Florida's Statutory Rule Against Perpetuities

David F. Powell

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FLORIDA'S STATUTORY RULE AGAINST PERPETUITIES

DAVID F. POWELL*

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In the aftermath of the sweeping changes in the federal Estate, Gift and Income Tax laws enacted by Congress over the past few years, it is not surprising that the re-learning of these important and basic areas has been foremost on the agenda of most estate practitioners. As a consequence, however, other less publicized changes in the law may have gone unnoticed. One such change occurred in 1977 with the enactment of chapter 77-23 of the Florida Laws. This complex addition to our laws added Florida to the growing list of jurisdictions that have reformed and modified the orthodox common-law Rule Against Perpetuities. In this article I offer a long overdue examination of Florida's statutory Rule Against Perpetuities with special emphasis on the practical impli-

1. 1977 Fla. Laws 31. Chapter 77-23 created Fla. Stat. § 689.22 (1981) (effective January 1, 1979). To make this article more readable, reference to the statute in text is to chapter 77-23. Reference to individual sections in text is to "subsection (1)," "subsection (2)(a)," etc.


The legislative remedial trend has been accompanied by a judicial trend in the same direction. Courts in Hawaii, Kansas, Mississippi, New Hampshire and West Virginia have either declined to apply the orthodox common-law Rule or have judicially reformed it. See Estate of Chun Quan Yee Hop, 469 P.2d 183 (Hawaii 1970); In re Foster's Estate, 376 P.2d 784 (Kan. 1962); Phelps v. Shropshire, 183 So. 2d 158 (Miss. 1966); Carter v. Berry, 140 So. 2d 843 (Miss. 1962); Merchants Nat'l Bank v. Curtis, 97 A.2d 207 (N.H. 1953); Edgerly v. Barker, 31 A. 900 (N.H. 1891); Berry v. Union Nat'l Bank, 262 S.E.2d 766 (W. Va. 1980).

See also Story v. First Nat'l Bank & Trust Co., 156 So. 101 (Fla. 1934) (discussed infra note 132).

Additionally, England and nine other Commonwealth jurisdictions have enacted perpetuities reform legislation. Perpetuities and Accumulations Act, 1964, c. 55 (England); Perpetuities and Accumulations Ordinance, 1970, No. 26 (Hong Kong); Perpetuities Act, 1964, No. 47 (New Zealand); Perpetuities Act, 1966, c. 2 (Northern Ireland); Perpetuities Ordinance, 1968 (second session), c. 15 (Northwest Territories, Canada); The Perpetuities Act, 1966, c. 113, as amended by The Perpetuities Amendment Act, 1968, c. 94 (Ontario, Canada); Perpetuities and Accumulations Act, 1972, 21 Eliz. 2, No. 9 (Queensland, Australia); Perpetuities and Accumulations Act, 1968, 17 Eliz. 2, No. 7750 (Victoria, Canada); Law Reform (Property, Perpetuities, and Succession) Act, 1962, 11 Eliz. 2, No. 83 (Western Australia); Perpetuities Ordinance, 1968 (second session), c. 2 (Yukon Territory, Canada).
cations of those provisions which differ from prior law.

I. THE NATURE, PERIOD AND SCOPE OF THE STATUTORY RULE

A. An Overview of Chapter 77-23

Before considering the various parts of chapter 77-23 individually, a brief overview of the statute might be helpful. Apart from the meaning of "vest" and the consequences of a perpetuities violation, chapter 77-23 codifies every aspect of the Rule Against Perpetuities in Florida. The statute begins with a restatement of the Rule. The terminology employed here is orthodox; it should be familiar to anyone having even a passing familiarity with this area of the law. Following this restatement is an intricate set of provisions relating to the scope of the codified Rule. Some of these provisions, such as those dealing with the treatment of revocable trusts and foreign trusts containing Florida real estate, merely clarify what is believed to be prior law. Most, however, work substantial changes.

Chapter 77-23 completely revises the Rule as it applies to commercial transactions. The basic approach is to remove them from the reach of the Rule. Thus, exemptions exist for trusts with transferable trust certificates (e.g., real estate investment trusts), for non-disturbance agreements between lessors and lessees, and for a variety of purchase options, including pre-emptive options in the nature of a right of first refusal, options appendant to leasehold interests, and options in gross. These latter options, however, are subjected to a new restriction. They may last only for a period of forty years. Somewhat similarly, leases limited to commence in the future are exempt, although here again the statute imposes a forty-year restriction. In futuro leases must take in possession within forty years of their creation.

Fiduciary powers are also given special treatment in chapter 77-23. The administrative powers of a trustee, the powers a trustee

7. FLA. STAT. § 689.22(3)(a)6 (1981).
8. FLA. STAT. § 689.22(3)(a)7 (1981).
9. Id.
has to advance income or principal to a beneficiary whose interest in principal is indefeasibly vested in quality and quantity, and the allocation or discretionary spray powers of a trustee are all exempt from the statutory Rule. However, chapter 77-23 restricts the time period in which allocation or discretionary spray powers may be validly exercised to the period of the Rule Against Perpetuities. Attempted exercises after that time are void.

Apart from the provisions which define the scope of the statutory Rule Against Perpetuities, chapter 77-23 makes a variety of changes in the way the Rule is to be applied by courts. The harshness of the common-law requirement of absolute certainty of timely vesting is mitigated by a series of four rules of construction. Additionally, the common-law "might have been" test under which validity is determined on a prospective basis only is substantially altered by the limited acceptance of the controversial "wait and see" doctrine. And for one frequently recurring type of violation—that caused by an age contingency in excess of twenty-one—chapter 77-23 provides that the age condition is to be automatically reduced to twenty-one if to do so would save an otherwise invalid interest.

Finally, chapter 77-23 makes a radical and arguably unwise change in the treatment of interests created by the exercise of powers of appointment. The common-law Rule draws a distinction between presently exercisable general powers and all others. Chapter 77-23 eliminates this distinction; all powers of whatever type are now covered by the rules previously reserved for presently exercisable general powers. More importantly, chapter 77-23 subjects all powers to a new restriction that raises serious questions about the validity of some frequently used trust provisions.

B. The Nature of the Rule

The common-law Rule Against Perpetuities evolved gradually by case decision in the seventeenth, eighteenth and nineteenth centu-

14. Id.
15. FLA. STAT. § 689.22(5)(a)-(d) (1981).
19. Id. For a discussion of this new restriction, see infra pp. 848-56 (particularly pp. 856).
ries as one of several rules of property law designed generally to further the alienability of property.\textsuperscript{20} Historical treatments of the Rule establish that it evolved in response to judicial concerns over potential accumulations of wealth and power through the creation and perpetuation of large family dynasties.\textsuperscript{21} Today, the Rule is believed to serve three slightly different objectives. First, it strikes a necessary balance between the natural desires of present generation property owners to extend control over their property into the future for family, tax or other reasons, and similar desires of future owners to own and control "their" property free of the restrictions of past owners. Second, it is instrumental in limiting dead-hand control of property, thereby assuring that the wealth of the world will be controlled by the living. Third, and to a lesser extent, the Rule serves to keep property productive by keeping it alienable.\textsuperscript{22}

Despite some early confusion on the point, it is now well settled in Florida and elsewhere that the Rule Against Perpetuities is a rule against remoteness of vesting.\textsuperscript{23} It is therefore functionally distinguishable from the common-law Rule Against Restraints on Alienation which applies to direct restraints on alienation whether or not the interests to which they are appended are vested.\textsuperscript{24} More-

\textsuperscript{20} Prior to the enactment of chapter 77-23, the common-law Rule was in force in Florida. E.g., Adams v. Vidal, 60 So. 2d 545, 549 (Fla. 1952); Story v. First Nat'l Bank & Trust Co., 156 So. 101, 104 (Fla. 1934).


Professor Simes argued that in contemporary society where most wealth is represented by corporate securities or other forms of intangible personal property rather than by land, and where most future interests are equitable rather than legal, the Rule Against Perpetuities cannot be justified solely on the basis of alienability for the sake of productivity. The productivity of property held in corporate form is not impaired when contingent future interests are created in corporate stock. Similarly, equitable contingent future interests do not impair the productivity of property held in trust as long as the trustee has a power of sale. Most trust instruments grant such a power and, even when the instrument is silent, a power of sale is frequently granted as a matter of law. See, e.g., Fla. Stat. §§ 737.402, 738.12 (1981); Simes, supra, at 712-21. But cf. Schuyler, \textit{Should the Rule Against Perpetuities Discard Its Vest?}, 56 Mich. L. Rev. 683, 691 (1958) (some of the productivity rationale may remain because not all trust instruments include a power of sale, not all jurisdictions grant such powers as a matter of law and, when these situations co-exist, courts are reluctant to imply a power of sale).


\textsuperscript{24} See generally 6 A.L.P., \textit{supra} note 23, at §§ 26.1-132; Restatement (Second) of
over, the Rule Against Perpetuities differs from the statutory Rules Against Suspension of Alienation enacted in some states in that the perpetuities Rule, unlike these other rules, is not satisfied merely because there exists a group of persons who by concert of action can convey a fee simple title.

Because of its emphasis on vesting, the Rule is said to be concerned with the time when interests commence, not when they terminate. This is somewhat misleading, however, because "vested" is not synonymous with "possession." A remainder limited in favor of an ascertained and living person and which is not subject to any condition precedent is "vested in interest" as opposed to "vested in possession." Such an interest satisfies the Rule even though it might not take in present possession until after the expiration of the perpetuities period. For somewhat similar reasons, it is now generally agreed that the Rule does not directly limit the duration of trusts. A trust with a potential maximum duration in excess of the perpetuities period is valid provided the beneficial interests vest in time. As a practical matter, however, the Rule indirectly


25. As part of its perpetuities reform in 1830, New York introduced a statutory Rule Against the Suspension of Alienation. Although much of the 1830 legislation was subsequently repealed, the Suspension Rule remains a part of New York law. As currently constituted, the New York statutory Rule Against Suspension of Alienation provides:

(a)(1) The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred.

(a)(2) Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years.


Several states have enacted statutes modeled after the New York suspension statute, but the precise meaning of most of the provisions of these statutes is in doubt. See generally 5 R. Powell, supra note 21, at ¶ 808-827; L. Simes & A. Smith, supra note 21, at §§ 1411, 1425-1436.


27. 6 A.L.P., supra note 23, at § 24.3; J. Gray, supra note 22, at § 205; accord Reimer v. Smith, 142 So. 603 (Fla. 1932).

28. J. Gray, supra note 22, at §§ 121.1-5; 5 R. Powell, supra note 21, at ¶ 772; Restatement (Second) of Property § 2.1 (1983) (Donative Transfers); L. Simes & A. Smith, supra note 21, at § 1391. Honorary trusts and trusts for unincorporated associations are exceptions. See J. Gray, supra note 22, at §§ 894-909.2; 5 R. Powell, supra note 21, at ¶ 773; Restatement of Property §§ 379-380 (1944); L. Simes & A. Smith, supra note 21, at
limits the duration of most usable trusts to the perpetuities period.29

Nothing in chapter 77-23 alters the nature of the Rule Against

§§ 1394-1395.

In England, a trust may be terminated at any time at the request of its beneficiaries. In the United States, however, the prevailing rule follows the holding of Claflin v. Claflin, 20 N.E. 454 (Mass. 1889), that a trust may not be terminated by the consent of its beneficiaries as long as some material purpose of the trust remains to be served. RESTATEMENT (SECOND) OF TRUSTS § 337 (1957); 4 A. SCOTT, THE LAW OF TRUSTS §§ 329A, 337 (3d ed. 1967). Accord Byers v. Beddow, 142 So. 894 (Fla. 1932); Featherston v. Tompkins, 339 So. 2d 306 (Fla. 3d DCA 1976). Consequently, in most states, including Florida, a trust may be made "indestructible" merely by placing a provision to that effect in the trust instrument.

In commenting on "indestructible" trusts, Gray predicted the evolution of a common-law rule directly limiting their duration. J. GRAY, supra note 22, at § 121.7. There is evidence of the emergence of such a rule, although its exact parameters are not clear. See RESTATEMENT (SECOND) OF PROPERTY § 2.1 (1983) (Donative Transfers); L. SIMES & A. SMITH, supra note 21, at §§ 1391, 1393.

A few states have enacted statutes which directly limit the duration of private trusts. See, e.g., MINN. STAT. ANN. § 501.11(6) (West Supp. 1983) (applicable to trusts other than pension or similar trusts); Nev. Rev. Stat. § 166.140 (1979) (applicable to spendthrift trusts only). Furthermore, the practical effect of the statutory Rule Against Suspension of Alienation in force in New York and several other states is to limit the duration of spendthrift trusts. See supra note 25 for a discussion of statutory Rules Against Suspension of Alienation.

Several Florida cases where the issue of trust duration is mentioned illustrate the confusion that can be caused through the use of imprecise vocabulary or overly broad dicta. Two cases may be read to refer to a rule limiting trust duration. See Porter v. Baynard, 28 So. 2d 890 (Fla. 1946), cert. denied, 330 U.S. 844 (1947); Pelton v. First Sav. & Trust Co., 124 So. 169 (Fla. 1929), overruled by implication in Pattillo v. Glenn, 7 So. 2d 328 (Fla. 1942). However, these decisions may also be explained as following the common-law Rule Against Accumulations where the duration of a trust can be critical. See infra note 112.

Two other cases imply that private trusts cannot last longer than the perpetuities period. Montgomery v. Carlton, 126 So. 135 (Fla. 1930) (containing dicta that private trusts can endure only for lives in being plus 21 years); Green v. Lewis, 151 So. 270 (Fla. 1933) (implying a "law against perpetuities" that limits trust duration). These contrary indications notwithstanding, the weight of Florida case authority follows the prevailing view. Thus, in Story v. First Nat'l Bank & Trust Co., 156 So. 101, 105 (Fla. 1934), the Florida Supreme Court stated:

The weight of authority in this country also supports the rule that an estate vested does not necessarily include a right to possession. In other words, if the estate vests within the time, it is not subject to the rule against perpetuities, even if the time may be remote when it comes into possession. The doctrine of remoteness being concerned solely with the question of vesting, would in no sense be violated by a will creating a trust, if the estate therein created vests within the time allowed under the rule against perpetuities though possession be deferred and the trust continued after the time fixed for vestiture. This rule is almost universal, and much error has resulted from failure to bear it in mind. (citations omitted)

 Accord In re Will of Jones, 289 So. 2d 42 (Fla. 2d DCA 1973). But see In re Estate of Jones, 318 So. 2d 231 (Fla. 2d DCA 1975) (discussed infra note 109).

29. See RESTATEMENT OF PROPERTY, ch. 26, topic 2, Introductory Note, at 2212-13 (1944). See also infra note 111.
Perpetuities. The statutory Rule remains a rule against remoteness of vesting. Chapter 77-23 does not require interests to become posses-sory within the perpetuities period and nothing in the statute purports to limit the duration of trusts. Likewise, the policies served by the statutory Rule are identical to those served by the common-law Rule. Chapter 77-23 does, however, reflect a greater awareness of the numerous instances where the common-law Rule has been applied to transactions where the policies it seeks to serve are not germane. This greater awareness serves as the basis for the previously mentioned exemption provisions.

C. The Perpetuities Period

Gray's universally accepted formulation of the common-law Rule states that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." In the interest of accuracy, two footnotes to this formulation are in order. First, in applying the Rule, a person in ventra sa mere is treated as if he were alive as of his conception. In other words, a person conceived before but born after the creation of an interest is a life in being. And an interest limited in favor of an unborn person is not invalid because of the possibility he might be conceived within the perpetuities period but be born thereafter. In this latter situation, the period of the Rule simply expands to take into account the actual period of gestation involved.

The second footnote involves the rules relating to the selection

30. J. Gray, supra note 22, at § 201. In Adams v. Vidal, 60 So. 2d 545, 549 (Fla. 1952), the Florida Supreme Court stated the Rule Against Perpetuities to be "that an estate or interest in order to be good must vest within the period of life or lives in being at testator's death or within twenty-one years thereafter with the term of gestation added in case of posthumous birth."

The fixed in gross period of 21 years can be traced to early decisions upholding the validity of limitations in which the vesting of interests was postponed until the takers attained the age of majority. J. Gray, supra note 22, at §§ 171-175. Subsequently, courts extended the period of the Rule to include some "reasonable period" beyond lives in being even though no actual period of minority was involved. Lloyd v. Carew, 137, 1 Eng. Rep. 93 (H.L. 1698). Gray believed this extension could not be defended on principle. J. Gray, supra note 22, at §§ 186-188. Nevertheless, it occurred, and with the decision of Cadell v. Palmer, 6 Eng. Rep. 956 (H.L. 1833), "reasonable period" became a set in gross period of 21 years.

31. 6 A.L.P., supra note 23, at § 24.18; J. Gray, supra note 22, at § 220; J. Morris & W. Leach, supra note 23, at 64-65; Restatement of Property § 374 comment p (1944); L. Simes & A. Smith, supra note 21, at § 1224.

32. The gestation rule does not permit an extension of the perpetuities period by an additional nine or ten months in gross. See authorities cited supra note 31 (particularly J. Gray at § 222).
of the permissible measuring lives. In his statement of the common-law Rule, Gray referred to the singular "life in being." Notwithstanding this, it is well settled that the period of the Rule is not confined to the duration of a single life plus twenty-one years. More than one person's life may be used to measure the period. Moreover, the permissible measuring lives are not restricted to those of the transferor, the beneficiaries of the transfer or even the relatives of either. Any person's life may be considered. Accordingly, an interest made contingent until the last to die of a designated group of persons, all of whom are alive at the creation of the interest, is valid even though some or even all of the designated group bear no nexus to the transferor or his beneficiaries other than the fact that they are referenced in the limitation. The only restriction is a practical one. The designated group may not be so numerous as to make proof of its end unreasonably difficult to ascertain.

Throughout the modern perpetuities reform movement, several proposals for modifying the period of the common-law Rule have been advanced. In general, these proposals have focused on that aspect of the common-law Rule which permits an artificial extension of the perpetuities period through the use of unrelated extrinsic measuring lives. In England, for example, courts have sanctioned the use of "royal-lives" clauses. These clauses are sometimes used in English settlements to postpone vesting to the

34. 6 A.L.P., supra note 23, at § 24.13; J. Morris & W. Leach, supra note 23, at 62; Restatement of Property § 374 & comment l (1944); L. Simes & A. Smith, supra note 21, at § 1223.
36. The number of violations of the Rule which occur because of age contingencies in excess of 21 years suggests that most settlors believe that financial maturity comes after that age. Professors Morris and Leach have suggested that an extension of the 21 year period to 25 or 30 years would allow settlors to postpone termination of their trusts until their beneficiaries are more mature. See J. Morris & W. Leach, supra note 23, at 68-69. Accord Dunn, An Attack on the "Twenty-one Year Rule," 18 M.L. Rev. 34 (1958). Only two states, however, have enacted legislation on this point. Both have abolished the common-law Rule Against Perpetuities and have substituted a statutory Rule Against the Suspension of Alienation. Idaho Code § 55-111 (1979) (lives in being plus 25 years); Wis. Stat. Ann. § 700.16 (West 1981) (lives in being plus 30 years).

Perhaps the paucity of legislative action in this area may be explained by the fact that the desires of most settlors can be accomplished within the framework of the common-law period. See Schuyler, The Statute Concerning Perpetuities, 65 Nw. U.L. Rev. 3 (1970). With a judicious selection of extrinsic measuring lives, most settlors can postpone vesting for as long as their reasonable needs require. Also, if a beneficiary's interest is vested at age 21, possession may be postponed until some later date. See infra notes 103-07 and accompanying text.
outer limits of society's tolerance. The clauses provide that interests are to remain contingent until the last to die of a group of living persons consisting of all of the lineal descendants of some member of the Royal family such as Queen Victoria. Quite obviously, such clauses distort the essential objectives of the Rule. Through them, property owners can fashion private perpetuities periods of excessive length. As a matter of public policy, this practice has few defenders. Its effective elimination, however, has proven to be difficult.

Tax and other considerations frequently make it advisable to postpone vesting for the lives of living beneficiaries plus a period of sufficient length to span the minority of secondary takers. Whatever its weaknesses, the period of the common-law Rule accommodates this reasonable objective in all cases. In contrast, a set period in gross or a statutory definition of permissible measuring lives, both of which were alternatives considered by the English Law Reform Committee, would not. The former would be too arbitrary and the latter would prove meaningless. Any definition of measuring lives would of necessity include beneficiaries, and over-reaching property owners could, as a result, circumvent the objective of a statutory definition by creating illusory or de minimus interests.

In the absence of a workable solution to a problem that it recognized existed, the English Law Reform Committee recommended that the common-law period be retained. Their recommendation was subsequently incorporated in reform legislation in England and several other Commonwealth nations.

In the United States, the case for retaining the status quo is

37. See, e.g., In re Villar, [1929] 1 Ch. 243.
38. LAW REFORM COMMITTEE, FOURTH REPORT, Cmd. 18, at 5-7 (1956) [hereinafter cited as LAW REFORM COMM. REP.].
39. Id. at 7.
40. In an effort to wean draftsmen from the use of royal-lives clauses, the Law Reform Committee recommended the enactment of legislation permitting conveyancers to specify an alternate in gross perpetuities period not to exceed 80 years as a substitute for the common-law period of lives in being plus 21 years. Id. The Committee's recommendation has been incorporated in the statutes of several Commonwealth jurisdictions. See Perpetuities and Accumulations Act, 1964, c. 55, § 1(1) (England); Perpetuities and Accumulations Ordinance, 1970, No. 26, § 6(1) (Hong Kong); Perpetuities Act, 1964, No. 47, § 6(1) (New Zealand); Perpetuities Act, 1966, c. 2, § 1(1) (Northern Ireland); Perpetuities and Accumulations Act, 1972, 21 Eliz. 2, No. 9, § 5(1) (Queensland, Australia); Perpetuities and Accumulations Act, 1968, 17 Eliz. 2, No. 7750, § 5(1) (Victoria, Canada); Law Reform (Property, Perpetuities, and Succession) Act, 1962, 11 Eliz. 2, No. 83, § 5 (Western Australia). In this country, only California has followed this approach. Cf. CAL. CIV. CODE § 715.6 (West 1982) (60 years).
even stronger. Royal-lives clauses are seldom used in this country.\textsuperscript{41} Accordingly, of those states that have recently enacted reform legislation, all have chosen to retain the common-law period, at least insofar as the rules relating to the choice of measuring lives are concerned.\textsuperscript{42}

Chapter 77-23 adopts the same approach. Subsection (1) of the statute restates the common-law Rule Against Perpetuities in terms which are substantively identical to Gray's formulation as it has been interpreted and applied by English and American courts. Subsection (1) provides:

No interest in real or personal property is valid unless it must vest, if at all, not later than 21 years after one or more lives in being at the creation of the interest and any period of gestation involved. The lives measuring the permissible period of vesting must not be so numerous or designated in such a manner as to make proof of their end unreasonably difficult.

\textbf{D. Interests to Which the Rule Applies}

\textit{1. Background: The Scope of the Common-Law Rule}

If only from the dim memory of long past law school classes, most attorneys possess some familiarity with the types of interests to which the common-law Rule applies. Briefly, it applies to legal and equitable contingent future interests in real or personal property.\textsuperscript{43} Where a transfer is in trust (the usual case in contemporary society), the Rule requires the vesting of the beneficial interests even though the trust instrument or local law gives the trustee an unqualified power to sell trust property and to reinvest the proceeds.\textsuperscript{44} Additionally, the Rule applies to the creation and exercise of certain powers which permit their holders to shift the beneficial enjoyment of trust property. Powers of this type include: powers of

\textsuperscript{41} Royal-lives clauses should be contrasted with the “perpetuities-savings” clauses frequently used in long-term trusts in this country. Typically, these later clauses call for the termination of a trust no later than 21 years after the death of the last to die of the trust beneficiaries living at the creation of the trust. Perpetuities-savings clauses refer only to persons having a reasonable relationship to the trust. Therefore, they do not present the same policy concerns as royal-lives clauses which reference persons totally unrelated to the transfer with the objective of extending the duration of the perpetuities period for as long as possible.

\textsuperscript{42} See statutes cited \textit{supra} note 2.

\textsuperscript{43} \textit{J. Gray, supra} note 22, at § 202; \textit{L. Simes \& A. Smith, supra} note 21, at § 1235.

\textsuperscript{44} \textit{J. Gray, supra} note 22, at § 269; \textit{J. Morris \& W. Leach, supra} note 23, at 15; \textit{L. Simes \& A. Smith, supra} note 21, at § 1254.
appointment, powers associated with discretionary trusts, and in England, but not generally in the United States, certain administrative powers of fiduciaries such as powers to sell, lease or mortgage trust property.

To the occasional surprise of some unwary attorney, the jurisdiction of the Rule Against Perpetuities is not confined to gratuitous dispositions of property. It extends to some commercial transactions as well.

Normally, contractual arrangements are exempt from the Rule because no property interests are involved. Specifically enforceable contracts are the exception. The prevailing view is that these involve equitable interests to which the Rule applies.

