
Every general practitioner must be concerned with and understand the awesome and terrible realities of the Rule Against Perpetuities. Despite the protestations of attorneys that they don't and won't encounter perpetuity problems in practice, the Rule Against Perpetuities is a potential problem for any attorney since any attorney may draft a will, deed, or trust, and may have to examine a title in the course of representing a buyer in a real estate transaction. Perpetuity problems may arise in a great number of practical situations. For example, many practitioners represent clients who are desirous of benefiting their children and grandchildren. If the attorney decides to establish an inter-vivos trust for the benefit of the client's children, with a remainder to the grandchildren living at the death of the children, care must be exercised that the Rule Against Perpetuities is not violated. Likewise, if a client desires to benefit his son, his son's widow, and their surviving children, perpetuities problems may develop. This is especially true where there is a possibility of the son divorcing his current wife and remarrying. Furthermore, the penalties for violating the Rule may not be limited merely to the transferor and his intended beneficiaries. The spectre of a malpractice suit against the attorney who drafts a will violative of the Rule has arisen.

The task of the attorney in this area has been further complicated by intensive legislative activity. Since 1955, the Rule has been subjected to legislative treatment in California, Connecticut, Idaho, Kentucky, Maine, Maryland, Massachusetts, Montana, New York, Pennsylvania, Vermont, and Washington.

2 Id. at 472.
12 N.Y. Real Property Law §42.
The practical problems posed by the Rule and the legislative ferment in this corner of the law have converged to make an understanding of the Rule an urgent necessity. Any vacuum in an attorney's understanding of the Rule will be more than adequately filled by Professor Dukemmer's well-written book. This book is a concise, cogent, and comprehensive literary and legal gem.

Although this book should now be recognized as the primary authority on the Rule in Kentucky, it is of immense value to attorneys everywhere for a number of reasons. First of all, it contains an excellent summary of the technical refinements of the Rule and its policy implications. In this respect, it is in the tradition of Professor Leach's classic article, *Perpetuities in a Nutshell.* In passing, it should be noted that Professor Leach wrote the foreword to this book. Having two fine scholars like Leach and Dukemmer in one volume is like having Lloyd's insurance on the success of a venture.

Second of all, this book describes and explains the recently enacted Kentucky Perpetuity statute which contains "wait and see" and "cy-pres" features. The common law Rule Against Perpetuities has been aptly described as a "might-have-been" rule. The common law rule invalidated an interest if there was even a remote or fantastic possibility, at the outset, that the interest might vest beyond the perpetuity period. Under the Kentucky statute, the validity of an interest is determined at a later date upon the basis of what actually happens. If despite "waiting and seeing," the interest is still void under the Rule, the Court is directed, under the cy-pres provision, to reform the instrument (within the limits of the Rule) to approximate most closely the intention of the creator of the interest. The explanation of these innovations should be helpful to lawyers and legislators in other states. Due to the missionary-like zeal of Professor Leach, a nationwide statutory trend appears to be developing in favor of the adoption of "wait and see" and "cy-pres" provisions.

16 51 Harv. L. Rev. 638 (1938).
18 See the Connecticut, Maine, Maryland, Massachusetts, Pennsylvania, Vermont, and Washington statutes cited, notes 5, 8, 9, 10, 13, 14, and 15 supra.
19 Coupled with their "wait and see" provisions Vermont and Washington, like Kentucky, have complete "cy-pres" provisions. See statutes cited, notes 14 and 15 supra. See also Idaho Code Ann. 555-111 (1957). In addition, in Connecticut, Maine, Maryland, Massachusetts, and New York, there are limited cy-pres provisions which are operative to save gifts which are contingent upon any person attaining an age in excess of 21. See statutes cited, notes 5, 8, 9, 10, and 12 supra.
This book is also of importance to lawyers and legislators in states in which the Rule Against Perpetuities has been developed in a maze-like fashion in an impassable jungle of "disorganized confusion" alongside of such rules as the Suspension of the Power of Alienation Rule and the rules relating to Restraints on Alienation. Such a labyrinthine state of affairs has existed in such states as Arizona, California, the District of Columbia, Idaho, Indiana, Michigan, Minnesota, Mississippi, Montana, New York, and Oklahoma. Professor Dukemmer's keen analysis of the situation in Kentucky and his solution of eliminating the confusion by abolishing the suspension of the power of alienation rule and declaring the common law rule to be in existence should prove to be of invaluable assistance to lawyers and legislators in other jurisdictions who have been struggling with the same problems.

