis. Several items are relevant to the question, including who takes the stricken interests in place of those the transferor designated to take.

The doctrine of infectious invalidity is superseded by this Act by Section 3, under which courts, upon the petition of an interested person, are required to reform the disposition to approximate as closely as possible the transferor's manifested plan of distribution when an invalidity under the Statutory Rule occurs.

Separability. The common law's separability doctrine is that when an interest is expressly subject to alternative contingencies, the situation is treated as if two interests were created in the same person or class. Each interest is judged separately; the invalidity of one of the interests

does not necessarily cause the other one to be invalid. This common-law principle was established in Longhead v. Phelps, 2 Wm. Bl. 704, 96 Eng. Rep. 414 (K.B. 1770), and is followed in this country. L. Simes & A. Smith, The Law of Future Interests § 1257 (2d ed. 1956); 6 American Law of Property § 24.54 (A. Casner ed. 1952); Restatement of Property § 376 (1944). Under this doctrine, if property is devised "to B if X-event or Y-event happens," B in effect has two interests, one contingent on X-event happening and the other contingent on Y-event happening. If the interest contingent on X-event but not the one contingent on Y-event is invalid, the consequence of separating B's interest into two is that only one of them, the one contingent on X-event, is invalid. B still has a valid interest -- the one contingent on the occurrence of Y-event.

The separability principle is not superseded by this Act. As illustrated in the following example, its invocation will usually result in one of the interests being initially validated by Section 1(a)(1) and the validity of the other interests being governed by Section 1(a)(2).

> Example (22) -- Separability Case. G devised real property "to A for life, then to A's children who survive A and reach 25, but if none of A's children survives A or if none of A's children who survives A reaches 25, then to B." G was survived by his brother (B), by his daughter (A), by A's husband (H), and by A's two minor children (X and Y).
>
> The remainder interest in favor of A's children who reach 25 fails the test of Section 1(a)(1) for initial validity. Its validity is, therefore, governed by Section 1(a)(2) and depends on each of A's children doing any one of the following things within 90 years after G's death: predeceasing A, surviving A and failing to reach 25, or surviving A and reaching 25.
>
> Under the separability doctrine, B has two interests. One of them is contingent on none of A's children surviving A. That interest passes Section 1(a)(1)'s test for initial validity; the validating life is A. B's other interest, which is contingent on none of A's surviving children reaching 25, fails Section 1(a)(1)'s test for initial validity. Its validity is governed by Section 1(a)(2) and depends on each of A's surviving children either reaching 25 or dying under 25 within 90 years after G's death.

Suppose that after G's death, A has a third child (Z). A subsequently dies, survived by her husband (H) and by X, Y, and Z. This, of course, causes B's interest that was contingent on none of A's children surviving A to terminate. If X, Y, and Z had all reached the age of 25 by the time of A's death, their interest would vest at A's death, and that would end the matter. If one or two, but not all three of them, had reached the age of 25 at A's death, B's other interest -- the one that was contingent on none of A's surviving children reaching 25 -- would also terminate. As for the children's interest, if the after-born child Z's age was such at A's death that Z could not be alive and under the age of 25 at the expiration of the allowable waiting period, the class gift in favor of the children would be valid under Section 1(a)(2), because none of those then under 25 could fail either to reach 25 or die under 25 after the expiration of the allowable 90-year waiting period. If, however, Z's age at A's death was such that Z could be alive and under the age of 25 at the expiration of the 90-year permissible vesting period, the circumstances requisite to reformation under Section 3(2) would arise, and the court would be justified in reforming G's disposition by reducing the age contingency with respect to Z to the age he would reach on the date when the permissible vesting period is due to expire. See Example (3) in the Comment to Section 3. So reformed, the class gift in favor of A's children could not become invalid under Section 1(a)(2), and the children of A who had already reached 25 by the time of A's death could receive their shares immediately.

The "All-or-Nothing" Rule with Respect to Class Gifts; the Specific Sum and Sub-Class Doctrines. The common law applies an "all-or-nothing" rule with respect to class gifts, under which a class gift stands or falls as a whole. The all-or-nothing rule, usually attributed to Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), is commonly stated as follows: If the interest of any potential class member might vest too remotely, the entire class gift violates the Rule. Although this Act does not supersede the basic idea of the much-maligned "all-or-nothing" rule, the evils sometimes attributed to it are substantially if not entirely eliminated by the wait-and-see feature of the Statutory Rule and by the availability of reformation under Section 3, especially in the circumstances described in Sections 3(2) and (3). For illustrations of the application of the all-or-nothing rule under this Act, see Examples (3), (4), and (6) in the Comment to Section 3.

The common law also recognizes a doctrine called the specific-sum doctrine, which is derived from Storrs v. Benbow, 3 De G.M. & G. 390, 43 Eng. Rep. 153 (Ch. 1853), and states: If a specified sum of money is to be paid to each member of a class, the interest of each class member is entitled to separate treatment and is valid or invalid under the Rule on its own. The common law also recognizes a doctrine called the sub-class doctrine, which is derived from Cattlin v. Brown, 11 Hare 372, 68 Eng. Rep. 1318 (Ch. 1853), and states: If the ultimate takers are not described as a single class but rather as a group of subclasses, and if the share to which each separate subclass is entitled will finally be determined within the period of the Rule, the gifts to the different subclasses are separable for the purpose of the Rule. American Security & Trust Co. v. Cramer, 175 F.Supp. 367 (D.D.C. 1959); Restatement of Property § 389 (1944). The specific-sum and sub-class doctrines are not superseded by this Act. The operation of the specific-sum doctrine under this Act is illustrated in the following example.

Example (23) -- Specific-Sum Case. G bequeathed "$10,000 to each child of A, born before or after my death, who attains 25." G was survived by A and by A's two children (X and Y). X but not Y had already reached 25 at G's death. After G's death a third child (Z) was born to A.

If the phrase "born before or after my death" had been omitted, the class would close as of G's death under the common-law's rule of construction known as the rule of convenience: The after-born child, Z, would not be entitled to a $10,000 bequest, and the interests of both X and Y would be valid upon their creation at G's death. X's interest would be valid because it was initially vested; neither the Common-law Rule nor the Statutory Rule applies to interests that are vested upon their creation. Although the interest of Y was not vested upon its creation, it would be initially valid under Section 1(a)(1) because Y would be his own validating life; Y will either reach 25 or die under 25 within his own lifetime.

The inclusion of the phrase "before or after my death," however, would probably be construed to mean that G intended after-born children to receive a $10,000 bequest. See Earle Estate, 369 Pa. 52, 85 A.2d 90 (1951). Assuming that this construction were adopted, the specific-sum doctrine allows the interest of each child of A to be treated separately from the others for purposes of the Statutory Rule. For the reasons cited above, the interests of X and Y are initially valid under Section 1(a)(1). The nonvested interest of Z, however, fails Section 1(a)(1)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could reach 25 or die under 25 more than 21 years after the death of the survivor of A, X, and Y. Under Section 1(a)(2), the validity of Z's interest depends on Z's reaching (or failing to reach) 25 within 90 years after G's death.

The operation of the sub-class doctrine under this Act is illustrated in the following example.