The most frequently encountered example of this situation involves an in gross option to purchase or repurchase land. Typically, options of either type are contingent on the giving of notice or on the tendering of the option price. Accordingly, courts have voided them under the Rule if their duration is not expressly or by implication limited to the perpetuities period. A similar result has


46. J. Morris & W. Leach, supra note 23, at 143-44; L. Simes & A. Smith, supra note 21, at § 1277.


Gray’s initial position was that the English cases subjecting administrative powers to the Rule were correctly decided. Professor Leach, however, argued that fiduciary administrative powers should be exempt because they increase, rather than impede, the trustee’s ability to keep trust property productive. Leach, Powers of Sale in Trustees and the Rule Against Perpetuities, 47 Harv. L. Rev. 948 (1934). Professor Leach’s views have prevailed in the United States, a development which is cited with favor in the latest edition of Gray’s book. J. Gray, supra note 22, at § 509.18. And recently, the English cases subjecting fiduciary administrative powers to the Rule have been modified by statute. See Perpetuities and Accumulations Act, 1964, c. 55, § 8 (England).


49. There is dicta to the contrary in Florida. See Warren v. City of Leesburg, 203 So. 2d 522 (Fla. 2d DCA 1967). But the court in Warren was clearly mistaken. Since the leading English case of London & S.W. Ry. v. Gomm, 20 Ch. D. 562 (1882), where the Rule Against Perpetuities was held to apply to an option to repurchase land, the overwhelming weight of authority in England and in this country has been that specifically enforceable purchase contracts create equitable property interests. 6 A.L.P., supra note 23, at § 24.56; J. Morris & W. Leach, supra note 23, at 219-20; Restatement of Property § 393 & comment c, § 401 & comment b (1944). Moreover, the dicta in Warren is inconsistent with subsequent Florida decisions. See Iglehart v. Phillips, 383 So. 2d 610 (Fla. 1980) (dicta that repurchase option creates interest in land subject to Rule Against Perpetuities); Watergate Corp. v. Reagan, 321 So. 2d 133 (Fla. 4th DCA 1975) (Rule held applicable to right of first refusal).
been reached in the case of pre-emptive options at least insofar as the option price does not fluctuate with the market value of the underlying property.\footnote{51}

In limited circumstances a commercial lease transaction may also cause perpetuities problems. A present possessory lease, regardless of its duration, is valid. It is vested in possession.\footnote{52} Likewise, according to the weight of authority, the Rule is not violated by a right to renew a lease, even if it is perpetual.\footnote{53} The justification for this is said to be that a renewal right makes a lease more attractive. It therefore tends to increase rather than retard the productivity of the property and the alienability of the leasehold.\footnote{54} A similar rationale is applicable to options to purchase appurtenant to long-term leases. Appendant purchase options render property more productive because leasehold owners are more willing to invest in necessary capital improvements when they own such options. Consequently, courts in the United States have held appellant options to be exempt from the Rule.\footnote{55}

\begin{footnotes}
\footnotetext[51]{Simes & A. Smith, supra note 21, at § 1244. An option to repurchase is subject to the Rule even though it is similar to the possibility of reverter and right of entry for condition broken, both of which are exempt. 6 A.L.P., supra note 23, at § 24.56; Restatement of Property § 394 comment a (1944).}
\footnotetext[52]{In the United States, an option which violates the Rule is totally void. No action for specific performance or for damages may be brought. Restatement of Property § 393 comment h (1944). In England, however, courts have held that the Rule does not prevent an action for specific performance between the original parties to the option contract. Further, an action for damages may be maintained even where an action for specific performance may not. J. Morris & W. Leach, supra note 23, at 221-22. Recently, the treatment of options in England has been modified by statute. See Perpetuities and Accumulations Act, 1964, c. 55, §§ 3(1), 9 (England).}
\footnotetext[53]{See 6 A.L.P., supra note 23, at §§ 26.66-67. But cf. Watergate Corp. v. Reagan, 321 So. 2d 133 (Fla. 4th DCA 1975) (Rule held applicable to pre-emptive option at market price on date of exercise).}
\footnotetext[54]{See, e.g., Cawthon v. Stearns Culver Lumber Co., 53 So. 738 (Fla. 1910).}
\footnotetext[55]{See, e.g., Fonact Corp. v. Superior Apartments, Inc., 251 So. 2d 537 (Fla. 3d DCA 1971) (easement renewable from month to month without time limitation upheld). But cf. Sisco v. Rotenberg, 104 So. 2d 365 (Fla. 1958) (covenant to renew lease held satisfied by one renewal because of law’s disfavor of perpetuities and perpetual leases).}
\end{footnotes}
The above exemptions presuppose a present lease. Contingent leases limited to take in the future, however, such as "on-completion" leases used in office building and shopping center construction projects, have given rise to perpetuities problems in some jurisdictions.

Because the Rule Against Perpetuities is concerned with when interests vest, it does not apply to reversions, their equitable counterparts, resulting trusts, or indefeasibly vested remainders. These interests satisfy the Rule; they are vested as of their inception. Moreover, in the United States, possibilities of reverter and rights of entry for condition broken have generally been held to be exempt from the Rule. Unlike the previously mentioned exemptions, however, the exemption for reversioners and rights of entry for condition broken cannot be justified on the basis of sound perpetuities policy. These interests tie up the use of property in a manner similar to contingent executory interests. Their exempt status, therefore, is apparently the result of a historical aberration. For this reason, Florida and a number of other states have enacted

VA. CODE § 36-1-24 (1966). The English cases have been modified by statute as well. See Perpetuities and Accumulations Act, 1964, c. 55, § 9(1) (England).

56. If a lease is not contingent there is authority that it is valid even though it is limited to take in possession at a point beyond the permissible perpetuities period. L. Simes & A. Smith, supra note 21, at § 1242. But see J. Gray, supra note 22, at § 320.1.

57. An "on-completion" lease was held to violate the Rule Against Perpetuities in Haggerty v. City of Oakland, 326 P.2d 957 (Cal. Ct. App. 1958). The California appellate court rejected the argument that the court should read into the agreement the unstated condition that the building must be completed within a reasonable time—a period which counsel argued would necessarily be less than 21 years. Id. at 965-66. This argument was subsequently accepted in Wong v. DiGrazia, 35 Cal. Rptr. 241 (Cal. 1963). In that case, the California Supreme Court eviscerated the earlier Haggerty decision by disapproving that decision's rejection of the reasonable time argument. Id. at 250. Similar results have been reached in other contingent lease cases. See, e.g., Isen v. Giant Food, Inc., 295 F.2d 136 (D.C. Cir. 1961) (lease contingent on favorable zoning held to require that zoning occur within a reasonable period of less than 21 years); Singer Co. v. Makad, Inc., 518 P.2d 493 (Kan. 1974) (lease contingent on completion of shopping center held to include implied condition that completion occur within a reasonable period of less than 21 years). But see First & C Corp. v. Wencke, 61 Cal. Rptr. 531 (Cal. Ct. App. 1967); Southern Airways Co. v. De Kalb County, 115 S.E.2d 207 (Ga. Ct. App. 1960), rev'd on other grounds, 116 S.E.2d 602 (Ga. 1960).

58. J. Gray, supra note 22, at § 205; L. Simes & A. Smith, supra note 21, at § 1235.

59. 6 A.L.P., supra note 23, at § 24.62; RESTATEMENT OF PROPERTY § 372 (1944); L. Simes & A. Smith, supra note 21, at §§ 1238, 1239.

In England, the right of entry for condition broken was made subject to the Rule by the Law of Property Act, 1925, § 4(3). Even before that, however, these interests had been subjected to the Rule by case decision. See J. Gray, supra note 22, at §§ 300-302; J. Morris & W. Leach, supra note 23, at 210-11. In 1964, the Rule was similarly extended to possibilities of reverter. Perpetuities and Accumulations Act, 1964, c. 55, § 12 (England).

statutes placing temporal restrictions on the duration of reverters and rights of entry for condition broken.  

Finally, charitable transfers are also said to be exempt from the Rule Against Perpetuities. Perhaps it would be more accurate to say that they are partially exempt. The Rule requires even a charitable transfer to vest initially in the transferee within the permissible perpetuities period. However, once this occurs, a gift may be validly limited from one charity to another charity upon the happening of a remote event or contingency.  

2. Statutory Exemptions from the Florida Rule  

Portions of three of the seven subsections of chapter 77-23 are concerned exclusively with the scope of Florida's statutory Rule Against Perpetuities. Of all of chapter 77-23, these provisions promise to be some of the most important. Within them are found exemptions for all interests that were valid under prior law, exemptions for a variety of commercial transactions, exemptions for most discretionary powers held by trustees and a conflict of laws provision which ensures that Florida's Rule Against Perpetuities applies to foreign trusts containing Florida real estate.  

a. Interests Valid Under Prior Law  

(3) APPLICATION OF RULE.—  
(a) The rule against perpetuities does not apply to:  
1. Any disposition of property or interest therein, which disposition, as of the effective date of this section, does not violate, or is exempted by statute from the operation of, the common-law rule against perpetuities.
This subsection ensures the remedial nature of chapter 77-23 by exempting from the statutory Rule any interest that, as of January 1, 1979, does not violate the common-law Rule. This of course includes those interests previously discussed that either were exempt from or satisfied the requirements of the common-law Rule Against Perpetuities. Additionally, Florida presently has four separate statutory provisions which provide exemptions for various types of transactions. The exempted transactions include: (1) conveyances of corporate stock by a corporation created for, and engaged solely in, the operation of a hospital; 63 (2) honorary trusts created for the care of burial grounds and church yards; 64 (3) trusts created as part of employee deferred compensation plans; 65 and (4) rights given any person or entity by a declaration of condominium for the purpose of allowing unit owners to retain reasonable control over the use, occupancy, and transfer of condominiums. 66

b. Transactions Arising in a Commercial Setting

As previously indicated, specifically enforceable contracts create equitable property interests to which the common-law Rule Against Perpetuities has been applied. Nevertheless, most of these contracts arise in a commercial setting where policies of the Rule relating to the balancing of the interests of living and past generations have no relevance. Accordingly, the only policy justification for applying the Rule to a commercial transaction would be one founded on the furtherance of alienability for the sake of productivity. Recognizing this, courts in this country have fashioned the aforementioned exemptions for options to purchase appendant to leases and for options to renew leases. These options, although specifically enforceable, further the commercial use of property rather than restrict it. Apart from these well-established exemptions, however, courts have been more myopic in their approach to the Rule as it relates to commercial transactions. Most have adhered to the overly formalistic view that specifically enforceable contracts are interests in property; ipso facto the Rule applies to them. 67

This process is graphically illustrated by the recent Florida deci-

67. See Leach, supra note 60, at 736-39.
sion Watergate Corporation v. Reagan, in which the Fourth District Court of Appeal held a pre-emptive purchase option subject to the Rule Against Perpetuities even though the court found that it did not restrain alienability. With respect, these conclusions are patently incongruous. If an agreement does not adversely impact on alienability, it should be upheld regardless of its duration. To the extent that the Rule Against Perpetuities applies to this type of agreement, it needlessly interferes with a freely bargained-for arrangement. If, on the other hand, an agreement does hamper alienability, some form of judicial restriction on its duration may be warranted. It is doubtful, however, that the Rule Against Perpetuities is an appropriate tool for this purpose. The ability of a competent draftsperson to extend the permissible perpetuities period through the use of unrelated measuring lives makes the perpetuities period arbitrary and, at its maximum potential length, excessive for transactions arising in a commercial setting. What is needed is an easily understood rule which balances the benefits to society that arise from commercial contractual arrangements with the potential evil they produce through restrained alienability. Wherever the line is to be drawn, it would only be by chance that the Rule Against Perpetuities would draw it at the correct place.

There is a second reason why the Rule Against Perpetuities is a poor tool for monitoring the duration of commercial arrangements. It is established dogma that when the orthodox Rule is violated, the offending interest is void ab initio. Whatever merit this approach has in other situations, there is nothing that can be said for it when the subject is a freely bargained-for commercial agreement. Assuming arguendo that a particular commercial arrangement impairs alienability, it should be valid for as long as its commercial utility outweighs its adverse impact on alienability and invalid only after that time.

Chapter 77-23 includes four separate provisions dealing with commercial arrangements. In general, these provisions exempt the arrangements to which they apply from all restrictions as to duration. There are two exceptions. Because they have some potential

68. 321 So. 2d 133 (Fla. 4th DCA 1975).
69. See 6 A.L.P., supra note 23, at § 24.56; LAW REFORM COMM. REP., supra note 38, at 19; Leach, supra note 60, at 737-38.
71. 6 A.L.P., supra note 23, at § 24.56, LAW REFORM COMM. REP., supra note 38, at 19-20; L. SIMES & A. SMITH, supra note 21, at § 1244; Schuyler, supra note 22, at 707.
adverse impact on alienation, a forty-year restriction applies to the
duration of in gross options to purchase property and to the period
during which leases limited to commence in the future must take
in possession.

1) Leases Commencing in Futuro

(3) APPLICATION OF RULE.—
(a) The rule against perpetuities does not apply to:
5. Leases to commence in the future or upon the happening of
a future event, but no such lease is valid unless the term thereof
actually commences in possession within 40 years from the date
of execution of the lease.

Suppose an owner of undeveloped real property plans to build
an office building or a shopping center and, once completed, to
lease it to commercial tenants. It is likely that the person provid-
ing the risk capital for construction will want early assurance that
the venture will prove to be financially successful. One method
by which this assurance can be effectuated would be for the owner to
enter into “on-completion” leases with potential tenants.72 The
leases would be made contingent on the completion of the building
or shopping center complex. However, some courts have voided
leases of this type unless they are certain to commence in posses-
sion within the permissible period of the Rule.73

Properly analyzed, contingent leases are “Janus-faced.” The un-
certainty that surrounds the contingent leasehold estate has a po-
tential for impairing the alienability of the fee interest. At the
same time, it must be recognized that most such leases arise in a
commercial setting and the very transaction that impairs the alien-
ability of the fee estate increases the ability of the owner to make
his property productive. Accordingly, while some restriction on
their duration may be warranted, they should not be void ab initio

72. As an alternative, the lease agreement could be structured as a present lease with
possession and the obligation to pay rent contingently postponed until the completion of the
project. As a present lease, this agreement would be “vested in interest” as of the date of its
creation. It would be valid even though possession of the leasehold and the rent obligation
were postponed beyond the perpetuities period. E.g., Francis v. Superior Oil Co., 102 F.2d
732 (10th Cir. 1939). Accordingly, the voiding of contingent leases commencing in futuro
exalts form over substance by “punishing” property owners whose attorneys are not suffi-
ciently familiar with the intricacies of the Rule to draft lease agreements that comply with
its technical requirements. Leach, Perpetuities: New Absurdity, Judicial and Statutory
73. See supra note 57.
merely because they might last too long.

Under subsection (3)(a)5, leases commencing in futuro are exempt from the statutory Rule. Because these leases do involve some restraint on alienation, however, the subsection requires them to commence in possession within forty years\textsuperscript{74} of their execution. Regardless of their maximum potential period of contingency, leases which actually commence in possession within the forty-year period are valid. Only those which actually remain contingent for longer than forty years are void. Because forty years is more than enough time for the construction of even the most ambitious project, virtually all “on-completion” leases should be effective.

2) Non-Disturbance Agreements

(3) APPLICATION OF THE RULE.—

(a) The rule against perpetuities does not apply to:

6. Commitments by a lessor to enter into a lease with a subtenant or with the holder of a leasehold mortgage or commitments by a lessee or sublessee to enter into a lease with the holder of a leasehold mortgage.

Subsection (3)(a)6 is modeled after a substantially identical provision of the Illinois perpetuities reform statute.\textsuperscript{75} It is concerned with a type of agreement employed in commercial lease transactions to which even the relaxed rule of subsection (3)(a)5 is too strict.

Often it is to the advantage of owners of leased property to allow their tenants to enter into favorable subleases. However, any potential sublessee is likely to want some assurance from the fee owner or his tenant that his possession will remain undisturbed upon termination of the original lease or upon a foreclosure of an unsubordinated mortgage on the fee or leasehold interests. This assurance is typically provided through an agreement between the fee owner, his lessee, or the holder of any potential subleases, as the case may be, providing that the possession of the sublessees will remain undisturbed if the lessee’s lease terminates or if an un-

\textsuperscript{74} See infra note 87 for a discussion of the appropriateness of a 40-year limitation as opposed to some other, such as 21 years.

\textsuperscript{75} ILL. ANN. STAT. ch. 30, § 194(a)(6) (Smith-Hurd Supp. 1983-1984). The Illinois provision is discussed in Schuyler, supra note 36, at 36-37. Points made in the text concerning the justification and application of subsection (3)(a)6 are based on Professor Schuyler’s article.
subordinated mortgage is foreclosed.

The drafters of the Illinois provision recognized that these so-called "non-disturbance agreements" probably present no perpetuities problems. Nevertheless, they are specifically enforceable, and it is possible that a court might view them as creating future interests in property contingent on the lessee's execution of a sublease. Were this view adopted, a non-disturbance agreement would be void under subsection (3)(a)5 where the original lease had a duration in excess of forty years and the attempt to execute a sublease occurred after that time.

This is too harsh a result. Neither the alienability of the fee interest nor that of the leasehold interest is more restricted when a non-disturbance agreement is executed than when there is no such agreement. Actually, alienability is furthered in the former case because advantageous subleases are more likely to occur with one than without. Therefore, subsection (3)(a)6 exempts this type of agreement from both the statutory Rule and from the forty-year limitation otherwise applicable to leases commencing in futuro.

3) Purchase Options

(3) APPLICATION OF RULE.—
(a) The rule against perpetuities does not apply to:
7. Options to purchase in gross or in a lease or preemptive rights in the nature of a right of first refusal, but no option in gross is valid for more than 40 years from the date of its creation.

Whether an option to purchase property restrains alienability depends on the type of option involved and, in some cases, on the relationship of the option price to the value of the subject property at the time of exercise. As has been noted, options to purchase appendant to a leasehold interest render property more productive. They enable leasehold owners to make necessary capital improvements free from the fear of forfeiture at the end of the lease. As a result, these options have not been subjected to the Rule Against Perpetuities in this country.

In contrast, options in gross clearly restrict the alienability of the property to which they apply. As long as the option remains outstanding, the class of potential purchasers is effectively limited to the option holder. Other potential purchasers may be scarce. Who would want an interest that could be terminated unilaterally

76. Schuyler, supra note 36, at 37.
at the option of someone else? Moreover, if the exercise price of an option does not fluctuate with increases in the value of the subject property, productivity is potentially impaired. An owner may not be inclined to invest in the capital improvements necessary to make his property productive. Nevertheless, because options in gross serve useful objectives and because they are invariably used in commercial transactions to which both the result of the Rule and its permissible perpetuities period are inappropriate, subsection (3)(a)7 exempts them from the statutory Rule. At the same time, because these options do involve some restraint on alienability, their duration is limited to a period of forty years from their creation. Under the subsection, options in gross are not void ab initio merely because they might be exercised beyond the forty-year period. They are invalid if, and only to the extent, they remain unexercised beyond that time.

Subsection (3)(a)7 also exempts pre-emptive rights, thereby reversing the holding of Watergate Corp. v. Reagan, referred to previously. While some pre-emptive rights are “in gross” in the sense that they are not appendant to an interest in land, a careful reading of subsection (3)(a)7 makes it clear that the forty-year limitation applicable to options in gross is limited to nonappendant options in the nature of a call. According to the subsection, pre-emptive rights “in the nature of a right of first refusal” are treated separately. They are exempt both from the statutory Rule Against Perpetuities and from the forty-year limitation. This more lenient treatment is justified on the basis that, as long as the exercise price of a pre-emptive right is equal to fair market or appraisal value on the date the right is to be exercised, the existence of the right has no adverse impact on productivity or alienability. Knowing that any resulting increase in value would be reflected in the price he would receive at exercise, an owner of property subject to such a right would freely make necessary capital improvements. Similarly, the property owner would not be impeded from selling. If the option holder chose not to exercise his pre-emptive right, the

77. A purchaser might be interested if he could also buy the option itself. However, uncertainty about the identity and whereabouts of the option holder may make this difficult. Law Reform Comm. Rep., supra note 38, at 18-19; Browder, Restraints on the Alienation of Condominium Units (The Right of First Refusal), 1970 U. Ill. L.F. 231, 238.

78. 6 A.L.P., supra note 23, at § 24.56; Berg, Long-Term Options and the Rule Against Perpetuities, 37 Calif. L. Rev. 419, 422 (1949).

79. The identical Illinois provision has been similarly interpreted. See Schuyler, supra note 36, at 38.

80. Berg, supra note 78, at 439.
property could be sold at full value to some other purchaser.

There is one situation where the above analysis does not apply—where a pre-emptive right does impair alienability. If the contract calls for an exercise price that is not equal to market or appraisal value at the time of exercise, some restraint on alienability occurs. If the property increases in value, the owner would not offer it for sale; to do so he would run the risk that the option holder would exercise his right to buy at the less-than-market price. Additionally, this type of pre-emptive right impairs productivity. A property owner would not be inclined to make additional capital investments where the value of those investments could not be recovered when the property is sold.

The economic self-interest of contracting parties normally encourages either exercise prices equal to the full value of the property at the time of exercise or pre-emption contracts of short duration. However, fixed-price pre-emptive right contracts of unlimited duration are not uncommon. Considering the fact that all pre-emptive rights, not just those calling for a market or appraisal value exercise price, are exempt from Florida’s statutory Rule Against Perpetuities, the question arises whether pre-emptive rights should have been subjected to the forty-year limitation applicable to options in gross.

Were the total exemption provided by subsection (3)(a)7 to leave pre-emptive rights completely uncontrolled in our legal system, the answer to the proffered question might be yes. However, the common-law Rule Against Unreasonable Restraints on Alienation also applies to some pre-emptive rights. Florida law on this point follows the Restatement of Property. If a pre-emptive right has an exercise price necessarily equal to the market value of the property at the time of exercise, it does not constitute an unreasonable restraint on alienation. Where, however, the exercise price is not necessarily equal to the market value at the time of exercise, the option is void under the Rule Against Restraints unless its duration is limited to a reasonable period. Hence, there is no need for

81. Id. See also 6 A.L.P., supra note 23, at § 26.65.
82. See Watergate Corp. v. Reagan, 321 So. 2d 133 (Fla. 4th DCA 1975); Blair v. Kingsley, 128 So. 2d 889 (Fla. 2d DCA 1961); RESTATEMENT OF PROPERTY § 413(1) (1944). RESTATEMENT (SECOND) OF PROPERTY § 4.4 (1983) (Donative Transfers) implies that a pre-emptive right at market value might constitute an unreasonable restraint on alienation. Where, however, the exercise price is not necessarily equal to the market value at the time of exercise, the option is void under the Rule Against Restraints unless its duration is limited to a reasonable period. Hence, there is no need for

83. Iglehart v. Phillips, 383 So. 2d 610 (Fla. 1980); accord RESTATEMENT OF PROPERTY § 413(2) (1944).

Normally, a direct restraint on a legal fee interest is void regardless of its duration. 6
a separate forty-year restriction.

At this point, the need for a forty-year limitation for in gross options may be questioned. If the self-interests of the contracting parties and the common-law Rule Against Unreasonable Restraints on Alienation suffice to protect society's interests with regard to pre-emptions, why do they not suffice for options in gross? Professor Leach suggested they might.84 However, there are important differences between pre-emptions and options in gross. All options in gross, even those at market or appraisal value, impair alienability and productivity. Thus, the potential adverse impact of these options is greater. More importantly, there are problems with relying on the common-law Rule Against Unreasonable Restraints on Alienation to police options in gross that do not exist for pre-emptive rights.

The Rule Against Restraints applies to direct restraints on alienation.85 While many courts, including those of Florida, have had little difficulty in bringing pre-emptive rights within this classification (usually without discussion), far fewer courts have held that options in gross constitute a direct restraint within the purview of the Rule Against Restraints.86 Thus, the safer course would appear

\[ A.L.P., supra \text{ note 23, at §§ 26.16, .19, .24; Restatement (Second) of Property §§ 4.1-3 (1983) (Donative Transfers); L. Simes & A. Smith, supra \text{ note 21, at §§ 1143, 1149. Pre-emptive rights are an exception. Most authorities consider the duration of a pre-emptive right as a factor to be taken into account in determining whether the restraint is reasonable. See, e.g., Iglehart, 383 So. 2d at 610; Restatement (Second) of Property § 4.4 (1983) (Donative Transfers); L. Simes & A. Smith, supra \text{ note 21, at § 1154.}}

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Although subsection (3)(a)7 of chapter 77-23 permits options in gross to endure for 40 years, it does not necessarily follow that fixed-price pre-emptive rights which are limited in duration to 40 or less years would be valid under the common-law Rule Against Unreasonable Restraints on Alienation. Chapter 77-23 does not concern this latter rule and the Florida case law on what constitutes a reasonable restraint in this context is not clearly defined. The only certain way to ensure the validity of a pre-emptive right is to specify an exercise price that will equal the market or appraisal value of the property at the time of exercise.

84. Leach, supra note 60, at 737.

85. See generally 6 A.L.P., supra note 23, at §§ 26.1-.132; Restatement (Second) of Property §§ 4.1-.5 (1983) (Donative Transfers); Restatement of Property §§ 404-417 (1944); L. Simes & A. Smith, supra note 21, at §§ 1111-1117, 1131-1171. According to Simes, a direct restraint on alienation is "a provision in a deed, will, contract or other instrument which, by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation." L. Simes & A. Smith, supra note 21, at § 1112.

