Michigan
Law Revision Commission

TWENTY-FIRST ANNUAL REPORT
1986

MICHIGAN
LAW REVISION COMMISSION

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ANTHONY DEREZINSKI, *Vice Chairman*
DAVID LEBENBOM
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Legislative Members:

Senators:

ALAN CROPSEY
JOHN KELLY

Representatives:

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MICHIGAN LAW REVISION COMMISSION

Twenty-First Annual Report to the Legislature

To the Members of the Michigan Legislature:

The Michigan Law Revision Commission hereby presents its twenty-first annual report pursuant to Section 403 of Act No. 268 of the Public Acts of 1986.

The Commission, created by Section 401 of that Act, consists of: two members of the Senate, with one from the majority and one from the minority party, appointed by the Majority Leader of the Senate; two members of House of Representatives, with one from the majority and one from the minority party, appointed by the Speaker of the House; the Director of the Legislative Service Bureau or his or her designee, who serves as an ex-officio member; and four members appointed by the Legislative Council. Terms of the members appointed by the Legislative Council are staggered. The Legislative Council designates the Chairman of the Commission.

Membership

The legislative members of the Commission during 1986 were Senator Alan Cropsey of DeWitt, Senator John Kelly of Detroit, who replaced Senator Basil W. Brown of Highland Park in January of 1986, Representative Perry Bullard of Ann Arbor, and Representative Ernest W. Nash of Dimondale. Elliott Smith, Director of the Legislative Service Bureau, was an ex-officio Commission member. The appointed members of the Commission were Anthony Derezinski, David Lebenbom, Richard McLellan, and Richard C. Van Dusen. Mr. McLellan served as Chairman; Mr. Derezinski served as Vice Chairman; Professor Jerold Israel of the University of Michigan Law School served as Executive Secretary.

This year marked the retirement of one of the original appointees of the Commission, Mr. Tom Downs. A resolution of tribute for Mr. Downs accompanies this Report. Two legislative members, Senator Alan Cropsey and Representative Ernest Nash,

left the Legislature at the end of the 1986 legislative session. Resolutions honoring the service of Senator Cropsey and Representative Nash also accompany this Report.

The Commission's Work in 1986

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reform.

2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association, and other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers and the public generally as to defects and anachronisms in the law.

4. To recommend, from time to time, such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

5. To encourage the faculty and students of the law schools of this state to participate in the work of the Commission.

6. To cooperate with the law revision commissions of other states and Canadian provinces.

7. To issue an annual report.

The problems to which the Commission directs it studies are largely identified through an examination by the Commission members and the Executive Secretary of the statutes and case law of Michigan, the reports of learned bodies and Commissions from other jurisdictions, and the legal literature. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

The Commission's efforts during the past year have been devoted primarily to three areas. First, Commission members met with legislative chairpersons to secure disposition of various proposals previously recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National Conference of Commissioners on Uniform State Laws, and the Law Revision Commissions of various jurisdictions within and without the United States (e.g, California, New York, and British Columbia).

Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

As in previous years, the Commission studied various proposals that did not lead to legislative recommendations. In the case of certain Uniform or Model Acts, we found that the subjects treated had been considered by the Michigan legislature in recent legislation. In other instances, Uniform or Model Acts were not pursued as formal recommendations because similar or identical legislation was currently before the legislature upon the initiation of legislators having a special interest in the particular subject.

Three of the topics studied by the Commission over the past year have resulted in legislative recommendations. Those are:

(1) The Uniform Statutory Rule Against Perpetuities

(2) Repeal of Act No. 269 of the Public Acts of 1933 (municipal court in cities which have more than 1 justice of the peace)

(3) Amendment of various provisions referring to Abolished Courts

Recommendations and proposed statutes on these three topics accompany this Report.

Proposals for Legislative Consideration in 1986

In addition to our new recommendations, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1986.

(1) Repeal of M.C.L. Section 764.9 (duplicate provision relating to arrests in county other than that of the offense) -- H.B. 4424, passed by the House. See Recommendations of the 1982 Annual Report, page 9.

(2) Disclosure in the Sale of Visual Art Objects Produced in Multiples -- H.B. 4070, 4071, and 4072, passed by the House. See Recommendations of the 1981 Annual Report, page 57.

(3) Uniform Transfers to Minors Act -- H.B. 4769. See Recommendations of the 1984 Annual Report, page 17.

(4) Amendment of the Assumed Names Act (limited partnership) -- H.B. 5166. See Recommendations of the 1984 Annual Report, page 11.

(5) Uniform Transboundary Pollution Reciprocal Access Act. See Recommendations of the 1984 Annual Report, page 71.

(6) Amendments to Article 8 of the Uniform Commercial Code -- H.B. 5561, passed by the House. See Recommendations of the 1984 Annual Report, page 97.

(7) Justice of the Peace Repealers. See Recommendations of the 1985 Annual Report, page 12.

(8) Uniform Law on Notarial Acts. See Recommendations of the 1985 Annual Report, page 17.

Current Study Agenda

Topics on the current study agenda of the Commission are:

(1) Amendments to Uniform Trade Secrets Act
(2) Uniform Fraudulent Transfer Act (Uniform Fraudulent Conveyance Act)
(3) Uniform Premarital Agreement Act
(4) Uniform Conflicts of Law-Limitations Act

(5) Amendments to Uniform Real Estate Tax Apportionment Act
(6) Uniform Determination of Death Act
(7) Uniform Comparative Fault Act
(8) Duties, Rights, and Responsibilities of Receivers
(9) Health Care Consent for Minors
(10) Health Care Information, Access and Privacy
(11) Public Officials--Conflict of Interest and Misuse of Office
(12) Statewide Registration of Assumed Names by Individuals and Partnerships
(13) Transfer of a Business Having Liquor Sales as a Minor Portion of its Activities
(14) Revision of the Administrative Procedures Act
(15) Granting and Withdrawal of Medical Practice Privileges in Hospitals
(16) Usury Statutes
(17) Lost or Unclaimed Property

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are in the University of Michigan Law School, Ann Arbor, Michigan 48109-1215. By using faculty members at the several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions.

The Legislative Service Bureau, through Mr. Gary Gulliver, its Director of Legal Research, has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

Prior Enactments

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some cases amendments thereto by the Legislature:

1967 Legislative Session

Subject	Commission Report	Act No.
Original Jurisdiction of Court of Appeals	1966, p. 43	65
Corporation Use of Assumed Names	1966, p. 36	138
Interstate and International Judicial Procedures	1966, p. 25	178
Stockholder Action Without Meetings	1966, p. 41	201
Powers of Appointment	1966, p. 11	224
Dead Man's Statute	1966, p. 29	263

1968 Legislative Session

Subject	Commission Report	Act No.
Possibilities of Reverter and Right of Entry	1966, p. 22	13
Stockholder Approval of Mortgaging Assets	1966, p. 39	287
Corporations as Partners	1966, p. 34	288
Guardian Ad Litem	1967, p. 53	292
Emancipation of Minors	1967, p. 50	293
Jury Selection	1967, p. 23	326

1969 Legislative Session

Subject	Commission Report	Act No.
Access to Adjoining Property	1968, p. 21	55
Recognition of Acknowledgments	1968, p. 61	57
Dead Man's Statute Amendment	1969, p. 29	63
Notice of Tax Assessments	1968, p. 30	115
Antenuptial Agreements	1968, p. 27	139
Anatomical Gifts	1968, p. 39	189
Administrative Procedures Act	1967, p. 11	306
Venue Act	1968, p. 19	333

1970 Legislative Session

Subject	Commission Report	Act No.
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships Act	1969, p. 44	90
Minor Students Capacity to Borrow Act	1969, p. 51	107
Warranties in Sales of Art Act	1969, p. 47	121
Appeals from Probate Court Act	1968, p. 32	143
Circuit Court Commission Power of Magistrates Act	1969, p. 62	238

1971 Legislative Session

Subject	Commission Report	Act No.
Revision of Grounds for Divorce	1970, p. 7	75
Civil Verdicts by 5 of 6 Jurors In Retained Municipal Courts	1970, p. 40	158
Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

1972 Legislative Session

Subject	Commission Report	Act No.
Summary Proceeding for Possession of Premises	1970, p. 16	120
Interest on Judgments Act	1969, p. 64	135
Business Corporation Act	1970, Supp.	284
Constitutional Amendment re Juries of 12	1969, p. 65	HJR "M"

1973 Legislative Session

Subject	Commission Report	Act No.
Execution and Levy in Proceedings	1970, p. 51	96
Technical Amendments to Business Corporation Act	1973, p. 8	98

1974 Legislative Session

Subject	Commission Report	Act No.
Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Model Choice of Forum Act	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic Relations Cases	1972, p. 53	90
Technical Amendments to the General Corporations Act	1973, p. 38	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
1974 Technical Amendments to the Business Corporation Act	1974, p. 30	303
Amendment to "Dead Man's" Statute	1972, p. 70	305
Attachment Fees Act	1968, p. 23	306
Contribution Among Joint Tortfeasors Act	1967, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Elimination of Pre-judgment Garnishment	1972, p. 7	371

1975 Legislative Session

Subject	Commission Report	Act No.
Amendment of Hit-Run Provisions to Provide Specific Penalty	1973, p. 54	170
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 30	288
Uniform Disposition of Community Property Rights at Death Act	1973, p. 50	289
Insurance Policy in Lieu of Bond Act	1969, p. 54	290
Uniform Child Custody Jurisdiction Act	1969, p. 22	297

1976 Legislative Session

Subject	Commission Report	Act No.
Due Process in Replevin Actions	1972, p. 7	79
Qualifications of Fiduciaries	1966, p. 32	262
Revision of Revised Judicature Act Venue Provisions	1975, p. 20	375
Durable Family Power of Attorney	1975, p. 18	376

1978 Legislative Session

Subject	Commission Report	Act No.
Study Report on Juvenile Obscenity Law	1975, p. 133	33
Multiple Party Deposits	1966, p. 18	53
Amendment of Telephone and Messenger Service Act Amendments	1973, p. 48	63
Elimination of References to Abolished Courts		
a. Township By-Laws	1976, p. 74	103
b. Public Recreation Hall Licenses	1976, p. 74	138
c. Village Ordinances	1976, p. 74	189
d. Home Rule Village Ordinances	1976, p. 74	190
e. Home Rule Cities	1976, p. 74	191
f. Preservation of Property Act	1976, p. 74	237
g. Bureau of Criminal Identification	1976, p. 74	538
h. Fourth Class Cities	1976, p. 74	539
i. Election Law Amendments	1976, p. 74	540
j. Charter Townships	1976, p. 74	553
Amendments of the Plat Act	1976, p. 58	367
Amendments to Article 9 of the Uniform Commercial Code	1975, Supp.	369

1980 Legislative Session

Subject	Commission Report	Act No.
Condemnation Procedures Act	1968, p. 11	87
Technical Revision of the Code of Criminal Procedure	1978, p. 37	506

1981 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to the Justice of the Peace: Provision on the Sheriff's Service of Process	1976, p. 74	148
Amendment of R.J.A. Section 308 (Court of Appeals Jurisdiction) in accord with R.J.A. Section 861	1980, p. 34	206

1982 Legislative Session

Subject	Commission Report	Act No.
Revised Uniform Limited Partnership Act	1980, p. 40	213
Technical Amendments to the Business Corporation Act	1980, p. 8	407
Amendment of Probate Code as to Interest on Judgments	1980, p. 37	412

1983 Legislative Session

Subject	Commission Report	Act No.
Elimination of Various Statutory References to Abolished Courts	1979, p. 9	87
Uniform Federal Lien Registration Act	1979, p. 26	102

1984 Legislative Session

Subject	Commission Report	Act No.
Study Report on Legislative Privilege		
a. Immunity in Civil Actions	1983, p. 14	27
b. Limits of Immunity in Contested Cases	1983, p. 14	28
c. Amendments to R.J.A. for Legislative Immunity	1983, p. 14	29
Disclosure of Treatment Under the Psychologist/ Psychiatrist-Patient Privilege	1978, p. 28	362

1986 Legislative Session

Subject	Commission Report	Act No.
Amendments to the Uniform Limited Partnership Act	1983, p. 9	100

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Richard D. McLellan, Chairman
Anthony Derezinski, Vice Chairman
David Lebenbom
Richard C. Van Dusen
Sen. Alan Cropsey
Sen. John Kelly
Rep. Perry Bullard
Rep. Ernest W. Nash
Elliott Smith

Date: January 30, 1987

A RESOLUTION HONORING MR. TOM DOWNS

Whereas, With the completion of his excellent tenure of service on the Michigan Law Revision Commission, Mr. Tom Downs has brought to a close an important facet of his exceptional service to the people of the State of Michigan. We are proud to commend him in appreciation for all of his achievements in the legal field and in public service not only in the Great Lake State, but across the country; and

Whereas, A noted legal scholar who takes a deep personal interest in the role that the law plays in each of our lives, Tom Downs has won great respect for the wide spectrum of his expertise. This knowledge has been especially important to the work of the Michigan Law Revision Commission, for Mr. Downs was a charter member and the first chairman of the commission in 1966. Highlights of his work on the commission have included his service as vice chairman for 1967-1981, acting chairman for 1982, and chairman for 1983-1985. His insights, especially as reflected in his outstanding work as a delegate and vice president of the Constitutional Convention of 1963, have been invaluable to the commission in its task of studying and proposing changes to the statutes to eliminate anachronisms and inconsistencies and to bring laws into harmony; and

Whereas, The influence of Tom Downs has spread far beyond Michigan as well. A member of the National Conference of Commissioners on Uniform State Laws, Mr. Downs has contributed to the development of several pieces of legislation which have been adopted throughout the country in many of the states, including several in Michigan sponsored by the Michigan Law Revision Commission. Clearly, Tom Downs has been most generous with his talents in engaging them on behalf of the people of this state and the laws and judicial system which are the lifeblood of our society; now, therefore, be it

Resolved by the Michigan Law Revision Commission, That tribute be hereby accorded to honor Mr. Tom Downs in grateful appreciation of his work as a member of the Michigan Law Revision Commission; and be it further

Resolved, That a copy of this resolution be reprinted in the 1986 annual report of the Michigan Law Revision Commission.

A RESOLUTION HONORING SENATOR ALAN CROPSEY

Whereas, It is a pleasure for the members of the Michigan Law Revision Commission to honor former State Senator Alan L. Cropsey for his outstanding service for the commission. His distinguished efforts for the commission began on February 14, 1984, and extended until December 31, 1986; and

Whereas, As an attorney, Senator Cropsey understands the necessity for an effective Law Revision Commission. Since its establishment in 1965, the commission has worked diligently to examine common law, statutes, judicial rulings, and similar legal documents for defects, anachronisms, and needed reforms. It has further considered suggestions for changes in the law and made recommendations for changes to bring the law into harmony with modern conditions. With Senator Cropsey's legal expertise and understanding of the legislative process, he has brought a wealth of knowledge to the commission that has proved enormously beneficial; and

Whereas, In a changing world, it is very important for our laws to reflect the reality of life and our society today. The Michigan Law Revision Commission provides this necessary service and does so with the advice and decision-making ability of several exceptional individuals. In his capacity as Chairman of the Senate Judiciary Committee, Senator Cropsey was able to provide leadership in both the Senate and on the commission that has enhanced the quality of many people's lives. We salute him for his dedication to human need and the laws that are meant to protect and preserve the rights of our people; now, therefore, be it

Resolved, That the members of the Michigan Law Revision Commission hereby express our gratitude to former Senator Alan Cropsey in acknowledgment of his fine work. May he know in what high regard we hold his superb service.

A RESOLUTION HONORING REPRESENTATIVE ERNEST NASH

Whereas, It is a pleasure for the members of the Michigan Law Revision Commission to honor former State Representative Ernest W. Nash, for his outstanding service for the commission. His distinguished efforts for the commission began on January 25, 1983, and extended until December 31, 1986; and

Whereas, As a veteran lawmaker, Representative Nash understood the necessity for an effective Law Revision Commission. Since its establishment in 1965, the commission has worked diligently to examine common law, statutes, judicial rulings, and similar legal documents for defects, anachronisms, and needed reforms. It has further considered suggestions for changes in the law and made recommendations for changes to bring the law into harmony with modern conditions. With Representative Nash's dedication and understanding of the legislative process, he has brought a wealth of knowledge to the commission that has proved enormously beneficial; and

Whereas, In a changing world, it is very important for our laws to reflect the reality of life and our society today. The Michigan Law Revision Commission provides this necessary service and does so with the advice and decision-making ability of serveral exceptional individuals. With his prior experience in administering the state's laws as a member of the Michigan State Police, Representative Nash was able to provide insight in both the House and on the commission that has enhanced the quality of many people's lives. We salute him for his dedication to human need and the laws that are meant to protect and preserve the rights of our people; now, therefore, be it

Resolved, That the members of the Michigan Law Revision Commission hereby express our gratitude to former Representative Ernest W. Nash in acknowledgment of his fine work. May he know in what high regard we hold his superb service.