Example (24) -- Sub-Class Case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to the children of such child." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. A now has died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the children of a child of A is treated separately from the others. This allows the remainder interest in favor of X's children and the remainder interest in favor of Y's children to be validated under Section 1(a)(1). X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the children of Z fails Section 1(a)(1)'s test for initial validity; there is no validating life because Z, who was not alive when the

interest was created, could have children more than 21 years after the death of the survivor of A, X, and Y. Under Section 1(a)(2), the validity of the remainder interest in favor of Z's children depends on Z's dying within 90 years after G's death.

Note why both of the requirements of the sub-class rule are met. The ultimate takers are described as a group of sub-classes rather than as a single class: "children of the child so dying," as opposed to "grandchildren." The share to which each separate sub-class is entitled is certain to be finally determined within a life in being plus 21 years: As of A's death, who is a life in being, it is certain to be known how many children he had surviving him; since in fact there were three, we know that each sub-class will ultimately be entitled to one-third of the corpus, neither more nor less. The possible failure of the one-third share of Z's children does not increase to one-half the share going to X's and Y's children; they still are entitled to only one-third shares. Indeed, should it turn out that X has children but Y does not, this would not increase the one-third share to which X's children are entitled.

Example (25) -- General Testamentary Powers -- Sub-Class Case. G devised property in trust, directing the trustee to pay income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to such persons as the one so dying shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A.

The general testamentary powers conferred on each of A's children are entitled to separate treatment under the principles of the sub-class doctrine. See above. Consequently, the powers conferred on X and Y, A's children who were living at G's death, are initially valid under Section 1(c)(1). But the general testamentary power conferred on Z, A's child who was born after G's death, fails the test of Section 1(c)(1) for initial validity. The validity of Z's power is governed by Section 1(c)(2). Z's death must occur within 90 years after G's death if any provision in Z's will purporting to exercise his power is to be valid.

Duration of Indestructible Trusts -- Termination of Trusts by Beneficiaries. The widely accepted view in American law is that the beneficiaries of a trust other than a charitable trust can compel its premature termination if all beneficiaries consent and if such termination is not expressly restrained or impliedly restrained by the existence of a "material purpose" of the settlor in establishing the trust. Restatement (Second) of Trusts § 337 (1959); IV A. Scott, The Law of Trusts § 337 (3d ed. 1967). A trust that cannot be terminated by its beneficiaries is called an indestructible trust.

It is generally accepted that the duration of the indestructibility of a trust, other than a charitable trust, is limited to the applicable perpetuity period. See Restatement (Second) of Trusts § 62, Comment o (1959); Restatement (Second) of Property (Donative Transfers) § 2.1

and Legislative Note and Reporter's Note (1983); I A. Scott, The Law of Trusts § 62.10(2) (3d ed. 1967); J. Gray, The Rule Against Perpetuities
§ 121 (4th ed. 1942); L. Simes & A. Smith, The Law of Future Interests §§ 1391-93 (2d ed. 1956).

Nothing in this Act supersedes this principle. One modification, however, is necessary: As to trusts that contain a nonvested property interest or power of appointment whose validity is governed by the wait-and-see element adopted in Section 1(a)(2), 1(b)(2), or 1(c)(2), the courts can be expected to determine that the applicable perpetuity period is 90 years.

SECTION 2. WHEN NONVESTED PROPERTY INTEREST OR POWER OF APPOINTMENT CREATED.

(a) Except as provided in subsections (b) and (c) and in Section 5(a), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this [act], if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in Section 1(b) or 1(c), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates. [For purposes of this [act], a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.]

(c) For purposes of this [act], a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

COMMENT

Subsection (a): General Principles of Property Law; When Nonvested Property Interests and Powers of Appointment are Created. Under Section 1, the period of time allowed by the Statutory Rule Against Perpetuities is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 5, with certain exceptions, provides that the Act applies only to nonvested property interests and powers of appointment created on or after the effective date of the Act.

Except as provided in subsections (b) and (c), and in the second sentence of Section 5(a) for purposes of that section only, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law.

Since a will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the will, general principles of property law determine that the time when a nonvested property interest or a power of appointment created by will is created is at the decedent's death.

With respect to a nonvested property interest or a power of appointment created by inter vivos transfer, the time when the interest or power is created is the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed.

With respect to a nonvested property interest or a power of appointment created by the testamentary or inter vivos exercise of a power of appointment, general principles of property law adopt the "relation back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was created not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power. If the exercised power was a general power presently exercisable, the relation back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably exercised, not when the power was created.

Subsection (b): Postponement, for Purposes of this Act, of the Time when a Nonvested Property Interest or a Power of Appointment is Created in Certain Cases. The reason that the significant date for purposes of this Act is the date of creation is that the unilateral control of the interest (or the interest subject to the power) by one person is then relinquished. In certain cases, all beneficial rights in a property interest (including an interest subject to a power of appointment) remain under the unilateral control of one person even after the delivery of the deed or even after the decedent's death. In such cases, under this subsection, the interest or power is created, for purposes of this Act, when no person, acting alone, has a power presently exercisable to become the unqualified beneficial owner of the property interest (or the property interest subject to the power of appointment).

> Example (1) -- Revocable Inter-Vivos Trust Case. G conveyed property to a trustee, directing the trustee to pay the net income therefrom to himself (G) for life, then to G's son A for his life, then to A's children for the life of the survivor of A's children who are living at G's death, and upon the death of such last surviving child, the corpus of the trust is to be distributed among A's then-living descendants, per stirpes. G retained the power to revoke the trust.

Because of G's reservation of the power to revoke the trust, the creation for purposes of this Act of the nonvested property interests in this case occurs at G's death, not when the trust was established. This is in accordance with common law, for purposes of the Common-law Rule Against Perpetuities. Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958).

The rationale that justifies the postponement of the time of creation in such cases is as follows. A person, such as G in the above example, who alone can exercise a power to become the unqualified beneficial owner of a nonvested property interest is in effect the owner of that property interest. Thus, any nonvested property interest subject to such a power is not created for purposes of this Act until the power terminates (by release, expiration at the death of the donee, or otherwise). Similarly, as noted above, any property interest or power of appointment created in an appointee by the irrevocable exercise of such a power is created at the time of the donee's irrevocable exercise.

For the date of creation to be postponed under subsection (b), the power need not be a power to revoke, and it need not be held by the settlor or transferor. A presently exercisable power held by any person acting alone to make himself the unqualified beneficial owner of the nonvested property interest or the property interest subject to a power of appointment is sufficient. If such a power exists, the time when the interest or power is created, for purposes of this Act, is postponed until the termination of the power (by irrevocable exercise, release, contract to exercise or not to exercise, expiration at the death of the donee, or otherwise). An example of such a power that might not be held by the settlor or transferor is a power, held by any person who can act alone, fully to invade the corpus of a trust.

An important consequence of the idea that a power need not be held by the settlor for the time of creation to be postponed under this section is that it makes postponement possible even in cases of testamentary transfers.

Example (2) -- Testamentary Trust Case. G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall appoint; in default of appointment, the property to remain in trust to pay the income to A's children for the life of the survivor, and upon the death of A's last surviving child, to pay the corpus to A's grandchildren." A survived G.