---

20 Chairman of the Kentucky Judiciary Committee as quoted in Dukemmer, Perpetuities in Action 52 (1962).
22 Prior to 1959, California had both a suspension of the power of alienation rule and the common law rule. See Turrentine, The Suspension Rule and Other Statutory Restrictions on Alienation in California, 9 Hastings L.J. 262 (1958).
23 The language of the D.C. Code is phrased in terms of the suspension of the power of alienation but it is possible that the District also has the common law rule. D.C. Code tit. 45, §102 (1961). See Undergraff. The Rule Against Perpetuities in the District of Columbia, 14 Geo. L.J. 337 (1926).
24 Since 1957, Idaho has a suspension rule applicable only to realty. Idaho Code Ann. §55-111 (1957). Evidently, there is no (and never was) a common law rule relating to remoteness of vesting. Locklear v. Tucker. 69 Idaho 84, 203 P.2d 380 (1949).
25 Since 1945, only the common law rule has been in force. Ind. Ann. Stat. §51-105 (1951). Prior to 1945, Indiana had a suspension rule and it is unclear whether it also had the common law rule. See Gavit, Indiana Law of Future Interests, Descent and Wills, §129 (1934).
27 Minnesota is still like pre-1949 Michigan. See note 26 supra.
28 Realty transfers are governed by a "successive donee" statute and personality transfers by the common law rule. See Christy and Brand. The Mississippi Two Donee Statute and the Common Law Rule Against Perpetuities. 30 Miss. L.J. 221 (1959).
31 It is unclear which rule is in force. See Browder, Perpetuities in Oklahoma, 6 Okla. L. Rev. 1 (1953).
There is yet another value to be derived from the book. It dramatically exposes the disparity between what theorists, like Gray, say the Rule Against Perpetuities is, and how the judges of a particular jurisdiction interpret the Rule. Like the proverbial chancellor's foot, there may be as many Rules Against Perpetuities as there are judges.

The nationwide significance of the book is dwarfed only by its importance to Kentucky lawyers. It is a brief writer's delight. It contains an examination of all of the Perpetuities cases decided by the Kentucky Court of Appeals (and the briefs and records on appeal). The author also has prepared, in various appendices, tables showing which cases are consistent with orthodox perpetuities doctrine, which cases are contrary to orthodox doctrine, and the extent to which the new statute would affect the results reached in prior cases. Despite the values that the product of this mode of research has for appellate practice, I would, however, be remiss if I failed to point out one shortcoming it has if it is used as the sole source of policy-making in the legislative field. It fails to take into account the great number of cases which are settled either before or after a trial ruling and the cases where the perpetuities issue exists but is never raised.32

The brilliance of this work may also be its major shortcoming. In the course of reading this volume and its skillful exposure of the defects in the existing law, one envisions a superior statute to be the end product. Yet, as I shall shortly demonstrate, the enacted statute is inadequate in certain respects. In all fairness, however, to the draftsman, Professor Dukeminier, a superior but more intricate statute may have been difficult to "sell" to the legislature.

In attacking the statute, in explanation of which this book was written, I do not purport to align myself with the so-called "anti-wait and see" camp.33 "Wait and see" legislation has been criticized on the grounds that it makes the ascertainment of the measuring lives difficult and prevents an early determination of title. One commentator has even argued that it may preclude an action against a trustee for a breach of trust.34 I, personally, am in total agreement with Professor Dukeminier that the inconveniences which flow from a "wait and see" requirement are outweighed by the resulting fairness

I also do not share the view that the problem can be effectively dealt with by specific statutes dealing with specific problems such as the "fertile octogenarian" and "the unborn widow." For example, New York has adopted a specific provision purporting to eliminate the so-called "unborn widow" case. While this section does save the gift to the spouse, which was valid at common law anyhow, it does not necessarily save the future interest following a gift to the spouse which was void at common law. Thus, the criticisms of the Kentucky statute offered by this reviewer are those of a friendly critic.

I find the statute to be defective in the following respects:

(1) How long do we wait and see?

The statute does not explicitly tell us how long we "wait and see." In such circumstances, a reasonable interpretation might be that we "wait and see" for lives in being and twenty-one years—the perpetuities period. Yet, despite a lack of a manifestation of contrary legislative intent in the statute itself, Professor Dukeminier would have us believe that we "wait and see" for lives in being or twenty-one years, but not both. He assumes that such a standard will be applied since such an interpretation is embodied in the statute's legislative history. This appears to be a sudden and amazing demonstration of faith in the judiciary which was primarily responsible for the "disorganized confusion" of the pre-existing law. Such an interpretation, absent an express manifestation of legislative intent in the statute, is incongruous since it establishes different measuring periods for the basic perpetuities period and for the time of taking a second look.