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

The Uniform Statutory Rule Against Perpetuities is proposed to alter the Common-law Rule Against Perpetuities by installing a workable wait-and-see element. The Common-law Rule Against Perpetuities (Common-law Rule) is in force in Michigan for interests in real property as well as for interests in personal property by virtue of P.A.1949, No. 38 (M.C.L. § 554.51, 554.52, and 554.53, set forth in Appendix C). See the historical account of Michigan law set forth in L. Simes & A. Smith, The Law of Future Interests § 1430 (2d ed. 1956), set forth in Appendix B.

The Common-law Rule, as presented in John Chipman Gray's widely quoted formulation, is as follows:

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

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

The Common-law Rule has long been noted for its harshness. Under the Common-law Rule, a certainty that the vesting or termination of an interest within the permissible period of a life in being plus 21 years must have existed when the interest was created. This means that possible post-creation events, not actual post-creation events, are the sole criterion of validity. E.g., Michigan Trust Co. v. Baker, 226 Mich. 72, 77-78 (1924).

Since actual post-creation events are irrelevant at common law, even those that are known at the time of the lawsuit, interests that were likely to and in fact would have vested (if so allowed) well within the period of a life in being plus 21 years are nevertheless invalid if at the time of the interest's creation there was a possibility, no matter how remote, that they might not have done so. Michigan Trust Co. v. Baker, supra. Consequently, the Common-law Rule can invalidate interests on the ground of potential post-creation events that, though possible, are extremely unlikely to happen and in actuality almost never do happen. Reasonable dispositions can be rendered invalid because of such remote possibilities as

-- a woman who has passed the menopause giving birth to (or adopting) additional children (the so-called "fertile-octogenarian" type of case, illustrated in Example (7) in the Comment to Section 1 of the Uniform Act, Appendix E; see also Rozell v. Rozell, 217 Mich. 324, 331 (1922)),

-- the probate of an estate taking more than 21 years to complete (the so-called "administrative-contingency" type of case, illustrated in Example (8) in the Comment to Section 1 of the Uniform Act, set forth in Appendix E), or

-- a married man or woman in his or her middle or late years later becoming remarried to a person born after the testator's death (the so-called "unborn-widow" type of case, illustrated in Example (9) in the Comment to Section 1 of the Uniform Act, Appendix E).

None of these dispositions offends the underlying public policy of the rule against perpetuities of preventing people from tying up property in long-term or even perpetual family trusts. In fact, each disposition seems quite reasonable, and violates the Common-law Rule on technical grounds only.

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

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

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

Under the Uniform Act, as well as under the Restatement (Second), the wait-and-see element is applied only to interests that would have been invalid at common law. The Uniform Act gives such interests a second chance: They are valid if they actually vest within the allowable waiting period, and become invalid only if they remain in existence but still nonvested at the expiration of the allowable waiting period.

One of the early objections to wait-and-see reform was that it would put the validity of property interests in abeyance -- no one could determine whether an interest was valid or not. This argument has long been put to rest. It must be kept in mind that

the wait-and-see element is applied only to interests that would be invalid were it not for wait-and-see. Such interests, otherwise invalid, are always nonvested future interests. It is now understood that wait-and-see does nothing more than affect that type of future interest with an additional contingency. To vest, the other contingencies must not only be satisfied -- they must be satisfied within a certain period of time. If that period of time -- the allowable waiting period -- is easily determined, as it is under the Uniform Act, then the additional contingency causes no more uncertainty in the state of the title than would have been the case had it been explicitly placed in the governing instrument itself, to begin with. It should also be noted that only the status of the affected future interest in the trust or other property arrangement is deferred. In the interim, the other interests, such as the interest of a current income beneficiary, are carried out in the normal course without obstruction.

The Allowable Waiting Period. Despite its attraction, wait-and-see has not been widely adopted. The greatest controversy over wait-and-see concerns how one marks off the allowable waiting period -- the period of time during which the contingencies attached to a nonvested property interest are allowed to work themselves out to a final resolution.

The wait-and-see reform movement has always proceeded on the unexamined assumption that the allowable waiting period should be marked off in time by reference to so-called measuring lives who are in being at the creation of the interest; the allowable waiting period under this assumption expires 21 years after the death of the last surviving measuring life.

In a very important step, the Uniform Act foregoes the use of actual measuring lives and instead marks off the allowable waiting period by reference to a specified period that is a reasonable approximation of -- and serves as a proxy for -- the period of time that would, on average, be produced through the use of a set of actual measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor. The proxy utilized in the Uniform Act is a flat period of 90 years. The rationale for this period is briefly discussed below. See also Waggoner, The Uniform Statutory Rule Against Perpetuities, 21 Real Prop., Prob. & Tr.J. 569 (Winter 1987).

By using a flat 90-year period, problems inherent in the actual-measuring-lives approach are avoided. The difficulty of describing actual measuring lives in statutory language and the difficulty of identifying and tracing such individuals so as to determine which one is the survivor and when he or she died are no longer grounds for objecting to wait-and-see. The expiration of the allowable waiting period under the Uniform Act is easy to determine and unmistakable.

If the use of actual measuring lives plus 21 years generated an allowable waiting period that precisely self-adjusted to each situation, there might be objection to replacing the actual-measuring-lives approach with a flat waiting period of 90 years, which obviously cannot replicate such a function. That is not the function performed by the actual-measuring-lives approach, however. That is to say, that approach is not scientifically designed to generate an allowable waiting period that expires at a natural or logical stopping point along the continuum of each disposition, thereby mysteriously marking off the precise time before which actual vesting ought to be allowed and beyond which it ought not to be permitted. Instead, as documented and illustrated in the Prefatory Note to the Uniform Act, the actual-measuring-lives approach functions in a rather different way: It generates a period of time that almost always exceeds the time of actual vesting in cases when actual vesting ought to be allowed to occur. The actual-measuring-lives approach, therefore, performs a margin-of-safety function, and that is a function that can be replicated by the use of a proxy such as the flat 90-year period under the Uniform Act.

The myriad of problems associated with the actual-measuring-lives approach are swept aside by shifting away from actual measuring lives and adopting instead a 90-year waiting period as representing a reasonable approximation of -- a proxy for -- the period of time that would, on average, be produced by identifying and tracing an actual set of measuring lives and then tacking on a 21-year period following the death of the survivor. The selection of 90 years is based on a statistical study published in Waggoner, Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities, 20 U. Miami Inst. on Est. Plan. Ch. 7 (1986).

The adoption of a flat period of 90 years rather than the use of actual measuring lives is an evolutionary step in the development and refinement of the wait-and-see doctrine. The 90-year period makes wait-and-see simple, fair, and workable. Aggregate dead-hand control will not be increased beyond what is already possible by competent drafting under the Common-law Rule through the use of perpetuity saving clauses. In fact, as explained in some detail in the Prefatory Note to the Uniform Act, wait-and-see in general and the Uniform Act in particular amounts, in effect, to nothing more startling than the insertion of a perpetuity saving clause into instruments that, had they been competently drafted, would have contained such a clause to begin with.

Reformation of Dispositions That Fail the Wait-and-See Test. The Uniform Act, as well as the Restatement (Second), provides for judicial reformation of a disposition in case an interest to which the wait-and-see element applies is still in existence and nonvested when the allowable waiting period expires. It will seldom be necessary to apply this provision.

Nearly all of the trusts or other property arrangements that are governed by the wait-and-see element will terminate by their own terms long before the circumstances requisite to reformation arise.

The Uniform Act, reprinted in Appendix E, along with commentary, was approved by the NCCUSL in 1986 and shortly thereafter unanimously endorsed by the Council of the ABA Section of Real Property, Probate and Trust Law. It was subsequently endorsed unanimously by the Board of Regents of the American College of Real Estate Lawyers. The proposed bill follows:

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

A bill to replace the common-law rule against perpetuities with a rule against perpetuities that contains a wait-and-see element.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT

Section 1. (1) A nonvested property interest is invalid unless:

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

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

(2) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

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

(b) the condition precedent either is satisfied or becomes

impossible to satisfy within 90 years after its creation.

(3) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

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

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

(4) In determining whether a nonvested property interest or a power of appointment is valid under subsection (1)(a), (2)(a), or (3)(a), the possibility that a child will be born to an individual after the individual's death is disregarded.

Section 2. (1) Except as provided in subsections (2) and (3) and in Section 5(1), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(2) For purposes of this Act, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in Section 1(2) or 1(3), the nonvested property interest or power of appointment is created when the

power to become the unqualified beneficial owner terminates. For purposes of this Act, a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.

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

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

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

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

(c) a nonvested property interest that is not validated by

Section 1(1)(a) can vest but not within 90 years after its creation.

Section 4. Section 1 (statutory rule against perpetuities) does not apply to:

(a) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

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

(c) a power to appoint a fiduciary;

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

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

Section 5. (1) Except as extended by subsection (2), this Act applies to a nonvested property interest or a power of appointment that is created on or after the effective date of this Act. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

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

Section 6. This Act may be cited as the Uniform Statutory Rule Against Perpetuities.

Section 7. This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

Section 8. This Act supersedes the rule of the common law known as the rule against perpetuities and repeals section 21 of Chapter 62 of the Revised Statutes of 1846, being section 554.21 of the Michigan Compiled Laws of 1970, and Act No. 38 of the Public Acts of 1949, being sections 554.51, 554.52, and 554.53 of the Michigan Compiled Laws of 1970.

APPENDIX A

AN ANALYSIS OF THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES AS COMPARED WITH MICHIGAN LAW[1]

The Common-law Rule Against Perpetuities is in force in Michigan, for interests in both real and personal property. Although there are a number of Michigan decisions applying the Common-law Rule, Michigan has not developed any peculiarly local doctrines thereunder and on many major points there is no Michigan authority. As noted by L. Simes & A. Smith, The Law of Future Interests § 1430 at p. 309 (2d ed. 1956):

> Since the Michigan common law rule against perpetuities contained no peculiar local doctrines, and since [Section 554.51 of the Michigan Compiled Laws] expressly declares the common law rule to be in force, it would seem that the Michigan courts could well rely on the [First] Restatement of Property to determine the details of that rule.

Consequently, the following comparison of the Uniform Act with Michigan law will treat the First Restatement of Property as reflecting Michigan law in the absence of a contrary Michigan decision on the point at issue.

Section 1: Statutory Rule Against Perpetuities

Section 1 sets forth the Statutory Rule Against Perpetuities (Statutory Rule). Under Section 8, the Statutory Rule and the other provisions of the Act supersede the Common-law Rule Against Perpetuities (Common-law Rule). The statutory adoption of the Common-law Rule is repealed.

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1. Prepared by Lawrence W. Waggoner, James V. Campbell Professor of Law, University of Michigan Law School, and Reporter for the Uniform Statutory Rule Against Perpetuities.

Subsection (1) governs the validity of nonvested property interests, and will be the subsection most often applicable. Subsections (2) and (3) govern the validity of powers of appointment, a question less frequently raised.

Paragraph (a) of subsections (1), (2), and (3) codifies what may be called the validating side of the Common-law Rule. In effect, paragraph (a) of each of these subsections provides that a nonvested property interest or a power of appointment that is valid under the Common-law Rule Against Perpetuities is valid under the Statutory Rule and can be declared so at its creation. Consequently, the following Michigan cases upholding the disputed disposition under the Common-law Rule would, if brought, reach the same result under Section 1(1)(a): In re Dingler's Estate, 319 Mich. 189 (1947); Floyd v. Smith, 303 Mich. 137 (1942); Rodey v. Stotz, 280 Mich. 90, 100-102 (1937); Michigan Trust Co. v. Baker, 226 Mich. 72 (1924).

Paragraph (b) of subsections (1), (2), and (3) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by Section 1(1)(a), 1(2)(a), or 1(3)(a), and hence would have been invalid under the Common-law Rule, is nevertheless valid if it does not actually remain nonvested when the allowable 90-year waiting period expires (or, in the case of a power of appointment, if the power ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires). Consequently, Section 1(1)(b) would cause a different resolution of the following Michigan cases that found an invalidity under the Common-law Rule: Gardner v. City National Bank & Trust Co., 267 Mich. 270 (1934); Rozell v. Rozell, 217 Mich. 324 (1922). As a practical matter, it is doubtful that these cases would even be brought unless and until one of the circumstances requisite to reformation under Section 3 arose.

The rule established in subsection (4) deserves a special comment. Subsection (4) declares that the possibility of a child being born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purposes of determining the validity of an interest (or power of appointment) under paragraph (a) of subsection (1), (2), or (3). The rule of subsection (4) does not apply, for example, to questions such as whether or not a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest -- as a member of a class or otherwise. Neither subsection (4), nor any other provision of the Uniform Act, supersedes the widely accepted common-law principle, sometimes codified for all or certain purposes, such as in Section 109 of the Revised Probate Code, being Section 700.109 of the Compiled Laws, that a child in gestation (a child sometimes described as a child en ventre sa mere) who is later born alive is regarded as alive at the commencement of gestation.

The rule of subsection (4) does supersede the notion of the common law that the perpetuity period is comprised of three components: (i) a life in being (ii) plus 21 years (iii) plus a period of gestation, when needed. Restatement of Property § 374 (1944). The rule of subsection (4) supersedes the third component, the period of gestation. When the Common-law Rule was developing, it was recognized that in a case like "to A for life, remainder to A's children who reach 21," there was a possibility, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be his present wife, but instead might be someone born after the testator's death) might be pregnant when A died. If she was, and the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years of A's death. The device then invented to prevent this possibility from invalidating the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of deceased pregnant women long enough to develop the fetus to viability -- advances in medical science unanticipated when the Common-law Rule was in its developmental stages -- having a pregnant wife at death is no longer the only way of having children after death. Although the point has not yet been raised in a Michigan case, these medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under the Common-law Rule, and hence under Section 1(1)(a), on the interest of A's children in the above example. The rule of subsection (4), however, does insure the initial validity of the children's interest. Disregarding the possibility of A having children after his death allows the disposition to be validated under Section 1(1)(a). None of A's children, under this assumption, can reach 21 more than 21 years after A's death.

For other purposes, the legal status of conceived-after-death children is not yet clear. For example, if in the above example it in fact turns out that A does leave sperm on deposit at a sperm bank and if in fact A's wife does become pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift. See Restatement (Second) of Property (Donative Transfers) Introductory Note to Ch. 26 at pp. 2-3 (Tent. Draft No. 9, 1986). Without trying to predict how that matter will be settled in the future, the best way to handle the problem from the perpetuity perspective is subsection (4)'s rule requiring the possibility of post-death children to be disregarded.

Section 2: When Nonvested Property Interest and Power of Appointment Created

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

Section 2(1) provides that, with certain exceptions, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law. Since a will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the will, general principles of property law determine that the time when a nonvested property interest or a power of appointment created by will is created is at the decedent's death. With respect to an inter vivos transfer, the time when the interest or power is created is the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed. As for a nonvested property interest or a power of appointment created by the testamentary or inter vivos exercise of a power of appointment, general principles of property law adopt the "relation back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was created, not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power. If the exercised power was a presently exercisable general power, the relation-back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably exercised, not when the power was created.

Section 2(2) provides that, if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest (or a property interest subject to a power of appointment described in Section 1(2) or 1(3)), the time of creation of the nonvested property interest or the power of appointment is postponed until the power to become unqualified beneficial owner ceases to exist. This is in accord with existing common law. Restatement of Property § 373 (1944). The standard example of the application of this subsection would be a <u>revocable</u> inter vivos trust. In such a case, both at common law

and under the Uniform Act, the nonvested property interests and powers of appointment created in the trust are created when the power to revoke expires, usually at the settlor's death.

The last sentence of Section 2(2) is bracketed in the Uniform Act. This sentence is included in the Michigan bill because of the possibility of property governed by Michigan law being recognized as community property, e.g., under the Uniform Disposition of Community Property Rights at Death Act, P.A.1975, No. 289, being Sections 557.261 and following of the Michigan Compiled Laws, and because of the possibility of this state enacting the Uniform Marital Property Act and/or recognizing marital property under the Uniform Marital Property Act of another jurisdiction.