86. Four Florida cases have considered the validity of options as opposed to pre-emptive rights. None has held squarely that the Rule Against Restraints on Alienation applies to them. In three of these cases, the issue was either not raised at all or it was not raised in a timely manner. See MacArthur v. North Palm Beach Util., Inc., 202 So. 2d 181 (Fla. 1967); Warren v. City of Leesburg, 203 So. 2d 522 (Fla. 2d DCA 1967); Wing, Inc. v. Arnold, 107 So. 2d 765 (Fla. 3d DCA 1958). In the fourth case, Genet v. Florida E. Coast Ry., 150 So. 2d 272 (Fla. 3d DCA 1963), the court was faced with the validity of an option to repurchase in
to be that taken in subsection (3)(a)7—to limit the duration of these transactions to a set period.87

c. Mandatory and Discretionary Powers of Trustees

A power which enables its holder to alter the beneficial enjoyment of property is subject to the Rule Against Perpetuities.88 Where the power is exercisable only in favor of a group of persons that is not unreasonably large and which does not include its holder, it is void from its inception at common law unless the period in which it may be exercised is circumscribed to the permissible perpetuities period.69 To most readers, the special power of ap-

the form of a condition subsequent—that is, a right of entry. The agreement in question
provided in part:

As a part of the consideration for this deed it is mutually agreed between the
parties that the land hereby conveyed will be used for the construction of a ware-
house and business facilities for grantees [sic] own use and for no other purpose.
In the event said property is not developed for such use within two years . . . , said
property shall become at the option of grantor, re-sold to the grantor for the origi-
nal purchase price, plus the amount of all ad valorem taxes paid by grantee on
said property.

Id. at 273.

In the course of its opinion the court indicated that it believed that the option agreement
might have violated the Rule Against Unreasonable Restraints. Id. at 274-75. Upon close
examination, however, it was the requirement that the land be used only by the grantees
and only for a restricted purpose which gave the court concern, not the potential impact
that the option itself had on alienability. Id. at 274. That is, there is nothing in the opinion
to suggest that the court believed that an option agreement without the restriction on own-
ership and use would have raised an issue under the Rule Against Unreasonable Restraints
on Alienation.

87. An in gross limitation for all options other than those appendant to leases was one of the
recommendations of the English Law Reform Committee. See Law Reform Comm. Rep.,
supra note 38, at 18-20.

Assuming some restriction on the duration of in gross options is warranted, the appropri-
ateness of a 40-year limitation may be raised. Under chapter 77-23, the same period is used
for options in gross as is used for contingent future leases. In the abstract, the limitation in
both cases should be sufficiently long to ensure the validity of these arrangements for as
long as their commercial utility outweighs their adverse impact on alienability, but not so
long as to permit abuse by overreaching property owners. The framers of the Illinois perpetu-
ties statute from which subsections (3)(a)5 and (3)(a)7 were derived, chose a 40-year pe-
of 40 years was influenced by the similar restriction Illinois places on the duration of possi-
ble reverters and rights of entry. See Schuyler, supra note 36, at 36. On this basis a
21-year period would have been more appropriate for Florida. See Fla. Stat. § 689.18

88. See generally 6 A.L.P., supra note 23, at §§ 24.30-.36; J. Morris & W. Leach, supra
note 23, at 134-63; Restatement of Property §§ 390-392 (1944); L. Simes & A. Smith,
supra note 21, at §§ 1271-1272.

89. 6 A.L.P., supra note 23, at § 24.32; J. Gray, supra note 22, at § 473; L. Simes & A.
Smith, supra note 21, at § 1273.
pointment will be the most familiar power of this type. At this juncture, however, our concern is limited to other less familiar examples. While it may not be common to view them as such, some of the powers a trustee has to effectively execute a trust meet the above criteria for powers to which the Rule applies.

Fiduciary powers are either administrative or distributive in character. Powers to sell, lease or mortgage trust property or to allocate receipts and expenditures between the income and principal accounts fit within the administrative category.90 Distributive powers include discretionary as well as mandatory powers to allocate trust income and principal. Both categories of fiduciary powers are exercisable only for the benefit of a limited group of persons (the trust beneficiaries) which usually does not include the powers' holder (the trustee). Additionally, both types of powers permit a trustee to alter the beneficial interests of trust property to varying extents.91 Accordingly, in this country and elsewhere, fiduciary allocation powers are void in their inception if it is possible that they might be exercised beyond the period of the Rule.92 A similar result has been reached in the English decisions involving fiduciary administrative powers.93

Normally, when a power is given to a person who is alive at the time the instrument creating it takes effect, no perpetuities violation can occur. A power is generally personal to its holder. It terminates at his death. A fortiori, where a power is given to a living person, it cannot be exercised at a remote time. However, fiduciary powers involve unique considerations. These powers usually attach to the fiduciary office, not to the particular person occupying that office at any given time.94 As a result, the potential duration of the

90. Broad administrative powers are authorized by statute in many states. In Florida, for example, absent a provision in the trust instrument to the contrary, a trustee has the authority to sell trust assets and to reinvest the proceeds, to mortgage or lease trust property and to allocate items of receipts and expenditures between the income and principal accounts of the trust. Fla. Stat. § 737.402(f), (h), (k) & (v) (1981).

91. To the extent that administrative powers allow a trustee either directly or indirectly to shift receipts and expenses between the income and principal accounts, the interests of the trust beneficiaries may be altered.


93. The cases are discussed in J. Gray, supra note 22, at §§ 487-509.11 (see particularly §§ 509.1-11). Recently, the treatment of fiduciary administrative powers in England has been modified by statute. Perpetuities and Accumulations Act, 1964, c. 55, § 8 (England).

94. 3 A. Scott, THE LAW OF TRUSTS § 196 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 196 (1957). By statute in Florida, a successor personal representative has all the powers of his predecessor in office except those that are made personal to the initial office holder. Fla. Stat. § 733.614 (1981). There is no similar statute for trustees. But the identi-
trust in which they are included can be critical to their validity.

The voiding of fiduciary powers under the Rule Against Perpetuities solely because they are included in a trust instrument having a maximum potential duration in excess of the permissible perpetuities period is yet another example of a situation where the common-law Rule has exceeded its legitimate jurisdiction. A careful analysis of the policies the Rule seeks to advance demonstrates that fiduciary powers should not be subject to the Rule at all. The appropriate analysis varies somewhat with the type of power under consideration. At the outset, however, it is important to recognize that when a fiduciary power violates the Rule, the usual result is that only the power is void; the trust itself remains otherwise valid. It is therefore difficult to justify an application of the Rule to any fiduciary power on the basis of policies relating to dead-hand control; the consequence of the application would be largely irrelevant to that policy. It would not necessarily eliminate the principal vehicle for the perpetuation of that control—the trust itself.

That leaves as potential policy justifications either a policy in favor of the alienability of the specific property held in trust or a similar policy in favor of the alienability of the equitable interests in the hands of the trust beneficiaries. For reasons explained more fully below, it is the premise of three of the exemption provisions in chapter 77-23 that neither of these policies is sufficient to warrant subjecting fiduciary powers to the Rule Against Perpetuities.

1) Administrative Powers

(3) APPLICATION OF RULE.—

(a) The rule against perpetuities does not apply to:

2. Powers of a trustee to sell, lease, or mortgage property or which relate to the administration or management of trust assets, including, without limitation, discretionary powers to determine which receipts constitute principal and which receipts constitute income and powers to appoint a successor trustee.

The first of the three exemption provisions covers the administrative powers of a trustee. In the third edition of his book, Gray...
likened these powers to special powers of appointment. In his view, a trustee's power to sell or to lease trust property or to appoint a successor trustee was void in its inception unless its duration was circumscribed either directly or by proper construction to the permissible perpetuities period. This position was subsequently accepted by courts in England and other Commonwealth jurisdictions.

Fortunately, Gray's treatment of administrative powers has not gained acceptance on this side of the Atlantic. Courts in several American states have held these powers to be exempt from the Rule. These holdings are reflected in American treatises, all of which state categorically that in this country the Rule Against Perpetuities does not apply to fiduciary administrative powers. As Gray's nephew ultimately conceded, this is clearly the preferable view.

No viable policy objective is served by subjecting administrative powers to the Rule. Any impact these powers might have on the alienability of the equitable interests would be de minimus. Administrative powers do not permit a trustee to alter the relative interests of trust beneficiaries to any significant extent. Furthermore, the authority a trustee has to exercise administrative powers is circumscribed by his overall fiduciary duty to manage the trust property in a manner that is fair to all beneficiaries. More importantly, when attention is focused on the alienability of the specific assets in the trust, rather than on the equitable interests, it seems clear that these powers facilitate rather than impede alienability by making it easier and less expensive for a trustee to effectuate a desirable sale or to otherwise make trust property productive.

Prior to the enactment of chapter 77-23, the status of administrative powers in Florida was unclear. While no Florida court had subjected them to the Rule, no Florida court had squarely exempted them either. The importance of the question and the lack

97. E.g., In re Allott, 2 Ch. D. 498 (1924) (power of leasing); Davis v. Samuel, 28 N.S.W. 1 (1926) (power of sale). These and other administrative power cases are discussed in J. Gray, supra note 22, at §§ 509.1-.11.
99. See, e.g., 6 A.L.P., supra note 23, at § 24.63; 5 R. Powell, supra note 21, at ¶ 772[4]; Restatement of Property § 382 (1944); L. Simes & A. Smith, supra note 21, at § 1277.
100. J. Gray, supra note 22, at § 509.18. The fourth edition of Gray's work was published after his death. It was edited by his nephew, Roland Gray.
101. See Leach, supra note 47, at 952-53.
of authority in Florida made it desirable to settle the issue. Any possible doubt has now been eliminated by subsection (3)(a)2. This exemption provision expressly mentions all those powers which previously concerned courts and perpetuities scholars. Moreover, the wording of the provision is sufficiently broad to demonstrate a legislative intent to exempt all purely administrative powers from Florida's statutory Rule Against Perpetuities.102

2) Powers to Distribute to Beneficiaries Having Indefeasibly Vested Interests

(3) APPLICATION OF RULE.—

(a) The rule against perpetuities does not apply to:

3. Mandatory powers of a trustee to distribute income, or discretionary powers of a trustee to distribute principal, prior to termination of the trust, to a beneficiary having an interest in the principal, which interest is irrevocably vested in quality and quantity.

Suppose T dies with a will in which he leaves the residue of his estate in trust to pay the income to his wife for life; then to pay the income to such of his children as are from time to time living; and at the death of the last child, to distribute the trust principal per stirpes to T's then-living lineal descendants. The end limitation to T's lineal descendants is valid.103 It will "vest in possession" at the death of T's last child, who by definition would be a life in being at T's death. For similar reasons, this trust must terminate before the permissible perpetuities period expires. However, the termination of this trust may involve consequences which run counter to the natural desires of many settlors. By calling for a distribution to lineal descendants at the death of the last of T's children, the termination distribution may occur when one or more of T's lineal descendants is a minor or, even though of legal age, is not sufficiently mature to assume the responsibilities of outright ownership. Thus, in many trust instruments it is common to find an additional provision designed to prevent this possibility. Assuming the settlor wishes to postpone distribution until the takers attain the age of twenty-five, the provision might read something

102. Similar statutory provisions may be found in Illinois, Pennsylvania, and in several Commonwealth nations. See, e.g., ILL. ANN. STAT. ch. 30, § 194(a)(2) (Smith-Hurd Supp. 1983-1984); 20 PA. CONS. STAT. ANN. § 6104(b)(4) (Purdon 1975); Perpetuities and Accumulations Act, 1964, c. 55, § 8 (England).

103. RESTATEMENT OF PROPERTY § 386 & comment g (1944).
If, under the previous provisions of this trust instrument, the Trustee is directed to distribute a share of trust principal to a beneficiary who is under the age of twenty-five years when the distribution is to be made, the share shall vest in interest in the beneficiary indefeasibly, but the Trustee may in his discretion continue to hold the share in trust until the beneficiary attains age twenty-five. In the meantime, the Trustee shall distribute the net income currently, together with so much of the principal of the share as he deems necessary for the beneficiary's comfortable support, care, and benefit.

A clause of this type solves the problem of premature distributions. It also has the effect of extending the maximum potential duration of $T$'s trust to a point beyond which the Rule Against Perpetuities requires interests to vest. Nevertheless, the end limitation in favor of $T$'s descendants remains valid. The suggested provision specifically provides that the interest of each taker is to indefeasibly "vest in interest" at the death of the last child of $T$ (a life in being). Vesting is therefore timely; only possession is postponed.

On the other hand, the validity of the powers given to the trustee in the above clause is less certain. It is possible that some court might subject them to the Rule Against Perpetuities. If so, the powers would be void from their inception at common law. There is a possibility that they might be exercised beyond the perpetuities period. This would be an inappropriate result. The powers given to the trustee do not transgress the underlying policies of the Rule. They do not impair the alienability of the specific property in the trust. (The trustee is no less able to alienate the trust property when these powers exist than he would be were they to be declared void under the Rule.) Nor do these powers impair the alienability of the beneficial interests. (They do not permit the trustee to alter the respective interests of the beneficiaries.)

In the absence of any discernible policy justification for subjecting these types of fiduciary powers to the Rule, and in recognition

104. The duration of $T$'s trust would exceed the period of the rule if at the death of the last child of $T$ a share was set aside for a lineal descendant who was born after $T$'s death and who was less than four when $T$'s last child died.

105. Restatement of Property § 386 comment j (1944).

106. For a suggestion that the powers in the clause are exempt from the Rule, see J. Morris & W. Leach, supra note 23, at 144.
of their usefulness, subsection (3)(a)3 creates an exemption for them.\textsuperscript{107} It is immaterial what period of postponed enjoyment is used; the exemption is unlimited as to time. But note that subsection (3)(a)3 does not apply to any power which permits a trustee to shift the beneficial enjoyment of trust principal from one beneficiary to another. The existence of such a power would mean that the beneficial interests are not "irrevocably vested in quality and quantity." Instead, powers of this type are treated separately in subsection (3)(a)4, discussed next. Nor does the exemption appear to extend to mandatory spray powers, that is, to powers which require the trustee to distribute all trust income currently but which give him the discretionary authority to determine the share each of several beneficiaries is to receive. While mandatory spray powers over income can be included in an instrument without altering the fact that the beneficial interests in the principal are "irrevocably vested in quality and quantity," these powers fit more logically in subsection (3)(a)4. Therefore, as used in subsection (3)(a)3, the term "mandatory" should be interpreted to mean that the income be mandatorily distributable in fixed shares.

3) Discretionary Allocation Powers

(3) APPLICATION OF RULE.—

(a) The rule against perpetuities does not apply to:

4. Discretionary powers of a trustee to allocate income and principal among beneficiaries, except that any exercise of such power after the expiration of the period of the rule against perpetuities is void.

Subsection (3)(a)4 is the third of the triumvirate of exemption provisions dealing with fiduciary powers.\textsuperscript{108} According to its terms, the subsection covers "powers of a trustee to allocate income and principal among trust beneficiaries." In the more familiar vernacular of estate planners, subsection (3)(a)4 deals with the distributive fiduciary powers incident to the discretionary trust. Considering the significance of the discretionary trust in contemporary estate planning and the certainty that the common-law Rule applies to them,\textsuperscript{109} subsection (3)(a)4 promises to be the most important of


\textsuperscript{109} See 6 A.L.P., supra note 23, at §§ 24.30, .32; J. Gray, supra note 22, at §§ 246, 410.1-.5; J. Morris & W. Leach, supra note 23, at 134-35, 143-44, 177 (Illustrations 16, 17);
the fiduciary power exemptions.

Like administrative powers and powers to distribute income and principal to beneficiaries having indefeasibly vested interests, allocation powers do not impair the alienability of specific trust assets. With legal title in the trustee, the alienability of trusted assets is unaffected by the existence, duration or extent of the trustee's discretionary allocation powers. However, unlike other fiduciary powers, allocation powers do tend to restrict the alienability of the beneficial interests in trusted property. Predictably, potential purchasers of these interests would be hesitant to purchase any interest that could be diminished or eliminated altogether in the discretion of a trustee.

Because of their adverse impact on alienability, it is tempting to conclude that fiduciary allocation powers ought to be subject to the Rule Against Perpetuities. Such a course would not, however, make beneficial interests any more alienable. The absence of a recognized market for these interests would render them inalienable in any event. Moreover, even if a market existed, few beneficial interests could be alienated; most are subject to valid spendthrift provisions.\textsuperscript{110}

In recognition of the above, subsection (3)(a)4 removes fiduciary allocation powers from the reach of the statutory Rule Against Perpetuities. In doing so, the subsection insures that no fiduciary allocation power will be void \textit{ab initio} merely because its maximum potential duration exceeds the period of the Rule. Correspondingly, the reasonable desires of settlors and decedents will not be frustrated merely because their attorneys failed to comply with the needless rigors of the common-law Rule. At the same time, the final clause of subsection (3)(a)4 seeks to prevent abuses\textsuperscript{111} by cir-

\textsuperscript{110} L. Simes & A. Smith, supra note 21, at § 1277.

\textit{In re Estate of Jones}, 318 So. 2d 231 (Fla. 2d DCA 1975), cert. denied, 334 So. 2d 606 (Fla. 1976), involved the residuary trust of Emma Jones. The terms provided \textit{inter alia} that at least four percent of the original trust assets were to be distributed each year among a group of beneficiaries most of which were charities but some of which, under the court's interpretation of the will, were not. The court held that the trust violated the common-law Rule Against Perpetuities because its duration (25 years) exceeded the 21-year period in gross of the Rule.

The result in \textit{Jones} is correct, but the reasoning is faulty. The trust did not offend the Rule because of its duration \textit{per se}. Rather the violation existed because the trustee's power to select trust beneficiaries was exercisable beyond the permissible perpetuities period.

\textsuperscript{111} Spendthrift trusts are recognized in Florida. Waterbury v. Munn, 32 So. 2d 603 (Fla. 1947). \textit{See also} D. Lowell, \textit{Florida Law of Trusts} § 27-1 (2d ed. 1976).

\textsuperscript{110} When the common-law Rule Against Perpetuities was in force in Florida, an effective deterrent against unreasonably long trusts existed. Settlors who might have initially
cumscribing the period in which fiduciary allocation powers may be exercised. These powers may be exercised only during the perpetuities period; subsequent exercises are void.

In addition to the power to allocate trust property among beneficiaries, the trustee of the typical discretionary trust has the power to accumulate income and to add it to the principal. To the extent that an accumulation power permits a trustee to shift the beneficial enjoyment of trust income among trust beneficiaries, the power could be said to fall within the reach of the common-law Rule Against Perpetuities. If so, it would be consistent with the remedial objective of chapter 77-23, in general, and of subsection (3)(a)4, in particular, to liberally interpret the term "allocate" as used in the subsection to include this type of power. However, even this suggested interpretation would not guarantee the validity of an accumulation power that is placed in a trust having a maximum potential duration in excess of lives in being and twenty-one years because such powers are also subject to the common-law Rule Against Accumulations. Thus, when drafting trust instruments where the trustee is to be given authority to accumulate income, attorneys must take care to ensure that the instrument complies

entertained the idea of continuing their trusts for as long as legally possible found themselves deterred by the impact the common-law Rule would have on the primary source of their trusts' flexibility—the allocation powers of their trustees. To insure compliance with the common-law Rule, settlors had either to terminate their trusts or their trustees' discretionary allocation powers no later than the end of the permissible perpetuities period. The latter option frequently resulted in a trust that was too rigid for routine estate planning use.

Had the Florida Legislature merely exempted fiduciary allocation powers from the statutory Rule, without further restricting the period in which these powers could be validly exercised, the deterrent element of prior law would have been eliminated. The apparent objective of the final clause of section (3)(a)4 is to prevent this. Even with the restriction, settlors continue to have the option of extending their trusts beyond the period of the Rule where other estate planning objectives outweigh the loss of flexibility caused by the termination of their trustees' allocation powers. But it is to be expected that the loss of flexibility will deter most settlors from doing this, just as it did under the common-law Rule.

112. The Rule Against Accumulations is in force in Florida although its exact parameters have yet to be definitively settled. See, e.g., Porter v. Baynard, 28 So. 2d 890, 895 (Fla. 1946), cert. denied, 330 U.S. 844 (1947); Pattillo v. Glenn, 7 So. 2d 328, 332 (Fla. 1942), overruling by implication, Pelton v. First Sav. & Trust Co., 124 So. 169 (Fla. 1929); Brown v. Saake, 190 So. 2d 56, 58 (Fla. 2d DCA 1966).

Assuming Florida follows the common-law Rule Against Accumulations in its orthodox form, a mandatory or discretionary authority to accumulate income is void in its inception if the period over which it may be exercised might exceed the period in which interests must vest under the Rule Against Perpetuities. It is immaterial that the beneficial interests of the trust in which the accumulation authority is included are vested. See generally 6 A.L.P., supra note 23, at § 24.65; RESTATEMENT OF PROPERTY §§ 439-444 (1944); L. SIMES & A. SMITH, supra note 21, at §§ 1461-1468.
with this rule as well.\textsuperscript{113}

d. Miscellany

In addition to the provisions of subsection (3) dealing with prior valid interests, commercial transactions and fiduciary powers, two other subsections of chapter 77-23 are concerned with the scope of Florida's statutory Rule Against Perpetuities. Subsection (6) clarifies what law is to govern foreign trusts that acquire Florida real property and subsection (7) covers the treatment of real estate investment trusts. These two provisions are noteworthy only in that they codify generally accepted law for which there is no specific prior authority in Florida.

1) Foreign Trusts Containing Florida Real Estate

(6) ACQUISITION OF REAL PROPERTY BY FOREIGN TRUST.—

If real property situated in this state is acquired by a trust validly created under the law of another jurisdiction, the law of this state in effect at the time of the acquisition of such property determines whether there is a violation of the rule against perpetuities or whether a direction for the accumulation of rents and profits is valid.

Under generally accepted conflict of laws principles, the validity of a devise or conveyance of land is determined by applying the law of the jurisdiction where the land is situated.\textsuperscript{114} There is support for this view in Florida\textsuperscript{115} although no case has been found involving the validity of an equitable interest in Florida realty under the Rule Against Perpetuities. Consequently, prior Florida law is unclear on whether our courts would apply the Florida Rule Against Perpetuities to Florida real property held in a non-Florida trust, particularly if there were a choice-of-law clause to the contrary in the trust instrument.

\textsuperscript{113} This problem does not exist under the Illinois counterpart to subsection (3)(a)4. In Illinois, directions to accumulate are invalid if and only to the extent they last beyond the period of the Rule Against Perpetuities. ILL. ANN. STAT. ch. 30, § 153 (Smith-Hurd Supp. 1983-1984). Accord Restatement (Second) of Property § 2.2(1) (1983) (Donative Transfers).

\textsuperscript{114} Restatement (Second) of Conflict of Laws § 223 (1969).

\textsuperscript{115} E.g., Connor v. Elliott, 85 So. 164, 165 (Fla. 1920), cert. dismissed, 254 U.S. 665 (1920); Thomson v. Kyle, 23 So. 12, 16 (Fla. 1897); Frazier v. Boggs, 20 So. 245, 248 (Fla. 1896).
Subsection (6) should settle the issue. It provides that the Florida Rule Against Perpetuities is applicable to interests in Florida real estate held in foreign trusts.\textsuperscript{116} The subsection should be construed as a pre-emptive statement of public policy; a choice-of-law clause to the contrary should not be given effect.

Subsection (6) also makes it clear that it is the law of Florida in effect at the time that the trust acquires the Florida real property that is determinative. Thus, the remedial provisions of chapter 77-23 are applicable to foreign trusts created before January 1, 1979, to the extent they acquire Florida real property after that date.

2) Trusts with Transferable Trust Certificates (e.g., Real Estate Investment Trusts)

(7) TRUST WITH TRANSFERABLE CERTIFICATES.—

A trust with transferable certificates, heretofore or hereafter created, is not invalid as violating the rule against perpetuities, but such trust may continue for such time as is necessary to accomplish the purpose for which the trust was created if the instrument creating the trust provides that the trust may be terminated at any time by action of the trustees or by affirmative vote of the beneficiaries having a specified percentage of interest in the trust. This subsection applies to an investment trust, which is an unincorporated trust or association managed by trustees, and which does not hold any property for sale to customers in the ordinary course of its trade or business, and the beneficial ownership of which trust is evidenced by transferable shares or by transferable certificates of beneficial interest, which shares or certificates are offered for sale to the public.