If A exercises his presently exercisable general power, any nonvested property interest or power of appointment created by A's appointment is created for purposes of this Act when the power is exercised. If A does not exercise the power, the nonvested property interests in G's gift-in-default clause are created when A's power terminates (at A's death). In either case, the postponement is justified because the transaction is the equivalent of G's having devised the full remainder interest (following A's income interest) to A and of A's having in turn transferred that interest in accordance with his exercise of the power or, in the event the power is not exercised, devised that interest at his death in accordance with G's gift-in-

default clause. Note, however, that if G had conferred on A a nongeneral power or a general testamentary power, A's power of appointment, any nonvested property interest or power of appointment created by A's appointment, if any, and the nonvested property interests in G's gift-in-default clause would be created at G's death.

Unqualified Beneficial Owner of the Nonvested Property Interest or the Property Interest Subject to a Power of Appointment. For the date of creation to be postponed under subsection (b), the presently exercisable power must be one that entitles the donee of the power to become the unqualified beneficial owner of the nonvested property interest (or the property interest subject to a nongeneral power of appointment, a general testamentary power of appointment, or a general power of appointment not presently exercisable because of a condition precedent). This requirement was met in Example (2), above, because A could by appointing the remainder interest to himself become the unqualified beneficial owner of all the nonvested property interests in G's gift-in-default clause. In Example (2) it is not revealed whether A, if he exercised the power in his own favor, also had the right as sole beneficiary of the trust to compel the termination of the trust and possess himself as unqualified beneficial owner of the property that was the subject of the trust. Having the power to compel termination of the trust is not necessary. If, for example, the trust in Example (2) was a spendthrift trust or contained any other feature that under the relevant local law (see Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889); Restatement (Second) of Trusts § 337 (1959)) would prevent A as sole beneficiary from compelling termination of the trust, A's presently exercisable general power over the remainder interest would still postpone the time of creation of the nonvested property interests in G's gift-in-default clause because the power enables A to become the unqualified beneficial owner of such interests.

Furthermore, it is not necessary that the donee of the power have the power to become the unqualified beneficial owner of all beneficial rights in the trust. In Example (2), the property interests in G's gift-in-default clause are not created for purposes of this Act until A's power expires (or on A's appointment, until the power's exercise) even if someone other than A was the income beneficiary of the trust.

Presently Exercisable Power. For the date of creation to be postponed under subsection (b), the power must be presently exercisable. A testamentary power does not qualify. A power not presently exercisable because of a condition precedent does not qualify. If the condition precedent later becomes satisfied, however, so that the power becomes presently exercisable, the interests or powers subject thereto are not created, for purposes of this Act, until the termination of the power. The common-law decision of Fitzpatrick v. Mercantile Safe Deposit Co., 220 Md. 534, 155 A.2d 702 (1959), appears to be in accord with this proposition.

Example (3) -- General Power in Unborn Child Case. G devised property "to A for life, then to A's first-born child for life, then to such persons, including A's first-born child or such child's estate or creditors, as A's first-born child shall appoint." There was a further provision that in default of appointment, the trust would continue for the benefit of G's descendants. G was survived by his daughter (A),

who was then childless. After G's death, A had a child, X. A then died, survived by X.

As of G's death, the power of appointment in favor of A's first-born child and the property interests in G's gift-in-default clause would be regarded as having been created at G's death because the power in A's first-born child was then a general power not presently exercisable because of a condition precedent.

At X's birth, X's general power became presently exercisable and excluded from the Statutory Rule. X's power also qualifies as a power exercisable by one person alone to become the unqualified beneficial owner of the property interests in G's gift-in-default clause. Consequently, the nonvested property interests in G's gift-in-default clause are not created, for purposes of this Act, until the termination of X's power. If X exercises his presently exercisable general power, before or after A's death, the appointed interests or powers are created, for purposes of this Act, as of X's exercise of the power.

Partial Powers. For the date of creation to be postponed under subsection (b), the person must have a presently exercisable power to become the unqualified beneficial owner of the full nonvested property interest or the property interest subject to a power of appointment described in Section 1(b) or 1(c). If, for example, the subject of the transfer was an undivided interest such as a one-third tenancy in common, the power qualifies even though it relates only to the undivided one-third interest in the tenancy in common; it need not relate to the whole property. A power to become the unqualified beneficial owner of only part of the nonvested property interest or the property interest subject to a power of appointment, however, does not postpone the time of creation of the interests or powers subject thereto, unless the power is actually exercised.

Example (4) -- "5 and 5" Power Case. G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall by will appoint;" in default of appointment, the governing instrument provided for the property to continue in trust. A was given a noncumulative power to withdraw the greater of $5,000 or 5% of the corpus of the trust annually. A survived G. A never exercised his noncumulative power of withdrawal.

G's death marks the time of creation of: A's testamentary power of appointment; any nonvested property interest or power of appointment created in G's gift-in-default clause; and any appointed interest or power created by a testamentary exercise of A's power of appointment over the remainder interest. A's general power of appointment over the remainder interest does not postpone the time of creation because it is not a presently exercisable power. A's noncumulative power to withdraw a portion of the trust each year does not postpone the time of creation as to all or the portion of the trust with respect to which A allowed his power to lapse each year because A's power is a power over only part of any nonvested property interest or property interest subject to a power of appointment in G's gift-

in-default clause and over only part of any appointed interest or power created by a testamentary exercise of A's general power of appointment over the remainder interest. The same conclusion has been reached at common law. See Ryan v. Ward, 192 Md. 342, 64 A.2d 258 (1949).

If, however, in any year A exercised his noncumulative power of withdrawal in a way that created a nonvested property interest (or power of appointment) in the withdrawn amount (for example, if A directed the trustee to transfer the amount withdrawn directly into a trust created by A), the appointed interests (or powers) would be created when the power was exercised, not when G died.

Incapacity of the Donee of the Power. The fact that the donee of a power lacks the capacity to exercise it, by reason of minority, mental incompetency, or any other reason, does not prevent the power held by such person from postponing the time of creation under subsection (b), unless the governing instrument extinguishes the power (or prevents it from coming into existence) for that reason.

Joint Powers -- Community Property; Marital Property. For the date of creation to be postponed under subsection (b), the power must be exercisable by one person alone. A joint power does not qualify, except that, if the bracketed sentence of subsection (b) is enacted, a joint power over community property or over marital property under the Uniform Marital Property Act held by individuals married to each other is, for purposes of this Act, treated as a power exercisable by one person acting alone. See Restatement (Second) of Property (Donative Transfers) § 1.2, Comment b and illustrations 5, 6, and 7 (1983), for the rationale supporting the enactment of the bracketed sentence and examples illustrating its principle.

Subsection (c): No Staggered Periods. For purposes of this Act, subsection (c) in effect treats a transfer of property to a previously funded trust or other existing property arrangement as having been made when the nonvested property interest or power of appointment in the original contribution was created. The purpose of subsection (c) is to avoid the administrative difficulties that would otherwise result where subsequent transfers are made to an existing irrevocable trust. Without subsection (c), the allowable period under the Statutory Rule would be marked off in such cases from different times with respect to different portions of the same trust.