Section 2(3) provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable trust. Arguably, at common law, each transfer starts the period of the Rule running anew as to that transfer. This difficulty is avoided by subsection (3).

Section 3: Reformation

Section 3 directs a court, upon the petition of an interested person, to reform a disposition within the limits of the allowable 90-year period, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in any one of three circumstances. Section 3 only applies to dispositions whose validity is governed by the wait-and-see element of Section 1(1)(b), 1(2)(b), or 1(3)(b); it does not apply to dispositions that are initially valid under Section 1(1)(a), 1(2)(a), or 1(3)(a) -- the codified version of the validating side of the Common-law Rule.

This section will seldom be applied. Of the fraction of trusts and other property arrangements that are incompetently drafted, and thus fail to meet the requirements for initial validity under the codified version of the validating side of the Common-law Rule, almost all of them will have terminated by their own terms long before the circumstances requisite to reformation under Section 3 arise.

If, against the odds, one of the circumstances requisite to reformation does arise, it will be found easier than perhaps

anticipated to determine how best to reform the disposition. The court is given two criteria to work with: (i) the transferor's manifested plan of distribution and (ii) the allowable 90-year period. Since governing instruments are where transferors manifest their plans of distribution, the imaginary horrible of courts being forced to probe the minds of long-dead transferors will not materialize.

The theory of Section 3 is to defer the right to reformation until reformation becomes truly necessary. Thus the basic rule of Section 3(a) is that the right to reformation does not arise until a nonvested property interest or a power of appointment becomes invalid, which under Section 1 does not occur until the expiration of the 90-year allowable waiting period. As noted above, this approach substantially reduces the number of reformation suits. It also is consistent with the saving-clause principle embraced by the Uniform Act. Deferring the right to reformation until the allowable waiting period expires is the only way to grant every reasonable opportunity for the donor's disposition to work itself out without premature interference.

At the same time, the Uniform Act is not inflexible, for it grants the right to reformation before the expiration of the 90-year allowable waiting period when it becomes necessary to do so or when there is no point in waiting that period out. Thus subsection (b), which pertains to class gifts that are not yet but still might become invalid under the Statutory Rule, grants a right to reformation whenever the time comes when the share of any class member is entitled to take effect in possession or enjoyment. Were it not for this subsection, a great inconvenience and possibly injustice could arise, for a class member whose share had vested within the allowable period might otherwise have to wait out the remaining part of the 90 years before obtaining his or her share. Reformation under this subsection will seldom be needed, however, because of the common practice nowadays of structuring trusts so that they split into separate shares or separate trusts at the death of each income beneficiary, one such separate share or separate trust being created for each of the income beneficiary's then-living children; when this pattern is followed, the circumstances described in subsection (b) will not arise.

Subsection (c) also grants the right to reformation before the 90-year waiting period expires. The circumstance giving rise to the right to reformation under subsection (c) occurs when a nonvested property interest can vest but not before the 90-year period has expired. Though unlikely, such a case can theoretically arise. If it does, the interest -- unless it terminates by its own terms earlier -- is bound to become invalid under Section 1 eventually. There is no point in deferring the right to reformation until the inevitable happens. The Uniform Act provides for early reformation in such a case, just in case it arises.

Section 4: Exclusions from Statutory Rule Against Perpetuities

Section 4 identifies the interests and powers that are excluded from the Statutory Rule Against Perpetuities. Subsections (b), (c), and (d) are declaratory of existing common law. In addition, subsection (e) preserves all the exclusions from the Common-law Rule recognized at common law and by statute in Michigan. Since Michigan has already enacted a comprehensive exclusion of transfers for charitable and public welfare purposes and for pension and profit-sharing plans, Sections 4(5) and 4(6) of the Uniform Act have been eliminated from the Michigan bill. The existing statutory exclusions are contained in P.A.1915, No. 280, being Section 554.351 of the Michigan Compiled Laws, P.A.1925, No. 373, being Section 554.381 of the Michigan Compiled Laws, and P.A. 1947, No. 193, as amended by P.A. 1951, No. 61, being Sections 555.301 and 555.302 of the Michigan Compiled Laws. See Appendix D. These exclusions are not repealed, and so they continue to function as exclusions from the Statutory Rule by virtue of Section 4(e) of the Michigan bill (section 4(7) of the Uniform Act).

The major departure from existing common law comes in subsection (a). In line with long-standing scholarly commentary, subsection (a) excludes nondonative transfers from the Statutory Rule. See 6 American Law of Property § 24.56 at 142 (A. Casner ed. 1952); L. Simes & A. Smith, The Law of Future Interests § 1244 at 159 (2d ed. 1956); Leach, Perpetuities: New Absurdity, Judicial and Statutory Correctives, 73 Harv. L. Rev. 1318, 1321-22 (1960); Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, 660 (1938). See also Metropolitan Transportation Authority v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 384 (1986); Restatement (Second) of Property (Donative Transfers) Introduction p. 1 (1983). The Rule Against Perpetuities is an inappropriate instrument of social policy to use as a control on such arrangements. The period of the Rule -- a life in being plus 21 years -- is suitable for donative transfers only, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Section 1 because that period, as noted, represents an approximation of the period of time that would be produced, on average, by tracing a set of actual measuring lives identified by statutory list and adding a 21-year period following the death of the survivor.

Certain types of transactions -- although in some sense supported by consideration, and hence arguably nondonative -- arise out of a domestic situation, and should not be excluded from the Statutory Rule. To avoid uncertainty with respect to

such transactions, subsection (a) lists and excepts such transactions, such as premarital or postmarital agreements, contracts to make or not to revoke a will or trust, and so on, from the nondonative-transfers exclusion.

The Drafting Committee of the Uniform Act recognized that some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded from the Statutory Rule by the nondonative-transfers exclusion of subsection (a). The reason, again, is that the period of a life in being plus 21 years -- actual or by the 90-year proxy -- is inappropriate for them; that period is appropriate for family-oriented, donative transfers.

The Drafting Committee of the Uniform Act was aware that a few states have adopted statutes on perpetuities that include special limits on certain commercial transactions. E.g., Fla. Stat. § 689.22(3)(a); Ill. Rev. Stat. ch. 30, § 194(a). In fact, the Committee itself drafted a comprehensive version of Section 4 that would have imposed a 40-year-period-in-gross limitation in specified cases. In the end, however, the Committee did not present that version to the National Conference for approval because it was of the opinion that the control of commercial transactions that directly or indirectly restrain alienability is better left to other types of statutes, such as marketable title acts (P.A. 1945, No. 200, being Sections 565.101 through 565.109 of the Michigan Compiled Laws) and the Uniform Dormant Mineral Interests Act (approved by the NCCUSL in 1986 and not yet enacted in Michigan), backed up by the potential application of the common-law rules regarding unreasonable restraints on alienation.

As for possibilities of reverter and rights of entry, whether created in a donative or nondonative transfer, Michigan has a comprehensive statute limiting the duration of these two types of interests in conveyances of real property in certain cases. See P.A. 1968, No. 13, being Sections 554.61 through 554.65 of the Michigan Compiled Laws. Consequently, the fact that these interests are excluded from the Common-law Rule (see Moffit v. Sederlund, 145 Mich.App. 1, 14 (1985)), and hence are excluded from the Statutory Rule under Section 4(e), does not mean that there is no control on the duration of these interests.

Section 5: Prospective Application

Section 5 provides that the Statutory Rule Against Perpetuities applies only to nonvested property interests or powers of appointment created on or after the Act's effective date. Although the Statutory Rule does not apply retroactively, Section 5(2) authorizes a court to exercise its equitable power to reform instruments that contain a violation of Michigan's former Rule Against Perpetuities and to which the Statutory Rule does not apply because the offending property interest or power of appointment was created before the effective date of the Act. Courts are urged in the Comment to the Uniform Act to consider reforming such dispositions by judicially inserting a saving clause, since a saving clause would probably have been used at the drafting stage of the disposition had it been drafted competently.

Sections 6 and 7: Short Title; Uniformity of Application and Construction

Sections 6 and 7 are boilerplate provisions included in Uniform Acts.

Section 8: Supersession; Repeal

Section 8 serves the dual purpose in Michigan of providing that the Common-law Rule Against Perpetuities is superseded by the Uniform Act and of repealing the statutory adoption of the Common-law Rule. Also repealed is Section 21 of the Revised Statutes of 1846, being Section 554.21 of the Michigan Compiled Laws; as the Simes & Smith treatise points out, at § 1430, page 309, this section is "unrelated to anything else in the Michigan statutes" and "there is no rational basis for it."

L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS (2d ed. 1956)

§ 1430. Michigan Statutes

In the Michigan Revised Statutes of 1846 appeared for the first time a group of statutes modeled after the pattern of the New York legislation with respect to estates, trusts, and powers. Included among them was legislation with respect to the suspension of the absolute power to alienate land. The significant sections were unmodified from their original enactment until the reinstatement of the common law rule against perpetuities in 1949. In chapter 62, of the Revised Statutes of 1846, these sections appear as follows: [37]

"Sec. 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter: Such power of aliena-

37. For a summary of the decisions interpreting these statutes, see 10 Mich.State Bar J. 26-32 (1930).

In this section, no attempt is made to include the statutory exception as to charities, which was enacted at a much later time. See § 1439, infra.

tion is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed.

"Sec. 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section.

"Sec. 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age.

"Sec. 17. Successive estates for life shall not be limited, unless to persons in being at the creation thereof; and when a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those persons, the remainder shall take effect, in the same manner as if no other life estate had been created.

"Sec. 18. No remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such remainder be in fee; nor shall any remainder be created upon such an estate in a term for years, unless it be for the whole residue of the term.

"Sec. 19. When a remainder shall be created upon any such life estate, and more than two persons shall be named as the persons during whose lives the estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.

"Sec. 20. A contingent remainder shall not be created on a term for years, unless the nature of the contingency upon which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

"Sec. 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

"Sec. 23. All the provisions in this chapter contained relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer

period than the absolute power of alienation can be suspended, in respect to a fee."

In 1949, the following statute was enacted, and is still in effect: [38]

"554.51 Rule against perpetuities; applicability; uniformity.

"Sec. 1. The common law rule known as the rule against perpetuities now in force in this state as to personal property shall hereafter be applicable to real property and estates and other interests therein, whether freehold or non-freehold, legal or equitable, by way of trust or otherwise, thereby making uniform the rule as to perpetuities applicable to real and personal property.

"554.52 Sections repealed.

"Sec. 2. Sections 14, 15, 16, 17, 18, 19, 20 and 23 of chapter 62 of the Revised Statutes of 1846, being sections 554.14, 554.15, 554.16, 554.17, 554.18, 554.19, 554.20 and 554.23, respectively, of the Compiled Laws of 1948, concerning perpetuities and the suspension of the absolute power of alienation, are hereby repealed.

"554.53 Same; applicability.

"Sec. 3. This act applies only to wills with respect to which the testator dies after the effective date of this act and to deeds and other instruments executed after the effective date of this act."

Since the repeal of the statutes of 1846 on perpetuities was not retroactive, those statutes may sometimes still be significant. Hence, in the further course of this discussion, two questions will be considered: First, what was the Michigan law on perpetuities after 1846 and prior to 1949? Second, precisely what was the effect of the statute of 1949, which has just been quoted?

The first thing to be noted concerning the legislation of 1846 on perpetuities is that it applied only to interests in land. It was included in a chapter entitled, "Of the nature and qualities of estates in real property, and the alienation thereof." There was no legislation prohibiting the suspension of the absolute ownership of personal property, such as was enacted in New York.[39] The common law rule against perpetuities had been recognized as being in force in Michigan prior to 1846,[40] and subsequent to the legislation of that date, the Michigan decisions recognized that it

38. Mich.Pub.Acts (1949), No. 38, enacted as Mich.Comp.Laws (1948), §§ 554.51–554.53.

39. But the statutes did restrict the absolute ownership of a term of years. See Mich.Rev.Stat. (1846), c. 62, § 23.

40. St. Amour v. Rivard, 2 Mich. 294 (1852), involving the will of a testator who died in 1841.

was still in force as to personal property.[41] On the other hand, it was also recognized that the legislation of 1846 was substituted for the common law rule against perpetuities as to land, and that, after that date, the common law rule was not in force as to land.[42]

Now since the common law rule against perpetuities applied to personal property, and the statutes restricting the suspension of the power of alienation applied to interests in land, the question arose: Which rule should be applied to limitations involving a mixed mass of real and personal property? Apparently, the Michigan court took the position that the limitations were void both as to real and personal property involved unless they complied with both rules. Thus, if a trust, consisting of a mixed mass of real and personal property was so limited that it violated the rule as to suspension of the absolute power of alienation of land, but was valid under the common law rule against perpetuities, the entire trust was void.[43] It would seem that the real and personal property might well be regarded as severable, and, in a proper case, the trust might be held valid as to the personalty, though void as to the realty. In Dodge v. Detroit Trust Co.,[44] an estate valued at over $23,000,000 was involved, in which there was but one piece of real estate, valued at $40,000. The question was raised whether an illegal suspension of the power of alienation as to the land would invalidate the entire estate, but the court found it unnecessary to decide that issue. In giving the opinion of the court, however, Justice Butzel, by way of dictum, observed:[45] "Could not the wishes of the testator be safely carried out without doing violence to the law, the trust being held good as to the almost 99.9 per cent. of the property consisting of per-

41. Palms v. Palms, 36 N.W. 419, 68 Mich. 355 (1888).

Penny v. Croul, 43 N.W. 649, 76 Mich. 471, 5 L.R.A. 858 (1889).

42. Windiate v. Lorman, 211 N.W. 62, 236 Mich. 531 (1926).

Rodey v. Stotz, 273 N.W. 404, 280 Mich. 00 (1937).

But compare Michigan Trust Co. v. Baker, 196 N.W. 976, at page 977, 226 Mich 72, at page 76 (1924).

43. State v. Holmes, 73 N.W. 548, 115 Mich. 456 (1898).

Grand Rapids Trust Co. v. Herbst, 190 N.W. 250, 220 Mich. 321 (1922).

Gardner v. City Nat. Bank & Trust Co., 255 N.W. 587, 267 Mich. 270 (1934).

In re Richards' Estate, 278 N.W. 657, 283 Mich. 485 (1938).

DeBuck v. Bousson, 294 N.W. 135, 295 Mich. 164 (1940).

See, also, Toms v. Williams, 2 N.W. 814, 41 Mich. 552 (1879).

44. 2 N.W.2d 509, 300 Mich. 575 (1942).

45. 2 N.W.2d 509, at page 518, 300 Mich. 575 at page 508 (1942).

sonalty, the scintilla of real estate being declared intestate property?"

The absolute power of alienation could be suspended by the existence of a contingent future interest limited in favor of unborn or unascertained persons. If such persons could not be ascertained within two lives in being, then there was an illegal suspension of the absolute power of alienation.[46] But if all interests were certain to be vested within two lives in being, so that one or more ascertained persons could together convey an absolute interest, then the interests were valid under this rule.[47]

Not only could a future interest suspend the absolute power of alienation, but it could also be suspended by a present trust.[48] Michigan has a body of legislation with reference to trusts of land similar to the New York legislation. Therein it is provided that "no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest. * * *"[49] In Michigan, as in New York, such legislation could render a trust inalienable and thus illegally suspend the absolute power of alienation.[50]

Did the existence of a discretionary power in a trustee to sell or exchange the land prevent any possible suspension of the absolute power of alienation? It has been contended that it should.[51] But after some wavering, the court held otherwise.[52] If, however, a

46. Trufant v. Nunneley, 64 N.W. 469, 106 Mich. 554 (1895).

Rozell v. Rozell, 186 N.W. 489, 217 Mich. 324 (1922).

47. Cary v. Toles, 177 N.W. 279, 210 Mich. 30 (1920).

Russell v. Musson, 216 N.W. 428, 240 Mich. 631 (1927).

48. Methodist Episcopal Church of Newark v. Clark, 3 N.W. 207, 41 Mich. 730 (1879).

49. Mich.Comp.Laws (1948), § 555.19. Originally enacted as Mich.Rev. Stat. (1846), c. 63, sec. 19.

50. See Dean v. Mumford, 61 N.W. 7, 102 Mich. 510 (1894).

Casgrain v. Hammond, 90 N.W. 510, 134 Mich. 419, 104 Am.St.Rep. 610 (1903).

Grand Rapids Trust Co. v. Herbst, 190 N.W. 250, 220 Mich. 321 (1922).