It may also be argued (I would hope without success) that the failure to explicitly state how long we "wait and see" causes the statute to be void for indefiniteness. Such a contention has been raised with respect to the measuring lives aspect of the Pennsylvania statute.

Furthermore, the legislative history cited in the text results in the taking of a second look at the termination of prior life estates if the future interest is limited to take effect at the termination of one or more life estates. This appears to be a fair result if there is a

35 For an excellent analysis of the arguments, pro and con, see Waterbury, Some Further Thoughts on Perpetuities Reform, 42 Minn. L. Rev. 41 (1957).
36 See Bordwell, note 33 supra.
37 N. Y. Real Property Law §42.
38 Although it should be apparent that I am not too enthusiastic about "cy-pres."
remainder limited to the children of the life tenant. Suppose, however, we have a transfer "to A for life, remainder to the children of B who attain 30." The legislative history cited in the text would not permit the taking of a second look at the death of the parent B even though B, under the terms of the statute, is a life in being!

Finally, the statute does not explicitly state for how long we "wait and see" to determine the validity of interests created by the exercise of power of appointment. Even at common law the court would take a "second look" at the date of the exercise of a power to determine the validity of the interests created. By the express language of the Massachusetts, Maine, Connecticut, and Maryland statutes, these "wait and see" statutes may give you an opportunity to take into consideration facts occurring subsequent to the date the power is exercised. Professor Dukeminier does not definitely indicate whether a similar result would be reached under the Kentucky statute.

(2) The cy-pres provision.

The major objection to this provision is that it injects into perpetuities cases the most difficult of all construction problems, i.e., that of "deciding what a dead man would have thought had he thought about something that he didn't think about." Perpetuities litigation is likely to become more involved, protracted, and costly.

Professor Dukeminier appears to interpret the cy-pres provision as mandatory and as precluding the court from decreeing total and/or infectious invalidity Yet, there may be situations where total and/or infectious invalidity might be desirable.

The statute directs the court to reform the interest to approximate the intent of the "creator of the interest." As applied to powers of appointment, it is unclear whether the court is to attempt to approximate the intent of the donee of the power. In passing, it should be observed that the Leach and Logan Standard Saving Clause also suffers from the same ambiguity.

The cy-pres provision also appears, as interpreted by Professor Dukeminier, to permit a court to reform an interest created by an

---

40 Ligget v. Fidelity and Columbia Trust Co., 274 Ky. 387, 118 S.W.2d 720 (1938).
exercise of a power of appointment, even though the donor provided
for a gift in default of appointment. It is unclear as to what extent,
if any, the court is to be influenced by the gift in default of appoint-
ment in ascertaining the intent of the creator of the interest.

The cy-pres provision may also cause sub-classes to be inequitably
treated. Although the sub-classes exception to the all or nothing
rule has not been applied in Kentucky as yet, most of the cases re-
jecting the exception may be distinguished on the grounds that the
ultimate gifts were not specifically separated into sub-classes. There
is English authority that the use of per stirpes language does not
create a sub-class. Furthermore, there have been some judicial indi-
cations in Kentucky that the court might be receptive to the sub-class
exception. The inequity created is illustrated by the following
example:

Testator devises property to A for life, then to the children of
A for their lives, and upon the death of any child of A, to pay a
share of the principal to such of that deceased child's children as
attain age twenty-five (and they are not to receive the income
in the meantime). A has two children named C-1 and C-2, both
of whom were born before the testator died. A second look at A's
death may reveal that A had no other children and that C-1 pre-
deceased A leaving surviving an only child, GC-1, who was born
before the testator died. Since GC-1 is a life in being, his gift of
principal is obviously valid, even if it is subject to a condition
precedent of attaining age twenty-five, since he must attain twenty-
five within his own lifetime. Hence, GC-1 must still attain age
twenty-five to take. However, let us assume that C-2 survives A and
that the children of C-2 (some of whom were less than four years
old at C-2's death) cannot be considered lives in being (more were
born after the testator's death). These children might attain twenty-
five more than twenty-one years after the death of lives in being.
Since a "second look" does not help us, we must utilize the cy-pres
provision. As far as the subclass of children of C-2 is concerned, we
will validate the gift to them by permitting them to take at age
twenty-one since the gift now vests in them no later than twenty-
one years after the death of C-2 (and a "second look" reveals that
C-2 is a life in being). The inequity is that GC-1 who is not a
member of this sub-class must attain age twenty-five before he can
take, while the children of C-2 take upon attaining twenty-one.