Subsection (7) applies to trusts authorized to do business in Florida\textsuperscript{117} that also meet certain additional requirements. Among these are the requirements that the trust not hold any property for sale to customers in the ordinary course of a trade or business, that the beneficial ownership of the trust be evidenced by transferable shares or certificates and that the shares or certificates be offered for sale to the public. These requirements derive from the New


\textsuperscript{117} See Fla. Stat. §§ 609.01-.08 (1981) for the statutory requirements for such authorization.
York statute upon which subsection (7) is based.\textsuperscript{118}

When the New York statute was enacted, the above requirements reflected some of the then-applicable conditions for favorable tax treatment as a real estate investment trust under the federal Internal Revenue Code.\textsuperscript{119} In 1976, the federal tax laws were amended to eliminate the absolute prohibition against holding property for sale in the ordinary course of a trade or business.\textsuperscript{120} Hence, this requirement of subsection (7) is somewhat dated from a tax standpoint. It does, however, continue to serve its primary function of ensuring that subsection (7) applies only to "investment" trusts. The subsection was not intended to apply to trusts created in a donative or estate setting.\textsuperscript{121}

Subsection (7) also requires that the trust provide for termination at any time by action of the trustees or by the affirmative vote of the beneficiaries owning a specified percentage of interest in the trust. This is not a requirement of the tax laws. Rather, it is designed to ensure that there is some method by which the trust can be terminated before its full business purpose has been accomplished.\textsuperscript{122} If the mechanism used is that of an affirmative vote of the trust beneficiaries, no maximum percentage of interest is set by subsection (7). A provision stating that termination requires an affirmative vote of beneficiaries owning one hundred percent of the trust would appear to satisfy the subsection. It is to be anticipated, however, that some lesser percentage would invariably be used as a means of minimizing the leverage of holdouts.

\textsuperscript{118} N.Y. EST. POWERS & TRUSTS LAW § 9-1.5 (McKinney 1967). MINN. STAT. ANN. §§ 318.01, .02(3)(1) (West 1961); MISS. CODE ANN. § 79-15-21 (1972); S.C. CODE ANN. § 33-53-30 (Law. Co-op. 1976) are similar. Cf. GA. CODE ANN. § 53-12-51 (1982) (in the absence of a provision in the trust instrument restricting the duration of business trusts to the lives of designated persons plus 21 years, their duration is restricted to a period of 25 years with a possible extension for an additional 25 years); OKLA. STAT. ANN. tit. 60, § 172 (West 1971) (the duration of business trusts must be limited to a period measured by the lives of its beneficiaries who are alive at its creation or to a definite period not to exceed 21 years with a possible extension for another definite period of up to 21 years).

\textsuperscript{119} For the current law relating to Real Estate Investment Trusts, see I.R.C. §§ 856-860 (CCH 1982), discussed in detail in Real Estate Investment Trusts, TAX MGMT. (BNA) 107-5th (1982).


\textsuperscript{121} See FOURTH REPORT OF THE NEW YORK TEMPORARY STATE COMMISSION ON MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES 360-61 (1965).

\textsuperscript{122} This ensures that termination at the request of all trust beneficiaries would not be prevented by an application of the Claflin doctrine, discussed supra note 28. But see L. SIMES & A. SMITH, supra note 21, at § 1393 (indicating that the Claflin doctrine does not apply to business trusts).
Assuming a trust meets the requirements of subsection (7), it is exempt by virtue of that provision from Florida's statutory Rule Against Perpetuities. This exemption is not particularly significant. The beneficial interests of a business trust are vested as of their creation. Accordingly, the authorities are unanimous that even a perpetual business trust would not violate the common-law Rule.\textsuperscript{132} There is concern, however, that such a trust might violate a somewhat related rule that is sometimes cast under the rubric of the Rule Against Perpetuities.\textsuperscript{134}

Business trusts differ from most other trusts in two important respects. First, because they involve only presently vested interests represented by transferable trust certificates, their duration is not even indirectly restricted by the Rule Against Perpetuities. Second, their numerous beneficial interests\textsuperscript{128} are subject to frequent changes as share certificates are bought and sold. This decreases the likelihood that a business trust could be terminated at the request of its beneficiaries. There would be obvious difficulties in obtaining the unanimous consent that the common-law rules on trust termination require. Thus, in a very practical, if not a legal, sense, business trusts can be perpetually indestructible.

It is this feature that has led to concerns that business trusts of unlimited duration may offend some as yet ill-defined rule against perpetually indestructible trusts.\textsuperscript{136} There is authority in other contexts for the existence of such a rule.\textsuperscript{127} Hence, the prevailing wisdom has been that the duration of these trusts should be expressly restricted to twenty-one years or to the duration of designated lives in being.\textsuperscript{128}

This is an inadequate solution to a problem that does not exist.

\textsuperscript{123} 6 A.L.P., \textit{supra} note 23, at § 24.67; G. G. Bogert \& G. T. Bogert, \textit{Trusts and Trustees § 247(p) (rev. 2d ed. 1977); Restatement of Property § 378 (1944); Restatement (Second) of Trusts § 62N (1957); 1 A. Scott, \textit{The Law of Trusts} § 62.10(2)(c) (3d ed. 1967).

\textsuperscript{124} See authorities cited \textit{supra} note 123.

\textsuperscript{125} To qualify as a Real Estate Investment Trust, for example, there must be a minimum of 100 beneficiaries. I.R.C. § 856(a)(5) (CCH 1983).


\textsuperscript{127} The right of a settlor to make a trust indestructible by the consent of its beneficiaries is restricted by such a rule. See \textit{Restatement of Property} § 381 (1944); L. Simes \& A. Smith, \textit{supra} note 21, at §§ 1391, 1393.

\textsuperscript{128} A clause restricting the duration of a business trust to a period longer than lives in being at its creation may not be valid. See the caveat following \textit{Restatement of Property} § 381 (1944). \textit{But see Restatement (Second) of Property} § 2.1 (1983) (Donative Transfers) (trusts may be made indestructible for full period of the Rule; validity determined on "wait and see" basis).
The solution is inadequate because twenty-one years or the duration of designated measuring lives may not be sufficiently long in all cases to permit a business trust to accomplish its purpose. The problem does not exist because business trusts further, rather than restrict, the productive use of property. There is no policy justification for restricting their duration at all. Accordingly, the major significance of subsection (7) is not the exemption from the statutory Rule it provides, but the assurance the subsection gives that eligible trusts may validly exist in this state for as long as is necessary to accomplish their business objectives.

II. PROVISIONS RELATED TO APPLYING THE RULE—GENERAL

So far we have considered the nature, period and scope of Florida's statutory Rule Against Perpetuities. We now move to a consideration of the several provisions of chapter 77-23 that concern how the Rule applies to transactions within its reach. These include the "wait and see" doctrine of subsection (2)(a), the statutory rules of construction found in subsection (5) and the reduction of age contingencies provision of subsection (4). Together, these several subsections constitute the heart of Florida's statutory Rule as it applies to donative transactions. If they do not simplify prior law,\textsuperscript{129} as they most assuredly do not, they at least make it less treacherous for attorney and client alike.

\textsuperscript{129} The complexities of the common-law Rule are legendary. Thus, in Lucas v. Hamm, 15 Cal. Rptr. 821 (Cal. 1961), the California Supreme Court held that an attorney who drafted a testamentary trust in violation of the Rule Against Perpetuities was not liable for negligence. The court held as a matter of law that the Rule is so difficult to understand that the drafting attorney could not be held accountable for violating it. This decision prompted one of my students to pen the following in partial response to a perpetuities question on his exam:

\begin{quote}
These ancient rules with all their might
have given me a terrible fright.
I only hope that on this test,
I've given you my very best.
BUT! Should you decide that's not the case,
Remember Lucas v. Hamm.
It set the pace.
A dangerous instrumentality is all I ever hope to be.
\end{quote}

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1984] RULE AGAINST PERPETUITIES 805

A. The "Wait and See" Doctrine

1. Introduction

(2) BASIS FOR DETERMINING VALIDITY OF INTEREST.—

(a) Except as provided in subparagraph (5)(d) 1.a., in determining whether an interest violates the rule against perpetuities, the validity of the interest is determined on the basis of facts existing at the end of the lives in being used to measure the permissible period or, if no life in being is used, the facts existing at the end of the twenty-one-year period.

Subsection (2)(a) is a "wait and see" provision similar to those in effect in fifteen other American states and ten Commonwealth jurisdictions. While these various statutes differ significantly in scope and detail, they share the common underlying policy premise that interests which actually vest within the permissible perpetuities period do not offend public policy. This should be contrasted with the contrary policy premise of the common-law Rule. That

130. 1983 Alaska Sess. Laws ch. 51 (to be codified at ALASKA STAT. § 34.27.010); CONN. GEN. STAT. ANN. § 45-95 (West 1981); ILL. ANN. STAT. ch. 30, § 195 (Smith-Hurd Supp. 1983-1984) (applicable to trusts only); Act of Apr. 22, 1983, S.F. 433, 1983 Iowa Legis. Serv. 90 (West) (to be codified at IOWA CODE § 558.68); KY. REV. STAT. § 381.216 (1972); MD. EST. & TRUSTS CODE ANN. § 11-103 (1974); MASS. GEN. LAWS ANN. ch. 184A, § 1 (West 1977); Act of May 19, 1983, ch. 380, § 4, 1983 Nev. Stat. 927, 928 (to be codified at Nev. Rev. Stat. ch. 111); 1983 N.M. LAWS 246; OHIO REV. CODE ANN. § 2131.08 (Page 1976); 20 PA. CONS. STAT. ANN. § 6104(b) (Purdon 1975); VT. STAT. ANN. tit. 27, § 501 (1975); VA. CODE § 55-13.3 (Supp. 1982); WASH. REV. CODE ANN. § 11.98.010 (Supp. 1983-1984). The "wait and see" doctrine has also found acceptance in RESTATEMENT (SECOND) OF PROPERTY § 1.4 (1983) (Donative Transfers) as well as in judicial decisions in Mississippi and New Hampshire. See Phelps v. Shropshire, 183 So. 2d 158 (Miss. 1966); Merchants Nat'l Bank v. Curtis, 97 A.2d 207 (N.H. 1953). Additionally, Story v. First Nat'l Bank & Trust Co., 156 So. 101 (Fla. 1934) (discussed infra note 132), is frequently cited by "wait and see" advocates as indicating that Florida has judicially accepted the doctrine. But see Waggoner, Perpetuities Reform, 81 Mich. L. Rev. 1718, 1760 n.111 (1983) where Professor Waggoner indicates that in none of these decisions did courts knowingly and unambiguously accept "wait and see."

131. Perpetuities and Accumulations Act, 1964, c. 55, § 3(1) (England); Perpetuities and Accumulations Ordinance, 1970, No. 26, § 8 (Hong Kong); Perpetuities Act, 1964, No. 47, § 8 (New Zealand); Perpetuities Act, 1966, c. 2, § 3 (Northern Ireland); Perpetuities Ordinance, 1968 (second session), c. 15, § 5 (Northwest Territories, Canada); Perpetuities Act, 1966, c. 113, as amended by The Perpetuities Amendment Act, 1968, c. 94, § 4 (Ontario, Canada); Perpetuities and Accumulations Act, 1972, 21 Eliz. 2, No. 9, § 6 (Queensland, Australia); Perpetuities and Accumulations Act, 1968, 17 Eliz. 2, No. 7750, § 6 (Victoria, Canada); Law Reform (Property, Perpetuities, and Succession) Act, 1962, 11 Eliz. 2, No. 83, § 7 (Western Australia); Perpetuities Ordinance, 1968 (second session), c. 2, § 5 (Yukon Territory, Canada).
premise dictates that public policy is offended by the mere existence of any possibility of remote vesting. Whether or not an interest actually vests in time is irrelevant. More importantly, under the "might have been" test, the required certainty of vesting must exist as of the date the interest is created. If after considering only those facts known to exist at the date the interest is created there is any possibility that it might vest remotely, the interest is void in its inception.132

132. 6 A.L.P., supra note 23, at § 24.21; J. Gray, supra note 22, at § 214; J. Morris & W. Leach, supra note 23, at 70; Restatement of Property § 370 comment K (1944); L. Simes & A. Smith, supra note 21, at § 1228. Interests created by the exercise of special or testamentary powers of appointment are subject to a special rule. See infra text accompanying notes 222-228.

The recently adopted Restatement (Second) of Property repudiates the common-law "might have been" test in favor of the "wait and see" doctrine. Restatement (Second) of Property § 1.4 (1983) (Donative Transfers). Reporter's Note 6, comment F to that section cites several case decisions as judicial support for the Restatement's position. Among these decisions are two Florida cases, Adams v. Vidal, 60 So. 2d 545 (Fla. 1952), and Story v. First Nat'l Bank & Trust Co., 156 So. 101 (Fla. 1934).

It is difficult to see why Adams was cited in this context. That case involved the validity of a gift over on the failure of issue. Since the court adopted a definite failure of issue construction under which the gift over would vest, if at all, at the death of initial takers all of whom were lives in being, it is difficult to see how the gifts could have vested remotely. In any case, the court was unable to envisage such a possibility. Adams, 60 So. 2d at 550. Accordingly, the case hardly stands for a judicial acceptance of the "wait and see" doctrine.

The implications of the Story case are less clear. In that case, the Florida Supreme Court was asked to hold that certain interests created in the testamentary trust of W. L. Story were violative of public policy. One of the contentions was that the share of the trust limited in favor of Mr. Story's daughter, Kate, offended the Rule Against Perpetuities. As to that share of the trust, the instrument provided that the trustee was to retain the share in trust for Kate's life, paying the income to her together with such amounts of principal as the trustee believed necessary for the support and education of her children. When Kate died, the trustee was to divide her share among her children "share and share alike, upon the youngest of her said children arriving at the age of thirty (30) years." Story, 156 So. at 104. In the interim, the trustee was to use such income and principal as he believed necessary for the support and education of Kate's children.

The nature of the interest limited in favor of Kate's children in Story is not free from doubt. It has been suggested, for example, that the interest was presently vested as of Story's death with only possession postponed until the youngest child attained age 30. See Smith and Keathley, Future Interests in Florida: A Plea For Judicial Supremacy, 9 U. Fla. L. Rev. 123, 129-30 (1956). Under this construction, the children's interest did not transgress the Rule Against Perpetuities. The Florida Supreme Court, however, did not expressly accept this construction. It is possible, therefore, that the court viewed the interest as contingent on the children attaining the specified age. If so, the interest violated the orthodox common-law Rule. As of the death of W. L. Story, Kate might have given birth to another child which child might not have attained age 30 within 21 years of Kate's death. Accordingly, orthodox dogma required the court either to adopt the vested construction or to invalidate the interest as of its inception. Instead, in an opinion devoid of any indication that they were departing from orthodox perpetuities dogma, the Florida Supreme Court simply declined to pass on the validity of the interest. It stated:

It would be highly improper to strike a will down because of a contingency that
To varying degrees dictated by legislative and administrative practicalities, "wait and see" statutes modify or in some instances abolish altogether the common-law "might have been" test. In particular, subsection (2)(a) directs that compliance with Florida's statutory Rule Against Perpetuities is to be determined on the basis of facts known to exist at the end of the waiting period, rather than on the facts that exist at the creation of the interest as the common law requires. For the relatively rare limitation where there are no measuring lives involved, the applicable waiting period corresponds to the twenty-one year in gross period of the Rule. More commonly, vesting will be related to the duration of one or more specified lives in being. For these limitations, the waiting period extends to the end of the last eligible measuring life. In either case, interests are no longer void in their inception merely because, as of their creation, they might vest remotely. Rather, an interest is valid under subsection (2)(a) if, at the expiration of the waiting period, the interest has already vested or, in the absence of actual vesting, if the facts show that the interest can no longer vest remotely. Invalidity occurs under subsection (2)(a) only if remote vesting remains a possibility at the expiration of the waiting period.

**CASE-1:** T bequeaths $250,000 to Bank as trustee to pay the income to his daughter M for life, then to distribute the trust principal in fee to such of M's children as live to attain the age of twenty-five. M is twenty years old, unmarried and childless at T's death.

At common law, the remainder in M's children is void in its in-

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may never arise, and, if it should arise, it may do nothing more than accelerate the enjoyment of the gift.

156 So. at 107.

In commenting on the "wait and see" doctrine, Professor Leach, like the Restatement (Second) of Property, cited the Story decision as authority that the Florida Supreme Court had rejected the common-law "might have been" test. Leach, supra note 60, at 730. This may be. But the failure of the court to definitively construe the interest as contingent together with the fact that no other Florida court has referred to Story as embracing the "wait and see" concept sheds doubt on this point. Moreover, even assuming these interpretations of Story are correct, subsequent decisions would appear by negative implication to limit the application of any judicial "wait and see" doctrine in this state to donative transactions involving interests limited to take in possession after one or more life estates. In cases litigated after Story, Florida courts have continued to apply the common-law "might have been" test to commercial transactions as well as to donative transfers where no life estates are involved. See Watergate Corp. v. Reagan, 321 So. 2d 133 (Fla. 4th DCA 1975) (commercial); In re Estate of Jones, 318 So. 2d 231 (Fla. 2d DCA 1975) (donative).
ception. After \(T\)'s death, \(M\) might give birth to a child who would not attain age twenty-five until more than twenty-one years after \(M\)'s death. The fact that \(M\) is childless at \(T\)'s death is not relevant to the result. In general, class gifts are either totally good or totally bad under the common-law Rule.\(^{133}\) Thus, the remainder is invalid even if \(M\) has children at \(T\)'s death and even if one or all of such childrens' interests are individually certain to vest in time. The possibility that an afterborn child's interest would vest remotely invalidates the entire gift.\(^{134}\)

Under chapter 77-23, class gifts remain either totally valid or totally invalid.\(^{135}\) However, because of subsection (2)(a), the remainder in CASE-1 is not necessarily void. A court may “wait and see” to ascertain what facts exist at \(M\)'s death when the waiting period specified in the subsection expires.\(^{136}\) If \(M\) dies without having had any children or if all of her children are at least age four at her death, the remainder will be valid. In the former case it will never vest. In the latter, it may be said as a matter of certainty that the interest will vest, if at all, within twenty-one years of \(M\)'s death. Only if \(M\) is survived by an afterborn child who is under the age of four at her death would remote vesting remain a possibility at the expiration of the waiting period. In this event the age contingency

\(^{133}\) Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), criticized in Leach, The Rule Against Perpetuities and Gifts to Classes, 51 Harv. L. Rev. 1329 (1938). Per capita class gifts and gifts to sub-classes are exceptions. See infra note 206. But see Carter v. Berry, 140 So. 2d 843, 850 (Miss. 1962) (rejecting Leake).

\(^{134}\) 6 A.L.R., supra note 23, at § 24.26; J. Gray, supra note 22, at § 373; J. Morris & W. Leach, supra note 23, at 101-02; Restatement of Property § 371 (1944); L. Simes & A. Smith, supra note 21, at § 1265.

\(^{135}\) The English Law Reform Committee recommended that courts be directed to construe class gifts to exclude any member whose individual interest might not vest in time, thereby validating the gift for any member whose interest complied with the Rule. Law Reform Comm. Rep., supra note 38, at 14. This recommendation has not been utilized in this country, presumably because it is mandatory. There are instances where splitting a class might not further the intent of the transferor. Leach, supra note 133, at 1337; Schuyler, supra note 22, at 721. Provisions requiring courts to split classes have, however, been incorporated in the perpetuities legislation of a number of Commonwealth jurisdictions. See Perpetuities and Accumulations Act, 1964, c. 55, §§ 9(3), (4) (England); Perpetuities and Accumulations Ordinance, 1970, No. 26, §§ 9(3), (4) (Hong Kong); Perpetuities Act, 1964, No. 47, §§ 9(3), (4) (New Zealand); Perpetuities Act, 1966, c. 2, §§ 4(3), (4) (Northern Ireland); Perpetuities Ordinance, 1968 (second session), c. 15, §§ 9(2), (3) (Northwest Territories, Canada); Perpetuities Act, 1966, c. 113, as amended by The Perpetuities Amendment Act, 1968, c. 94, §§ 8(2), (3) (Ontario, Canada); Perpetuities and Accumulations Act, 1972, 21 Eliz. 2, No. 9, §§ 9(3), (4) (Queensland, Australia); The Perpetuities and Accumulations Act, 1968, 17 Eliz. 2, No. 7750, §§ 9(3), (4) (Victoria, Canada); Perpetuities Ordinance, 1968 (second session), c. 2, §§ 9(2), (3) (Yukon Territory, Canada).

\(^{136}\) It may not be necessary to wait the full subsection (2)(a) waiting period in order to save the gift in CASE-1. See subsection (5)(d) (discussed infra pp. 828-36).
would be reduced pursuant to subsection (4).\textsuperscript{137}

CASE-2: \(T\) bequeaths $250,000 to Bank as trustee to pay the income to his twenty-five-year-old son \(S\) for life, then to pay the income to \(S\)'s oldest surviving child for life, and at the death of that child (or at \(S\)'s death if he is not survived by a child) in fee, \textit{per stirpes}, to \(S\)'s then-living lineal descendants. At \(T\)'s death, \(S\) is married and has a two-year-old child, \(C-1\).

In CASE-2, the remainder limited in favor of \(S\)'s lineal descendants might vest remotely. This would occur if \(C-1\) predeceased \(S\), \(S\) then died survived by a second child and that child then survived \(S\) by more than twenty-one years. In such a case the remainder, which vests at the death of the second child, would vest more than twenty-one years after the death of \(S\), the last relevant life in being.

Under the common-law Rule, the mere possibility that this scenario might occur is fatal. Under subsection (2)(a) it is not. Instead a court will wait until \(S\)'s death to see if remote vesting remains a possibility at that time. If \(S\) is not survived by a child, the remainder interest is valid. It will vest, if at all, at \(S\)'s death. Likewise, the remainder is valid if \(S\) is survived by \(C-1\). It will vest no later than the death of \(S\)'s oldest surviving child whom the court will know to be \(C-1\), a life in being. Invalidity under the "wait and see" rule of subsection (2)(a) occurs only if \(S\)'s eldest surviving child is an afterborn child. Only in that case would the required certainty of timely vesting not be present at the expiration of the subsection (2)(a) waiting period.

2. Who Are the Permissible Measuring Lives?

The essence of the "wait and see" doctrine is the authority it gives courts to consider the impact post-creation events have on the vesting or failure of interests. Events which occur within the applicable waiting period may be taken into account; subsequent events may not. Therefore, a question of critical importance in the application of any "wait and see" statute is whose lives may be used to measure the waiting period.

Subsection (2)(a) offers little direct guidance on this point. It provides only that where lives have been \textit{used} to measure the perpetuities period, the waiting period extends to the end of the lives

\textsuperscript{137} See infra pp. 836-39.
so used. The meaning of *used* in this context is not explained in chapter 77-23 and no exact parallel exists in the legislation of any other jurisdiction. Nevertheless, it is a virtual certainty that only beneficiaries of the transfer were intended to qualify as subsection (2)(a) measuring lives.\(^{138}\) The first evidence of this may be found in the legislative history of chapter 77-23. It implies that subsection (2)(a) was based on the Massachusetts perpetuities statute.\(^{139}\) This is a point of considerable significance because the Massachusetts statute was influenced in part by the criticism Professor Simes expressed of the pioneering Pennsylvania "wait and see" statute.\(^{140}\) That statute provides simply that the period of the Rule is to be measured by "actual rather than possible events."\(^{141}\) Professor Simes contended that this type of statute leaves no satisfactory criteria for the selection of measuring lives.\(^{142}\)

To the extent this criticism is well founded, and there is considerable disagreement on the point,\(^{143}\) the problem may be eliminated by better drafting. The Massachusetts statute illustrates one possible approach.\(^{144}\) With few exceptions, it restricts the class of

138. For the sole exception, see *infra* note 154.
139. See Statement of Henry A. Fenn in support of the addition of § 689.22 to the Florida Statutes, where Professor Fenn, who drafted chapter 77-23, stated that Florida's statute is based on the perpetuities reform statutes of Illinois, New York, Delaware and Massachusetts. Similarities between subsection (2)(a) and *Mass. Gen. Laws Ann.* ch. 184A, § 1 (West 1977) (quoted *infra* note 144) indicate that subsection (2)(a) is based on that provision. In particular, subsection (2)(a) provides for a truncated waiting period, see *infra* pp. 811-14, a feature that is uniquely attributable to the Massachusetts perpetuities statute. In contrast, *Ill. Ann. Stat.* ch. 30, § 195 (Smith-Hurd Supp. 1983-1984), the only other of the source statutes to adopt the "wait and see" doctrine, is limited to transfers in trust.
eligible measuring lives to those persons at whose death the interest to be judged is limited to take. Effectively this means that only beneficiaries of the transfer are eligible as measuring lives. The implication of the legislative history of chapter 77-23 is that the measuring lives under subsection (2)(a) should be similarly restricted.

The language of subsection (2)(a) provides additional support for this construction. Observe that the subsection (2)(a) waiting period (measuring lives) is truncated short of the full period of the

In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this section an interest which must terminate not later than the death of one or more persons is a "life estate" even though it may terminate at an earlier time.

Virtually identical statutes may be found at CONN. GEN. STAT. ANN. § 45-95 (West 1981); ME. REV. STAT. ANN. tit. 33, § 101 (1964); MD. EST. & TRUSTS CODE ANN. § 11-103 (1974).

An alternative approach to the measuring lives problem is illustrated by Ky. REV. STAT. § 381.216 (1972). This statute is phrased similarly to the Pennsylvania “wait and see” statute with the added proviso that “the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest.” Accord 1983 Alaska Sess. Laws ch. 51 (to be codified at ALASKA STAT. § 34.27.010); Act of May 19, 1983, ch. 380, § 4, 1983 Nev. Stat. 927, 928 (to be codified at NEV. REV. STAT. ch. 111); 1983 N.M. Laws 246. Legislation using a similar concept has also been enacted in several Commonwealth jurisdictions. See Perpetuities Ordinance, 1968 (second session), c. 15, § 7 (Northwest Territories, Canada); Perpetuities Act, 1966, c. 94, § 6 (Ontario, Canada); Perpetuities and Accumulations Act, 1972, 21 Eliz. 2, No. 9, § 6 (Queensland, Australia); Perpetuities and Accumulations Act, 1968, 17 Eliz. 2, No. 7750, § 6 (Victoria, Canada); Perpetuities Ordinance, 1968 (second session), c. 2, § 7 (Yukon Territory, Canada). For an explanation of how the causal relationship criteria would apply to various types of limitations, see J. DUKEMINIER, PERPETUITIES LAW IN ACTION: KENTUCKY CASE LAW AND THE 1960 REFORM ACT 79-91 (1962).