In re Richards' Estate, 278 N.W. 657, 283 Mich. 485 (1938).

And compare Coster v. Lorillard, 14 Wend.(N.Y.) 265 (1835).

51. See Goddard, "Perpetuity Statutes," 22 Mich.L.Rev. 95 (1923), in which it is argued that the power of the trustee to alienate should make the limitations in trust valid.

52. Palms v. Palms, 36 N.W. 419, 68 Mich. 355 (1888).

Niles v. Mason, 85 N.W. 1100, 126 Mich. 482 (1901).

Grand Rapids Trust Co. v. Herbst, 190 N.W. 250, 220 Mich. 321 (1922).

In re Richards' Estate, 278 N.W. 657, 283 Mich. 485 (1938).

trustee had a mandatory power to convert realty into personalty within the period permitted for the suspension of the absolute power of alienation, then there could be no illegal suspension of the power of alienation.[53] Moreover, if the trustee's power was not merely to alienate, but to alienate and thereby terminate the trust, then there was no suspension of the absolute power of alienation.[54]

The whole question of the effect of a trustee's power is closely related to the larger question: Was the power of alienation illegally suspended if there was a contingent future interest which might not vest within two lives in being, even though there was a group of ascertained persons who might alienate in fee simple absolute? In other words, did these statutes lay down, not merely a rule as to the legal power of alienation, but also a rule as to remoteness of vesting? It would seem that the statutes are not regarded as announcing any general rule as to remoteness of vesting.[55] The decisions to the effect that a perpetual option to

See, also, Gardner v. City Nat. Bank & Trust Co., 255 N.W. 587, 267 Mich. 270 (1934).

But compare Thatcher v. Wardens, etc., of St. Andrew's Church, 37 Mich. 264 (1877).

Fitz Gerald v. City of Big Rapids, 82 N.W. 56, 123 Mich. 281 (1900).

Allen v. Merrill, 194 N.W. 131, 223 Mich. 467 (1923).

53. Penny v. Croul, 43 N.W. 640, 76 Mich. 471, 5 L.R.A. 858 (1889).

Michigan Trust Co. v. Baker, 196 N.W. 976, 226 Mich. 72 (1924).

In re De Bancourt's Estate, 272 N.W. 891, 279 Mich. 518, 110 A.L.R. 1346 (1937).

Floyd v. Smith, 5 N.W.2d 695, 303 Mich. 137 (1942).

54. See Allen v. Merrill, Lynch & Co., 194 N.W. 131, 223 Mich. 467 (1923).

Later decisions have sought to distinguish the case of Thatcher v. Wardens, etc., of St. Andrew's Church, 37 Mich. 264 (1877), on that ground. See Grand Rapids Trust Co. v. Herbst, 190 N.W. 250, at page 253, 220 Mich. 321, at page 331 (1922), and Niles v. Mason, 85 N.W. 1100, at page 1102, 126 Mich. 482, at page 486 (1901).

55. It is true, section 20, Revised Statutes of 1846, c. 62, does deal with remoteness of vesting, since it provides that a contingent remainder on a term of years must "vest in interest, during the continuance of not more than two lives in being * * *". But the New York provision commonly relied on in that state as the basis for a rule against remoteness of vesting, which provides that a fee on a fee may be limited on a contingency which must happen within the statutory period, was not copied in Michigan.

The Michigan cases indicate that the rule related solely to the power of alienation, and that if there was a group of ascertained persons who could together convey an absolute interest, the rule was satisfied. See Russell v. Musson, 216 N.W. 428, at page 429, 240 Mich. 631, at page 635 (1927).

purchase land is valid clearly supports that doctrine.[56]

It should be observed that Michigan, like New York, restricted the suspension of the absolute power of alienation to two lives in being except in one uncommon situation involving an actual minority.[57] Therefore, if the suspension was for a period of years in gross, it was necessarily bad.[58]

The rigorous character of the Michigan rule in making no provision for a period in gross and in limiting the number of lives to two was tempered considerably by two elements. First, as has already been suggested, the statute did not apply to personalty, and therefore if there was a direction to sell so that an equitable conversion took place, then the statute was inapplicable.[59] More-

Fitz Gerald v. City of Big Rapids, 82 N.W. 56, at page 57, 123 Mich. 281, at page 283 (1900).

Windiate v. Lorman, 211 N.W. 62, at page 63, 236 Mich. 531, at page 534 (1926).

Gardner v. City Nat. Bank & Trust Co., 255 N.W. 587, at page 593, 267 Mich. 270 (1934).

In Michigan Trust Co. v. Baker, 196 N.W. 976, at page 977, 226 Mich. 72, at page 76 (1924), the court said: "It must be kept in mind that, while the rule against perpetuities applies to future interests * * * it has nothing to do with the statutory prohibition against suspension of power of alienation. The rule requires vesting of estates within a period, while the statute prohibits inalienability beyond a period; * * *"

But in Toms v. Williams, 2 N.W. 814, at page 818, 41 Mich. 552, at page 562 (1879), the court said: "The statutes restricting perpetuities are confined to avoiding future estates that are made more remote in their vesting than two lives in being and such arrangements as serve to postpone them."

56. Windiate v. Lorman, 211 N.W. 62, 236 Mich. 531 (1926).

Windiate v. Leland, 225 N.W. 620, 246 Mich. 659 (1929).

57. That is the situation involving the restricted minority provision. See Michigan Revised Statutes (1846), c. 62, sec. 16, which has already been quoted in full.

58. State v. Holmes, 73 N.W. 548, 115 Mich. 456 (1898).

Casgrain v. Hammond, 96 N.W. 510, 134 Mich. 419 (1903).

Otis v. Arntz, 164 N.W. 498, 198 Mich. 106 (1917).

DeBuck v. Bousson, 294 N.W. 135, 295 Mich. 164 (1940).

But a trust to receive and apply the rents and profits of land and to pay five per cent of the principal annually, plus all the income, to the beneficiary until the principal was expended, or, if the beneficiary should die before the principal was all expended, to distribute to seven named persons, would not illegally suspend the power of alienation; the power of alienation would not be suspended longer than the life of the income beneficiary. Miller v. Curtiss, 43 N.W.2d 834, 328 Mich. 239 (1950).

59. See note 53, supra, in this section.

Even though the trustee is not required to sell at once, but only on or before the expiration of two lives in being, the direction to sell

over, the Michigan court developed a doctrine to the effect that, if there was a gift to a group of persons as a class for their lives, they were considered as one life for purposes of the application of the rule.[60] Thus, in Kemp v. Sutton, the court, after quoting from a Pennsylvania case to the effect that "It matters not how many lives there may be so that the candles are all burning at the same time, for the life of the longest liver is but a single life," continued with this observation of its own:[61] "Such rule was announced upward of two and a half centuries ago. See 1 Siderfin, 451. To hold otherwise would permit a life estate to two children and prohibit such an estate to three or more children. If a man has nine children and, by will, devises all nine a life estate, with fee vested in a remainderman, the nine constitute a class; their heads are not counted in determining lives in being, for they constitute collectively but one life, that of the longest liver, between the devisor and the devisee of the fee in remainder." It would seem that this group of decisions represents a long step in the direction of substituting "lives in being" for the measure of "two lives" as a literal construction of the statute would require.

It is clear that the statutes with respect to the suspension of the absolute power of alienation do not modify the common-law rules prohibiting conditions or provisions directly in restraint of alienation.[62] Such conditions, limitations, or restrictions, when applied to a fee simple estate, are void without regard to the period of time.

prevents any violation of the statutory two lives rule. See Van Tyne v. Pratt, 289 N.W. 275, 291 Mich. 626 (1939).

60. Felt v. Methodist Educational Advance, 225 N.W. 545, 247 Mich. 168 (1929).

Kemp v. Sutton, 206 N.W. 366, 233 Mich. 249 (1925).

Truitt v. City of Battle Creek, 171 N.W. 338, 205 Mich. 180 (1919).

Woolfitt v. Preston, 169 N.W. 838, 203 Mich. 502 (1918).

61. 206 N.W. 368, at page 369, 233 Mich. 249, at page 260.

62. Mandlebaum v. McDonell, 29 Mich. 78, 18 Am.Rep. 61 (1874).

Bennett v. Chapin, 43 N.W. 893, 77 Mich. 526, 7 L.R.A. 377 (1889).

In re Schilling's Estate, 61 N.W. 62, 102 Mich. 612 (1894).

Watkins v. Minor, 183 N.W. 186, 214 Mich. 380 (1921).

Porter v. Barrett, 206 N.W. 532, 233 Mich. 373, 42 A.L.R. 1267 (1925).

Smith v. Smith, 287 N.W. 411, 290 Mich. 143, 124 A.L.R. 215 (1939).

Braun v. Klug, 57 N.W.2d 299, 335 Mich. 691, 36 A.L.R.2d 1434 (1953).

See, also, Sloman v. Cutler, 242 N.W. 735, 258 Mich. 372 (1932).

Lantis v. Cook, 69 N.W.2d 849, 342 Mich. 347 (1955).

The effect of the Michigan legislation of 1949 on perpetuities is not difficult to state. From and after its effective date, it reinstates the common law rule against perpetuities as to interests in land, so that the common law rule applies both to realty and personalty. Doubtless a mere repeal of the suspension of the power of alienation legislation would have that effect, since the common law rule was in effect in Michigan prior to 1846.[63] But the statute of 1949 also affirmatively declares the common law rule to be in force both as to land and personalty. Since the Michigan common law rule against perpetuities contained no peculiar local doctrines, and since the statute expressly declares the common law rule to be in force, it would seem that the Michigan courts could well rely on the Restatement of Property to determine the details of that rule.

It should be pointed out that the 1949 act did not repeal section 21 of chapter 62 of the Revised Statutes of 1846, which restricts a life estate after a term of years, in the fashion of the New York legislation. This section is only remotely connected with the subject of suspension of the power of alienation; but must be recognized as an existing statutory restriction on the creation of a life estate after a term of years. Since it is now unrelated to anything else in the Michigan statutes, there is no rational basis for it, and it might well be repealed.

It should also be noted that Michigan did not repeal the legislation borrowed from New York, which makes inalienable the equitable interest in certain trusts. However, while this legislation has validity in and of itself, it no longer has any relation to the existing rule against perpetuities, which is a rule against remoteness of vesting.

As to wills and other instruments which took effect prior to the effective date of the 1949 act, the 1846 legislation is still applicable.[64]

63. See note 40, supra, this section. 64. See section 2 of the 1949 act, quoted earlier in this section.

APPENDIX C

MICHIGAN STATUTE ADOPTING COMMON-LAW RULE AGAINST PERPETUITIES

RULE AGAINST PERPETUITIES

Caption editorially supplied

P.A.1949, No. 38, Eff. Sept. 23

AN ACT concerning perpetuities and the suspension of the absolute power of alienation with respect to interests in real property, making uniform the law as to real and personal property; and repealing sections 14, 15, 16, 17, 18, 19, 20 and 23 of chapter 62 of the Revised Statutes of 1846, being sections 554.14, 554.15, 554.16, 554.17, 554.18, 554.19, 554.20 and 554.23, respectively, of the Compiled Laws of 1948.

The People of the State of Michigan enact:

554.51 Rule against perpetuities; applicability; uniformity

Sec. 1. The common law rule known as the rule against perpetuities now in force in this state as to personal property shall hereafter be applicable to real property and estates and other interests therein, whether freehold or non-freehold, legal or equitable, by way of trust or otherwise, thereby making uniform the rule as to perpetuities applicable to real and personal property. P.A.1949, No. 38, § 1, Eff. Sept. 23.

554.52 Sections repealed

Sec. 2. Sections 14, 15, 16, 17, 18, 19, 20 and 23 of chapter 62 of the Revised Statutes of 1846, being sections 554.14, 554.15, 554.16, 554.17, 554.18, 554.19, 554.20 and 554.23, respectively, of the Compiled Laws of 1948, concerning perpetuities and the suspension of the absolute power of alienation, are hereby repealed. P.A.1949, No. 38, § 2, Eff. Sept. 23.

554.53 Same; applicability

Sec. 3. This act applies only to wills with respect to which the testator dies after the effective date of this act and to deeds and other instruments executed after the effective date of this act. P.A.1949, No. 38, § 3, Eff. Sept. 23.

MICHIGAN STATUTORY EXCLUSIONS FROM RULE AGAINST PERPETUITIES

P.A.1915, No. 280, Eff. Aug. 24

AN ACT to establish the validity and to provide for the administration and control of gifts, grants, bequests and devises to religious, educational, charitable or benevolent uses, or for cemeteries, whether in trust or otherwise, which would be otherwise invalid by reason of indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same or by reason of contravening any statute or rule against perpetuities; and regulating the same; to establish the validity of all gifts, grants, devises or bequests made in pursuance of Act 122 of the Public Acts of 1907 and of the acts amendatory thereof, and all proceedings and acts performed in accordance therewith; and repealing Act 122 of the Public Acts of 1907, and all amendments thereto.

The People of the State of Michigan enact:

554.351 Gift or grant for certain purposes; effect of indefiniteness, vesting of title, appointment of trustee

Sec. 1. No gift, grant, bequest or devise, whether in trust or otherwise to religious, educational, charitable or benevolent uses, or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, or anything therein contained which shall in other respects be valid under the laws of this state, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities. If in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes, shall vest in such trustee. If no such trustee shall be named in said instrument or if a vacancy occurs in the trusteeship, then the trust shall vest in the court of chancery for the proper county, and shall be executed by some trustee appointed for that purpose by or under the direction of the court; and said court may make such orders or decrees as may be necessary to vest the title to said lands or property in the trustee so appointed.

554.353 Validation clause

Sec. 3. All gifts, grants, devises or bequests made in pursuance to the provisions of Act No. 122 of the Public Acts of 1907 and of the acts amendatory thereof,[1] and all proceedings and acts performed in accordance therewith are hereby validated.

[1] Repealed by P.A.1915, No. 280, § 4, Eff. Aug. 24.

P.A.1925, No. 373, Eff. Aug. 27

AN ACT to relieve gifts, grants, devises and bequests, in trust or otherwise, for public welfare purposes, from the operation of all statutory and all common law rules of this state against perpetuities and restraint of alienation, to define said purposes, and to provide a rule of construction.

The People of the State of Michigan enact:

554.381 Public welfare purposes; validity of gifts and bequests

Sec. 1. No statutory or common law rule of this state against perpetuities or restraint of alienation shall hereafter invalidate any gift, grant, devise or bequest, in trust or otherwise, for public welfare purposes.

P.A.1947, No. 193, Eff. Oct. 11

AN ACT relative to the validity, duration and effectiveness of certain trusts of any property created by an employer as part of a stock bonus plan, pension plan, disability or death benefit plan, or profit-sharing plan; and to permit the accumulation of the income arising from such trusts. As amended P.A.1951, No. 61, § 1, Eff. Sept. 28.

The People of the State of Michigan enact:

555.301 Trust of property for employees; effect of rule against perpetuities

Sec. 1. A trust of any kind of property created by an employer as part of a stock bonus plan, pension plan, disability or death benefit plan, or profit-sharing plan, for the exclusive benefit of some or all of his employees, to which contributions are made by such employer or employees, or both, for the purpose of distributing to such employees the earnings or the principal, or both earnings and principal, of the fund so held in trust, shall not be deemed to be invalid as violating the so-called rule against perpetuities, any other existing law against perpetuities or any law restricting or limiting the duration of trusts; but such a trust may continue for such time as may be necessary to accomplish the purposes for which it was created. As amended P.A. 1951, No. 61, § 1, Eff. Sept. 28.

555.302 Same; accumulation of trust income

Sec. 2. The income arising from any trust within the classifications mentioned in the preceding section may be permitted to accumulate in accordance with the terms of such trust for as long a time as may be necessary to accomplish the purposes for which the same was created, notwithstanding any existing law or laws limiting the period during which trust income may be accumulated.

APPENDIX E

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

and by it

Approved and Recommended for Enactment

in All the States

at its

ANNUAL CONFERENCE

MEETING IN ITS NINETY-FIFTH YEAR

IN BOSTON, MASSACHUSETTS

AUGUST 1-8, 1986

With Prefatory Note and Comments

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

PREFATORY NOTE

The Uniform Statutory Rule Against Perpetuities (Statutory Rule) alters the Common-law Rule Against Perpetuities by installing a workable wait-and-see element. For a general explanation of the Uniform Act, see Waggoner, The Uniform Statutory Rule Against Perpetuities, 21 Real Prop., Prob. & Tr.J. 569 (Winter, 1987).