Example (5) -- Series of Transfers Case. In Year One, G created an irrevocable inter vivos trust, funding it with $20,000 cash. In Year Five, when the value of the investments in which the original $20,000 contribution was placed had risen to a value of $30,000, G added $10,000 cash to the trust. G died in Year Ten. G's will poured the residuary of his estate into the trust. G's residuary estate consisted of Blackacre (worth $20,000) and securities (worth $80,000). At G's death, the value of the investments in which the original $20,000 contribution and the subsequent $10,000 contribution were placed had risen to a value of $50,000.

Were it not for subsection (c), the permissible vesting period under the Statutory Rule would be marked off from three different times: Year One, Year Five, and Year Ten. The effect of subsection (c) is that the permissible vesting period under

the Statutory Rule starts running only once -- in Year One -- with respect to the entire trust. This result is defensible not only to prevent the administrative difficulties inherent in recognizing staggered periods. It also is defensible because if G's inter vivos trust had contained a perpetuity saving clause, the perpetuity-period component of the clause would be geared to the time when the original contribution to the trust was made; this clause would cover the subsequent contributions as well. Since the major justification for the adoption by this Act of the wait-and-see method of perpetuity reform is that it amounts to a statutory insertion of a saving clause (see the Prefatory Note), subsection (c) is consistent with the theory of this Act.

Additional References. Restatement (Second) of Property (Donative Transfers) §§ 1.1, 1.2 (1983) and the Comments thereto.

SECTION 3. REFORMATION. Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by Section 1(a)(2), 1(b)(2), or 1(c)(2) if:

(1) a nonvested property interest or a power of appointment becomes invalid under Section 1 (statutory rule against perpetuities);

(2) a class gift is not but might become invalid under Section 1 (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) a nonvested property interest that is not validated by Section 1(a)(1) can vest but not within 90 years after its creation.

COMMENT

Reformation. This section requires a court, upon the petition of an interested person, to reform a disposition whose validity is governed by the wait-and-see element of Section 1(a)(2), 1(b)(2), or 1(c)(2) so that the reformed disposition is within the limits of the 90-year period allowed by those subsections, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: First, when (after the application of the Statutory Rule) a nonvested property interest or a power of appointment becomes invalid under the Statutory Rule; second, when a class gift has not but still might

become invalid under the Statutory Rule and the time has arrived when the share of one or more class members is to take effect in possession or enjoyment; and third, when a nonvested property interest can vest, but cannot do so within the allowable 90-year period under the Statutory Rule.

It is anticipated that the circumstances requisite to reformation will seldom arise, and consequently that this section will be applied infrequently. If, however, one of the three circumstances arises, the court in reforming is authorized to alter existing interests or powers and to create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole. In reforming, the court is urged not to invalidate any vested interest retroactively (the doctrine of infectious invalidity having been superseded by this Act, as indicated in the Comment to Section 1). The court is also urged not to reduce an age contingency in excess of 21 unless it is absolutely necessary, and if it is deemed necessary to reduce such an age contingency, not to reduce it automatically to 21 but rather to reduce it no lower than absolutely necessary. See Example (3), below; Waggoner, Perpetuity Reform, 81 Mich.L.Rev. 1718, 1755-1759 (1983); Langbein & Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U.Pa.L.Rev. 521, 546-49 (1982).

Judicial Sale of Land Affected by Future Interests. Although this section -- except for cases that fall under subsections (2) or (3) -- defers the time when a court is directed to reform a disposition until the expiration of the 90-year permissible vesting period, this section is not to be understood as preventing an earlier application of other remedies. In particular, in the case of interests in land not in trust, the principle, codified in many states, is widely recognized that there is judicial authority, under specified circumstances, to order a sale of land in which there are future interests. See 1 American Law of Property §§ 4.98-.99 (A. Casner ed. 1952); L. Simes & A. Smith, The Law of Future Interests §§ 1941-1946 (2d ed. 1956); see also Restatement of Property § 179 at pp. 485-95 (1936); L. Simes & C. Taylor, Improvement of Conveyancing by Legislation 235-38 (1960). Nothing in Section 3 of this Act should be taken as precluding this type of remedy, if appropriate, before the expiration of the 90-year permissible vesting period.

Duration of the Indestructibility of Trusts -- Termination of Trusts by Beneficiaries. As noted in Part G of the Comment to Section 1, it is generally accepted that a trust cannot remain indestructible beyond the period of the rule against perpetuities. Under this Act, the period of the rule against perpetuities applicable to a trust whose validity is governed by the wait-and-see element of Section 1(a)(2), 1(b)(2), or 1(c)(2) is 90 years. The result of any reformation under Section 3 is that all nonvested property interests in the trust will vest in interest (or terminate) no later than the 90th anniversary of their creation. In the case of trusts containing a nonvested property interest or a power of appointment whose validity is governed by Section 1(a)(2), 1(b)(2), or 1(c)(2), courts can therefore be expected to adopt the rule that no purpose of the settlor, expressed in or implied from the governing instrument, can prevent the beneficiaries of a trust other than a charitable trust from compelling its termination after 90 years after every nonvested property interest and power of appointment in the trust was created.

Paragraph (1): Invalid Property Interest or Power of Appointment. Paragraph (1) is illustrated by the following examples.

Example (1) -- Multiple Generation Trust. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children for the life of the survivor, then to A's grandchildren for the life of the survivor, and on the death of A's last surviving grandchild, the corpus of the trust is to be divided among A's then living descendants per stirpes; if none, to" a specified charity. G was survived by his child (A) and by A's two minor children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by his children (X, Y, and Z) and by three grandchildren (M, N, and O).

There are four interests subject to the Statutory Rule in this example: (1) the income interest in favor of A's children, (2) the income interest in favor of A's grandchildren, (3) the remainder interest in the corpus in favor of A's descendants who survive the death of A's last surviving grandchild, and (4) the alternative remainder interest in the corpus in favor of the specified charity. The first interest is initially valid under Section 1(a)(1); A is the validating life for that interest. There is no validating life for the other three interests, and so their validity is governed by Section 1(a)(2).

If, as is likely, A and A's children all die before the 90th anniversary of G's death, the income interest in favor of A's grandchildren is valid under Section 1(a)(2).

If, as is also likely, some of A's grandchildren are alive on the 90th anniversary of G's death, the alternative remainder interests in the corpus of the trust then become invalid under Section 1(a)(2), giving rise to Section 3(1)'s prerequisite to reformation. A court would be justified in reforming G's disposition by closing the class in favor of A's descendants as of the 90th anniversary of G's death (precluding new entrants thereafter), by moving back the condition of survivorship on the class so that the remainder interest is in favor of G's descendants who survive the 90th anniversary of G's death (rather than in favor of those who survive the death of A's last surviving grandchild), and by redefining the class so that its makeup is formed as if A's last surviving grandchild died on the 90th anniversary of G's death.

Example (2) -- Sub-Class Case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child the proportionate share of corpus of the one so dying shall go to the descendants of such child surviving at such child's death, per stirpes." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the descendants of a child of A is treated separately from the others. Consequently, the remainder interest in favor of X's descendants and the remainder interest in favor of Y's descendants are valid under Section 1(a)(1): X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the descendants of Z is not validated by Section 1(a)(1) because Z, who was not alive when the interest was created, could have descendants more than 21 years after the death of the survivor of A, X, and Y. Instead, the validity of the remainder interest in favor of Z's descendants is governed by Section 1(a)(2), under which its validity depends on Z's dying within 90 years after G's death.