RESTATEMENT (SECOND) OF PROPERTY § 1.3 (1983) (Donative Transfers) illustrates yet another approach to the measuring lives problem. That section restricts the class of eligible measuring lives to the transferor, the donee of a nonfiduciary power of appointment if an exercise of the power could effect the interest in question and, if reasonable in number, the beneficiaries of the transfer and the parents and grandparents of the beneficiaries. The recently enacted Iowa statute is modeled after the RESTATEMENT OF PROPERTY although the Iowa provision contains a somewhat expanded definition of eligible measuring lives. See Act of Apr. 22, 1983, S.F. 433, 1983 Iowa Legis. Serv. 90 (West) (to be codified at IOWA CODE § 558.68(2)(b)(2)). The statutes of several Commonwealth jurisdictions also include a detailed catalogue of the persons whose lives must be used to define the duration of the “wait and see” period. See Perpetuities and Accumulations Act, 1964, c. 55, § 3(4), (5) (England); Perpetuities and Accumulations Ordinance, 1970, No. 26, § 8(4), (5) (Hong Kong); Perpetuities Act, 1964, No. 47, § 8(4), (5) (New Zealand); Perpetuities Act, 1966, c. 2, § 3(4), (5) (Northern Ireland).

Rule Against Perpetuities (measuring lives plus twenty-one years). A moment's reflection will reveal that this feature, which is uniquely traceable to the Massachusetts perpetuities statute, compromises, to some extent, the underlying policy premise of the "wait and see" doctrine. Some interests that actually vest in time will nevertheless be invalid under the Florida statute. The impetus for this policy compromise may be found in two arguments critics of "wait and see" have made against the doctrine as a method of perpetuities reform. The first of these is that the doctrine constitutes a "long step toward the inalienability of property." Under the common-law "might have been" test, doubts about timely vesting are resolved on the side of invalidity. Under "wait and see," the opposite is the case. As long as the waiting period continues, doubts are resolved on the side of validity. Hence, the "wait and see" doctrine permits interests to restrain alienability for a period of time after their creation while, at least in theory, the common-law "might have been" test does not.

The second of the arguments against "wait and see" is closely related to the first. Critics contend the inability to determine the ultimate fate of interests during the waiting period will cause inconvenience. They point particularly to the case of legal interests in land where the uncertainty caused by the doctrine will itself render the land virtually inalienable throughout the permissible waiting period.

To a limited extent, these arguments are well founded. "Wait and see" does involve the potential "costs" of increased uncertainty and restrained alienability. However in some jurisdictions, including Massachusetts and to a less certain extent Florida,

145. This possibility may be illustrated in the context of the limitation described in CASE-2. If at S's death his eldest surviving child is C-2, a child born to him after T's death, and if C-2 in turn dies within 21 years of S's death, the remainder in S's then-living lineal descendants vests in time. Nevertheless, the remainder is void under chapter 77-23. As of S's death, when the subsection (2)(a) waiting period expired, the required certainty of timely vesting was not present. C-2 might have lived more than 21 years beyond S in which case the remainder interest would have vested remotely. 146. Simes, supra note 142, at 188-90. 147. See, e.g., Phipps, The Pennsylvania Experiment In Perpetuities, 143 TEMP L.Q. 20, 22-23 (1949); Simes, supra note 142, at 188; Schuyler, supra note 22, at 715. But see, e.g., Brégý, A Defense of Pennsylvania's Statute on Perpetuities, 23 TEMP. L.Q. 313, 315-20 (1950).


149. See Story v. First Nat'l Bank & Trust Co., 156 So. 101 (Fla. 1934) (discussed supra note 132). But see Van Roy v. Hoover, 117 So. 887 (Fla. 1928).
courts traditionally decline to pass on the validity of remainder interests until antecedent life estates have ended.\textsuperscript{150} Not only has there been no inconvenience caused by this practice,\textsuperscript{151} but the enactment of "wait and see" in such jurisdictions would not involve any additional restraint on alienation provided the waiting period under the doctrine is restricted to the duration of preceding valid estates.\textsuperscript{152} Courts would wait that long in any event. 

Therein lies the purpose of the truncated waiting period in sub-

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  \item 150. This rule of judicial restraint was approved by Professor Leach and criticized by Professor Simes. Cf. Leach, supra note 60, at 729; Simes, supra note 142, at 185.
  \item 151. Although these problems have yet to arise, the rule of judicial restraint and correspondingly the "wait and see" doctrine do create a certain potential for inconvenience that would not be present were courts to apply the common-law "might have been" test as of the creation of an interest. One such possibility might arise if a trustee made a discretionary distribution to a beneficiary whose interest was subsequently determined to be invalid. Could the beneficiary be forced to rebate the distribution? Could the trustee be surcharged for making it?
  
  At least insofar as the "wait and see" doctrine is concerned, the answer to both questions should be no. During the waiting period, all interests that continue to have a possibility of timely vesting should be treated as presumptively valid and actions taken in reliance thereon should be regarded as proper. This result should be reached even in the absence of the specific statutory provision to that effect that exists in some jurisdictions. See, e.g., Perpetuities and Accumulations Act, 1964, c. 55, § 3(1) (England).
  
  The doctrine of infectious invalidity provides a second possibility for inconvenience. Simes, supra note 142, at 189. Normally, when an interest violates the Rule Against Perpetuities, that interest and only that interest is void. The doctrine of infectious invalidity is the exception. This doctrine gives courts the authority to strike otherwise valid interests if doing so produces a result that more nearly approximates the testator's presumed intent. Porter v. Baynard, 28 So. 2d 890 (Fla. 1946), cert. denied, 330 U.S. 844 (1946); 6 A.L.P., supra note 23, at §§ 24.48-.52; Restatement of Property § 402 (1944); L. Simes & A. Smith, supra note 21, at § 1262.

The application of the infectious invalidity doctrine in tandem with either a rule of judicial restraint or the "wait and see" doctrine presents unique considerations. In either case, the interests that would fall prey to infectious invalidity would have been in existence throughout the judicial restraint or "wait and see" period. However, as Professor Leach noted, the absence of even a single case where the problem has arisen indicates that it is more pedagogical than real and, in any case, the "wait and see" doctrine is to be preferred over the infectious invalidity doctrine. "Wait and see" has a greater remedial impact for a larger number of cases. See Leach, supra note 143, at 1147-49.

152. This is true, of course, only if the "wait and see" doctrine is applicable exclusively to interests limited to take after one or more valid anterior interests. While the Massachusetts statute, supra note 144, is restricted in this manner, subsection (2)(a) is not. It provides an alternate 21-year in gross waiting period for certain executory interests to which the Massachusetts provision would not apply at all. In practice, however, the alternate subsection (2)(a) waiting period will seldom apply. Most limitations which do not involve measuring lives are either gifts over from one charity to another, purchase options, or gifts made contingent on some aspect of the estate administration process. The former two are exempt from the statutory Rule Against Perpetuities under subsections (3)(a)1 and 7, respectively. For the latter, it is not necessary to "wait and see" at all. See subsection (5)(c) (discussed infra pp. 826-28).
section (2)(a). It is designed to mitigate to the greatest extent possible the "costs" of "wait and see" by circumscribing the waiting period to the duration of preceding valid estates. Significantly, this can only be accomplished if the class of eligible measuring lives is restricted to the beneficiaries of the transfer. Indeed, this objective suggests the need for a further refinement of the measuring lives criteria. As used in subsection (2)(a), the phrase "used to measure the permissible period" should be construed to exclude as a measuring life any person (beneficiary or not) whose life, if used for that purpose, could extend the waiting period beyond the expiration of anterior valid interests.

Within this stricture and provided further that only persons alive or in gestation at the creation of an interest are "lives in being," all beneficiaries are permissible measuring lives. Where there is more than one such person, the waiting period extends until the death of the last. Moreover, in identifying the measuring lives, the type of future interest involved should not be relevant. Subsection (2)(a) makes no distinction between remainder interests and executory interests except, of course, that the latter may involve no permissible measuring lives, in which case the subsection (2)(a) period is twenty-one years. Likewise it should not be relevant whether the

153. In a recent article, Professor Waggoner of the University of Michigan suggests that one of the criteria against which "wait and see" statutes should be measured is whether they produce a result that closely approximates that which could be obtained by a "Rule-wise" lawyer. Waggoner, supra note 130, at 1773-74. On this criterion, "wait and see" statutes such as those of Massachusetts and Florida, which restrict the class of eligible measuring lives to the beneficiaries of the transfer and which truncate the "wait and see" period short of the full period of the Rule, fall "markedly short of the goal." Id. at 1773 n.149. Of the various "wait and see" approaches, Professor Waggoner prefers that of the Restatement (Second) of Property (discussed supra note 144). Id. at 1776-85. As for the so-called "costs" of the "wait and see" doctrine, Professor Waggoner suggests that these can be kept within acceptable limits if: (1) courts "wait to see" only where it is necessary to do so; (2) a workable criterion for the identification of the measuring lives is included in the statute; and (3) when faced with an interest that might or might not vest in time, courts competently identify the possible chains of future events that can affect vesting and state clearly which will result in validity and which will not. Id. at 1769-73.

154. There is one exception. As previously indicated, subsection (1) of chapter 77-23 continues that aspect of the common-law Rule which permits a testator to specify an ascertainable group of persons to be used as measuring lives in determining the period of the Rule Against Perpetuities. Where this has been done, logic and the language of subsection (2)(a) indicate that the designated lives are also measuring lives for purposes of the "wait and see" rule. In this one instance, the subsection (2)(a) measuring lives need not be beneficiaries. While this result may appear to be inconsistent with the objective of restricting the waiting period to the duration of preceding valid estates, in practice the inconsistency will seldom be present. Usually, with the type of provision under discussion here, there will be no need to "wait and see" at all.
interests of the measuring lives are present or future; whether they are vested, contingent or subject to divestment; or whether the takers are identified by class description or by name. Additionally, in the case of class gifts, it should not be relevant that the class is open as of the date of a transfer or that additional members actually enter the class after that date.\textsuperscript{188} None of these various factors has any bearing on the policy or practical concerns that influenced the language used in subsection (2)(a).

CASE-3: \(T\) bequeaths $250,000 in trust to pay the income to his brother \(B\) for life, then to distribute the trust principal to the first grandchild of \(B\) to marry. \(T\) is survived by his brother \(B\), by \(B\)'s two children, \(C-1\) and \(C-2\), and by \(C-1\)'s infant child, \(GC\).

In CASE-3, the only subsection (2)(a) measuring life is \(B\). \(C-1\) and \(C-2\) do not qualify; they are not beneficiaries of the transfer. To use them as measuring lives would necessarily mean that the subsection (2)(a) waiting period could extend beyond the expiration of \(B\)'s life interest. \(GC\), although a potential beneficiary, should be disqualified for the same reason.

CASE-4: \(T\) bequeaths $250,000 to the grandchildren of his brother \(B\). At \(T\)'s death, \(B\) is alive. He has two children but no grandchildren.

Under principles similar to those discussed in conjunction with CASE-3, there are no measuring lives for CASE-4. Therefore the subsection (2)(a) waiting period is twenty-one years.

CASE-5: \(T\) devised Blackacre to his son \(S\) for so long as it is used as a parking lot for the family lumber business and if it shall ever cease to be so used, then, and in that event, to his daughter \(M\).

In CASE-5, \(S\) is clearly a permissible measuring life. But what about \(M\)? It may be difficult to say that \(T\) has used \(M\) to measure the perpetuities period. \(M\)'s life is in no way relevant to the vesting

\textsuperscript{155} But see In re Estate of Pearson, 275 A.2d 336 (Pa. 1971), where the court in applying the Pennsylvania "wait and see" statute, supra note 141, held that members of a class alive at the commencement of the perpetuities period could not be used as measuring lives if additional members to the class were born during the "wait and see" period. This result has been appropriately criticized as an unwarranted extension of the common-law requirement that class gifts must either be good as to all members or they are bad as to all members. J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES 1058 n.81 (2d ed. 1978).
or failure of her own interest. Nevertheless, $M$ is easily identifiable; she is a beneficiary of the transfer; and using her as a measuring life could not extend the waiting period beyond the termination of $S$'s determinable fee. On balance, therefore, there would appear to be no sound reason for excluding her.\textsuperscript{156} By naming her as a beneficiary of his limitation, $T$ could be said to have used her to measure the perpetuities period.

CASE-6: $T$ leaves the residue of his estate in trust to pay the income to his son $S$ for life, then to pay the income in equal shares to such of $S$'s children as are from time to time living and, at the death of the last, to distribute the trust principal to $S$'s then-living grandchildren.

The subsection (2)(a) measuring lives for CASE-6 consist of $S$, and all of his children and grandchildren who were alive at $T$'s death.

CASE-7: $T$ leaves the residue of his estate in trust to pay the income to his son $S$ for life, then to pay the income to $S$'s surviving spouse, if any, for life, then to divide the income among such of $S$'s children as are from time to time living and, at the death of the last child of $S$, to distribute the trust principal \textit{per stirpes} to $S$'s then-living lineal descendants. $T$ is survived by $S$, by $S$'s wife, $W$, and by their only child, $GC$. Subsequently, $S$ and $W$ divorce and still later $S$ marries $M$. $M$ has a child, $A-1$, whom $S$ adopts. $A-1$ was born before $T$'s death.

In CASE-7, $S$ and $GC$ are permissible measuring lives. $W$ does not qualify because she is no longer a beneficiary of $T$'s trust. Beyond that, things are less certain. As $S$'s surviving spouse and adopted child, respectively, $M$ and $A-1$ are beneficiaries of $T$'s transfer. But are they eligible measuring lives under subsection (2)(a)?

Whether $M$ and $A-1$ qualify depends on whether the subsection (2)(a) measuring lives must be ascertainable as such when the period of the Rule commences.\textsuperscript{157} The statutes of some jurisdictions

\textsuperscript{156} Accord Act of Apr. 22, 1983, S.F. 433, 1983 Iowa Legis. Serv. 90 (West) (to be codified as \textit{Iowa Code} § 558.68(2)(b)(2)); \textit{Restatement (Second) of Property} § 1.3 comment e (1983) (Donative Transfers). See also ILL. ANN. STAT. ch. 30, § 195(a) (Smith-Hurd Supp. 1983-1984) (waiting period measured by lives of all trust beneficiaries, not just those whose lives are relevant to vesting).

\textsuperscript{157} A similar problem would exist if $S$ and $W$ had remained married until $S$'s death. $W$ would be a life in being but she would not be an ascertainable beneficiary of $T$'s trust until
expressly include such a requirement. 158 Although chapter 77-23
does not, arguably the requirement is implicit in the requirement
of subsection (1) that the lives used to measure the perpetuities
period not be “so numerous or designated in such a manner as to
make proof of their end unreasonably difficult.” Alternatively, this
language could be interpreted to require only that the measuring
lives be ascertainable by the time it is necessary to resort to their
use to measure the waiting period.

Whether a requirement that the measuring lives be ascertainable
as of the testator’s death would serve any viable objective is doubt-
ful. Perhaps where the statute allows courts to consider measuring
lives other than beneficiaries of the transfer, the requirement could
be justified on the basis of administrative convenience. However,
where only beneficiaries qualify as measuring lives, there would be
little inconvenience in waiting to see who the permissible measur-
ing lives are. 158 Accordingly, the better interpretation of chapter
77-23 would be one which required only that the measuring lives
be ascertainable as of the time that reference to them becomes
necessary to keep the subsection (2)(a) waiting period from end-
ing. 160 This would ensure that \( M \) and \( A-1 \) in CASE-7 qualify. Their
identity and status as beneficiaries will be known at or before \( S \)’s
death.

B. Statutory Rules of Construction

As an adjunct to the “might have been” test, courts have con-
sistently held that the common-law Rule is satisfied only if an in-
terest is absolutely certain to vest, if at all, within the permissible
perpetuities period. A probability of timely vesting, regardless of
how high, is not sufficient. 161 As a consequence, interests have been
stricken (and otherwise reasonable testamentary objectives have
been frustrated) solely on the basis of preposterous factual pre-
sumptions. The classic “unborn widow,” “administrative contin-

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158. See Perpetuities and Accumulations Act, 1964, c. 55, § 3(4)(a) (England); Perpetu-
ities and Accumulations Ordinance, 1970, No. 26, § 8(4)(a) (Hong Kong); Perpetuities Act,
Ireland) (creating an exception for spouses of eligible measuring lives).
159. But see Maudsley, Perpetuities: Reforming The Common-Law Rule — How to
160. Accord RESTATEMENT (SECOND) OF PROPERTY § 1.3 comment e (1983) (Donative
Transfers).
161. 6 A.L.P., supra note 23, at § 24.21; J. GRAY, supra note 22, at § 214; J. MORRIS & W.
LEACH, supra note 23, at 70-72; L. SIMES & A. SMITH, supra note 21, at § 1228.
ergency" and "fertile octogenarian"-type violations are notorious in this regard.\textsuperscript{162} Respectively, these violations are founded on the possibility that a life beneficiary might marry someone who, by legal presumption, was not born at the commencement of the perpetuities period; the possibility that the administration of even the simplest of estates could take longer than twenty-one years; and the possibility that a woman might give birth to a child even though she is physiologically or medically incapable of doing so.

Subsection (5) of chapter 77-23 injects a healthy dose of common sense into Florida's perpetuities law through a series of four presumptive rules of construction to be used by courts in applying the statutory Rule. These rules of construction reflect the unanimous view of perpetuities authorities that interests should not be invalid solely because some unrealistic factual presumption can be used to establish the existence of a remote possibility of untimely vesting.

In the overall context of chapter 77-23, the subsection (5) rules of construction serve two important functions. First, as previously discussed, an interest is invalid under subsection (2)(a) if at the expiration of the truncated waiting period there exists a continuing possibility of remote vesting. Subsection (5) ensures that any such possibility must be based on realistic rather than fanciful factual presumptions. Second, to the extent that the critics of "wait and see" are correct in their concerns about the added "costs" involved in waiting to see, the priority use of subsection (5) will have the salutory effect of mitigating those "costs."\textsuperscript{163}

1. A General Presumption of Validity

(5) RULES OF CONSTRUCTION.—

Unless a contrary intent appears . . .

(a) It shall be presumed that the creator of an interest intended that the interest be valid.

According to Gray, the Rule Against Perpetuities is a rule of law, not of construction. It accomplishes its objectives by defeating rather than by furthering the transferor's intent. Thus, Gray admonished that limitations were to be construed as if there were no


\textsuperscript{163} Accord Law Reform Comm. Rep., supra note 38, ¶ 18, at p. 11.
Rule; then the Rule was to be remorselessly applied.\(^{164}\)

There is ample evidence of courts, particularly those of England, taking Gray's admonition literally.\(^ {165}\) However, in appropriate cases, most American courts attempt to minimize the harshness of the Rule by employing a constructional preference for validity.\(^ {166}\) The Florida Supreme Court, for example, has held that in ruling on the validity of an interest that is "fairly susceptible of two constructions, one of which would turn it into an illegal perpetuity and the other make it valid and operative, the latter should be adopted, as the law presumes that the testator intended to make a binding will."\(^ {167}\)

Subsection (5)(a) makes this heretofore judicially sanctioned rule of construction a part of the codified Rule Against Perpetuities.\(^ {168}\) Although it may be viewed as declaratory of existing law, the extent of the constructional preference for validity under prior law is unclear. The Restatement of Property, for example, adopts the position that a limitation must normally be ambiguous without regard for the Rule before a validating construction may be adopted. That is, the possibility that one construction might violate the Rule, while another would not, is not sufficient justification, in and of itself, for a court to adopt the former.\(^ {169}\)

It may be, as some have suggested, that the line drawn by the Restatement is not the same line drawn by courts in this country—that in many instances courts have used the possibility of a perpetuities violation as the sole justification for adopting some other validating construction.\(^ {170}\) In any case, it is clear that such an approach would be permissible under subsection (5). Note, how-

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\(^{164}\) J. Gray, supra note 22, at § 629.


\(^{166}\) 6 A.L.P., supra note 23, at § 24.45; L. Simes & A. Smith, supra note 21, at § 1288. Even Gray conceded that where a true ambiguity exists and a limitation is reasonably susceptible of two constructions, the one which results in validity should be preferred. J. Gray, supra note 22, at § 633. But Gray argued that this constructional technique should be narrowly confined. He did not approve of a broad license in courts to avoid the consequences of the Rule Against Perpetuities through the construction process. See id. at §§ 634-642.


\(^{169}\) Restatement of Property § 375 & comment b (1944). But see id. at § 377 comment c.

\(^{170}\) L. Simes & A. Smith, supra note 21, at § 1289.
ever, that the subsection (5)(a) presumption is not conclusive. If the terms of the limitation or other facts show the transferor's intent to be inconsistent with the facts a court would have to presume in order to avoid a violation of the Rule, subsection (5)(a) should not be used to avoid the violation. Moreover, under prevailing dogma, the transferor's intent must be determined at the time the instrument of transfer is executed. For testamentary transfers, this would be at the execution of the will rather than at the testator's death.171

CASE-8: Mrs. T executes a will in which she leaves the residue of her estate in trust to pay the income to her daughter A for life, then to distribute the trust principal to such of A's children as live to attain the age of twenty-five. At the time Mrs. T executes her will, A is forty-five years old and is married to H, age fifty. A and H have two daughters the youngest of whom is sixteen. Mrs. T dies within a few months of executing her will, survived by A, H and their two daughters.

Normally, a class gift to children is construed to include all children, whenever born, not just those alive at the execution of the instrument.172 Were this construction applied to CASE-8, the gift to A's children would violate the common-law Rule.

Under chapter 77-23, it would be possible to "wait and see" if A gives birth to another child after Mrs. T's death. But it is not necessary to do so. Under the facts of CASE-8, it is reasonable to assume that Mrs. T did not contemplate the birth of additional children by A and H. Accordingly, the remainder interest could be upheld pursuant to subsection (5)(a) without waiting to see. This could be done by adopting a construction of Mrs. T's instrument which precluded afterborn children of A from sharing.173

171. "[T]he intent of the testator shall be determined as of the time of the execution of his will, and such intention cannot be altered by the occurrence of subsequent events . . . which the testator did not anticipate and over which he had no control." In re Parker's Estate, 110 So. 2d 498, 502 (Fla. 1st DCA 1959), cited with approval in Jenkins v. Donahoo, 231 So. 2d 809, 811 (Fla. 1970). Accord 2A R. Powell, supra note 21, at ¶ 319; Restatement of Property §§ 242, 244 (1940).

172. 5 A.L.P., supra note 23, at §§ 22.44, .45; Restatement of Property § 295(a) comment a (1940); L. Simes & A. Smith, supra note 21, at § 640.

173. 6 A.L.P., supra note 23, at § 24.22; Restatement of Property § 243(c) comment n, illustration 4 (1940); L. Simes & A. Smith, supra note 21, at § 1229. For other situations where subsection (5)(a) might appropriately be used to save a gift, see generally 5A R. Powell, supra note 21, at ¶ 777.
CASE-9: Same as CASE-8 except Mrs. T had executed her will several years before her death. At that time, A and H were twenty-four and twenty-nine, respectively. A had just given birth to her second daughter. Sixteen years later, Mrs. T dies survived by A, H and their two daughters.

Here, the ages of A and H when Mrs. T executed her will, as well as the recent birth of one of their daughters, indicates that Mrs. T probably contemplated the possibility that A and H might have additional children. There is no evidence to suggest that Mrs. T would not have wanted to treat afterborn children equally with the two existing daughters. In fact, the use of "children" rather than "daughters" in Mrs. T's will indicates the contrary. Accordingly, under these facts, it would be inappropriate for a court to save the gift to A's children by presuming pursuant to subsection (5)(a) that Mrs. T intended only the existing children of A to share under her will. In CASE-9, it is necessary to "wait and see."

2. Unborn Widows

(5) RULES OF CONSTRUCTION.—

Unless a contrary intent appears...

(b) If, except for this paragraph, an interest would be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the estate, and such person is referred to in the instrument creating the interest as the spouse of another without further identification, it is presumed that such reference is to a person in being on the effective date of the instrument.

We have seen that in order for an interest to be valid under the common-law Rule it must be absolutely certain to vest, if at all, within lives in being at its creation plus twenty-one years. Moreover, under the "might have been" test the required certainty of vesting must exist as of the date the interest is created. Carried to their logical extremes, these elements of the common-law Rule have resulted in the "unborn widow" genre of perpetuities violations.

CASE-10: T's will leaves $250,000 in trust to pay the income to his son S for life, then to pay the income to S's widow for life.

174. 6 A.L.P., supra note 23, at § 24.22; Restatement of Property § 377 comment c & illustration 1 (1944).
and at the death of the widow, or at S’s death if he is not survived by a widow, to distribute the principal in fee to S’s then-living children. The residue of T’s estate is left to T’s daughter. When T executes his will, S is twenty years old and unmarried. T dies two years later.