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

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

J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

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

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

Notice that the invalidating side focuses on a lack of certainty, which means that invalidity under the Common-law Rule is not dependent on actual post-creation events but only on possible post-creation events. Since actual post-creation events are irrelevant at common law, even those that are known at the time of the lawsuit, interests that are likely to, and in fact would (if given the chance), vest well within the period of a life in being plus 21 years are nevertheless invalid if at the

time of the interest's creation there was a possibility, no matter how remote, that they might not have done so. This is what makes the invalidating side of the Common-law Rule so harsh: It can invalidate interests on the ground of post-creation events that, though possible, are extremely unlikely to happen and in actuality almost never do happen, if ever. Reasonable dispositions can be rendered invalid because of such remote possibilities as a woman who has passed the menopause giving birth to (or adopting) additional children (see Example (7) in the Comment to Section 1), the probate of an estate taking more than 21 years to complete (see Example (8) in the Comment to Section 1), or a married man or woman in his or her middle or late years later becoming remarried to a person born after the testator's death (see Example (9) in the Comment to Section 1). None of these dispositions offends the public policy of preventing people from tying up property in long term or even perpetual family trusts. In fact, each disposition seems quite reasonable, and violates the Common-law Rule on technical grounds only.

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

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

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

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

the allowable waiting period.

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

> Validating Side of the Statutory Rule: A nonvested property interest is initially valid if, when it is created, it is then certain to vest or terminate (fail to vest) no later than 21 years after the death of an individual then alive. A nonvested property interest that is not initially valid is not necessarily invalid. Such an interest is valid if it vests within the allowable waiting period after its creation.
>
> Invalidating Side of the Statutory Rule: A nonvested property interest that is not initially valid becomes invalid (and, as explained later, subject to reformation to make it valid) if it neither vests nor terminates within the allowable waiting period after its creation.

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

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

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

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

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

The Saving-Clause Principle of Wait-and-See. The measuring lives selected in that earlier draft were patterned after the measuring lives listed in the Restatement (Second), which adopts the saving-clause principle of wait-and-see. Under the saving-clause principle, the measuring lives are those individuals who might appropriately have been selected in a well-drafted perpetuity saving clause.

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

In most cases, the saving clause not only avoids a violation of the Common-law Rule; it also, in a sense, over-insures the client's disposition against the gift over from ever taking effect, because the period of time determined by the perpetuity-period component provides a margin of safety. Its length is sufficient to exceed -- usually by a substantial margin -- the time when the interests in the trust or other arrangement actually vest (or terminate) by their own terms. The clause, therefore, is usually a formality that validates the disposition

without affecting the substance of the disposition at all.

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

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

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

The use of a proxy, such as the flat 90-year period utilized in the Uniform Act, is greatly to be preferred over the conventional approach of using actual measuring lives plus 21 years. The conventional approach has serious disadvantages: Wait-and-see measuring lives are difficult to describe in statutory language and they are difficult to identify and trace so as to determine which one is the survivor and when he or she died.

Drafting statutory language that unambiguously identifies actual measuring lives under wait-and-see is immensely more difficult than drafting an actual perpetuity saving clause. An actual perpetuity saving clause can be tailored on a case by case basis to the terms and beneficiaries of each trust or other property arrangement. A statutory saving clause, however, cannot be redrafted for each new disposition. It must be drafted so that one size fits all. As a result of the difficulty of drafting such a one-size-fits-all clause, the list of measuring lives set forth in the Restatement (Second) contains ambiguities, at least at the fringe. See Dukeminier, Perpetuities: The

Measuring Lives, 85 Colum. L. Rev. 1648, 1681-1701 (1985).

Although the Restatement (Second)'s list could be improved on so as to reduce if not eliminate these ambiguities, the resulting statutory language would be complex and difficult to understand. The language would have to specify whether and in what circumstances individuals who were not measuring lives when the nonvested property interest or power of appointment was created might later become measuring lives by, for example, becoming beneficiaries, or ancestors or descendants of beneficiaries, through adoption, marriage, or assignment of or succession to a beneficial interest. Conversely, the statutory language would have to specify whether and in what circumstances individuals who were once measuring lives might later lose that status, by being adopted out of the family, by divorce, or by assigning or devising their beneficial interests to another.

Also considered, but not adopted in the Uniform Act, was another method of identifying wait-and-see measuring lives -- by reference to a formula set forth in the proposed statutory language "persons in being when the interest is created who can affect the vesting of the interest." This formula approach is advocated in Dukeminier, Perpetuities: The Measuring Lives, 85 Colum. L. Rev. 1648 (1985). This approach was not adopted because, among other reasons, it was concluded that it would shift to the courts the unwelcome task of divining who the measuring lives are on a case-by-case basis, in an environment in which the exact meaning of "persons . . . who can affect the vesting of the interest" is disputable: Not even perpetuity scholars, to say nothing of non-experts in the field, can agree on its precise meaning. See Waggoner, Perpetuities: A Perspective on Wait-and-See, 85 Colum. L. Rev. 1714 (1985); Waggoner, A Rejoinder, 85 Colum. L. Rev. 1739 (1985).

Quite apart from the difficulty of drafting unambiguous and uncomplicated statutory language, another serious problem connected to the actual-measuring-lives approach is that it imposes a costly administrative burden. The Common-law Rule uses the life-in-being-plus-21-years period in a way that does not require the actual tracing of individuals' lives, deaths, marriages, adoptions, and so on. Wait-and-see imposes this burden, however, if measuring lives are used to mark off the allowable period. It is one thing to write a statute specifying who the measuring lives are. It is another to apply the actual-measuring-lives approach in practice. No matter what method is used in the statute for selecting the measuring lives and no matter how unambiguous the statutory language is, actual individuals must be identified as the measuring lives and their lives must be traced to determine who the survivor is and when the survivor dies. The administrative burden is increased if the measuring lives are not a static group, determined once and for all at the beginning, but instead are a rotating group. Adding to the administrative burden is the fact that the perpetuity

question will often be raised for the first time long after the interest or power was created. The task of going back in time to reconstruct not only the facts existing when the interest or power was created, but facts occurring thereafter as well may not be worth the effort. In short, not only would births and deaths have to be kept track of, but adoptions, divorces, and possibly assignments and devises, etc., also, over a long period of time. Keeping track of and reconstructing these events to determine the survivor and the time of the survivor's death imposes an administrative burden wise to avoid. The proxy approach makes it feasible to do just that.

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

One final point. If the use of actual measuring lives plus 21 years generated an allowable waiting period that precisely self-adjusted to each situation, there might be objection to replacing the actual-measuring-lives approach with a flat waiting period of 90 years, which obviously cannot replicate such a function. That is not the function performed by the actual-measuring-lives approach, however. That is to say, that approach is not scientifically designed to generate an allowable waiting period that expires at a natural or logical stopping point along the continuum of each disposition, thereby mysteriously marking off the precise time before which actual vesting ought to be allowed and beyond which it ought not to be permitted. Instead, the actual-measuring-lives approach functions in a rather different way: It generates a period of time that almost always exceeds the time of actual vesting in cases when actual vesting ought to be allowed to occur. The actual-measuring-lives approach, therefore, performs a margin-of-safety function, and that is a function that can be replicated by the use of a proxy such as the flat 90-year period under the Uniform Act.

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

> Example (1) -- Corpus to Grandchildren Contingent on Reaching an Age in Excess of 21. G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren, remainder in corpus to G's

grandchildren who reach age 30; if none reaches 30, to a specified charity.

Example (2) -- Corpus to Descendants Contingent on Surviving Last Living Grandchild. G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren for the life of the survivor, and on the death of G's last living grandchild, corpus to G's descendants then living, per stirpes; if none, to a specified charity.

In both examples, assume that G's family is typical, with two children, four grandchildren, eight great-grandchildren, and so on. Assume further that one or more of the grandchildren are living at G's death, but that one or more are conceived and born thereafter.

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

The allowable waiting period, however, is measured by reference to the lives of individuals who must be in being at the creation of the interests. This means that the key players in these dispositions -- the after-born beneficiaries -- cannot be counted among the measuring lives. Since the after-born beneficiaries in both of these examples are members of the same or an older generation as that of the youngest of the measuring lives, the validity of these examples fits well within the policy of the Rule. See Waggoner, The Uniform Statutory Rule Against Perpetuities, 21 Real Prop., Prob. & Tr. J. 569, ___ (Winter, 1987). In consequence, it is clear that an allowable waiting period measured by the lifetime of individuals in being at the creation of the interests plus 21 years is not scientifically designed to and does not in practice expire at the latest point when actual vesting should be allowed -- on the death of the last survivor of the after-born beneficiaries. Because of its tack-on 21-year part, the period usually expires at some arbitrary time after that beneficiary's death. In Example (2), the period of 21 years following the death of the last survivor of the descendants who were in being at G's death is normally more than sufficient to cover the death of the last survivor of the grandchildren born after G's death.

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

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

Rationale of the Allowable 90-year Waiting Period. The myriad problems associated with the actual-measuring-lives approach are swept aside by shifting away from actual measuring lives and adopting instead a 90-year waiting period as representing a reasonable approximation of -- a proxy for -- the period of time that would, on average, be produced by identifying and tracing an actual set of measuring lives and then tacking on a 21-year period following the death of the survivor. The selection of 90 years as the period of time reasonably approximating the period that would be produced, on average, by using the set of actual measuring lives identified in the Restatement (Second) or the earlier draft of the Uniform Act is based on a statistical study published in Waggoner, Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities, 20 U. Miami Inst. on Est. Plan. Ch. 7 (1986). This study suggests that the youngest measuring life, on average, is about 6 years old. The remaining life expectancy of a 6-year old is reported as 69.6 years in U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986, Table 108, at p. 69. (In the STATISTICAL ABSTRACT for 1985, 69.3 years was reported.) In the interest of arriving at an end number that is a multiple of five, the Uniform Act utilizes 69 years as an appropriate measure of the remaining life expectancy of a 6-year old, which -- with the 21-year tack-on period added -- yields an allowable waiting period of 90 years.

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

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

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

SUMMARY OF THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

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

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

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

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

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

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

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

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

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

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

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

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Table of Sections

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

SECTION 1. STATUTORY RULE AGAINST PERPETUITIES.

(a) A nonvested property interest is invalid unless:

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

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

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

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

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

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) when the power is created, it is certain to be

irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

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

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

COMMENT

A. General Purpose

B. Section 1(a)(1): Nonvested Property Interests That Are Initially Valid

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

1. The 90-Year Allowable Waiting Period

2. Technical Violations of the Common-Law Rule

D. Sections 1(b)(1) and 1(c)(1): Powers of Appointment That Are Initially Valid

E. Sections 1(b)(2) and 1(c)(2): Wait-and-See -- Power of Appointment Whose Validity Is Initially in Abeyance

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

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

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

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

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

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

A. GENERAL PURPOSE

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

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

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

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

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

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

The Statutory Rule Against Perpetuities. The essential difference between the Common-law Rule and its statutory replacement is that the Statutory Rule preserves the Common-law

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

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

As indicated, this modification of the invalidating side of the Common-law Rule is generally known as the wait-and-see method of perpetuity reform. The wait-and-see method of perpetuity reform was approved by the American Law Institute as part of the Restatement (Second) of Property (Donative Transfers) §§ 1.1-1.6 (1983). For a discussion of the various methods of perpetuity reform, including the wait-and-see method and the Restatement (Second)'s version of wait-and-see, see Waggoner, Perpetuity Reform, 81 Mich.L.Rev. 1718 (1983).

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

Nonvested Property Interest. Section 1(a) sets forth the Statutory Rule Against Perpetuities with respect to nonvested property interests. A nonvested property interest (also called a contingent property interest) is a future interest in property that is subject to an unsatisfied condition precedent. In the

case of a class gift, the interests of all the unborn members of the class are nonvested because they are subject to the unsatisfied condition precedent of being born. At common law, the interests of all potential class members must be valid or the class gift is invalid. As pointed out in more detail later in this Comment, this so-called all-or-nothing rule with respect to class gifts is not superseded by this Act, and so remains in effect under the Statutory Rule. Consequently, all class gifts that are subject to open are to be regarded as nonvested property interests for the purposes of this Act.

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

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

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

Determining Whether There is a Validating Life. The process for determining whether a validating life exists is to postulate the death of each individual connected in some way to the transaction, and ask the question: Is there with respect to this individual an invalidating chain of possible events? If one individual can be found for whom the answer is No, that individual can serve as the validating life. As to that individual there will be the requisite causal connection between his or her death and the questioned interest's vesting or terminating no later than 21 years thereafter.

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

Example (1) -- Parent of Devisees As the Validating Life. G devised property "to A for life, remainder to A's children who attain 21." G was survived by his son (A), by his daughter (B), by A's wife (W), and by A's two children (X and Y).

The nonvested property interest in favor of A's children who reach 21 satisfies Section 1(a)(1)'s requirement, and the interest is initially valid. When the interest was created (at G's death), the interest was then certain to vest or terminate no later than 21 years after A's death.

The process by which A is determined to be the validating life is one of testing various candidates to see if any of them have the requisite causal connection. As noted above, no one from the world at large can have the requisite causal connection, and so such individuals are disregarded. Once the inquiry is narrowed to the appropriate candidates, the first possible validating life that comes to mind is A, who does in fact fulfill the requirement: Since A's death cuts off the possibility of any more children being born to him, it is impossible, no matter when A dies, for any of A's children to be alive and under the age of 21 beyond 21 years after A's death. (See the discussion of subsection (d), below.)

A is therefore the validating life for the nonvested property interest in favor of A's children who attain 21. None of the other individuals who is connected to this transaction could serve as the validating life because an invalidating chain of possible post-creation

events exists as to each one of them. The other individuals who might be considered include W, X, Y, and B. In the case of W, an invalidating chain of events is that she might predecease A, A might remarry and have a child by his new wife, and such child might be alive and under the age of 21 beyond the 21-year period following W's death. With respect to X and Y, an invalidating chain of events is that they might predecease A, A might later have another child, and that child might be alive and under 21 beyond the 21-year period following the death of the survivor of X and Y. As to B, she suffers from the same invalidating chain of events as exists with respect to X and Y. The fact that none of these other individuals can serve as the validating life is of no consequence, however, because only one such individual is required for the validity of a nonvested interest to be established, and that individual is A.

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

The limited purpose of subsection (d) is to solve a perpetuity problem caused by advances in medical science. The problem is illustrated by a case such as Example (1) above -- "to A for life, remainder to A's children who reach 21." When the Common-law Rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common-law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when

needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of deceased pregnant women long enough to develop the fetus to viability (see Detroit Free Press, July 31, 1986, at 5A; Ann Arbor News, Oct. 30, 1978, at C5 (AP story); N.Y.Times, Dec. 6, 1977, at 30; N.Y.Times, Dec. 2, 1977, at B16) -- advances in medical science unanticipated when the Common-law Rule was in its developmental stages -- having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 1(a)(1) on the interest of A's children in Example (1). The rule of subsection (d), however, does insure the initial validity of the children's interest. Disregarding the possibility that A will have children after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that subsection (d) subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With subsection (d) in place, the third component of the common-law perpetuity period is unnecessary and has been jettisoned. The perpetuity period recognized in paragraph (1) of subsections (a), (b), and (c) has only two components: (1) a life in being (2) plus 21 years.

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

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

Example (2) -- Devisees As Their Own Validating Lives. G devised real property "to A's children who attain 25." A predeceased G. At G's death, A had three living children, all of whom were under 25.

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

Validating Life Can Be Survivor of Group. In appropriate cases, the validating life need not be individualized at first. Rather the validating life can initially (i.e., when the interest was created) be the unidentified survivor of a group of individuals. It is common in such cases to say that the members of the group are the validating lives, but the true meaning of the statement is that the validating life is the member of the group who turns out to live the longest. As the court said in Skatterwood v. Edge, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1697), "for let the lives be never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once."

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

The nonvested property interest in favor of G's grandchildren who attain 21 is valid under Section 1(a)(1). The validating life is that one of G's children who turns out to live the longest. Since under subsection (d) it must be assumed that none of

G's children will have post-death children, it is regarded as impossible for any of G's grandchildren to be alive and under 21 beyond the 21-year period following the death of G's last surviving child.