Although unlikely, suppose that Z is still living 90 years after G's death. The remainder interest in favor of Z's descendants will then become invalid under the Statutory Rule, giving rise to subsection (1)'s prerequisite to reformation. In such circumstances, a court would be justified in reforming the remainder interest in favor of Z's descendants by making it indefeasibly vested as of the 90th anniversary of G's death. To do this, the court would reform the disposition by eliminating the condition of survivorship of Z and closing the class to new entrants after the 90th anniversary of G's death.

Paragraph (2): Class Gifts Not Yet Invalid. Paragraph (2), which, upon the petition of an interested person, requires reformation in certain cases where a class gift has not but still might become invalid under the Statutory Rule, is illustrated by the following examples.

Example (3) -- Age Contingency in Excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

Since the remainder interest in favor of A's children who reach 30 is a class gift, at common law (Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817)) and under this Act (see Part G of the Comment to Section 1) the interests of all potential class members must be valid or the class gift is totally invalid. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. There is no validating life, and the class gift is therefore not validated by Section 1(a)(1).

Under Section 1(a)(2), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death. If in fact there is an afterborn child (Z), and if upon A's death, Z has at least reached an age such that he cannot be alive and under the age of 30 on the 90th anniversary of G's death, the class gift is valid. (Note that at Z's birth it would have been known whether or not Z could be alive and under the age of 30 on the 90th anniversary of G's death; nevertheless, even if it was then certain that Z could not be alive and under the age of 30 on the 90th anniversary of G's death, the class gift could not then have been declared valid because, A being alive, it was then possible for one or more additional children to have later been born to or adopted by A.)

Although unlikely, suppose that at A's death (prior to the expiration of the 90-year period), Z's age was such that he could be alive and under the age of 30 on the 90th anniversary of G's death. Suppose further that at A's death X and Y were over the age of 30. Z's interest and hence the class gift as a whole is not yet invalid under the Statutory Rule because Z might die under the age of 30 within the remaining part of the 90-year period following G's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after G's death. Consequently, the prerequisites to reformation set forth in subsection (2) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on reaching the age he can reach if he lives to the 90th anniversary of G's death. This would render Z's interest valid so far as the Statutory Rule Against Perpetuities is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to reach the required age under the reformed disposition, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Example (4) -- Case Where Subsection (2) Applies, Not Involving an Age Contingency in Excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who graduate from an accredited medical school or law school." G was survived by A, by A's spouse (H), and by A's two minor children (X and Y).

As in Example (3), the remainder interest in favor of A's children is a class gift, and the common-law principle is not superseded by this Act by which the interests of all potential class members must be valid or the class gift is totally invalid. Although X and Y will either graduate from an accredited medical or law school, or fail to do so, within their own lifetimes, there is at G's death the possibility that A will have an after-born child (Z), who will graduate from an accredited medical or law school (or die without having done either) more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would not be valid under the Common-law Rule and is, therefore, not validated by Section 1(a)(1).

Under Section 1(a)(2), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death.

Suppose in fact that there is an afterborn child (Z), and that at A's death Z was a freshman in college. Suppose further that at A's death X had graduated from an accredited law school and that Y had graduated from an accredited medical school. Z's interest and hence the class gift as a whole is not yet invalid under Section 1(a)(2) because the 90-year period following G's death has not yet expired; but the class gift might become invalid because Z might be alive but not a graduate

of an accredited medical or law school 90 years after G's death. Consequently, the prerequisites to reformation set forth in Section 3(2) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on graduating from an accredited medical or law school within 90 years after G's death. This would render Z's interest valid so far as the Section 1(a)(2) is concerned and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to graduate from an accredited medical or law school within the allowed time under the disposition as so reformed, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Paragraph (3): Interests that Can Vest But Not Within the 90-Year Permissible Vesting Period. In exceedingly rare cases, an interest might be created that can vest, but not within the 90-year permissible vesting period of the Statutory Rule. This may be the situation when the interest was created (See Example (5)), or it may become the situation at some time thereafter (see Example (6)). Whenever the situation occurs, the court, upon the petition of an interested person, is required by subsection (3) to reform the disposition within the limits of the 90-year permissible vesting period.

Example (5) -- Case of an Interest, as of its Creation, being Impossible to Vest Within the 90-Year Period. G devised property in trust, directing the trustee to divide the income, per stirpes, among G's descendants from time to time living, for 100 years. At the end of the 100-year period following G's death, the trustee is to distribute the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's descendants who are living 100 years after G's death can vest, but not within the 90-year period of Section 1(a)(2). The interest would violate the Common-law Rule, and hence is not validated by Section 1(a)(1), because there is no validating life. In these circumstances, a court is required by Section 3(3) to reform G's disposition within the limits of the 90-year period. An appropriate result would be for the court to lower the period following G's death from a 100-year period to a 90-year period.

Note that the circumstance that triggers the direction to reform the disposition under this subsection is that the nonvested property interest still can vest, but cannot vest within the 90-year period of Section 1(a)(2). It is not necessary that the interest be certain to become invalid under that subsection. For the interest to be certain to become invalid under Section 1(a)(2), it would have to be certain that it can neither vest nor terminate within the 90-year period. In this example, the interest of G's descendants might terminate within the period (by all of G's descendants dying within 90 years of G's death). If this were to happen, the interest of XYZ Charity would be valid because it would have vested within the allowable period. However, it was thought desirable to require reformation without waiting to see if this would happen: The only way that G's descendants, who are G's

primary set of beneficiaries, would have a chance to take the property is to reform the disposition within the limits of the 90-year period on the ground that their interest cannot vest within the allowable period and subsection (3) so provides.

Example (6) -- Case of an Interest after its Creation Becoming Impossible to Vest Within the 90-Year Period. G devised property in trust, with the income to be paid to A. The corpus of the trust was to be divided among A's children who reach 30, each child's share to be paid on the child's 30th birthday; if none reaches 30, to the XYZ Charity. G was survived by A and by A's two children (X and Y). Neither X nor Y had reached 30 at G's death.

The class gift in favor of A's children who reach 30 would violate the Common-law Rule Against Perpetuities and, thus, is not validated by Section 1(a)(1). Its validity is therefore governed by Section 1(a)(2).

Suppose that after G's death, and during A's lifetime, X and Y die and a third child (Z) is born to or adopted by A. At A's death, Z is living but her age is such that she cannot reach 30 within the remaining part of the 90-year period following G's death. As of A's death, it has become the situation that Z's interest cannot vest within the allowable period. The circumstances requisite to reformation under subsection (3) have arisen. An appropriate result would be for the court to lower the age contingency to the age Z can reach 90 years after G's death.

Additional References. For additional discussion and illustrations of the application of some of the principles of this section, see the Comments to Restatement (Second) of Property (Donative Transfers)
§ 1.5 (1983).