(3) The Lives in Being.

Although this statute avoids the problems presented by the Penn-
sylvania statute by defining lives in being as lives whose continuance
has a causal relationship to the vesting or failure of an interest, it
reaches an anomalous result in the area of options. An option which
is personal to A is valid, whereas an option which is assignable by A

47 See Tuttle v. Steele, 281 Ky. 218, 135 S.W.2d 436 (1939).
48 See Dukemnier, op. cit, supra note 20, at 85.
is valid for only twenty-one years.\textsuperscript{48} I do not comprehend why it shouldn't be valid for either twenty-one or A’s lifetime (whichever is longer) on the theory that A may be used as a life in being.

\textbf{(4) Related Rules.}

It is uncertain whether the statute will be applicable, by analogy, to certain related rules such as the Rule Against Accumulation and the Rule Prohibiting the Indestructability of Private Trusts.\textsuperscript{49} The failure to deal with these rules may be justified on the grounds that it is doubtful whether these rules exist in Kentucky.

\textbf{(5) Vesting.}

Professor Dukemmier's graphic analysis of the confusion surrounding the meaning of the word “vest” and the uncertainty as to whether the Common Law Rule Against Perpetuities required a gift to vest in interest or vest in possession is probably the most striking indictment which may be leveled at the statute's failure to deal with these problems.

\textbf{(6) Right of Entry.}

Under the statute, a fee simple subject to a right of entry becomes a fee simple absolute if the specified contingency does not occur within thirty years from the date of the creation of these interests. Thus, as a practical matter, seriously impedes one from subjecting future estates following life estates to a right of entry. For example, O transfers Blackacre to A for life, remainder to B and his heirs so long as liquor is not sold upon the premises, but if it is, O and his heirs may re-enter and take the premises. If A lives more than thirty years, O and his heirs will lose the benefit of the restriction. A fairer approach to the problem would have been to compute the thirty-year period from the date B’s estate became possessory. The desirable certainty of land title could have been achieved by imposing a requirement that the restriction be re-recorded periodically.

Under the statute, a shifting executory interest following a determinable fee is validated for thirty years. Executory interests which divest a fee are not so benignly treated. Yet, the statute offers no standard for distinguishing between a fee simple subject to a divesting executory interest and a determinable fee followed by an executory interest. One of the reasons offered for abolishing the possibility of reverter (which the Statute does) is the difficulty of distinguishing.

between the possibility of reverter and the right of entry. One has equal difficulty in distinguishing between these two types of executory interests. Professor Dukeminier has urged elsewhere that there is no distinction between contingent remainders and executory interests. The statute would require us to differentiate among executory interests.

Finally, while options were subject to the Rule Against Perpetuities at common law, rights of entry weren't. Frequently, it was difficult to ascertain whether an option or right of entry had been created. Although the statute does tend to narrow the gap in legal consequence that exists between the two devices, it offers no divining rod for identifying these interests.

In conclusion, I would like to reiterate that it is not the purpose of this reviewer to sound the alarm for abolition of the statute. Rather, it is a cry for clarification. Any revision can and should be based upon Professor Dukeminier's excellent study. It is to be hoped that the critical tone of this review does not obscure the fact that a contract to buy this unique book would be specifically enforceable.

William Schwartz
Professor of Law
Boston University


This work on the role of the jury in the administration of civil justice consists of two parts: the author's "critique" of the jury, followed by a selection of "what thoughtful lawyers and judges have said about the jury since its inception." The initial portion purports

to examine the jury as it operates today, to compare the arguments pro and con, to marshal what is known about its operations, to put it in context within the whole framework of government as well as within the process of resolving disputes between litigants, and lastly, to examine suggestions for its improvement.

To the accomplishment of these sizable tasks the author allocates less than half of the book, or roughly 30,000 words!

In actuality, this section of the work amounts to little more than a highly simplified and somewhat idealized explanation of the oper-

50 Contingent Remainders and Executory Interests; A Requiem for the Distinction, 43 Minn. L. Rev. 13 (1958).
1 Joiner, Civil Justice and the Jury xviii (1962).
2 Id. at xvii.