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

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

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

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

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

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

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

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

It is important to note that regardless of what group of individuals is designated in the perpetuity-period component of a saving clause, the surviving member of the group is not necessarily the individual who would be the validating life for the nonvested property interest or power of appointment in the absence of the saving clause. Without the saving clause, one or more interests or powers may in fact fail to satisfy the requirement of paragraph (1) of subsections (a), (b), or (c) for

initial validity. By being designated in the saving clause, however, the survivor of the group becomes the validating life for all interests and powers in the trust or other arrangement: The saving clause confers on the last surviving member of the designated group the requisite causal connection between his or her death and the impossibility of any interest or power in the trust or other arrangement remaining in existence beyond the 21-year period following such individual's death.

> Example (6) -- Valid Saving Clause Case. A testamentary trust directs income to be paid to the testator's children for the life of the survivor, then to the testator's grandchildren for the life of the survivor, corpus on the death of the testator's last living grandchild to such of the testator's descendants as the last living grandchild shall by will appoint; in default of appointment, to the testator's then-living descendants, per stirpes. A saving clause in the will terminates the trust, if it has not previously terminated, 21 years after the death of the testator's last surviving descendant who was living at the testator's death. The testator was survived by children.
>
> In the absence of the saving clause, the nongeneral power of appointment in the last living grandchild and the nonvested property interest in the gift-in-default clause in favor of the testator's descendants fail the test of Sections 1(a)(1) and 1(c)(1) for initial validity. That is, were it not for the saving clause, there is no validating life. However, the surviving member of the designated group becomes the validating life, so that the saving clause does confer initial validity on the nongeneral power of appointment and on the nonvested property interest under Sections 1(a)(1) and 1(c)(1).

If the governing instrument designates a group of individuals that would cause it to be impracticable to determine the death of the survivor, the common-law courts have developed the doctrine that the validity of the nonvested property interest or power of appointment is determined as if the provision in the governing instrument did not exist. See cases cited in Restatement (Second) of Property (Donative Transfers) (1983), Reporter's Note No. 3 at p. 45. See also Restatement (Second) of Property (Donative Transfers) § 1.3(1) Comment a (1983); Restatement of Property § 374 & Comment l (1944); 6 American Law of Property § 24.13 (A. Casner ed. 1952); 5A R. Powell, The Law of Real Property Para. 766[5] (1985); L. Simes & A. Smith, The Law of Future Interests § 1223 (2d ed. 1956). If, for example, the designated group in Example (6) were the residents of X City (or the members of Y Country Club) living at the time of the testator's death, the saving clause would not validate the power

of appointment or the nonvested property interest. Instead, the validity of the power of appointment and the nonvested property interest would be determined as if the provision in the governing instrument did not exist. Since without the saving clause the power of appointment and the nonvested property interest would fail to satisfy the requirements of Sections 1(a)(1) and 1(c)(1) for initial validity, their validity would be governed by Sections 1(a)(2) and 1(c)(2).

The application of the above common-law doctrine, which is not superseded by this Act and so remains in full force, is not limited to saving clauses. It also applies to trusts or other arrangements where the period thereof is directly linked to the life of the survivor of a designated group of individuals. An example is a trust to pay the income to the grantor's descendants from time to time living, per stirpes, for the period of the life of the survivor of a designated group of individuals living when the nonvested property interest or power of appointment in question was created, plus the 21-year period following the survivor's death; at the end of the 21-year period, the corpus is to be divided among the grantor's then-living descendants, per stirpes, and if none, to the XYZ Charity. If the group of individuals so designated is such that it would be impracticable to determine the death of the survivor, the validity of the disposition is determined as if the provision in the governing instrument did not exist. The term of the trust is therefore governed by the allowable 90-year period of paragraph (2) of subsections (a), (b), or (c) of the Statutory Rule.

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

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

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

1. The 90-Year Allowable Waiting Period

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

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

Jurisdictions adopting this Act are therefore strongly urged not to adopt a different period of time.

2. Technical Violations of the Common-Law Rule

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

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

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

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

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

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

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

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

will be invalid is negligible.

Example (9) -- Unborn Widow Case. G devised property in trust, the income to be paid "to my son A for life, then to A's spouse for her life, and upon the death of the survivor of A and his spouse, the corpus to be delivered to A's then living descendants." G was survived by A, by A's wife (W), and by their adult children (X and Y).

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

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

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

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

The remainder interest in favor of A's children who reach 30 is a class gift. At common law, the interests of all potential class members must be valid or the

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

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

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

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

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

The various persons connected to a power of appointment are identified by a special terminology. The "donor" is the person who created the power of appointment. The "donee" is the person who holds the power of appointment, i.e., the powerholder. The "objects" are the persons to whom an appointment can be made. The "appointees" are the persons to whom an appointment has been made. The "takers in default" are the persons whose property interests are subject to being defeated by the exercise of the

power of appointment and who take the property to the extent the power is not effectively exercised. Restatement (Second) of Property (Donative Transfers) § 11.2 (1986).

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

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

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

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

Two different tests for validity are employed at common law, depending on what type of power is at issue. In the case of a <u>nongeneral power</u> (whether or not presently exercisable) and in the case of a <u>general testamentary power</u>, the power is initially valid if, when the power was created, it is certain that the latest possible time that the power can be exercised is no later than 21 years after the death of an individual then in being. In the case of a <u>general power not presently exercisable because of a condition precedent</u>, the power is initially valid if it is then

certain that the condition precedent to its exercise will either be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then in being. Subsections (b)(1) and (c)(1) codify these rules. Under either test, initial validity depends on the existence of a validating life. The procedure for determining whether a validating life exists is essentially the same procedure explained in Part B, above, pertaining to nonvested property interests.

Example (11) -- Initially Valid General Testamentary Power Case. G devised property "to A for life, remainder to such persons, including A's estate or the creditors of A's estate, as A shall by will appoint." G was survived by his daughter (A).

A's power, which is a general testamentary power, is valid as of its creation under Section 1(c)(1). The test is whether or not the power can be exercised beyond 21 years after the death of an individual in being when the power was created (G's death). Since A's power cannot be exercised after A's death, the validating life is A, who was in being at G's death.

Example (12) -- Initially Valid Nongeneral Power Case. G devised property "to A for life, remainder to such of A's descendants as A shall appoint." G was survived by his daughter (A).

A's power, which is a nongeneral power, is valid as of its creation under Section 1(c)(1). The validating life is A; the analysis leading to validity is the same as applied in Example (11), above.

Example (13) -- Case of Initially Valid General Power Not Presently Exercisable Because of a Condition Precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint." G was survived by his daughter (A), who was then childless.

The power in A's first born child, which is a general power not presently exercisable because of a condition precedent, is valid as of its creation under Section 1(b)(1). The power is subject to a condition precedent -- that A have a child -- but this is a contingency that under subsection (d) is deemed certain to be resolved one way or the other within A's lifetime. A is therefore the validating life: The power cannot remain subject to the condition precedent after A's

death. Note that the latest possible time that the power can be exercised is at the death of A's first born child, which might occur beyond 21 years after the death of A (and anyone else who was alive when G died). Consequently, if the power conferred on A's first born child had been a nongeneral power or a general testamentary power, the power could not be validated by Section 1(c)(1); instead, the power's validity would be governed by Section 1(c)(2).

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

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

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

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

Since the general testamentary power conferred on A's first born child fails the test of Section 1(c)(1) for initial validity, its validity is governed by Section 1(c)(2). If A has a child, such child's death must occur within 90 years of G's death for any provision in the child's will purporting to exercise the power to be valid.

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

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

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

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

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

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

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

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

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

The fact that a power of appointment is valid, either because it (i) was not subject to the Statutory Rule to begin with, (ii) is initially valid under Sections 1(b)(1) or 1(c)(1), or (iii) becomes valid under Sections 1(b)(2) or 1(c)(2), means merely that the power can be validly exercised. It does not mean that any exercise that the donee decides to make is valid. The validity of the interests or powers created by the exercise of a valid power is a separate matter, governed by the provisions of this Act. A key factor in deciding the validity of such appointed interests or appointed powers is determining when they were created for purposes of this Act. Under Section 2, as

explained in the Comment thereto, the time of creation is when the power was exercised if it was a presently exercisable general power; and if it was a nongeneral power or a general testamentary power, the time of creation is when the power was created. This is the rule generally accepted at common law (see Restatement (Second) of Property (Donative Transfers) § 1.2, Comment d (1983); Restatement of Property § 392 (1944)), and it is the rule adopted under this Act (except for purposes of Section 5 only, as explained in the Comment to Section 5).

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

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

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

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

death).

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

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

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

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

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

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

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

Common-Law "Second-look" Doctrine. As indicated above, both at common law and under this Act (except for purposes of Section 5 only, as explained in the Comment to Section 5), appointed interests and powers established by the exercise of a general

testamentary power or a nongeneral power are created when the power was created, not when the power was exercised. In applying this principle, the common law recognizes a so-called doctrine of second look, under which the facts existing on the date of the exercise are taken into account in determining the validity of appointed interests and appointed powers. E.g., Warren's Estate, 320 Pa. 112, 182 A. 396 (1930); In re Estate of Bird, 225 Cal.App.2d 196, 37 Cal.Rptr. 288 (1964). The common-law's second-look doctrine in effect constitutes a limited wait-and-see doctrine, and is therefore subsumed under but not totally superseded by this Act. The following example, which is a variation of Example (18) above, illustrates how the second-look doctrine operates at common law and how the situation would be analyzed under this Act.

Example (21) -- Second-look Case. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of G's descendants. The trust was created by the will of his mother M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his children for the life of the survivor, and upon the death of his last surviving child, to pay the corpus of the trust to his grandchildren. At M's death, G had two children, X and Y. No further children were born to G, and at his death X and Y were still living.

The common-law solution of this example is as follows: G's appointment is valid under the Common-law Rule. Although the period of the Rule begins to run at M's death, the facts existing at G's death can be taken into account. This second look at the facts discloses that G had no additional children. Thus the possibility of additional children, which existed at M's death when the period of the Rule began to run, is disregarded. The survivor of X and Y therefore becomes the validating life for the remainder interest in favor of G's grandchildren, and G's appointment is valid. The common-law's second-look doctrine would not, however, save G's appointment if he actually had one or more children after M's death and if at least one of these after-born children survived G.

Under this Act, if no additional children are born to G after M's death, the common-law second look doctrine can be invoked as of G's death to declare G's appointment then to be valid under Section 1(a)(1); no further waiting is necessary. However, if additional children are born to G and one or more of them survives G, Section 1(a)(2) applies and the validity of G's appointment depends on G's last surviving child dying

within 90 years after M's death.

Additional References. Restatement (Second) of Property (Donative Transfers) § 1.2, Comments d, f, g, and h; § 1.3, Comment g; § 1.4, Comment 1 (1983).

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

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

Constructional Preference for Validity. Professor Gray in his treatise on the common-law Rule Against Perpetuities declared that a will or deed is to be construed without regard to the Rule, and then the Rule is to be "remorselessly" applied to the provisions so construed. J. Gray, The Rule Against Perpetuities § 629 (4th ed. 1942). Some courts may still adhere to this proposition. Colorado Nat'l Bank v. McCabe, 143 Colo. 21, 353 P.2d 385 (1960). Most courts, it is believed, would today be inclined to adopt the proposition put by the Restatement of Property § 375 (1944), which is that where an instrument is ambiguous -- that is, where it is fairly susceptible to two or more constructions, one of which causes a Rule violation and the other of which does not -- the construction that does not result in a Rule violation should be adopted. Cases supporting this view include Southern Bank & Trust Co. v. Brown, 271 S.C. 260, 246 S.E.2d 598 (1978); Davis v. Rossi, 326 Mo. 911, 34 S.W.2d 8 (1930); Watson v. Goldthwaite, 184 N.E.2d 340, 343 (Mass. 1962); Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979); Drach v. Ely, 703 P.2d 746 (Kan.1985).

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

Conclusive Presumption of Lifetime Fertility. At common law, all individuals -- regardless of age, sex, or physical condition -- are conclusively presumed to be able to have children throughout their entire lifetimes. This principle is not superseded by this Act, and in view of the widely accepted rule of construction that adopted children are presumptively included in class gifts, the conclusive presumption of lifetime fertility is not unrealistic. Since even elderly individuals probably cannot be excluded from adopting children based on their ages alone, the possibility of having children by adoption is seldom extinct. See generally Waggoner, In re Lattouf's Will and the Presumption of Lifetime Fertility in Perpetuity Law, 20 San Diego L.Rev. 763 (1983). Under this Act, the main force of this principle is felt as in Example (7), above, where it prevents a nonvested property interest from passing the test for initial validity under Section 1(a)(1).

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

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

Separability. The common law's separability doctrine is that when an interest is expressly subject to alternative contingencies, the situation is treated as if two interests were created in the same person or class. Each interest is judged separately; the invalidity of one of the interests does not necessarily cause the other one to be invalid. This common law principle was established in Longhead v. Phelps, 2 Wm.Bl. 704, 96 Eng. Rep. 414 (K.B. 1770), and is followed in this country. L. Simes & A. Smith, The Law of Future Interests § 1257 (2d ed. 1956); 6 American Law of Property § 24.54 (A. Casner ed. 1952); Restatement of Property § 376 (1944). Under this doctrine, if property is devised "to B if X-event or Y-event happens," B in effect has two interests, one contingent on X-event happening and the other contingent on Y-event happening. If the interest contingent on X-event but not the one contingent on Y-event is invalid, the consequence of separating B's interest into two is that only one of them, the one contingent on X-event, is

invalid. B still has a valid interest -- the one contingent on the occurrence of Y-event.

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

> Example (22) -- Separability Case. G devised real property "to A for life, then to A's children who survive A and reach 25, but if none of A's children survives A or if none of A's children who survives A reaches 25, then to B." G was survived by his brother (B), by his daughter (A), by A's husband (H), and by A's two minor children (X and Y).
>
> The remainder interest in favor of A's children who reach 25 fails the test of Section 1(a)(1) for initial validity. Its validity is therefore governed by Section 1(a)(2), and depends on each of A's children doing any one of the following things within 90 years after G's death: predeceasing A, surviving A and failing to reach 25, or surviving A and reaching 25.
>
> Under the separability doctrine, B has two interests. One of them is contingent on none of A's children surviving A. That interest passes Section 1(a)(1)'s test for initial validity; the validating life is A. B's other interest, which is contingent on none of A's surviving children reaching 25, fails Section 1(a)(1)'s test for initial validity. Its validity is governed by Section 1(a)(2) and depends on each of A's surviving children either reaching 25 or dying under 25 within 90 years after G's death.
>
> Suppose that after G's death, A has a third child (Z). A subsequently dies, survived by her husband (H) and by X, Y, and Z. This, of course, causes B's interest that was contingent on none of A's children surviving A to terminate. If X, Y, and Z had all reached the age of 25 by the time of A's death, their interest would vest at A's death, and that would end the matter. If one or two but not all three of them had reached the age of 25 at A's death, B's other interest -- the one that was contingent on none of A's surviving children reaching 25 -- would also terminate. As for the children's interest, if the after-born child Z's age was such at A's death that Z could not be alive and under the age of 25 at the expiration of the allowable waiting period, the class gift in favor of the children would be valid under Section 1(a)(2), because none of those then under 25 could fail either to reach 25 or die

under 25 after the expiration of the allowable 90-year waiting period. If, however, Z's age at A's death was such that Z could be alive and under the age of 25 at the expiration of the allowable 90-year waiting period, the circumstances requisite to reformation under Section 3(2) would arise, and the court would be justified in reforming G's disposition by reducing the age contingency with respect to Z to the age he would reach on the date when the allowable waiting period is due to expire. See Example (3) in the Comment to Section 3. So reformed, the class gift in favor of A's children could not become invalid under Section 1(a)(2), and the children of A who had already reached 25 by the time of A's death could receive their shares immediately.

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

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

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

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

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

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

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

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

The remainder interest in favor of the children of Z fails Section 1(a)(1)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could have children more than 21 years after the death of the survivor of A, X, and Y. Under Section 1(a)(2), the validity of the remainder interest in favor of Z's children depends on Z's dying within 90 years after G's death.

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

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

The general testamentary powers conferred on each of A's children are entitled to separate treatment under the principles of the sub-class doctrine. See above.

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

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

It is generally accepted that the duration of the indestructibility of a trust, other than a charitable trust, is limited to the applicable perpetuity period. See Restatement (Second) of Trusts § 62, comment o (1959); Restatement (Second) of Property (Donative Transfers) § 2.1 & Legislative Note & Reporter's Note (1983); I A. Scott, The Law of Trusts § 62.10(2) (3d ed. 1967); J. Gray, The Rule Against Perpetuities § 121 (4th ed. 1942); L. Simes & A. Smith, The Law of Future Interests §§ 1391-93 (2d ed. 1956).