SECTION 4. EXCLUSIONS FROM STATUTORY RULE AGAINST PERPETUITIES. Section 1 (statutory rule against perpetuities) does not apply to:

(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of

(A) a premarital or postmarital agreement,

(B) a separation or divorce settlement,

(C) a spouse's election,

(D) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties,

(E) a contract to make or not to revoke a will or trust,

(F) a contract to exercise or not to exercise a power of appointment,

(G) a transfer in satisfaction of a duty of support, or

(H) a reciprocal transfer;

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

COMMENT

Section 4 lists seven exclusions from the Statutory Rule Against Perpetuities (Statutory Rule). Some are declaratory of existing law; others are contrary to existing law. Since the Common-law Rule Against Perpetuities is superseded by this Act (or a statutory version or variation thereof is repealed by this Act), a nonvested property interest, power of appointment, or other arrangement excluded from the Statutory Rule by this section is not subject to any rule against perpetuities, statutory or otherwise.

A. PARAGRAPH (1): NONDONATIVE TRANSFERS EXCLUDED

Rationale. In line with long-standing scholarly commentary, paragraph (1) excludes (with certain enumerated exceptions) nonvested property interests and powers of appointment arising out of a nondonative transfer. The rationale for this exclusion is that the Rule Against Perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule -- a life in being plus 21 years -- is not suitable for nondonative transfers, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Section 1 because that period represents an approximation of the period of time that would be produced, on average, by using a statutory list identifying actual measuring lives and adding a 21-year period following the death of the survivor.

No general exclusion from the Common-law Rule Against Perpetuities is recognized for nondonative transfers, and so paragraph (1) is contrary to existing common law. (But see Metropolitan Transportation Authority v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 384 (1986), pointing out the inappropriateness of the period of a life in being plus 21 years to cases of commercial and governmental transactions and noting that the Rule Against Perpetuities can invalidate legitimate transactions in such cases.)

Paragraph (1) is therefore inconsistent with decisions holding the Common-law Rule to be applicable to the following types of property interests or arrangements when created in a nondonative, commercial-type transaction, as they almost always are: options (e.g., Milner v. Bivens, 335 S.E.2d 288 (Ga. 1985)); preemptive rights in the nature of a right of first refusal (e.g., Atchison v. City of Englewood, 170 Colo. 295, 463 P.2d 297 (1969); Robroy Land Co., Inc. v. Prather, 24 Wash. App. 511, 601 P.2d 297 (1969)); leases to commence in the future, at a time certain or on the happening of a future event such as the completion of a building (e.g., Southern Airways Co. v. DeKalb County, 101 Ga. App. 689, 115 S.E.2d 207 (1960)); nonvested easements; top leases and top deeds with respect to interests in minerals (e.g., Peveto v. Starkey, 645 S.W.2d 770 (Tex. 1982)); and so on.

Consideration Does Not Necessarily Make the Transfer Nondonative. A transfer can be supported by consideration and still be donative in character and hence not excluded from the Statutory Rule. A transaction that is essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration. Thus, for example, the exclusion would not apply if a

parent purchases a parcel of land for full and adequate consideration, and directs the seller to make out the deed in favor of the purchaser's daughter for life, remainder to such of the daughter's children as reach 25. The nonvested property interest of the daughter's children is subject to the Statutory Rule.

Some Transactions Not Excluded Even if Considered Nondonative. Some types of transactions -- although in some sense supported by consideration and hence arguably nondonative -- arise out of a domestic situation, and should not be excluded from the Statutory Rule. To avoid uncertainty with respect to such transactions, paragraph (1) specifies that nonvested property interests or powers of appointment arising out of any of the following transactions are not excluded by paragraph (1)'s nondonative-transfers exclusion: a premarital or postmarital agreement; a separation or divorce settlement; a spouse's election, such as the "widow's election" in community property states; an arrangement similar to any of the foregoing arising out of a prospective, existing, or previous marital relationship between the parties; a contract to make or not to revoke a will or trust; a contract to exercise or not to exercise a power of appointment; a transfer in full or partial satisfaction of a duty of support; or a reciprocal transfer. The term "reciprocal transfer" is to be interpreted in accordance with the reciprocal transfer doctrine in the tax law (see United States v. Estate of Grace, 395 U.S. 316 (1969)).

Other Means of Controlling Some Nondonative Transfers Desirable. Some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded by paragraph (1) from the Statutory Rule because, as noted above, the period of a life in being plus 21 years -- actual or by the 90-year proxy -- is inappropriate for them; that period is appropriate for family-oriented, donative transfers.

The Committee was aware that a few states have adopted statutes on perpetuities that include special limits on certain commercial transactions (e.g., Fla. Stat. § 689.22(3)(a); Ill. Rev. Stat. ch. 30, § 194(a)), and in fact the Committee itself drafted a comprehensive version of Section 4 that would have imposed a 40-year period-in-gross limitation in specified cases. In the end, however, the Committee did not present that version to the National Conference for approval because it was of the opinion that the control of these interests is better left to other types of statutes, such as marketable title acts (e.g., the Uniform Simplification of Land Transfers Act) and the Uniform Dormant Mineral Interests Act, backed up by the potential application of the common-law rules regarding unreasonable restraints on alienation.

B. PARAGRAPHS (2)-(7): OTHER EXCLUSIONS

Subsection (2) -- Administrative Fiduciary Powers. Fiduciary powers are subject to the Statutory Rule Against Perpetuities, unless specifically excluded. Purely administrative fiduciary powers are excluded by paragraphs (2) and (3), but distributive fiduciary powers are generally speaking not excluded. The only distributive fiduciary power excluded is the one described in paragraph (4).

The application of paragraph (2) to fiduciary powers can be illustrated by the following example.

> Example (1). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children for the life of the survivor, and on the death of A's last surviving child to pay the corpus to B. The trustee is granted the discretionary power to sell and to reinvest the trust assets and to invade the corpus on behalf of the income beneficiary or beneficiaries.
>
> The trustee's fiduciary power to sell and reinvest the trust assets is a purely administrative power, and under paragraph (2) of this section is not subject to the Statutory Rule.
>
> The trustee's fiduciary power to invade corpus, however, is a nongeneral power of appointment that is not excluded from the Statutory Rule. Its validity, and hence its exercisability, is governed by Section 1. Under that section, since the power is not initially valid under Section 1(c)(1), Section 1(c)(2) applies and the power ceases to be exercisable 90 years after G's death.

Paragraph (3) -- Powers to Appoint a Fiduciary. Paragraph (3) excludes from the Statutory Rule Against Perpetuities powers to appoint a fiduciary (a trustee, successor trustee, or co-trustee, a personal representative, successor personal representative, or co-personal representative, an executor, successor executor, or co-executor, etc.). Sometimes such a power is held by a fiduciary and sometimes not. In either case, the power is excluded from the Statutory Rule.

Paragraph (4) -- Certain Distributive Fiduciary Power. The only distributive fiduciary power excluded from the Statutory Rule Against Perpetuities is the one described in paragraph (4); the excluded power is a discretionary power of a trustee to distribute principal before the termination of a trust to a beneficiary who has an indefeasibly vested interest in the income and principal.

> Example (2). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children; each child's share of principal is to be paid to the child when he or she reaches 40; if any child dies under 40, the child's share is to be paid to the child's estate as a property interest owned by such child. The trustee is given the discretionary power to advance all or a portion of a child's share before the child reaches 40. G was survived by A, who was then childless.
>
> The trustee's discretionary power to distribute principal to a child before the child's 40th birthday is excluded from the Statutory Rule Against Perpetuities. (The trustee's duty to pay the income to A and after A's death to A's children is not subject to the Statutory Rule because it is a duty, not a power.)