At common law the remainder in S’s children is void in its inception. It is not certain to vest until the termination of the intermediate life interest in S’s surviving spouse. This might occur beyond the permissible period of the Rule.

The primary objection to the orthodox result in CASE-10 is that in many instances an otherwise reasonable testamentary plan is frustrated even though there is little likelihood that the children’s remainder will in fact vest remotely. For that to happen, S must not only father a child after the transfer, but he must also be survived by a wife who was not alive at T’s death. This unique sequence of events is only remotely possible if S is of advanced age when T executes his will. If, as in CASE-10, S is in his twenties and unmarried at that time, remote vesting is more likely although even here it is not probable.

Many “unborn widow”-type violations will be eliminated by the “wait and see” rule of subsection (2)(a). In CASE-10, for example, at S’s death it might be known that S was not survived by an afterborn spouse, or even if he was, that he was not survived by an afterborn child. In either situation, the remainder in S’s children would be valid.

175. 6 A.L.P., supra note 23, at ¶ 24.21; J. GRAY, supra note 22, at ¶ 214; J. MORRIS & W. LEACH, supra note 23, at 72-73; L. SIMES & A. SMITH, supra note 21, at ¶ 1228.

The circumstances existing when T executes his will may make it possible to avoid a violation of the Rule by applying the subsection (5)(a) presumption of validity. If S was married at that time, a violation could be avoided by adopting a construction of T’s limitation which restricted his reference to S’s widow to the spouse S had at the will’s execution. Alternatively, if S had children when T executed his will and was old enough that he was not likely to have more, the limitation could be upheld by construing T’s reference to S’s children to include only those children S had when T executed his instrument. See generally 6 A.L.P., supra note 23, at ¶ 24.21; 5A R. POWELL, supra note 21, at ¶ 765[4]; L. SIMES & A. SMITH, supra note 21, at ¶ 1228 and the authorities cited therein.

176. If S either has no surviving spouse or his surviving spouse was alive at T’s death, the remainder in S’s children is valid pursuant to subsection (2)(a). In the first event, it will vest at S’s death. In the second, it will vest at the death of S’s surviving spouse whom the court will know to be a life in being. Similarly, even if S is survived by an afterborn spouse, the remainder is valid under subsection (2)(a) provided he is not also survived by an afterborn child. In this case, the remainder interest would vest or fail within the lifetimes of a class comprised exclusively of lives in being.

In appropriate situations, it may also be possible to use the general presumption of validity in subsection (5)(a) to uphold the gift to S’s children without waiting to see. See supra
Suppose, however, that the facts at S's death show that the unlikely has happened. S's wife died shortly after T and eighteen years later S married someone who was not alive at T's death. Then S and his child-bride (call her Lolita) had a child S Jr. Several years later, S died, survived by Lolita and S Jr. Under these postulated facts, it would not be possible to save the remainder interest in S's children simply by applying the “wait and see” rule. There is no certainty of timely vesting at S's death when the subsection (2)(a) waiting period expires. Nevertheless, the remainder may yet be saved by the constructional presumption of subsection (5)(b).

Subsection (5)(b) creates a rebuttable presumption that references to a person's spouse in an instrument are intended by the maker of the instrument to refer exclusively to persons who are alive at the “effective date of the instrument.” The initial phrase of the subsection makes it clear that it is to apply only where remote vesting remains a possibility after the expiration of the subsection (2)(a) “wait and see” period. Where this possibility exists, a court may save the children's remainder by construing T's gift to S's widow as if it were qualified by the language: “provided, however, that no spouse of S shall take unless she was alive at the effective date of this instrument.” Construed in this manner, Lolita does not succeed to the intermediate life interest. As a consequence, however, the remainder interest in S's children is valid. It will vest in S's children, including any he had by Lolita, immediately at S's death.

Although the purpose of subsection (5)(b) is apparent, the wording of the subsection leaves something to be desired. There are two areas of concern. First, is the subsection restricted, as its wording might suggest, to limitations which refer to the word “spouse?” Quite obviously, if it is, the subsection has no application to CASE-10 where T's reference was to S's “widow.” Equally obvious, if the subsection is to serve its purpose, “spouse” must be inter-

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Note 175. Alternatively, since a violation presupposes the birth of an afterborn child, if S becomes medically incapable of procreating before he in fact has an afterborn child, the remainder could be upheld without waiting the full subsection (2)(a) period. See subsection (5)(d) (discussed infra pp. 828-36).

177. Cf. Perpetuities and Accumulations Act, 1964, c. 55, § 5 (England) (under which the afterborn spouse is entitled to take the intermediate income interest but the remainder is saved by accelerating its vesting to the end of a “wait and see” period that does not include the life of the afterborn spouse). Accord Perpetuities and Accumulations Ordinance, 1970, No. 26, § 10 (Hong Kong); Perpetuities Act, 1966, c. 2, § 5 (Northern Ireland). See also infra note 179.
interpreted to include such generic substitutes as wife, husband, widow and widower. Presumably this will present little difficulty for our courts.

More critically, if subsection (5)(b) is to accomplish its full remedial objective, courts will have to take poetic license with its wording. Read literally, the subsection applies only to transfers where the interest offending the Rule is limited in favor of the unnamed spouse. However, as CASE-10 illustrates, the interest that violates the Rule in the "unborn widow"-type situation is frequently not that of the spouse, but is instead that which is limited to take following the spouse's interest. Most likely Florida courts will eschew a literal interpretation of the subsection in favor of one which more logically comports with its obvious objective. Better yet, the subsection might be amended.


   (c) In determining whether an interest violates the rule against perpetuities:
      (1) it shall be presumed . . . (C) where the instrument creates an interest in
          the "widow", "widower", or "spouse" of another person, that the maker of the
          instrument intended to refer to a person who was living at the date that the pe-
          riod of the rule against perpetuities commences to run.

179. If subsection (5)(b) is to be amended, consideration should be given to the approach taken in California. Cal. Civ. Code § 715.7 (West 1982) provides:

   In determining the validity of a future interest in real or personal property . . . an
   individual described as the spouse of a person in being at the commencement of a
   perpetuities period shall be deemed a "life in being" at such time whether or not
   the individual so described was then in being. (emphasis added)

Similar legislation has been enacted in several Commonwealth jurisdictions. See Perpetuities Act, 1964, No. 47, § 13 (New Zealand); Perpetuities Ordinance, 1968 (second session), c. 15, § 10 (Northwest Territories, Canada); The Perpetuities Act, 1966, c. 94, § 9 (Ontario, Canada); Perpetuities and Accumulations Act, 1972, 21 Eliz. 2, No. 9, § 10 (Queensland, Australia); Perpetuities and Accumulations Act, 1968, 17 Eliz. 2, No. 7750, § 10 (Victoria, Canada); Law Reform (Property, Perpetuities, and Succession) Act, 1962, 11 Eliz. 2, No. 83, § 12 (Western Australia); Perpetuities Ordinance, 1968 (second session), c. 2, § 10 (Yukon Territory, Canada).

The California approach is open to the criticism that it lengthens the perpetuities period in situations like CASE-10, where S is in fact survived by an afterborn spouse and child. Under the precise facts of CASE-10, this may not appear too likely. But if S were younger, the likelihood increases and, in these cases, the period of the Rule could be lengthened by the interval of time between the testator's death and the birth of his afterborn spouse. This could be 20 or more years. However, there is little room for abuse in this area. Moreover, there are other instances where chapter 77-23 has the potential of lengthening the period of the Rule. See subsection (5)(d), discussed infra pp. 833-36, as it relates to the possibility that a person might have a child by adoption. And most importantly, the California approach has significant offsetting advantages. First, it eliminates the probable distortion of the testator's plan that exists under subsection (5)(b) when the afterborn spouse is precluded from taking the intermediate income interest. Second, the approach is self-operating and irrebuttable. It therefore eliminates a potential source of litigation that exists under
In determining whether the subsection (5)(b) presumption has been rebutted, the words used by the testator and the facts known to him at the time he executes his will are usually important factors. In a limitation like CASE-10, for example, if S is very young when T executes his will, it is more than remotely possible that he might be survived by an afterborn spouse and child. If these facts ultimately develop, so the remainder is not valid under “wait and see,” a court should normally decline a proffered construction based on subsection (5)(b). It could not reasonably be said that T had only lives in being in mind when he referred to S’s widow.

The consequences of a violation of the statutory Rule Against Perpetuities may also have some bearing on whether the subsection (5)(b) presumption has been rebutted. It is generally assumed that the intent of the testator is frustrated when the Rule Against Perpetuities is violated. But subsection (5)(b) has the same potential. When it is applied, the afterborn spouse is precluded from sharing in the property. While this result may be better than invalidity, this is not necessarily the case.

CASE-11: T’s will leaves the residue of his estate in trust to pay the income to his only child S for life, then to pay the income to S’s widow for life, and at the death of the widow, or at S’s death if he is not survived by a widow, to distribute the principal in fee to S’s then-living children. When T executes his will, S is twenty years old and unmarried. T dies a widower shortly thereafter. Eighteen years later, S marries afterborn Lolita. Still later, Lolita bears S a child. Then S dies survived by Lolita and their infant child, S Jr. After making adequate provision for Lolita, S’s will leaves the residue of his estate to S Jr.

On the surface, the facts of CASE-11 are similar to those of CASE-10. The remainder interest in S’s children is void as of S’s death unless the subsection (5)(b) presumption is applied to save it. But should a court do this when the effect is to preclude Lolita from succeeding to the intermediate income interest at S’s death? Consider the alternative. If subsection (5)(b) is not applied, T’s will is read as if the limitation in favor of S’s children had never been included. Consequently, a resulting trust arises in favor of T’s sole heir S. At S’s death, this interest passes to S Jr. pursuant to subsection (5)(b). Finally, in transfers like CASE-10, it would be possible to uphold the remainder interest in S’s children without the necessity of waiting to see. This would further mitigate the inconvenience and other “costs” attendant to the “wait and see” doctrine.

180. 6 A.L.P., supra note 23, at § 24.47.
S's will and at Lolita's death, when her intermediate income interest ends, the trust property will be distributed to S Jr. Arguably, this is a situation where the subsection (5)(b) presumption should not be applied.

3. Administrative Contingencies

(5) RULES OF CONSTRUCTION.—

Unless a contrary intent appears . . .

(c) If the duration or vesting of an interest is contingent upon the probate of a will, the appointment of a fiduciary, the location of a distributee, the payment of debts, the sale of assets, the settlement of an estate, the determination of questions relating to an estate or transfer tax, or the occurrence of any specified contingency, it is presumed that the creator of such interest intended that the contingency occur, if at all, within 21 years from the effective date of the interest.

Where the vesting of a future interest is dependent on the happening of an event which is unrelated to any person's life, the period of the Rule Against Perpetuities is twenty-one years. With the exclusion of gifts from one charity to another and specifically enforceable options, both of which are exempt from Florida's statutory Rule, the "administrative contingency"-type case is the most frequently recurring transfer of this type.

CASE-12: T's will leaves the residue of his estate, per stirpes, to such of his lineal descendants as are living when administration of his estate is completed and distribution is made.

At common law, the executory interest created in CASE-12 is void from its inception.181 Although administration and distribution of virtually all estates would be completed within a few years of the testator's death, the requisite absolute certainty of timely vesting is not present. Under subsection (5)(c), however, a court will presume that T intended administration and distribution to occur within twenty-one years of his death. Absent evidence of a contrary intent, this presumption will operate to save interests of the type illustrated in CASE-12.

An interesting question arises when subsection (5)(c) is applied to save an interest and subsequent facts show that the interest

181. Id. at § 24.23; J. Morris & W. Leach, supra note 23, at 73-76; L. Simes & A. Smith, supra note 21, at § 1228.
does not in fact vest within the twenty-one years permitted by the Rule. Estate administrations lasting more than twenty-one years are rare, but they are not impossible. Where they in fact occur, there would appear to be two possible consequences. The executory interest might be ruled void as of that time; alternatively, the interest might be saved by relieving it of its contingency. 182

The second alternative is preferable. Not only is it more consistent with the underlying presumption of subsection (5)(c), but it also creates a meaningful role for the subsection to play in the overall scheme of chapter 77-23. The first construction would make subsection (5)(c) duplicative of the “wait and see” rule of subsection (2)(a); the second would not. It would mean that subsection (5)(c) would insure the ultimate validity of all interests to which it applies. In turn, the subsection would offer yet another means of reducing the potential for inconvenience that some see in the “wait and see” doctrine.

Subsection (5)(c) is drafted broadly enough to evince a legislative intent to reach all contingencies reasonably related to estate administration. Indeed, most such contingencies are referred to in the subsection. Also included is an interest in property the vesting of which is made contingent on the occurrence of “any specified contingency.” This term can be traced to an identical New York provision, 183 the legislative history of which reveals that it was meant to ensure that the New York statutory rule was applicable to contingencies other than those directly related to the estate administration process. Specifically, the intent was to include interests contingent on the payment of mortgages or on the liquidation of a decedent’s business. 184 A similar construction would be appro-

182. Under the second construction, the executory interest would vest indefeasibly in the lineal descendants alive at the end of the 21-year waiting period. There would be no further requirement of survival and no lineal descendant born thereafter would share.


Concerns about the difficulties involved in phrasing a satisfactorily exhaustive administrative contingency statute led the English Law Reform Committee to recommend that no special statute addressed to this type of violation be enacted. Instead, they recommended that this type of violation be dealt with through the general curative impact of the “wait and see” doctrine. LAW REFORM COMM. REP., supra note 38, at 10.

The experience in New York has shown that the concerns of the Law Reform Committee may have been overstated. Perhaps out of necessity (New York does not have the “wait and see” doctrine), New York courts have proven adept at broadly interpreting their administrative contingency statute. Thus, in Buffalo Seminary v. McCarthy, 435 N.Y.S.2d 228 (N.Y. Sup. Ct. 1980), the New York provision was applied to an option to purchase land. In doing
priate for subsection (5)(c).

4. Fertile Octogenarians

(5) RULES OF CONSTRUCTION.—

Unless a contrary intent appears . . .

(d) 1. If the validity of a disposition depends upon the ability of a person to have a child at some future time, it is presumed, subject to paragraph 2., that a male can have a child at 14 years of age or older, but no younger than age 14, and that a female can have a child at 12 years of age or older, but not older than 55 or younger than 12. However, in the case of a living person, evidence may be given to establish whether such person can have a child at the time in question. The possibility that a person may have a child by adoption is disregarded.

a. A determination of validity of a disposition under the rule against perpetuities by the application of this paragraph is not affected by the later occurrence of facts in contradiction to the facts presumed or determined or the possibility of adoption disregarded under this paragraph.

b. Any invalidity because of the ability of a person to have a child at some future time shall be determined in accordance with paragraph (2)(a).

2. This paragraph does not apply for any purpose other than that of determining the validity of a disposition under the rule against perpetuities when such validity depends on the ability of a person to have a child at some future time.

Subsection (5)(d) is concerned with a particularly troublesome aspect of the common-law requirement of absolute certainty of vesting. In the infamous case of Jee v. Audley, an executory interest was invalidated because of the possibility that a married couple in their seventies might give birth to afterborn children. The interest would have been good had the court been willing to recognize what every reasonable person knows—it is physiologically impossible for seventy-year-old women to bear children. Nevertheless, arguments that the court should take into account the impossibility of birth under the facts in Jee fell on unreceptive so, the court rejected the implications of a previous decision that the New York statute, "under the principle of ejusdem generis, is limited to administrative contingencies inherent in the orderly liquidation and settlement of estates and related reasonably expectable short-term events." In re Shaul, 297 N.Y.S.2d 209, 212 (N.Y. Sup. Ct. 1969).

185. 1 Cox. 324, 29 Eng. Rep. 1186 (Ch. 1787).
ears. Sir Lloyd Kenyon ruled instead that for purposes of the Rule, a woman is conclusively presumed capable of conception throughout her life. Thus the common-law conclusive presumption of lifelong fertility became an established part of perpetuities law, and with it came an indefensible species of perpetuities violation euphemistically referred to as the “fertile octogenarian.” The following is but one of many possible examples.

CASE-13: T’s will leaves the residue of his estate in trust to pay the income to his sixty-year-old sister for life, then to distribute the trust principal in fee to such of the sister’s grandchildren as survive her. T’s sister is alive at his death but she has no grandchildren.

At common law, the interest in the grandchildren is void in its inception. Because T’s sister is conclusively presumed capable of having children, it is possible that her sole surviving lineal descendant would be a child born to her after T’s death. If that child then lived more than twenty-one years and died survived by a child, the remainder interest would vest remotely.

In the unanimous opinion of perpetuities reform enthusiasts, the application of the Rule Against Perpetuities to situations like that in CASE-13 has brought the common-law Rule into deserving disrepute. This type of case, even more than the “administrative contingency” and “unborn widow” fact situations, is deserving of reform. There is not even a remote possibility that the contingent interest would, in fact, vest beyond the permissible perpetuities period.

The rules of construction provided by subsection (5)(d) will go a long way toward eliminating this type of perpetuities violation. This subsection, which is virtually identical to a New York statute, replaces the common-law conclusive presumption of lifelong

186. But see In re Lattouf’s Will, 208 A.2d 411 (N.J. 1965) (holding that the common-law presumption of fertility is rebuttable).

The Florida Supreme Court has recognized the common-law presumption of lifelong fertility in a trust termination case. Byers v. Beddow, 142 So. 894 (Fla. 1932).

187. For a gift to a class to vest for purposes of the Rule, the class must close and all conditions precedent for all members of the class must be satisfied. RESTATEMENT OF PROPERTY § 371 (1944). Accord 6 A.L.P., supra note 23, at § 24.19; J. Morris & W. Leach, supra note 23, at 38-40; L. Sims & A. Smith, supra note 21, at § 1265. Thus, under the facts posited in CASE-13, the grandchildren’s interest transgresses the common-law rule even in the absence of the requirement that they survive T’s sister. Id. at § 1270.

188. N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e) (McKinney Supp. 1982-1983). For similar legislation, see ILL. ANN. STAT. ch. 30, § 194(c)(3) (Smith-Hurd Supp. 1983-1984); Perpe-
fertility with a series of statutory presumptions and related rules founded on common sense and medical knowledge.

In a direct reversal of common law, the last sentence of subsection (5)(d)1 permits the introduction of medical evidence to rebut the presumption that a person is capable of procreating. More important to the facts of CASE-13, subsection (5)(d)1 creates a presumption that females under the age of twelve or over the age of fifty-five are incapable of bearing children. This presumption saves the contingent remainder in CASE-13. With the elimination of possibilities based on T's sixty-year-old sister giving birth to afterborn children, the interest in her grandchildren becomes certain to vest, if at all, no later than the last to die of T's sister and the children she had at T's death.

Assume the same transfer as in CASE-13 except that T's sister is thirty-five rather than sixty years old at his death. Here, absent evidence showing that T's sister is incapable of procreating, the subsection (5)(d) rules of construction will not save the grandchildren's interest. In this case, subsection (5)(d)1.b tells us that validity of the interest is to be determined by applying the "wait and see" rule of subsection (2)(a).

T's sister is the only permissible measuring life for CASE-13; the subsection (2)(a) waiting period ends with her death. Once this occurs, the condition precedent attached to the grandchildren's interest becomes meaningless; the interest will vest as soon as the class of takers closes. Hence, the relevant inquiry is whether, as of the sister's death, it remains possible for the class of her grandchildren to stay open beyond the period permitted by the statutory Rule Against Perpetuities. This possibility would exist if but only if: 1) T's sister is survived by one or more afterborn chil-

189. Subsection (5)(d) would appear to place the burden of proving a medical inability to procreate on the proponents of the interest. Accord Tenn. Code Ann. § 24-5-112 (1980). Cf. Idaho Code § 55-111 (1979) ("there shall be no presumption that a person is capable of having children at any stage of adult life").

190. For the rules determining when a class closes, see 5 A.L.P., supra note 23, at §§ 22.39-46; Restatement of Property §§ 294-295 (1940); L. Simes & A. Smith, supra note 21, at §§ 634-651.
dren at least one of whom is still capable of procreating under the provisions of subsection (5)(d), and 2) T's sister is not survived by a grandchild. If this combination of facts exists, the remainder is invalid. Chapter 77-23 does not guarantee the validity of every interest. If either of these facts is absent, the remainder is good. It will be certain to vest, if it ever vests, no later than the death of the last child of T's sister who was alive at T's death.

The foregoing assumes that it would be necessary to wait in CASE-13 until the full subsection (2)(a) waiting period expires. This may not be the case. If T's sister loses the ability to procreate, the required certainty of timely vesting may be present before her death. This would be true if at any time after T's sister's loss of fertility: 1) there is no afterborn child of hers living or 2) all such afterborn children have themselves become incapable of procreating under the provisions of subsection (5)(d). In either case, it could be said as a matter of certainty that the interest in the grandchildren will vest, if at all, no later than the death of T's sister and the children she had at T's death.

Subsection (5)(d)1 applies somewhat differently to males. It does not include a maximum age limit on the ability of males to father children. Hence, if the transfer in CASE-13 had been to T's brother and the brother's grandchildren, respectively, absent evidence establishing the brother's medical lack of fertility, subsection (5)(d)1 would not be applicable to save the gift. That is not to say, however, that the remainder interest would necessarily be bad. Where the brother was of advanced age when T executed his will, particularly if T believed him to be happily married to a woman who was herself incapable of procreating under the provisions of subsection (5)(d), a court should normally presume, pursuant to the general subsection (5)(a) presumption of validity, that T intended to limit the remainder in CASE-13 to the children of his brother's existing children. Moreover, even in cases where such a

191. If T's sister is survived by one or more grandchildren, the class closes (and vests) immediately at her death. If no grandchildren survive her, the class will remain open until it is no longer possible for additional grandchildren to be born. 5 A.L.P., supra note 23, at § 22.43; RESTATEMENT OF PROPERTY § 295 (1940); L. SIMES & A. SMITH, supra note 21, at § 640. In this latter case, if T's sister is survived by children but only those who were alive at T's death have procreative capability, there is a certainty that the class of grandchildren will close physiologically (and thereby vest) no later than the death of the last to die of a group consisting exclusively of lives in being.


193. See 6 A.L.P., supra note 23, at § 24.22 (particularly p. 69); RESTATEMENT OF PROP-
construction would be inappropriate, the grandchildren’s interest might be upheld at the brother’s death (or possibly earlier if he became medically incapable of procreating) under the “wait and see” authority of subsection (2)(a).

What is the significance of the subsection (5)(d)1 presumptions that females under the age of twelve and males under the age of fourteen are incapable of procreating? Clearly these minimum age presumptions can have no curative impact for the typical limitation. To presume that a female under the age of twelve cannot have a child would do nothing to eliminate possibilities for remote vesting based on the assumption that she might live beyond that age and then have a child. Rather, these presumptions will apply to save a gift only in the rare situation where the facts which must occur to show a remote vesting require a person to have a child while the person remains under the minimum presumptive age.

There has only been one litigated case involving this situation. In that case, In re Gaite’s Will Trusts, 1949 1 All E.R. 459, which Professor Leach called the “precocious toddler,” a testatrix bequeathed property in trust to pay the income to a designated individual for life, remainder to such of that person’s grandchildren living at the death of the testatrix or born within five years therefrom who shall attain the age of twenty-one. Assuming that a person is capable of having children from the moment of his birth, as the conclusive presumption of lifelong fertility appears to require, the interest in the grandchildren could vest remotely. Within five years of the death of the testatrix, the life tenant might have an afterborn child, all lives in being might die, and the afterborn child might in turn have a child.

Obviously, to invalidate any interest on the basis that an afterborn child could procreate within five years of his or her birth would be absurd. Fortunately, the minimum age presumptions of subsection (5)(d)1 now ensure that no toddler can be that precocious.

In addition to the realistic fertility presumptions and the provision permitting the introduction of medical evidence to establish a person’s inability to procreate, subsection (5)(d) borrows a number of subsidiary rules from the New York perpetuities statute. One of

ERTY § 377 comment c (1944).
195. In the actual case, the court avoided a violation by reasoning that any child of a person under the age of five would not be entitled to take under the testatrix’s instrument. Such a child would be illegitimate under English law. This reasoning was later criticized in Leach, supra note 60, at 733-34.
these covers the way the possibility of having a child by adoption is to be treated.