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

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

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

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

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

COMMENT

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

Except as provided in subsections (b) and (c), and in the second sentence of Section 5(a) for purposes of that section only, the time of creation of nonvested property interests and

powers of appointment is determined under general principles of property law.

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

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

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

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

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

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

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

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

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

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

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

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

Furthermore, it is not necessary that the donee of the power have the power to become the unqualified beneficial owner of all beneficial rights in the trust. In Example (2), the property

interests in G's gift-in-default clause are not created for purposes of this Act until A's power expires (or on A's appointment, until the power's exercise) even if someone other than A was the income beneficiary of the trust.

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

> Example (3) -- General Power in Unborn Child Case. G devised property "to A for life, then to A's first-born child for life, then to such persons, including A's first-born child or such child's estate or creditors, as A's first-born child shall appoint." There was a further provision that in default of appointment, the trust would continue for the benefit of G's descendants. G was survived by his daughter (A), who was then childless. After G's death, A had a child, X. A then died, survived by X.
>
> As of G's death, the power of appointment in favor of A's first-born child and the property interests in G's gift-in-default clause would be regarded as having been created at G's death because the power in A's first-born child was then a general power not presently exercisable because of a condition precedent.
>
> At X's birth, X's general power became presently exercisable and excluded from the Statutory Rule. X's power also qualifies as a power exercisable by one person alone to become the unqualified beneficial owner of the property interests in G's gift-in-default clause. Consequently, the nonvested property interests in G's gift-in-default clause are not created, for purposes of this Act, until the termination of X's power. If X exercises his presently exercisable general power, before or after A's death, the appointed interests or powers are created, for purposes of this Act, as of X's exercise of the power.

Partial Powers. For the date of creation to be postponed under subsection (b), the person must have a presently exercisable power to become the unqualified beneficial owner of the full nonvested property interest or the property interest subject to a power of appointment described in Section 1(b) or

1(c). If, for example, the subject of the transfer was an undivided interest such as a one-third tenancy in common, the power qualifies even though it relates only to the undivided one-third interest in the tenancy in common; it need not relate to the whole property. A power to become the unqualified beneficial owner of only part of the nonvested property interest or the property interest subject to a power of appointment, however, does not postpone the time of creation of the interests or powers subject thereto, unless the power is actually exercised.

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

G's death marks the time of creation of: A's testamentary power of appointment; any nonvested property interest or power of appointment created in G's gift-in-default clause; and any appointed interest or power created by a testamentary exercise of A's power of appointment over the remainder interest. A's general power of appointment over the remainder interest does not postpone the time of creation because it is not a presently exercisable power. A's noncumulative power to withdraw a portion of the trust each year does not postpone the time of creation as to all or the portion of the trust with respect to which A allowed his power to lapse each year because A's power is a power over only part of any nonvested property interest or property interest subject to a power of appointment in G's gift-in-default clause and over only part of any appointed interest or power created by a testamentary exercise of A's general power of appointment over the remainder interest. The same conclusion has been reached at common law. See Ryan v. Ward, 192 Md. 342, 64 A.2d 258 (1949).

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

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

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

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

> Example (5) -- Series of Transfers Case. In Year One, G created an irrevocable inter vivos trust, funding it with $20,000 cash. In Year Five, when the value of the investments in which the original $20,000 contribution was placed had risen to a value of $30,000, G added $10,000 cash to the trust. G died in Year Ten. G's will poured the residuary of his estate into the trust. G's residuary estate consisted of Blackacre (worth $20,000) and securities (worth $80,000). At G's death, the value of the investments in which the original $20,000 contribution and the subsequent $10,000 contribution were placed had risen to a value of $50,000.
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> Were it not for subsection (c), the allowable period under the Statutory Rule would be marked off from three different times: Year One, Year Five, and Year Ten. The effect of subsection (c) is that the allowable period under the Statutory Rule starts running only

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

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

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

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

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

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

creation.

COMMENT

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

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

Judicial Sale of Land Affected by Future Interests. Although this section -- except for cases that fall under subsections (2) or (3) -- defers the time when a court is directed to reform a disposition until the expiration of the allowable 90-year waiting period, this section is not to be understood as preventing an earlier application of other remedies. In particular, in the case of interests in land not in

trust, the principle, codified in many states, is widely recognized that there is judicial authority, under specified circumstances, to order a sale of land in which there are future interests. See 1 American Law of Property §§ 4.98-.99 (A. Casner ed. 1952); L. Simes & A. Smith, The Law of Future Interests §§ 1941-1946 (2d ed. 1956); see also Restatement of Property § 179 at pp. 485-95 (1936); L. Simes & C. Taylor, Improvement of Conveyancing by Legislation 235-38 (1960). Nothing in Section 3 of this Act should be taken as precluding this type of remedy, if appropriate, before the expiration of the allowable 90-year waiting period.

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

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

> Example (1) -- Multiple Generation Trust. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children for the life of the survivor, then to A's grandchildren for the life of the survivor, and on the death of A's last surviving grandchild, the corpus of the trust is to be divided among A's then living descendants per stirpes; if none, to" a specified charity. G was survived by his child (A) and by A's two minor children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by his children (X, Y and Z) and by three grandchildren (M, N, and O).
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> There are four interests subject to the Statutory Rule in this example: (1) the income interest in favor of A's children, (2) the income interest in favor of A's grandchildren, (3) the remainder interest in the corpus

in favor of A's descendants who survive the death of A's last surviving grandchild, and (4) the alternative remainder interest in the corpus in favor of the specified charity. The first interest is initially valid under Section 1(a)(1); A is the validating life for that interest. There is no validating life for the other three interests, and so their validity is governed by Section 1(a)(2).

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

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

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

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

The remainder interest in favor of the descendants of Z is not validated by Section 1(a)(1) because Z, who was not alive when the interest was created, could have

descendants more than 21 years after the death of the survivor of A, X, and Y. Instead, the validity of the remainder interest in favor of Z's descendants is governed by Section 1(a)(2), under which its validity depends on Z's dying within 90 years after G's death.

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

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

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

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

Under Section 1(a)(2), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death. If in fact there is an afterborn child (Z), and if upon A's death, Z has at least reached an age such that he cannot be alive and under

the age of 30 on the 90th anniversary of G's death, the class gift is valid. (Note that at Z's birth it would have been known whether or not Z could be alive and under the age of 30 on the 90th anniversary of G's death; nevertheless, even if it was then certain that Z could not be alive and under the age of 30 on the 90th anniversary of G's death, the class gift could not then have been declared valid because, A being alive, it was then possible for one or more additional children to have later been born to or adopted by A.)

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

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

As in Example (3), the remainder interest in favor of A's children is a class gift, and the common-law principle is not superseded by this Act by which the interests of all potential class members must be valid or the class gift is totally invalid. Although X and Y will either graduate from an accredited medical or law school, or fail to do so, within their own lifetimes,

there is at G's death the possibility that A will have an after-born child (Z), who will graduate from an accredited medical or law school (or die without having done either) more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would not be valid under the Common-law Rule, and is therefore not validated by Section 1(a)(1).

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

Suppose in fact that there is an afterborn child (Z), and that at A's death Z was a freshman in college. Suppose further that at A's death X had graduated from an accredited law school and that Y had graduated from an accredited medical school. Z's interest and hence the class gift as a whole is not yet invalid under Section 1(a)(2) because the 90-year period following G's death has not yet expired; but the class gift might become invalid because Z might be alive but not a graduate of an accredited medical or law school 90 years after G's death. Consequently, the prerequisites to reformation set forth in Section 3(2) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on graduating from an accredited medical or law school within 90 years after G's death. This would render Z's interest valid so far as the Section 1(a)(2) is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to graduate from an accredited medical or law school within the allowed time under the disposition as so reformed, the remaining one-third share would be divided equally between X and Y or their successors in interest.

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

Example (5) -- Case of An Interest, As of Its Creation, Being Impossible to Vest Within the Allowable 90-Year Period. G devised property in trust, directing the

trustee to divide the income, per stirpes, among G's descendants from time to time living, for 100 years. At the end of the 100-year period following G's death, the trustee is to distribute the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to the XYZ Charity.

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

Note that the circumstance that triggers the direction to reform the disposition under this subsection is that the nonvested property interest still can vest, but cannot vest within the allowable 90-year period of Section 1(a)(2). It is not necessary that the interest be certain to become invalid under that subsection. For the interest to be certain to become invalid under Section 1(a)(2), it would have to be certain that it can neither vest nor terminate within the allowable 90-year period. In this example, the interest of G's descendants might terminate within the allowable period (by all of G's descendants dying within 90 years of G's death). If this were to happen, the interest of XYZ Charity would be valid because it would have vested within the allowable period. However, it was thought desirable to require reformation without waiting to see if this would happen: The only way that G's descendants, who are G's primary set of beneficiaries, would have a chance to take the property is to reform the disposition within the limits of the allowable 90-year period on the ground that their interest cannot vest within the allowable period and subsection (3) so provides.

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

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

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

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

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

(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

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

(3) a power to appoint a fiduciary;

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

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

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

beneficiary or spouse; or

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

COMMENT

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

A. SUBSECTION (1): NONDONATIVE TRANSFERS EXCLUDED

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

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

to cases of commercial and governmental transactions and noting that the Rule Against Perpetuities can invalidate legitimate transactions in such cases.)

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

Consideration Does Not Necessarily Make the Transfer Nondonative. A transfer can be supported by consideration and still be donative in character, and hence not excluded from the Statutory Rule. A transaction that is essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration. Thus, for example, the exclusion would not apply if a parent purchases a parcel of land for full and adequate consideration, and directs the seller to make out the deed in favor of the purchaser's daughter for life, remainder to such of the daughter's children as reach 25. The nonvested property interest of the daughter's children is subject to the Statutory Rule.

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

Grace, 395 U.S. 316 (1969)).

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

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

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

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

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

> Example (1). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children for the life of the survivor, and on the death of A's last surviving child to pay the corpus to B. The trustee is granted the discretionary

power to sell and to reinvest the trust assets and to invade the corpus on behalf of the income beneficiary or beneficiaries.

The trustee's fiduciary power to sell and reinvest the trust assets is a purely administrative power, and under subsection (2) of this section is not subject to the Statutory Rule.

The trustee's fiduciary power to invade corpus, however, is a nongeneral power of appointment that is not excluded from the Statutory Rule. Its validity, and hence its exercisability, is governed by Section 1. Under that section, since the power is not initially valid under Section 1(c)(1), Section 1(c)(2) applies and the power ceases to be exercisable 90 years after G's death.

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

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

Example (2). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children; each child's share of principal is to be paid to the child when he or she reaches 40; if any child dies under 40, the child's share is to be paid to the child's estate as a property interest owned by such child. The trustee is given the discretionary power to advance all or a portion of a child's share before the child reaches 40. G was survived by A, who was then childless.

The trustee's discretionary power to distribute principal to a child before the child's 40th birthday is excluded from the Statutory Rule Against Perpetuities. (The trustee's duty to pay the income to A and after A's death to A's children is not subject to the Statutory Rule because it is a duty, not a power.)

Subsection (5) -- Charitable or Governmental Gifts. Subsection (5) codifies the common-law principle that a nonvested property interest held by a charity, a government, or a governmental agency or subdivision is excluded from the Rule Against Perpetuities if the interest was preceded by an interest that is held by another charity, government, or governmental agency or subdivision. See L. Simes & A. Smith, The Law of Future Interests §§ 1278-87 (2d ed. 1956); Restatement (Second) of Property (Donative Transfers) § 1.6 (1983); Restatement of Property § 397 (1944).

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

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

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

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

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

Subsection (6) -- Trusts for Employees and Others; Trusts for Self-employed Individuals. Subsection (6) excludes from the Statutory Rule Against Perpetuities nonvested property interests

and powers of appointment with respect to a trust or other property arrangement, whether part of a "qualified" or "unqualified" plan under the federal income tax law, forming part of a bona fide benefit plan for employees (including owner-employees), independent contractors, or their beneficiaries or spouses. The exclusion granted by this subsection does not, however, extend to a nonvested property interest or a power of appointment created by an election of a participant or beneficiary or spouse.

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

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

SECTION 5. PROSPECTIVE APPLICATION.

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

(b) If a nonvested property interest or a power of

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

COMMENT

Subsection (a): Act Not Retroactive. This section provides that, except as provided in subsection (b), the Statutory Rule Against Perpetuities and the other provisions of this Act apply only to nonvested property interests or powers of appointment created on or after the Act's effective date. With one exception, in determining when a nonvested property interest or a power of appointment is created, the principles of Section 2 are applicable. Thus, for example, a property interest (or a power of appointment) created in a revocable inter vivos trust is created when the power to revoke terminates. See Example (1) in the Comment to Section 2.

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

pre-effective-date exercise was revocable and (ii) that revocable exercise becomes irrevocable on or after the effective date of this Act. This special rule applies to the exercise of all types of powers of appointment -- presently exercisable general powers, general testamentary powers, and nongeneral powers.

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

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

Example (1) -- Testamentary Power Created Before But Exercised After the Effective Date of this Act. G was the donee of a general testamentary power of appointment created by the will of his mother, M. M died in 1980. Assume that the effective date of this Act in the jurisdiction is January 1, 1987. G died in 1988, leaving a will that exercised his general testamentary power of appointment.

Under the special rule in the second sentence of Section 5(a), any nonvested property interest (or power of appointment) created by G in his will in exercising his general testamentary power was created (for purposes of Section 5) at G's death in 1988, which was after the effective date of this Act.

Consequently, all the provisions of this Act apply (except Section 5(b)). That point having been settled, the next step is to determine whether the nonvested property interests or powers of appointment created by G's testamentary appointment are initially valid under Section 1(a)(1), 1(b)(1), or 1(c)(1), or whether the wait-and-see element established in Section 1(a)(2), 1(b)(2), or 1(c)(2) apply. If the wait-and-see element does apply, it must also be determined when the allowable 90-year waiting period starts to run. In making these determinations, the principles of Section 2 control the time of creation of the nonvested property interests (or powers of appointment); under Section 2, since G's power was a general testamentary power of appointment, the common-law relation-back doctrine applies and the appointed nonvested property interests (and appointed powers of appointment) are created at M's death in 1980.

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

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

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

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

Without legislative authorization or direction, the courts in four states -- Hawaii, Mississippi, New Hampshire, and West Virginia -- have held that they have the power to reform instruments that contain a violation of the common-law Rule Against Perpetuities. In re Estate of Chun Quan Yee Hop, 52 Hawaii 40, 469 P.2d 183 (1970); Carter v. Berry, 243 Miss. 321, 140 So.2d 843 (1962); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891); Berry v. Union Natl. Bank, 262 S.E.2d 766 (W.Va. 1980). In four other states -- California, Missouri, Oklahoma, and Texas -- the legislatures have enacted statutes conferring this power on the courts or directing the courts to reform defective instruments. Cal.Civ. Code § 715.5 (West 1982); Mo. Rev. Stat. § 442.555 (1978); Okla. Stat. tit. 60, §§ 75-78 (1981); Tex. Property Code § 5.043 (Vernon 1984). See also Idaho Code § 55-111 (1948). The California statute is silent as to whether or not it applies to nonvested property interests and powers of appointment created prior to the effective date of the Act; the only significant California appellate decision to apply the statute, Estate of Ghiglia, 42 Cal.App.3d 433, 116 Cal. Rptr. 827 (1974), involved a will where the testator died after the Act's effective date. The Missouri, Oklahoma, and Texas statutes explicitly do not apply retroactively. The Hawaii, Mississippi, New Hampshire, and West Virginia decisions, however, invoked the court's equitable power (sometimes called the cy pres power, and sometimes called the doctrine of equitable approximation or equitable modification) to reform pre-existing instruments that contained a violation of the Common-law Rule. Subsection (b) constitutes statutory authority for a court to exercise its equitable reformation power.

Reformation Experience So Far. The existing judicial opinions and legislative provisions purport to adopt a principle of reformation that is consistent with the theme that the technique of reform should be shaped to grant every appropriate opportunity for the property to go to the intended beneficiaries. The New Hampshire court, for example, said that "where there is a general and a particular intent, and the particular one cannot take effect, the words shall be so construed as to give effect to the general intent." Edgerly v. Barker, 66 N.H. 434, 467, 31 A. 900, 912 (1891) (citation omitted). The Hawaii court held that "any interest which would violate the Rule Against Perpetuities shall be reformed within the limits of that rule to approximate most closely the intention of the creator of the interest." In re Estate of Chun Quan Yee Hop, 52 Hawaii 40, 46, 469 P.2d 183, 187 (1970). The Mississippi court described the reformation principle as "a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor." Carter v. Berry, 243 Miss. 321, 370, 140 So.2d 843, 852 (1962). The California statute provides that the authority to reform "shall be liberally construed and applied to validate [the] interest to the fullest extent consistent with [the] ascertained intent." Cal. Civ. Code § 715.5.