Paragraph (5) -- Charitable or Governmental Gifts. Paragraph (5) codifies the common-law principle that a nonvested property interest held by a charity, a government, or a governmental

agency or subdivision is excluded from the Rule Against Perpetuities if the interest was preceded by an interest that is held by another charity, government, or governmental agency or subdivision. See L. Simes & A. Smith, The Law of Future Interests §§ 1278-87 (2d ed. 1956); Restatement (Second) of Property (Donative Transfers) § 1.6 (1983); Restatement of Property § 397 (1944).

> Example (3). G devised real property "to the X School District so long as the premises are used for school purposes, and upon the cessation of such use, to Y City."
>
> The nonvested property interest held by Y City (an executory interest) is excluded from the Statutory Rule under paragraph (5) because it was preceded by a property interest (a fee simple determinable) held by a governmental subdivision, X School District.

The exclusion of charitable and governmental gifts applies only in the circumstances described. If a nonvested property interest held by a charity is preceded by a property interest that is held by a noncharity, the exclusion does not apply; rather, the validity of the nonvested property interest held by the charity is governed by the other sections of this Act.

> Example (4). G devised real property "to A for life, then to such of A's children as reach 25, but if none of A's children reaches 25, to X Charity."
>
> The nonvested property interest held by X Charity is not excluded from the Statutory Rule.

If a nonvested property interest held by a noncharity is preceded by a property interest that is held by a charity, the exclusion does not apply; rather, the validity of the nonvested property interest in favor of the noncharity is governed by the other sections of this Act.

> Example (5). G devised real property "to the City of Sidney so long as the premises are used for a public park, and upon the cessation of such use, to my brother, B."
>
> The nonvested property interest held by B is not excluded from the Statutory Rule by paragraph (5).

Paragraph (6) -- Trusts for Employees and Others; Trusts for Self-Employed Individuals. Paragraph (6) excludes from the Statutory Rule Against Perpetuities nonvested property interests and powers of appointment with respect to a trust or other property arrangement, whether part of a "qualified" or "unqualified" plan under the federal income tax law, forming part of a bona fide benefit plan for employees (including owner-employees), independent contractors, or their beneficiaries or spouses. The exclusion granted by this subsection does not, however, extend to a nonvested property interest or a power of appointment created by an election of a participant or beneficiary or spouse.

Paragraph (7) -- Pre-existing Exclusions from the Common-law Rule Against Perpetuities. Paragraph (7) assures that all property interests, powers of appointment, or arrangements that were excluded from the Common-law Rule Against Perpetuities or are excluded by another statute of this state are also excluded from the Statutory Rule Against Perpetuities.

Possibilities of reverter and rights of entry (also known as rights of re-entry, rights of entry for condition broken, and powers of termination) are not subject to the Common-law Rule Against Perpetuities, and so are excluded from the Statutory Rule. By statute in some states, possibilities of reverter and rights of entry expire if they do not vest within a specified period of years (such as 40 years). See Fratcher, A Modest Proposal for Trimming the Claws of Legal Future Interests, 1972 Duke L.J. 517, 527-31. See also Uniform Simplification of Land Transfers Act § 3-409. States adopting the Uniform Statutory Rule Against Perpetuities may wish to consider the enactment of some such limit on these interests, if they have not already done so.

SECTION 5. PROSPECTIVE APPLICATION.

(a) Except as extended by subsection (b), this [act] applies to a nonvested property interest or a power of appointment that is created on or after the effective date of this [act]. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before the effective date of this [act] and is determined in a judicial proceeding, commenced on or after the effective date of this [act], to violate this state's rule against perpetuities as that rule existed before the effective date of this [act], a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

COMMENT

Subsection (a): Act Not Retroactive. This section provides that, except as provided in subsection (b), the Statutory Rule Against Perpetuities and the other provisions of this Act apply

only to nonvested property interests or powers of appointment created on or after the Act's effective date. With one exception, in determining when a nonvested property interest or a power of appointment is created, the principles of Section 2 are applicable. Thus, for example, a property interest (or a power of appointment) created in a revocable inter vivos trust is created when the power to revoke terminates. See Example (1) in the Comment to Section 2.

The second sentence of subsection (a) establishes a special rule for nonvested property interests (and powers of appointment) created by the exercise of a power of appointment. For purposes of this section only, a nonvested property interest (or a power of appointment) created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise of the power becomes irrevocable. Consequently, all the provisions of this Act except Section 5(b) apply to a nonvested property interest (or power of appointment) created by a donee's exercise of a power of appointment where the donee's exercise, whether revocable or irrevocable, occurs on or after the effective date of this Act. All the provisions of this Act except Section 5(b) also apply where the donee's exercise occurred before the effective date of this Act if: (i) that pre-effective-date exercise was revocable and (ii) that revocable exercise becomes irrevocable on or after the effective date of this Act. This special rule applies to the exercise of all types of powers of appointment -- presently exercisable general powers, general testamentary powers, and nongeneral powers.

If the application of this special rule determines that the provisions of this Act (except Section 5(b)) apply, then for all such purposes, the time of creation of the appointed nonvested property interest (or appointed power of appointment) is determined by reference to Section 2, without regard to the special rule contained in the second sentence of Section 5(a).

If the application of this special rule of Section 5(a) determines that the provisions of this Act (except Section 5(b)) do not apply, then Section 5(b) is the only potentially applicable provision of this Act.

> Example (1) -- Testamentary Power Created Before but Exercised After the Effective Date of this Act. G was the donee of a general testamentary power of appointment created by the will of his mother, M. M died in 1980. Assume that the effective date of this Act in the jurisdiction is January 1, 1987. G died in 1988, leaving a will that exercised his general testamentary power of appointment.
>
> Under the special rule in the second sentence of Section 5(a), any nonvested property interest (or power of appointment) created by G in his will in exercising his general testamentary power was created (for purposes of Section 5) at G's death in 1988, which was after the effective date of this Act.
>
> Consequently, all the provisions of this Act apply (except Section 5(b)). That point having been settled, the next step is to determine whether the nonvested property interests or powers of appointment created by G's testamentary appointment are initially valid under Section 1(a)(1), 1(b)(1), or 1(c)(1), or whether the wait-and-see element established in Section 1(a)(2), 1(b)(2), or 1(c)(2) apply. If the wait-and-see element does apply, it must also be determined when the allowable 90-year waiting

period starts to run. In making these determinations, the principles of Section 2 control the time of creation of the nonvested property interests (or powers of appointment); under Section 2, since G's power was a general testamentary power of appointment, the common-law relation-back doctrine applies and the appointed nonvested property interests (and appointed powers of appointment) are created at M's death in 1980.

If G's testamentary power of appointment had been a nongeneral power rather than a general power, the same results as described above would apply.

Example (2) -- Presently Exercisable Nongeneral Power Created Before but Exercised After the Effective Date of this Act. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable nongeneral power. If G exercised the power in 1988, after the effective date of this Act (or, if a pre-effective-date revocable exercise of his power became irrevocable in 1988, after the effective date of this Act), the same results as described above in Example (1) would apply.