The modern trend in probate law is to treat adopted children identically to natural children for purposes of taking under instruments containing class gifts to "children," "lineal descendants" or "issue."\textsuperscript{196} Without some specific rule dealing with adoption, even a person who would be presumptively incapable of having children due to age or medical condition would be considered capable of having them by adoption. The last sentence of subsection (5)(d)\textsubscript{1} eliminates this concern. It provides that where the validity of a disposition depends on the ability of a person to have a child at some future time, the possibility that a person may have a child by adoption is to be disregarded.\textsuperscript{197}

It is possible that once a court has applied subsection (5)(d) to validate an interest, later events may occur in contradiction to the lack of fertility presumed or established pursuant to the subsection. Consider the following:

CASE-14: \(T\) leaves the residue of his estate in trust to pay the income to his daughter \(W\) for life, then to divide the income equally among such of \(W\)'s children as are from time to time living and at the death of the last of \(W\)'s children to distribute the trust principal in fee to \(W\)'s then-living grandchildren. At \(T\)'s death, \(W\) is thirty-five years old. She is married to \(H\); they have


Since 1961, it has been possible for men to deposit their sperm in a sperm bank and, theoretically at least, have children more than 21 years after their deaths. Should courts take cognizance of this possibility, a bequest to "\(A\) for life, remainder to such of his children as attain the age of 21" would violate the Rule. See Leach, Perpetuities in the Atomic Age: the Sperm Bank and the Fertile Decedent, 48 A.B.A.J. 942 (1962). To date, no jurisdiction has enacted legislation dealing with this possibility, no doubt because no court has invalidated an interest based on it. The "wait and see" rule of subsection (2)(a) will eliminate some of the problems presented by this new biology. The transfer above would be valid if at \(A\)'s death he had not in fact deposited sperm in a sperm bank. For possible solutions if he had, see id. at 943-44. See also Schuyler, The New Biology and the Rule Against Perpetuities, 15 U.C.L.A. L. Rev. 420, 425 (1968).
one child, but no grandchildren. In the course of the administration of T's estate, T's trustee/executor petitions the court for a determination of the validity of T's trust as it relates to the interest in W's grandchildren. T's trustee introduces evidence to show that W is medically incapable of bearing additional children and on this basis the court upholds the grandchildren's remainder interest. Subsequently, W and H adopt an infant child. The child was born after T's death.

Two questions are raised by the facts of CASE-14. First, what effect does the adoption have on the initial validity of the contingent remainder in W's grandchildren? Second, would the adopted child and that child's children be entitled to share T's trust?

In the context of the actual facts of CASE-14, the first question is definitively settled by subsection (5)(d)1.a which states: "A determination of validity is not affected by the later occurrence of facts in contradiction to the facts presumed or determined or the possibility of adoption disregarded." The grandchildren's interest remains valid.198

Suppose, though, that the validity of the grandchildren's interest is not presented to a court until the subsection (2)(a) "wait and see" period expires at the death of the last to die of W and her first child. At that time, the court would know that W had in fact adopted a child and that that child had in fact survived the expiration of the waiting period. Would subsection (5)(d)1.a apply to these facts?

The better answer is no. The purpose of subsection (5)(d)1.a is to give finality to court determinations so that interested persons may safely rely on them. The facts under discussion here do not raise this concern. This is not a situation where a prior determination would be affected by the later occurrence of contradictory facts as the wording and purpose of subsection (5)(d)1.a require. Thus, in some instances, the same interest that would be valid if

198. The position taken in subsection (5)(d)1.a comports with the recommendations of the English Law Reform Committee, supra note 38, at ¶ 12, and is reflected in the perpetuities legislation of virtually every jurisdiction that has modified the common-law fertility presumption. See, e.g., N.Y. Est. POWERS & TRUSTS LAW § 9-1.3(e)(4) (McKinney Supp. 1978-1979), Perpetuities and Accumulations Act, 1964, c. 55, § 2(3) (England); The Perpetuities Act, 1966, c. 113, as amended by The Perpetuities Amendment Act, 1968, c. 94, § 7(2) (Ontario, Canada); Law Reform (Property, Perpetuities, and Succession) Act, 1962, 11 Eliz. 2, No. 83, § 6(4) (Western Australia). Although ILL. ANN. STAT. ch. 30, § 194(c)(3) (Smith-Hurd Supp. 1983-1984) is silent on this point, Professor Schuyler, who helped draft it, has indicated that the result in Illinois would be the same. See Schuyler, supra note 36, at 45-46.
litigated before the contrary facts occur would be invalid if first litigated after that time.

Returning to the original facts of CASE-14, would W's adopted child and that child's children be entitled to take as beneficiaries of T's trust? For the adopted child, at least, the statute provides the answer. Subsection (5)(d)2 states that the subsection (5)(d)1 presumptions are limited to questions involving "the validity of a disposition under the rule against perpetuities when such validity depends on the ability of a person to have a child at some future time."

Although its purpose could have been stated more clearly, subsection (5)(d)2 was intended to ensure that the subsection (5)(d)1 rules of construction are not applied to prevent persons such as W's adopted child in CASE-14 from taking interests that they would otherwise take but for the subsection. Any doubt about this is eliminated by the legislative history of the virtually identical New York provision on which subsection (5)(d)2 was based. As for the question of whether the children of W's adopted child may share in the ultimate remainder, the answer is less certain. Theirs is not an interest that would be valid but for the presumptions of subsection (5)(d). Nevertheless, the better view is that they too should be permitted to take as beneficiaries of

199. As a result, subsection (5)(d) does not overrule Byers v. Beddow, 142 So. 894 (Fla. 1932), in which the common-law conclusive presumption of fertility was applied to an issue involving the right of trust beneficiaries to compel termination of their trust. See supra note 186. Cf. Perpetuities Act, 1964, No. 47, § 7(1) (New Zealand) (realistic fertility presumptions extended to a variety of issues other than validity under the Rule Against Perpetuities, including issues relating to trust termination). See also Tenn. Code Ann. § 24-5-112 (1980).


The second question concerns the rights of a natural child or adopted child who is born or adopted after a disposition has been held valid by presuming that the natural child would not be born or by disregarding the possibility of adoption. On this question the Commission believes that if the natural or adopted child had a valid interest under the instrument to begin with, there is no sound reason for invalidating that interest on the basis of subsequent events. In other words, the fact that another interest, which was questionable under the rule against perpetuities, has been "mistakenly" determined to be valid, is no reason to invalidate an interest whose validity was not in question from the outset. This approach again is reflected in the English Act as well as in the recent Ontario statute. (citations omitted)

But see Schuyler, supra note 36, at 46 (indicating that a different result would be reached under ILL. ANN. STAT. ch. 30, § 194(c)(3) (Smith-Hurd Supp. 1983-1984)).
T's trust. If W's adopted child is permitted to take as a beneficiary, there is no sound reason for excluding that child's children.\textsuperscript{202}

C. Reduction of Excess Age Contingencies

(4) REDUCTION OF AGE CONTINGENCY.—

If, except for this subsection, an interest in property would be invalid because it depends for its vesting upon any person attaining or failing to attain an age in excess of 21 years, the age contingency is reduced to 21 with respect to each person subject to the contingency.

Subsection (4) addresses one of the most frequently recurring types of perpetuities violations. Under the subsection, where an interest would violate the statutory Rule because its vesting is dependent on some person attaining or failing to attain an age in excess of twenty-one, the excessive age contingency is automatically reduced to twenty-one.\textsuperscript{203} The underlying premise of the sub-

\textsuperscript{202} Accord Waggoner, supra note 130, at 1737 n.50.

\textsuperscript{203} Subsection (4) applies only where the vesting of an interest is contingent on some person attaining or failing to attain a specified age in excess of 21. It does not apply to other contingencies, even those that are age related. Thus, for example, it would not apply to an interest that is contingent on its taker marrying before the age of 30. For similar legislation in other jurisdictions, see infra note 205.

Excess age contingencies may also be reduced under the statutory cy pres authority courts of some jurisdictions have to reform invalid limitations. These statutes are of two types: those that couple cy pres with "wait and see" and those that do not. Jurisdictions with the former type of statute include: 1983 Alaska Sess. Laws ch. 51 (to be codified at ALASKA STAT. § 34.27.010); Act of Apr. 22, 1963, S.F. 435, 1963 Iowa Legis. Serv. 90 (West) (to be codified at IOWA CODE § 658.68); KY. REV. STAT. § 381.216 (1968); Act of May 19, 1983, ch. 380, § 4, 1983 Nev. Stat. 927, 928 (to be codified at Nev. Rev. Stat. ch. 111); 1983 N.M. Laws 246; OHIO REV. CODE ANN. § 2131.08(C) (Page 1976); VT. STAT. ANN. tit. 27, § 501 (1975); VA. CODE § 55-13.3 (Supp. 1983); WASH. REV. CODE ANN. §§ 11.98.010, .030 (1967); Perpetuities Act, 1964, No. 47, §§ 8-10 (New Zealand). In all of these statutes, the "wait and see" doctrine is given priority over cy pres.

Jurisdictions that have enacted the cy pres doctrine without coupling it with "wait and see" include: CAL. CIV. CODE § 715.5 (West 1982); IDAHO CODE § 55-111 (1979); MO. ANN. STAT. § 442.555 (Vernon Supp. 1983); OKLA. STAT. ANN. tit. 60, § 75 (West Supp. 1982-1983); TEX. REV. CIV. STAT. ANN. art 1291b (Vernon 1980).

The cy pres doctrine also finds acceptance in Restatement (Second) of Property § 1.5 (1983) (Donative Transfers). In addition, Hawaii, Kansas, Mississippi, New Hampshire and West Virginia have to some extent adopted the doctrine by judicial decision. In re Estate of Chun Quan Yee Hop, 469 P.2d 183 (Hawaii 1970) (bequest reformed to take effect 21 rather than 30 years after testator's death); In re Foster's Estate, 376 P.2d 784 (Kan. 1963) (will provision postponing distribution until testator's youngest grandchild attained age 23 excised from instrument); Carter v. Berry, 140 So. 2d 843 (Miss. 1962) (age contingency reduced and class split to avoid violation); Edgerly v. Barker, 31 A. 900 (N.H. 1891) (age
section is that most testators would prefer that their beneficiaries take at an earlier age than not at all. However, because this reduction distorts to some extent the testator’s initial intent, subsection (4) applies only to interests that would be invalid but for its application. That is, the subsection (5) rules of construction and the “wait and see” rule of subsection (2)(a) take priority.264

CASE-15: T bequeaths $250,000 in trust to pay the income to his daughter A for life, then to distribute the trust principal to such of A’s children as live to attain the age of twenty-five. At T’s death, A is thirty-two years old. She and her husband have a four-year-old son, C-1. Subsequently, A has another son, C-2 and then dies. When A dies, C-1 and C-2 are ages eight and three, respectively.

In CASE-15, the remainder in A’s children can not be upheld under the “wait and see” rule of subsection (2)(a). The required certainty of timely vesting is not present when the subsection (2)(a) waiting period ends. Accordingly, at A’s death, the age contingency is reduced to twenty-one. No court intervention should be necessary. Subsection (4) is self-operating. The age contingency is automatically reduced; it is reduced to twenty-one even though a reduction to twenty-two would suffice265 and it is reduced with re-
spect to each person subject to it. Thus, the contingency is reduced with respect to C-1’s interest as well.206

CASE-16: T bequeaths $250,000 in trust to pay the income to his son A for life, then to pay the income to A’s widow, if any, for life, and at the death of the widow (or at A’s death if there is no widow) to such of A’s children as live to attain the age of twenty-five. The residue of T’s estate is left to T’s daughter, D. At T’s death, A is young and unmarried. Subsequently A dies, survived by a wife, W, and a three-year-old child, C-1. Both W and C-1 were born after T’s death.

The limitation in CASE-16 is a combination of the “unborn widow” and excess age contingency violations. The interest in A’s children cannot be saved by applying either the “unborn widow” provision of subsection (5)(b) or the age reduction provision of subsection (4) alone. It can, and normally should, however, be saved by applying the two subsections in tandem.207 W would not be entitled to the intermediate income interest and the age contingency attached to C-1’s interest would be reduced to twenty-one.

CASE-17: T leaves the residue of his estate in trust to pay the income to his son A for life, then to divide the trust income in equal shares among such of A’s children as are from time to time living and at the death of the last, to distribute the trust principal to such of A’s grandchildren as live to attain the age of twenty-five. At T’s death, A is thirty years old. He has one child, C-1 and

206. Cf. N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1967) (age contingency is to be reduced “as to any or all persons subject to such contingency” (emphasis added)).

Per capita class gifts and gifts to sub-classes are afforded special treatment under the common-law Rule. As to these gifts, the “bad as to one, bad as to all” rule of Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817) does not apply; valid portions of the class may be severed from the invalid portions. See 6 A.L.P., supra note 23, at §§ 24.28-29; J. Gray, supra note 22, at §§ 389-391; J. Morris & W. Leach, supra note 23, at 106-08; L. Simes & A. Smith, supra note 21, at §§ 1266-1267. In applying subsection (4) to these types of gifts, the age contingency for any portion of the class that satisfies the common-law Rule should not be reduced. The subsection (3)(a)1 exemption applies to these interests. Accord In re Pendleton’s Estate, 246 N.Y.S.2d 351 (N.Y. Sup. Ct. 1964). See also Leach, supra note 140, at 1361-62.

For an example of a limitation to which the rule under discussion here would apply, see Restatement of Property § 389 illustration 2 (1944).

207. See Morris & Wade, supra note 143, at 514-15 (suggesting that a similar result would be reached under sections 4 and 5 of the English Perpetuities and Accumulations Act).
no grandchildren. Subsequently, A has an afterborn child, C-2. Still later, C-1 gives birth to a child, GC. Then, when GC is three years old, A and C-1 die survived by C-2 and by C-1's child, GC.

CASE-17 illustrates that subsection (4) does not ensure the validity of every excess age contingency-type limitation. The subsection (2)(a) measuring lives for CASE-17 are A and C-1. At the death of the survivor, a reduction of the age condition would ensure that GC's individual interest would vest, if at all, in time. However, it would do nothing to ensure that any afterborn children of C-2 would attain age twenty-one or indeed even be born within twenty-one years of the death of A and C-1. Accordingly, if C-2 still has procreative capability when the subsection (2)(a) waiting period ends, the interest in A's grandchildren, including that of GC, is void as of that time.208

III. PROVISIONS RELATED TO APPLYING THE RULE—REVOCABLE TRUSTS AND POWERS OF APPOINTMENT

We have considered how the statutory Rule applies in general. We now consider how these general rules are affected by the existence of a power in some person to alter the beneficial enjoyment of the transferred property. One such power—a trustee's power to allocate trust income and principal—has been covered previously.209 Our concern here focuses on two other kinds of powers: the power to revoke a trust and the power a settlor or beneficiary might have to appoint trust property.

A. Revocable Inter Vivos Trusts

(3) APPLICATION OF RULE.—

(b) The period of perpetuities does not commence to run in connection with a disposition of property or interest therein, no instrument is considered to be effective for purposes of the rule against perpetuities, and no interest or power is considered to be created for purposes of the rule against perpetuities as long as, under the instrument, the maker of the instrument has the power to revoke the instrument or to transfer or direct transfer to him-

208. In jurisdictions with statutes that require class gifts to be construed to exclude members whose individual interests do not vest in time, see supra note 135, the gift to GC would be saved by reducing the age contingency attached to it and by closing the class at A's death. A similar result could be reached in jurisdictions in which the cy pres doctrine is in force. See supra note 203.

209. See subsection (3)(a)4 (discussed supra notes 108-113 and accompanying text).
self of the entire legal and equitable ownership of the property or interest therein.

Although there is no Florida authority on point, it is a universally accepted principle of the common-law Rule that the perpetuities period does not begin to run for a transfer as long as one person, acting alone, has an unqualified power to secure for himself the full ownership of the property.\textsuperscript{210} The justification for this is that the policies of the Rule are no more offended by such a transfer than they would be were the power holder to have absolute ownership. Indeed, the only thing standing between the power holder and absolute ownership is the formality of exercising the power.

Subsection (3)(b) of chapter 77-23 codifies this common-law principle as it applies to powers retained by a transferor. Since most contingent future interests are equitable, the subsection's most frequent application will be to transfers in trust where the settlor retains a power to revoke the transfer. Less common, but equally within the terms of subsection (3)(b), is an irrevocable trust in which the settlor retains a power to withdraw all of the trust principal. In either situation, subsection (3)(b) provides that the period of the statutory Rule begins when the settlor's power to revoke or withdraw terminates. In the typical case, this will be at the settlor's death. Additionally, subsection (3)(b) provides that no interest or other power in such a trust is considered to be created for purposes of Florida's statutory Rule as long as the settlor's power continues. This extends the remedial impact of chapter 77-23 to trusts created before January 1, 1979, where the settlor's power to revoke or withdraw terminates after that date.

The source of subsection (3)(b) is relevant to its proper construction. Subsection (3)(b) can be traced to a virtually identical Illinois statute.\textsuperscript{211} The Illinois provision was intended by its formulators to restate common law,\textsuperscript{212} not to modify or enlarge it. A similar purpose may therefore be ascribed to subsection (3)(b). As a consequence, the subsection does not tell the whole story. Com-

\textsuperscript{210} 6 A.L.P., supra note 23, at § 24.59; J. Gray, supra note 22, at § 524.1; J. Morris & W. Leach, supra note 23, at 56, 160-61; L. Simes & A. Smith, supra note 21, at § 1250.

\textsuperscript{211} ILL. ANN. STAT. ch. 30, § 194(b) (Smith-Hurd Supp. 1983-1984). For similar legislation in other states, see CAL. CIV. CODE § 716 (West 1982); MONT. CODE ANN. § 67-407 (1970); N.Y. EST. POWERS & TRUSTS LAW § 10-8.1(b) (McKinney 1967); OHIO REV. CODE ANN. § 2131.08(B) (Page Supp. 1992); 20 PA. CONS. STAT. ANN. § 6104(c) (Purdon 1975); VA. CODE § 55-13.2 (1981); WASH. REV. CODE ANN. § 11.98.040 (1967).

\textsuperscript{212} Schuyler, supra note 36, at 38-39.
mon-law requirements that the settlor's revocation or withdrawal power be solely and unconditionally exercisable by him\textsuperscript{215} are implicit requirements of subsection (3)(b) as well. Note, however, that the subsection requires only that the settlor have the requisite power "under the instrument." This phrase is intended to ensure that qualification under subsection (3)(b) is not adversely affected by the fact that the settlor may lack the legal capacity to exercise his power or that an exercise on his behalf by a guardian would require court approval.\textsuperscript{214}

**B. Powers of Appointment**

1. **Definitions and Classification**

   Because they are so useful in adding flexibility to trust dispositions, it is a rare trust that does not include one or more powers of appointment. In its broadest sense, a power of appointment is an authority, other than one that is incidental to beneficial ownership, to designate the beneficial interests in property.\textsuperscript{216} For chapter 77-23, however, the concept must be narrowed to exclude the discretionary allocation powers of trustees and powers associated with the revocable *inter vivos* trust.\textsuperscript{216} These powers are treated separately.

   For purposes of the common-law Rule and to a lesser extent chapter 77-23, powers of appointment must be divided into categories on the basis of the breadth of their objects and the time that they may be exercised.\textsuperscript{217} As to the breadth of objects, powers are either general or special. A power is general if it may be exercised in favor of the donee or his estate. A power is special if it is exercisable only in favor of a reasonably restricted class of objects that does not include the donee or his estate.

   With regard to time of exercise, powers are either testamentary

\textsuperscript{213} See *supra* note 210.

\textsuperscript{214} The Illinois counterpart to subsection (3)(b) has been similarly construed. See Schuyler, *supra* note 36, at 40. Accord *Restatement (Second) of Property* § 1.2 comment b & illustration 3 (1983) (Donative Transfers).

\textsuperscript{215} See *Restatement (Second) of Property* § 11.1 (Tent. Draft No. 5, 1982) (Donative Transfers).

\textsuperscript{216} This is in accord with orthodox classification terminology. See *Restatement of Property* § 318(2) (1940). But see Phipps v. Palm Beach Trust Co., 196 So. 299 (Fla. 1940) (trustee's power to allocate referred to as a power of appointment).

\textsuperscript{217} On the classification of powers, see generally 5 A.L.P., *supra* note 23, at § 23.12; *Restatement of Property* §§ 320, 321 (1940); L. Simes & A. Smith, *supra* note 21, at §§ 874-879.
or *inter vivos*. A testamentary power is one which may be exercised only in the donee's will. In effect, the exercise of a testamentary power is conditioned on the death of the donee. An *inter vivos* power is one which is or may become exercisable during the donee's life. An *inter vivos* power that is not subject to any conditions other than those relating to the formalities of exercise is said to be presently exercisable.

2. The Validity of Powers Themselves

There is no specific provision in chapter 77-23 dealing with the validity of the powers themselves. Rather, this matter is controlled by common-law principles as they are modified by the "wait and see" and other remedial provisions of Florida's statutory Rule. The appropriate analysis depends on the type of power involved.

a. General Powers Which Are or May Become Presently Exercisable

Because he has the ability to become an absolute owner simply by exercising his power in his own favor, the donee of a presently exercisable general power is regarded as the equivalent of an absolute owner for purposes of the Rule Against Perpetuities. It follows from this that the Rule is not violated merely because such a power can be exercised beyond the perpetuities period. The Rule is no more concerned with the duration of presently exercisable general powers than it is with the duration of absolute ownership. The Rule is concerned, however, with when general *inter vivos* powers become presently exercisable. Until they do, ownership equivalency is lacking. Thus, at common law, if the exercise of a general *inter vivos* power is conditioned on the happening of some event which might occur beyond the perpetuities period, the power is void in its inception. Under chapter 77-23, however, such a power would not be void in its inception. Under chapter 77-23, a general *inter vivos* power is invalid only if, at the expiration of the subsection (2)(a) waiting period, it remains possible that the power would not become exercisable within the permissible perpetuities period.

CASE-18: *T* leaves the residue of his estate in trust to pay the

income to his son A for life, then to pay the income to A's widow for life, and at the death of A's widow, or at A's death if he is not survived by a widow, to such persons as A's eldest surviving child shall appoint by deed or will.

CASE-18 is an "unborn widow"-type of limitation with the ultimate interest taking the form of a general inter vivos power of appointment. Under principles discussed previously, the power is void in its inception at common law. Both A's eldest surviving child and his widow might be born after T's death. Under chapter 77-23, the power is not necessarily bad. It is invalid only if those facts actually occur and the situation at T's death makes it inappropriate for a court to save the power by applying the subsection (5)(b) rule of construction.219

b. General Testamentary and All Special Powers

The Rule Against Perpetuities applies differently to general testamentary and all special powers of appointment. These powers lack the ownership equivalency that characterizes presently exercisable general powers. In the case of special powers, by definition, these powers may not be exercised in a manner benefiting the donee or his estate. Hence, special powers are more akin to an agency through which donors attempt to exert the very dead-hand control which it is the Rule's primary purpose to restrict. In the case of general testamentary powers, ownership equivalency is lacking because the donee cannot exercise his power during life. Accordingly, it is not enough that general testamentary and special powers become exercisable within lives in being plus twenty-one years. The Rule requires that they not be exercisable beyond that period.220

CASE-19: T leaves the residue of his estate in trust to pay the income to his daughter A for life, then to divide the income among such of A's children as are from time to time living and at the death of the last of A's children, to distribute the trust principal to such one or more of T's then-living lineal descendants as A's last surviving child by will appoints.

At common law the special testamentary power in CASE-19 is

219. See supra notes 175-180 and accompanying text.
220. 6 A.L.P., supra note 23, at § 24.32; J. Gray, supra note 22, at §§ 475, 477; J. Morris & W. Leach, supra note 23, at 141-43; Restatement of Property § 390(2) (1944); L. Simes & A. Smith, supra note 21, at § 1273.
void in its inception. The donee of the power might be an afterborn child of A who would attempt to exercise his testamentary power more than twenty-one years after the death of A and any children she had at T's death. The result would be the same if the power was either a special inter vivos or a general testamentary power. In the former case, the power would be certain to become exercisable, if at all, within the perpetuities period. There would not, however, be any certainty that it would terminate in time.

Under chapter 77-23, the power in CASE-19 is not necessarily invalid. A court will "wait and see" if the donee turns out to be a life in being. If so, it is valid. If not, it is void.221

3. The Validity of Appointments and Related Matters

In applying the Rule Against Perpetuities to interests created by the exercise of a power of appointment, the critical question concerns when the perpetuities period begins to run. The answer provided by chapter 77-23 differs greatly from that of prior law.

a. Appointments at Common Law

Prior to chapter 77-23, there was no specific Florida authority dealing with the question of when the perpetuities period begins for interests created by appointment. It is believed, however, that had the issue arisen, Florida courts would have resolved it by applying the generally accepted principles of the common-law Rule. Under these principles, the answer depends on the type of power involved. If the power is presently exercisable and general, the period begins when the power is exercised. This is in accord with the view that these powers are the equivalent of absolute ownership. If, however, the power is either general testamentary or spe-
cional, the operative principle is that the donee of one of these powers acts as the agent of the donor. As a result, the period begins when the powers themselves are created, not when they are exercised.\(^2\) Although the analogy is not a perfect one, in effect, the donee's exercise is read back into the donor's instrument. Then, in determining compliance with the Rule, courts apply the "second-look" doctrine.

The "second-look" doctrine is one of only two exceptions to the common-law requirement that compliance with the Rule must be determined on the basis of the facts that exist when the perpetuities period begins.\(^3\) Under this doctrine, courts take a "second-look" to see what facts exist at the time the appointment is made. If, after considering those facts, it may be said with certainty that the appointive interest will vest, if at all, within the perpetuities period (measured from the creation rather than the exercise of the power), the interest is valid.\(^4\)

The "second-look" doctrine has a remedial impact similar to that of "wait and see." Even so, the application of the common-law Rule to interests created by the exercise of general testamentary or special powers involves an added level of complexity that does not exist for interests created by other means. The complexity is

223. The Rule mentioned in text is applied to interests created by the exercise of special powers in every jurisdiction. In England and Ireland, however, the period for interests created by the exercise of general testamentary powers begins at the time the power is exercised. Rous v. Jackson [1885] 29 Ch. D. 521; Re Flower, [1885] 55 L.J. Ch. 200; Stuart v. Babington, [1891] 27 L.R.Ir. 551. See also Perpetuities and Accumulations Act, 1964, c. 55, § 7 (England). In this country, only Rhode Island accepts this view. Industrial Nat'l Bank of Rhode Island v. Barret, 220 A.2d 517 (R.I. 1966).