Example (3) -- Presently Exercisable General Power Created Before but Exercised After the Effective Date of this Act. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable general power. If G exercised the power in 1988, after the effective date of this Act (or, if a pre-effective-date revocable exercise of his power became irrevocable in 1988, after the effective date of this Act), all the provisions of this Act (except Section 5(b)) apply; for such purposes, Section 2 controls the date of creation of the appointed nonvested property interests (or appointed powers of appointment), without regard to the special rule of the second sentence of Section 5(a). With respect to the exercise of a presently exercisable general power, it is possible -- indeed, probable -- that the special rule of the second sentence of Section 5(a) and the rules of Section 2 agree on the same date of creation for their respective purposes, that date being the date the power was irrevocably exercised (or a revocable exercise thereof became irrevocable).

Subsection (b): Reformation of Pre-existing Instruments. Although the Statutory Rule Against Perpetuities and the other provisions of this Act do not apply retroactively, subsection (b) recognizes a court's authority to exercise its equitable power to reform instruments that contain a violation of the Common-law Rule Against Perpetuities (or of a statutory version or variation thereof) and to which the Statutory Rule does not apply because the offending nonvested property interest or power of appointment in question was created before the effective date of this Act. This equitable power to reform is recognized only where the violation of the former rule against perpetuities is determined in a judicial proceeding that is commenced on or after the effective date of this Act. See below.

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 violation of the Common-law Rule Against Perpetuities. 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). In four other states -- California, Missouri, Oklahoma, and Texas -- the legislatures have enacted statutes conferring this power on the courts or directing the courts to reform defective instruments. Cal. Civ. Code § 715.5 (West 1982); Mo. Rev. Stat. § 442.555 (1978); Okla. Stat. tit. 60, §§ 75-78 (1981); Tex. Property Code § 5.043 (Vernon 1984). See also Idaho Code § 55-111 (1948). The California statute is silent as to whether or not it applies to nonvested property interests and powers of appointment created prior to the effective date of the Act; the only significant California appellate decision to apply the statute, Estate of Ghiglia, 42 Cal.App.3d 433, 116 Cal. Rptr. 827 (1974), involved a will where the testator died after the Act's effective date. The Missouri, Oklahoma, and Texas statutes explicitly do not apply retroactively. The Hawaii, Mississippi, New Hampshire, and West Virginia decisions, however, invoked the court's equitable power (sometimes called the cy pres power, and sometimes called the doctrine of equitable approximation or equitable modification) to reform pre-existing instruments that contained a violation of the Common-law Rule. Subsection (b) constitutes statutory authority for a court to exercise its equitable reformation power.

Reformation Experience So Far. The existing judicial opinions and legislative provisions purport to adopt a principle of reformation that is consistent with the theme that the technique of reform should be shaped to grant every appropriate opportunity for the property to go to the intended beneficiaries. The New Hampshire 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." Edgerly v. Barker, 66 N.H. 434, 467, 31 A. 900, 912 (1891) (citation omitted). The Hawaii court 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." In re Estate of Chun Quan Yee Hop, 52 Hawaii 40, 46, 469 P.2d 183, 187 (1970). The Mississippi court 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." Carter v. Berry, 243 Miss. 321, 370, 140 So.2d 843, 852 (1962). The California statute provides that the authority to reform "shall be liberally construed and applied to validate [the] interest to the fullest extent consistent with [the] ascertained intent." Cal. Civ. Code § 715.5.

Unfortunately, all the cases that have arisen so far have been of one general type -- contingencies in excess of 21 years -- and all of the courts have simply ordered a reduction of the age or period in gross to 21.

Guidance as to How to Reform. The above reformation efforts are unduly narrow. Subsection (b) is to be understood as authorizing a more appropriate technique -- judicial insertion of a saving clause into the instrument. See Browder, Construction, Reformation, and the Rule Against Perpetuities, 62 Mich. L. Rev. 1 (1963); Waggoner, Perpetuity Reform, 81 Mich. L. Rev. 1718, 1755-1759 (1983); Langbein & Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U. Pa. L. Rev. 521, 546-49 (1982). This method of reformation allows reformation to achieve 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. See Waggoner, Perpetuity Reform, 81 Mich. L. Rev. 1718, 1756 n. 103 (1983). The insertion of a saving clause grants a more appropriate opportunity for the property to go to the intended beneficiaries. Furthermore, it would also be a suitable technique in fertile octogenarian, unborn widow, and administrative contingency cases. A saving clause is one of the formalistic devices that a professionally competent lawyer would have used before the fact to assure initial validity in these cases. Insofar as other violations are concerned, the saving clause technique also grants every appropriate opportunity for the property to go to the intended beneficiaries.

In selecting the lives to be used for the perpetuity-period component of the saving clause that in a given case is to be inserted after the fact, 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 disposition. While the exact make-up of the group in each case would be settled by litigation, the individuals designated in Section 1.3(2) of the Restatement (Second) of Property (Donative Transfers) (1983) as the measuring lives would be an appropriate referent for the court to consider. Care should be taken in formulating the gift-over component, so that it is appropriate to the dispositive scheme. Among possible recipients that the court might consider designating are: (i) the persons entitled to the income on the 21st anniversary of the death of the last surviving individual designated by the court for the perpetuity-period component and in the proportions thereof to which they are then so entitled; if no proportions are specified, in equal shares to the permissible recipients of income; or (ii) the grantor's descendants per stirpes who are living 21 years after the death of the last surviving individual designated by the court for the perpetuity-period component; if none, to the grantor's heirs at law determined as if the grantor died 21 years after the death of the last surviving individual designated in the perpetuity-period component.

Violation Must be Determined in a Judicial Proceeding Commenced On or After the Effective Date of this Act. The equitable power to reform is recognized by Section 5(b) only in situations where the violation of the former rule against perpetuities is determined in a judicial proceeding commenced on or after the effective date of this Act. The equitable power to reform would typically be exercised in the same judicial proceeding in which the invalidity is determined.

SECTION 6. SHORT TITLE. This [act] may be cited as the Uniform Statutory Rule Against Perpetuities.

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [act] among states enacting it.

SECTION 8. TIME OF TAKING EFFECT. This [act] takes effect

_____.

SECTION 9. [SUPERSESSION] [REPEAL]. This [act] [supersedes the rule of the common law known as the rule against perpetuities] [repeals (list statutes to be repealed)].

COMMENT

The first set of bracketed text is provided for states that follow the Common-law Rule Against Perpetuities. The second set of bracketed text is provided for the repeal of statutory adoptions of the Common-law Rule Against Perpetuities, statutory variations of the Common-law Rule Against Perpetuities, or statutory prohibitions on the suspension of the power of alienation for more than a certain period. Some states may find it appropriate to enact both sets of bracketed text by joining them with the word "and." This would be appropriate in states having a statute that declares that the Common-law Rule Against Perpetuities is in force in the state except as modified therein.

A cautionary note for states repealing listed statutes. If the statutes to be repealed contain exclusions from the rule against perpetuities, states should consider whether to repeal or retain those exclusions, in light of Section 4(7) of this Act that excludes from the Uniform Statutory Rule Against Perpetuities property interests, powers of appointment, and other arrangements "excluded by another statute of this State."