The question whether interests created by the exercise of general testamentary powers should be read back into the instrument creating the power or whether the period should commence at the time of exercise was the subject of a historic debate between Professors Gray and Kales. The latter believed that the English view was correct. Kales, General Powers and the Rule Against Perpetuities, 26 Harv. L. Rev. 64, 67 (1912). Gray disagreed. He believed the period should commence at the creation of these powers. Gray, General Testamentary Powers and the Rule Against Perpetuities, 26 Harv. L. Rev. 64, 67 (1912). Accord, Law Reform Comm. Rep., supra note 21, at 23-24. But see Berger, The Rule Against Perpetuities As it Relates to Powers of Appointment, 41 Neb. L. Rev. 583 (1962).

224. The other is the doctrine of split contingencies. See 6 A.L.P., supra note 23, at § 24.54; J. Gray, supra note 22, at §§ 351-354; J. Morris & W. Leach, supra note 21, at 181-84; Restatement of Property § 376 comment e (1944); L. Simes & A. Smith, supra note 21, at § 1275.

225. 6 A.L.P., supra note 23, at § 24.55; J. Morris & W. Leach, supra note 23, at 152-54; Restatement of Property § 392 (1944); L. Simes & A. Smith, supra note 21, at § 1274.
caused by the fact that the period for appointments begins before the execution of the instrument in which they are made.

b. Appointments Under Chapter 77-23

The treatment of appointive interests is much simpler under chapter 77-23. In a radical departure from what is believed to be the prior law of this state, subsection (2)(b) provides:

(2) BASIS FOR DETERMINING VALIDITY OF INTEREST.—

(b) For the purposes of the rule against perpetuities, every interest created through the exercise, by will, deed or other instrument, of a power of appointment, irrespective of whether the power is limited or unlimited as to appointees, the manner in which the power was created or may be exercised, or whether the power was created before or after this section takes effect, is considered to have been created at the time of the exercise, and not at the time of the creation of the power of appointment. No such interest is void because of the rule unless the interest would be void had it been created at the date of the exercise of the power of appointment otherwise than through the exercise of a power of appointment, except that no power may be exercised so as to create another power, limited as to appointees or as to the manner in which such second power may be exercised.

Shorn of its technical verbiage, subsection (2)(b) eliminates the common-law distinction between types of powers. Whether general or special, inter vivos or testamentary, the initial sentence of the subsection provides that the creation of interests by appointment occurs at the exercise of a power, rather than at the earlier date when the power itself was created. It follows from this that the period of the statutory Rule begins at the same time.

CASE-20: T leaves the residue of his estate in trust to pay the income to A for life, then to distribute the trust principal to such one or more of A's then-living lineal descendants as A by will appoints. At his death, A appoints in continuing trust to pay the income to his eldest child A Jr. for life, then to distribute the trust principal to A Jr.'s then-living children. A Jr. was born after T's death.

CASE-20 illustrates just how treacherous the common-law Rule can be when it is applied to interests created by appointment. Normally the period of the Rule is such that A could validly postpone
vesting until twenty-one years after the death of any person known to him. However, this is not true where A creates or funds his trust through the exercise of a general testamentary or special power. In such situations, A’s appointment is read back into T’s will as if T had left the residue of his estate to A for life, then to A’s eldest child for life, then to that child’s then-living children. Taking a “second-look” at A’s death, a court would see that A Jr. was not alive when T died. Hence, the remainder in A Jr.’s children is void for remoteness. It will not vest until the death of a person who was not a life in being at its creation.

Under subsection (2)(b), the treatment of appointive interests is no more complex than that of other interests; the interest in A Jr.’s children is valid just as it would be had A created it by transfer. It is certain to vest, if at all, at the death of A Jr., a life in being. Moreover, even if the remainder interest could remain contingent beyond A Jr.’s death, as would be the case, for example, if it was conditioned on the children attaining the age of twenty-five, the subsection (5) rules of construction, the subsection (2)(a) “wait and see” doctrine and ultimately the subsection (4) age reduction provision would all be available to save it.226

Suppose in CASE-20 that A had created the trust for himself sometime before A Jr. was born. In creating the trust, A reserved to himself the testamentary power to appoint among his lineal descendants. How would chapter 77-23 apply in this situation?

If A’s trust is revocable, subsection (3)(b) would produce the same result that subsection (2)(b) produced in CASE-20 as originally formulated. That is, the period of the statutory Rule would not begin until A’s death when his power to revoke terminates. A Jr. would therefore be a life in being and the interest in his children would be certain to vest in time.

Suppose, however, that A’s trust was irrevocable. Would the fact that A retained a testamentary power to appoint the trust property among his lineal descendants mean that the perpetuities period for his appointment begins at the time it is made? That is, does subsection (2)(b) apply to reserved powers as well as to those created by someone other than the donor?

The better answer is yes. The exercise of reserved powers presents the same complexities as other powers. Additionally, there

226. Any possible doubt on this point is eliminated by the first clause of the second sentence of subsection (2)(b) providing in effect that no appointive interest is invalid under chapter 77-23 unless it would have been invalid had it been created by transfer instead of appointment.
can be no adequate reason for applying one rule if A retains his own power and another if it is given to him by someone else. Accordingly, as used in subsection (2)(b), “power of appointment” should include reserved powers as well as those where the donor and donee are different persons. 227

c. The Final Clause—No Perpetual Trusts

If all subsection (2)(b) did was change when the period of the Rule begins for interests created by the exercise of general testamentary and special powers, the subsection would open the door to potential abuse. Without more, this change would permit the perpetual fettering of property through the use of successive exercises of powers to create what amounts to a perpetual trust. For example, assume A in CASE-20 exercises his special testamentary power by appointing in continuing trust for the benefit of A Jr. for life, remainder at his death to such of his lineal descendants as he by will appoints. Assume further that when A Jr. dies, he exercises his power to create another trust with identical terms for the benefit of his daughter. Likewise, at the daughter’s death, she attempts to do the same for her child.

At common law, successive exercises of powers in this manner could not continue forever. Each successive exercise would be read back into T’s original instrument; eventually one of them would violate the Rule. However, with the change made by the initial sentence of subsection (2)(b), successive exercises of powers in this fashion need never violate Florida’s statutory Rule. The perpetuities period begins anew with each exercise.

The final clause of subsection (2)(b) eliminates this potential abuse. The clause prevents the donee of any type of power228 from exercising it to create another power that is limited as to appointees (i.e., a special power) or as to the manner in which it may be exercised (e.g., a testamentary power). Moreover, it seems virtually certain that the clause will be construed to prohibit augmentations of pre-existing powers as well. Otherwise, it would be possible for A to do indirectly what the final clause prohibits him from doing directly. He could: 1) create a trust with the desired terms, funding

227. The RESTATEMENT OF PROPERTY also includes reserved powers within the meaning of powers of appointment. See RESTATEMENT OF PROPERTY § 318(1). (1940).
228. The inclusion of presently exercisable general powers in the subsection (2)(b) restriction is somewhat curious since the exercise of these powers to create additional powers is no more objectionable than the creation of additional powers by an absolute owner.
it initially with his own property and then 2) exercise his power to pour over the appointive property into this pre-existing trust. If the final clause does not prohibit this, the door would once again be opened to the creation of perpetual trusts.

d. Gifts in Default of Appointment

Of all the questions left unanswered by chapter 77-23, the least tractable concerns whether subsection (2)(b) extends to interests limited to take in default of appointment. If it does, the initial sentence of the subsection will apply to these interests in much the same manner that it applies to interests created by appointment. That is, interests limited to take in default of all powers, regardless of type, will be considered to be created at the time that the power to which they are appended expires. Correspondingly, the period of the statutory Rule for these interests will begin at the same time. If, however, subsection (2)(b) does not apply to default interests, the common-law treatment of these interests continues in effect, subject only to the other remedial provisions of chapter 77-23.

The common-law treatment of gifts in default exactly parallels that of interests created by the exercise of powers. If the power to which the default interest is appended is presently exercisable and general, the perpetuities period begins at the time the power expires—usually at the donee’s death—as if the donee had exercised the power in favor of the takers in default.229 This is but another application of the principle previously referred to that the policies of the Rule are not offended as long as one person acting alone has the unrestricted power to secure full ownership for himself. If, however, the power is testamentary, special or both, the common-law period begins when the power itself was created.230 Again the appropriate analogy is to an exercise in favor of the takers in default.

Read literally, subsection (2)(b) does not apply to gifts in default. The subsection speaks only in terms of interests created by the “exercise” of powers. However, the issue is not as straightforward as this wording might suggest. When a donee permits his power to expire without affirmative exercise, he could be viewed as

229. 6 A.L.P., supra note 23, at § 24.36; J. Morris & W. Leach, supra note 23, at 159-61; RESTATEMENT OF PROPERTY § 373 comment c (1944); L. Simes & A. Smith, supra note 21, at § 1252.

230. 6 A.L.P., supra note 23, at § 24.36. This is but another way of saying that testamentary and special powers have no impact on the running of the perpetuities period for interests subject to them. Hence, the period for these interests begins when they are created.
making a negative or passive exercise in favor of the takers in default. Hence, subsection (2)(b) could easily be extended to cover these interests as well. "Exercise" need only be broadly construed to include this type of negative or passive exercise. The question is: Should courts do this?

The argument that they should rests primarily on the generally accepted view that the expiration of a power without exercise is the functional equivalent of an exercise in favor of the takers in default. To this may be added the related argument that if gifts in default and appointments are not treated identically, illogical results can occur. The same interest that would be valid if created by appointment could be invalid if limited initially to takers in default of appointment. On principle this result would have nothing to commend it. Indeed the desire to avoid such an anomaly is a primary reason why the "second-look" doctrine has been applied to gifts in default.

231. This view is reflected in the treatment of powers under both the common-law Rule Against Perpetuities, see 6 A.L.P., supra note 23, at § 24.36, and the Federal transfer tax laws. See I.R.C. §§ 2041(a)(2), 2613(b)(1) (CCH 1983). Areas where it is not recognized include the inheritance tax laws of some states under which powers are taxed only if they are exercised (see, e.g., Ill. Ann. Stat. ch. 85, § 804 (Smith-Hurd 1969)), and the common-law rules relating to creditors rights under which a creditor of a donee of a power created other than by reservation can reach the appointive property only if the power is general and the donee exercises it. See generally 5 A.L.P., supra note 23, at §§ 23.14-18; Restatement of Property §§ 327-330 (1940); L. Simes & A. Smith, supra note 21, at §§ 944-945. Note, however, that the common-law treatment of creditors has been criticized to the extent it draws a distinction between exercised and unexercised powers. See, e.g., Berger, The General Power of Appointment as an Interest in Property, 40 Neb. L. Rev. 104, 119-20 (1960); Browder, Future Interest Reform, 35 N.Y.U. L. Rev. 1255, 1272 (1960). And many states have enacted legislation broadening the rights of creditors to reach appointive property. For a list of statutes, see A.L.P. (Supp. to Vols. I-VII, 1977), supra note 23, at § 23.17 n.5a. See also Restatement (Second) of Property, Statutory Note to Section 13.2 (Tent. Draft No. 5, 1982).

232. In the case of interests created by appointment, the "second-look" doctrine is justified on the rationale that courts cannot determine the validity of an appointive interest until the appointment is made. Since courts must wait that long in any event, it would be foolish not to let them take into account the facts that are known to exist at that time. In the case of gifts in default, however, it is not necessary to wait until the power expires to determine whether the default interests comply with the Rule. Their validity may be determined as soon as the instrument creating them takes effect. Nevertheless, courts in Massachusetts and Ontario, Canada have applied the "second-look" doctrine to gifts in default. Sears v. Coolidge, 108 N.E.2d 563 (Mass. 1952); Re Edwards, [1960] 20 D.L.R. 2d 755 (Ont.). And most text-writers agree that the anomalies that might occur were different rules to be applied to appointments and gifts in default justify these decisions. See 6 A.L.P., supra note 23, at § 24.36; J. Morris & W. Leach, supra note 23, at 161-63; 5A R. Powell, supra note 21, at ¶ 788[3]. But see L. Simes & A. Smith, supra note 21, at § 1276 (suggesting that the application of the "second-look" doctrine to gifts in default is subject to the same objections as the "wait and see" doctrine).
These problems aside, reasonable arguments can also be advanced for not applying subsection (2)(b) to default interests. First, of course, there is the wording of the subsection itself. Second, the objective of the subsection is not relevant to these interests. Gifts in default do not involve a situation where the common-law period can begin before the instrument containing the terms of the gift is executed. More importantly, if the initial sentence of subsection (2)(b) applies to default interests, so will the restriction contained in the final clause of the subsection. The implications of this would hardly be favorable.

Recall that the final clause of subsection (2)(b) seeks to preserve some semblance of perpetuities policy by placing a new restriction on the exercise of powers. Powers may not be exercised to create new (or augment pre-existing) special or testamentary powers. Even if subsection (2)(b) does not apply to gifts in default, the adverse impact of this restriction will be substantial. There are numerous instances where sound estate planning principles would call for the exercise of a power to create or augment another trust.233 While such appointments may be made, the beneficiaries of the appointive trust cannot have special or testamentary powers over the appointive property or, if they do, the powers cannot be validly exercised.234

This loss of estate planning flexibility is the minimum cost subsection (2)(b) exacts for a simplified treatment of appointive interests.235 The costs increase immeasurably if the subsection also applies to gifts in default. The situations where special or testamentary powers are created in default clauses are even more common than those where they are created by affirmative appointment. More common still are estate plans where gifts in default are limited in favor (or provide for the continuation) of a pre-existing trust, one or more beneficiaries of which have special or testamen-

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233. A desire to provide for a child whose spouse is a spendthrift or whose marriage is failing are two situations which immediately come to mind.

234. A trustee who acquiesces or participates in an exercise of an invalid power may be liable for a breach of trust. See G. G. Bogert & G. T. Bogert, Trusts and Trustees § 814 (rev. 2d ed. 1981); Restatement (Second) of Trusts § 226 (1957); 3 A. Scott, The Law of Trusts § 226 (3d ed. 1967).

235. Where his power is general, a donee can circumvent the subsection (2)(b) restriction by first appointing to himself or, if his power is testamentary, to his estate. In the latter case, it may not be necessary for the donee to actually make the appointment. An appointment in contravention of subsection (2)(b), conditioned on it being effective, followed by a secondary appointment in favor of the donee's estate if it is not, would appear to eliminate the stake anyone might have in contesting the validity of the primary appointment.
tary powers. If subsection (2)(b) applies to default interests, neither arrangement would be valid.236

Ultimately, therefore, the issue of whether subsection (2)(b) should be extended to gifts in default involves a classic Hobson's choice. One choice, although more consistent with the wording and purpose of subsection (2)(b), is contrary to common sense and has the potential for producing anomalous results. The other choice appreciably increases the "costs" of simplifying the treatment of appointments under Florida's statutory Rule. On balance, the former seems the lesser of the two evils.237 However, a third alternative is better still. Subsection (2)(b) could be repealed.

e. Should Subsection (2)(b) Be Repealed?

Should the Florida Legislature repeal subsection (2)(b)? At least in this author's opinion, the answer is yes. The sole raison d'etre for the subsection is that in simplifying the treatment of appointive interests, the subsection makes it less likely that appointments will transgress Florida's statutory Rule. Certainly this is a laudable objective. Nevertheless, laudable objectives are sometimes attained at too great a cost. The "costs" of subsection (2)(b) are considerable. Consider for example the adverse impact the subsection has on the Rule's primary function of restricting dead-hand control of property.

236. By this it is meant that the prohibited special or testamentary power created, augmented or continued in the default clause could not be validly exercised over the original appointive property.

237. In Florida, a broadly worded power in a trustee to distribute trust principal to the beneficiaries of the trust includes the authority to make a distribution by creating a second trust. Phipps v. Palm Beach Trust Co., 196 So. 299 (Fla. 1940). Where this is done, the application of the Rule Against Perpetuities to the contingent beneficial interests of the second trust involves the same complexities as the application of the Rule to other interests created by appointment. Would subsection (2)(b) cover this situation?

It seems clear that subsection (2)(b) cannot apply both to this situation and to gifts in default of appointment. If it did, a trustee's allocation powers could validly exist under subsection (3)(a)4 until the perpetuities period ends and incongruously, subsection (2)(b) would provide that the period does not begin as long as the power exists.

On the other hand, if subsection (2)(b) does not apply to gifts in default, there would be no anomaly created by applying it to interests created by the exercise of a trustee's discretionary allocation powers. Such a holding, however, would significantly impair the usefulness of powers in estate planning. It would mean that the final clause of subsection (2)(b) would prohibit the creation or augmentation of discretionary trusts by appointment. It would appear, therefore, that the preferable view would be that the fact that trustee allocation powers are separately treated in subsection (3)(a)4 manifests a legislative intent that they not be "powers of appointment" for purposes of subsection (2)(b).
1) Subsection (2)(b) and Perpetuities Policy

If a donee of a valid special power chooses to exercise it, he must do so within strictures initially determined by the power’s donor. Of course, those strictures are removed if the donee appoints outright. However it can never be in his economic self-interest to do so and a variety of estate planning objectives, including a desire to minimize taxes, frequently induce donees to appoint in trust. Where this occurs, the donor’s dead-hand control is not abated by the donee’s exercise. Moreover, from the time of the donor’s original transfer until the termination of the donee’s appointive trust, there is no person who has unfettered ownership of the trust property. Hence, it is incorrect in principle to view the donee’s appointment as creating a new trust. It is but a continuation, perhaps with somewhat modified terms, of the donor’s original trust.

The premise of the common-law treatment of special powers, a premise with which everyone without so much as a dissenting voice agrees, is that a person should not be able to do through the intervention of an agent (i.e., a donee) what he cannot do for himself. So, from the standpoint of perpetuities policy, the relevant questions are these: How long into the future can a person validly extend his control without the use of special powers and how long can he do so under subsection (2)(b) with their use?

The answer to the first question under both the common-law and statutory Rules is that a person can extend his control for the lifetime of persons known to him, then for twenty-one years thereafter, and then, if all interests are vested and all discretionary allocation powers of the trustee are terminated, for the lifetime of persons alive at the end of the twenty-one-year period.

Under subsection (2)(b), however, the period of control is considerably longer. First, it can last for the lifetimes of persons known to the donor. Then, because the period begins anew at the exercise of a power, the donor’s control (through his donee/agent) can last for the lifetimes of persons alive at the donee’s exercise, then for an additional period of twenty-one-years and then, assuming again that all interests are vested and the discretionary allocation powers of the trustee are terminated, for the lifetimes of per-

238. The beneficiaries of the donee’s appointive trust are restricted to the objects of his power. 5 A.L.P., supra note 23, at § 23.52; RESTATEMENT OF PROPERTY § 351 (1940); L. SIMES & A. SMITH, supra note 21, at § 981.

239. For a discussion of the effect various types of powers have on the perpetuation of dead-hand control, see Berger, supra note 223, at 591-94.
sons alive at the expiration of the twenty-one-year period. Thus, subsection (2)(b) adds another complete generation to the time frame during which dead-hand control can endure.

At this point, it may be worth noting that no study of the Rule has ever advocated this type of fundamental change in perpetuities policy. And, only one other jurisdiction (Delaware) has done so. But the Delaware provision,\textsuperscript{240} upon which the initial sentence of subsection (2)(b) is based, has been criticized as unjustifiably defeating the social policies of the Rule.\textsuperscript{241} Admittedly, from the standpoint of perpetuities policy, the Delaware statute is more objectionable than subsection (2)(b). It does not contain the restriction found in the final sentence of the Florida provision. Even so, the bottom line is that subsection (2)(b) significantly increases dead-hand control.

2) An Offsetting Remedial Objective?

In defense of subsection (2)(b), those who would advocate keeping it might contend that there are other portions of chapter 77-23 where orthodox perpetuities policy is compromised in the interest of reform. The “wait and see” rule of subsection (2)(a) is the primary example. There are, however, important differences between “wait and see” and subsection (2)(b). The “wait and see” doctrine does not allow property owners to do anything they could not already do through competent drafting under the common-law Rule in its orthodox form. The same may not be said of subsection (2)(b). Moreover, the compromise in perpetuities policy effectuated by “wait and see” is more than offset by the remedial impact the doctrine has for those who might not have had the benefit of competent counsel. If this is the underlying premise of subsection (2)(b) as well, it is suggested that that premise is demonstrably false.

In the first place, even without subsection (2)(b), the potential for inadvertent perpetuities violations involving appointments will be less under chapter 77-23 than at common law. Subsection (4)
will be available to save any violation caused by the use of an excess age contingency. More importantly, even under the common-law Rule, the potential was merely that—a potential, not a reality. The fact is that there is not one instance in Florida where the validity of an interest created by the exercise of an otherwise valid power has even been litigated, much less one where an appointment has been struck for remoteness. That is not to say that violations have not occurred. Some may have escaped notice. A few more may have been settled out of court. What it does say is that this is not an area where the reasonable objectives of testators (or donees) are being frustrated on anywhere near the scale that would justify subsection (2)(b). To the contrary, the restriction placed on the exercise of powers by the final clause of the subsection would appear to have a much greater potential for frustrating otherwise reasonable objectives than would the common-law treatment of appointive interests. The restriction applies to every appointment in trust. The Rule applies only to the few that involve perpetuities problems. Thus, on balance, subsection (2)(b) seems well intended but ill-advised. At some compromise in perpetuities policy, the subsection makes a change of only marginal remedial utility, and in the process, the subsection has in all likelihood created many more problems than it solves.

3) On Repeal

If subsection (2)(b) is repealed, there is one aspect of the sub-
section that should not be repealed along with it. In providing that interests created by appointment are considered to be created at the time that the power is exercised, subsection (2)(b) insures that the remedial provisions of chapter 77-23 extend to appointments after January 1, 1979, even though the power exercised was created before that date. This aspect of the subsection should be retained. In order to do so it is not necessary to retain the rest of the subsection. Indeed, had subsection (2)(b) not been included in chapter 77-23 in the first place, it is highly likely that Florida courts would have reached the same result.\textsuperscript{243} But to avoid any implication that the repeal of subsection (2)(b) was intended to restrict chapter 77-23 to powers created after its effective date, a provision negating such an intent would be advisable.

IV. Conclusion

Through chapter 77-23, the Florida Legislature sought to reform and modernize the common-law Rule Against Perpetuities. In the case of transactions arising in a commercial setting, this objective has been fully realized. The Rule Against Perpetuities—as distinct from the Rule Against Unreasonable Restraints on Alienation—is no longer a concern in this area.

For transactions arising in a donative setting, the results are more mixed. The exemptions provided for fiduciary powers, the new rules of construction, and the age contingency reduction provision are all welcome additions to our law. So too is the acceptance of the “wait and see” doctrine. Nevertheless, chapter 77-23 may be criticized on several counts.

The first possible criticism is that chapter 77-23 does not go far enough. Despite its length, chapter 77-23 is less comprehensive than many other perpetuities reform measures. This is so both because no one but a beneficiary can qualify as a measuring life under the “wait and see” rule of subsection (2)(a) and because chapter 77-23 does not include a general cy pres authority permitting courts to reform limitations that are not saved by waiting to see. In both respects, the Florida statute represents a minority position among “wait and see” jurisdictions in this country.

Apart from the above, there are also other aspects of chapter 77-

\textsuperscript{243} This result has been reached by case decision in other states. See, \textit{e.g.}, \textit{In re Pendleton’s Estate}, 246 N.Y.S.2d 351 (N.Y. Sup. Ct. 1964).
23 that are not ideal. The statute fails to deal with the common-law Rule Against Accumulations; the provision covering the "unborn widow"-type violation is patently defective and the statute does not clearly and unambiguously set out the criteria to be used in the selection of the measuring lives under the "wait and see" rule of subsection (2)(a). Instead this criteria is provided only by innuendos discoverable in the language of the subsection and the sparse legislative history of chapter 77-23.

Yet those who would criticize chapter 77-23 should bear in mind an observation of Professor Leach. In the midst of the scholarly debate that engulfed his endorsement of the "wait and see" doctrine, Professor Leach noted that while it is one thing to propose perpetuities reform legislation, it is quite another to get it enacted into law. At least chapter 77-23 has passed this more difficult hurdle. Moreover, with but one exception, the weaknesses of chapter 77-23 are not critical. In its present form chapter 77-23 should suffice to eliminate virtually all inadvertent violations of the Rule; a more comprehensive statute would be meaningful only in fringe cases. As for the Rule Against Accumulations, if it wishes, the Florida Legislature can deal with it in separate legislation. Finally, the defect in the "unborn widow" provision and the ambiguity, if any, that exists in the criteria for the selection of the subsection (2)(a) measuring lives can be resolved by Florida courts. Thus, while chapter 77-23 may not be perfect, it is clearly preferrable to no perpetuities reform statute at all. The one exception is the treatment of appointive interests under subsection (2)(b). As I have indicated previously, this provision should be repealed. The restriction it places on the exercise of powers promises to do more harm than good.