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

Guidance as to How to Reform. The above reformation efforts are unduly narrow. Subsection (b) is to be understood as authorizing a more appropriate technique -- judicial insertion of a saving clause into the instrument. See Browder, Construction, Reformation, and the Rule Against Perpetuities, 62 Mich.L.Rev. 1 (1963); Waggoner, Perpetuity Reform, 81 Mich.L.Rev. 1718, 1755-1759 (1983); Langbein & Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U.Pa.L.Rev. 521, 546-49 (1982). This method of reformation allows reformation to achieve an after-the-fact duplication of a professionally competent product. Such a technique would have been especially suitable in the cases that have already arisen, for it probably would have allowed the dispositions in all of them to have been rendered valid without disturbing the transferor's intent at all. See Waggoner, Perpetuity Reform, 81 Mich.L.Rev. 1718, 1756 n. 103 (1983). The insertion of a saving clause grants a more appropriate opportunity for the property to go to the intended beneficiaries. Furthermore, it would also be a suitable technique in fertile octogenarian, unborn widow, and administrative contingency cases. A saving clause is one of the formalistic devices that a professionally competent lawyer would have used before the fact to assure initial validity in these cases. Insofar as other violations are concerned, the saving clause technique also grants every appropriate opportunity for the property to go to the intended beneficiaries.

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

died 21 years after the death of the last surviving individual designated in the perpetuity-period component.

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

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

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

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

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

COMMENT

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

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

REPEAL OF ACT NO. 269, P.A. OF 1933

This proposal is part of an ongoing "housekeeping" project of eliminating references to abolished courts. Public Act No. 269 of 1933 provides for the establishment of municipal courts in any city having more than 1 justice of the peace paid a salary in lieu of fees. Michigan Compiled Laws section 600.9921 abolished justice courts and municipal courts except for those cities which chose to retain their municipal courts under section 600.9928. No new municipal courts may be established. See M.C.L. 600.9928(4). Since none of the remaining municipal courts were established under Public Act No. 269, its provisions apply to no existing court. The proposed bill follows:

A bill to repeal Act No. 269 of the Public Acts of 1933 entitled "An Act to provide for a municipal court in any city having more than 1 justice of the peace paid a salary in lieu of fees, and a clerk; to prescribe the title and define the jurisdiction of and practice in such courts; to provide for a conciliation division

of such courts; to define the powers and duties of the judges thereof; to authorize such courts to make and enforce rules governing the practice and procedure therein; to provide for a review of judgments rendered by such courts and the taking and filing of transcripts of such judgments; to provide for the issuance and service of process issued from such courts and the pleading and practice therein; to provide for the appointment of process server to serve process issued by such courts; and to repeal all acts or parts of acts inconsistent therewith," being sections 730.101 to 730.159 of the Michigan Compiled Laws.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Act No. 269 of the Public Acts of 1933, being sections 730.101 to 730.159 of the Michigan Compiled Laws, is repealed.

AMENDMENTS TO DELETE REFERENCES TO ABOLISHED COURTS AND SUBSTITUTE REFERENCES TO THE DISTRICT AND MUNICIPAL COURTS

In each of the Acts that follow, amendments are needed to delete references to abolished courts. The proposed amendments basically substitute references to the district and municipal courts as the courts today exercising the jurisdiction formerly granted to the justice of the peace. See M.C.L. §600.9922 and M.C.L. §600.9928. The amendments are not here presented in bill form since the Commission, with the assistance of the Legislative Service Bureau, is examining the most appropriate means of presenting these amendments as a package, to facilitate consideration by the Legislature.

Act No. 283 of 1909 (M.C.L. §239.3)

Sec. 3. In case any such applicant, heirs or assigns shall fail to keep his culvert or cattle-pass already constructed, or hereafter to be constructed, in good repair, it shall be the duty of such highway at the expense of such applicant, or owner, heirs or assigns, such expense to be collected by suit in the name of such commissioner of highways in an action of trespass on the case before ~~any justice of the peace of such township.~~ THE DISTRICT OR MUNICIPAL COURT IN THE JUDICIAL DISTRICT IN WHICH THE CULVERT OR CATTLE PASS IS SITUATED.

Comment:

This provision concerns actions relating to the upkeep of culverts and cattle-passes. Such actions would now be brought in a district or municipal court.

Act No. 359 of 1941 (M.C.L. §247.70)

Sec. 10. The boards of supervisors may make appropriations from the county treasury to aid in destroying the noxious weeds in any 1 or more towns or precincts of the county; and in case they deem it expedient, they may assume control over any 1 tract or of all the noxious weeds in the county, and make such provisions as they may deem necessary, and impose penalties, not exceeding $100.00 for each

offense, for a violation of any provision made by them on this subject, to be sued for by the commissioner, in the name and for the use of the proper county, before ~~any justice of the peace~~ THE DISTRICT OR MUNICIPAL COURT ~~having jurisdiction~~ OF THE JUDICIAL DISTRICT IN WHICH THE WEEDS ARE GROWING. Whenever the board of supervisors shall decide to assume control, and so long as they exercise it, their jurisdiction shall be superior to that of the commissioner.

Comment:

This section allows the county board of supervisors to "assume control" over tracts containing noxious weeds, thereby superceding the state highway commissioner. The board may impose penalties under $100, seeking enforcement before the justice of the peace. District and municipal courts would now be the appropriate courts for enforcement. Although the board may "assume control" over all weeds within the county, traditional jurisdictional limits would require that separate actions be brought where the tracts, though owned by the same person, are located in different judicial districts.

Act No. 368 of 1925 (M.C.L. §§247.172, 247.174)

Sec. 2. If such encroachment shall not be removed within 30 days after the service of a copy of such order, such owner or occupant shall forfeit the sum of 1 dollar for every day after the expiration of that time during which such encroachment shall continue unremoved, to be recovered in an action of trespass before ~~any justice of the peace of~~

~~the township, or of an adjoining township in the same county,~~ THE DISTRICT OR MUNICIPAL COURT OF THE JUDICIAL DISTRICT IN WHICH THE ENCROACHMENT IS SITUATED, and the commissioner or commissioners may proceed to remove such encroachment in such manner as to cause the least damage to the property or loss to the owner, and the person at fault shall be liable for the costs and expenses of such removal. The highway commissioner or commissioners shall keep an accurate account of the expenses incurred ~~by him or them~~ in carrying out the provisions hereof and shall present a full and complete statement thereof, verified by oath, together with a full and legal description of the lands entered upon, to the occupants of such lands, requiring the ~~said~~ occupant to pay the amount therein set forth; and in case such owner or occupant shall refuse or neglect to pay the same within 30 days after such notice and demand, the highway commissioner or commissioners shall present a duly verified copy of ~~said~~ THAT statement to the township clerk of the township in which such expense was incurred, and thereupon the amount of all such costs and expenditures shall be certified to the supervisor and shall be assessed and levied on the lands described in the statement of the commissioner or commissioners, and shall be collected in the same manner as other taxes are collected, but no person shall be required to remove any fence under the provisions of this section between the first day of May and the first day of September unless such fence shall have been

made within 3 months next before the making of the order for the removal thereof, or interferes with the construction, improvement or maintenance of the road.

Comment:

This section provides for an action of trespass against the owner of an encroachment upon a road or highway. District and municipal courts now have jurisdiction in such cases.

Sec. 4. Such action shall be brought by the commissioner or commissioners in ~~his or~~ their name of office, claiming nominal damages only in the sum of 6 cents, before any ~~justice of the peace of the township, or of any adjoining township in the same county,~~ DISTRICT COURT OR MUNICIPAL COURT SPECIFIED IN SECTION 2. The summons in such action may be in the same form, and shall be issued and served, and a jury shall be impaneled when demanded, and all proceedings had as near as may be, as in cases of personal actions of trespass, and full costs shall be taxed by the ~~justice~~ JUDGE and paid by the losing party, except that if the commissioner or commissioners demand a jury ~~he or they~~ , THE COMMISSIONER OR COMMISSIONERS shall not be required to advance the jury fee.

Comment:

This section refers to the procedure for bringing the trespass action specified in section 2.

Sec. 13. (1) The director or his agent at all times may seize and take possession of any lot of agricultural, flower, herb, forest tree and vegetable seeds which, in his opinion is held, kept for sale, or exposed for sale contrary to the provisions of this act.

(2) The person making the seizure shall take samples of the seeds if he deems it necessary, cause the remainder to be sealed and leave them in the possession of the person from whom they were seized, subject to such disposition as may be made thereof according to the provisions of this act.

(3) The person making the seizure shall forward the notice of seizure and deliver the sample to the state seed analyst who shall make an analysis of it and certify the results of the analysis which certificate shall be prima facie evidence of the acts, or facts therein certified to, in any court where the same may be offered in evidence.

(4) If upon analysis, it appears that the seeds seized were, at the time of such seizure, possessed for the purpose of being sold, or were offered or exposed for sale contrary to the provisions of this act, the director may make complaint before any ~~justice of the peace~~ DISTRICT OR MUNICIPAL COURT JUDGE having jurisdiction in the township or city where such seeds were seized.

The ~~justice~~ JUDGE shall issue ~~his~~ THE summons to the person from whom the seeds were seized, directing ~~him~~ THAT PERSON to appear not less than 6 nor more than 12 days from the date of the issuing of the summons, and show cause why the seeds should not be condemned, or disposed of as provided in this act. If the person from whom the seeds were seized cannot be found, the summons shall be served upon the person then in possession of the seeds. The summons shall be served at least 6 days before the time of appearance mentioned herein. If the person from whom the seeds were seized cannot be found and no one can be found in possession of the seeds, and the defendants do not appear on the return day, then the ~~justice of the peace~~ DISTRICT OR MUNICIPAL COURT JUDGE shall proceed in the cause in the same manner provided by law where a writ of attachment is returned not personally served upon any of the defendants and none of the defendants appear upon the return day.

(5) Unless cause to the contrary is shown, or if the seeds are found upon trial to be possessed for the purpose of being sold or offered or exposed for sale contrary to this act, the ~~justice~~ JUDGE shall render judgment as in his discretion seems proper, as follows: (a) That the seeds seized be forfeited to the state to be disposed of by the director, (b) that the defendant clean the seed under reasonable restrictions imposed by the director, or (c) that the defendant properly mark or label the packages of seeds according to

the requirements of this act. In any judgment, the defendant shall also be required to pay the court costs as well as the costs and actual necessary expenses of the person making the seizure, to be levied by the ~~justice~~ JUDGE and paid before the return to the defendants of the seeds. The mode of procedure before the ~~justice~~ DISTRICT OR MUNICIPAL COURT shall be the same as near as may be in civil proceedings. ~~before justices of the peace.~~ Either party may appeal to the circuit court as appeals ORDINARILY are taken from ~~justices' courts,~~ THE PARTICULAR COURT, but it shall not be necessary for the people to give any appeal bond.

(6) The prosecuting attorney, when called upon by the director shall appear for and represent the director.

Comment:

This section provides for the procedure in enforcing the Michigan Seed Law Act. The appropriate courts of jurisdiction would now be the district or municipal courts.

Act No. 211 of 1893 (M.C.L. §289.37)

Sec. 7. The commissioner, ~~his~~ THE COMMISSIONER'S deputy, or any person ~~by said commissioner~~ duly appointed BY THE COMMISSIONER for that purpose, is authorized at all times to seize and take possession of any and all food and dairy products, substitutes thereof kept for sale, exposed for sale or held in possession or

under the control of any person which in the opinion of the ~~said~~ commissioner, ~~or his~~ THE deputy, or ~~such~~ THE DULY APPOINTED person ~~by him duly appointed,~~ shall be contrary to the provisions of this act or other laws which now exist or which may be hereafter enacted.

Taking of sample. First, The person so making such seizure as aforesaid, shall take from such goods as seized a sample for the purpose of analysis and shall cause the remainder thereof to be boxed and sealed and shall leave the same in the possession of the person from whom they were seized, subject to such disposition as shall hereafter be made thereof according to the provisions of this act.

Sample forwarded; state analyst, duties; evidence. Second, The person so making such seizure, shall forward the sample so taken to the state analyst for analysis, who shall make an analysis of the same and shall certify the results of such analysis, which certificate shall be prima facie evidence of the fact or facts therein certified to in any court where the same may be offered in evidence.

Product adulterated, procedure. Third, If upon such analysis, it shall appear that said food or dairy products are adulterated, substitutes or imitations within the meaning of this act, ~~said~~ THE commissioner, ~~or his~~ THE COMMISSIONER'S deputy or any DULY APPOINTED person ~~by him duly authorized,~~ may make complaint before any ~~justice~~

~~of the peace or police justice~~ DISTRICT OR MUNICIPAL COURT JUDGE ~~having jurisdiction in the city, village or township where~~ OF THE JUDICIAL DISTRICT IN WHICH such goods were seized, and thereupon ~~said justice of the peace~~ THAT JUDGE shall issue his summons to the person from whom ~~said~~ THE goods were seized, directing ~~him~~ THAT PERSON to appear not less than 6 nor more than 12 days from the date of the issuing of ~~said~~ THE summons and show cause why ~~said~~ THE goods should not be condemned and disposed of. If the ~~said~~ person from whom ~~said~~ THE goods were seized cannot be found, ~~said~~ THE summons shall be served upon the person then in possession of the goods. The ~~said~~ summons shall be served at least 6 days before the time of appearance mentioned therein. If the person from whom ~~said~~ THE goods were seized cannot be found, and no one can be found in possession of ~~said~~ THE goods, and the defendants shall not appear on the return day, then ~~said justice of the peace~~ THE JUDGE shall proceed in ~~said~~ THE cause in the same manner provided by law where a writ of attachment is returned not personally served upon any of the defendants and none of the defendants ~~shall~~ appear upon the return day.

Justice, duty to render judgment; procedure; appeal. Fourth, Unless cause to the contrary thereof is shown, or if ~~said~~ THE goods shall be found upon trial to be in violation of any of the provisions of this act or other laws which now exist or which may be hereafter enacted, it shall be the duty of ~~said justice of the peace or police justice~~ THE DISTRICT OR MUNICIPAL COURT JUDGE to render judgment that

~~said~~ THE seized property be forfeited to the state of Michigan, and that the ~~said~~ goods be destroyed or sold by the ~~said~~ commissioner for any purpose other than to be used for food. The mode of procedure before ~~said justice~~ THE COURT shall be the same, as near as may be, as in civil proceedings. ~~before justices of the peace.~~ Either parties may appeal to the circuit court as appeals ORDINARY are taken from ~~justices' courts,~~ THE PARTICULAR COURT, but it shall not be necessary for the people to give any appeal bond.

Proceeds of sale. Fifth, The proceeds arising from any such sale shall be paid into the state treasury and credited to the general fund: Provided, That if the owner or party claiming the property or goods so declared forfeited can produce and prove a written guarantee of purity, signed by the wholesaler, jobber, manufacturer or other party from whom ~~said~~ THE articles were purchased, then the proceeds of the sale of such articles, over and above the costs of seizure, forfeiture, and sale, shall be paid over to such owner or claimant to reimburse him, to the extent of such surplus, for his actual loss resulting from such seizure and forfeiture, as shown by the invoice.

Duty of prosecuting attorney. Sixth, It shall be the duty of each prosecuting attorney when called upon by ~~said commissioners [commissioner]~~ THE COMMISSIONER, THE COMMISSIONER'S DEPUTY, or by any person ~~by him~~ authorized ~~as aforesaid,~~ BY THE COMMISSIONER AS PREVIOUSLY PROVIDED, to render any legal assistance in his power

in proceeding under the provisions of this act, or any subsequent act relative to the adulteration of food, for the sale of impure or unwholesome food or food products.

Comment:

This section provides for the seizure and analysis of suspected adulterated food and dairy products by the office of the dairy and food commissioner and for subsequent enforcement of the provisions of the act before a justice of the peace or police court. Jurisdiction now lies with the district or municipal court.

Act No. 355 of 1927 (M.C.L. §318.66)

Sec. 6. The superintendent of the Mackinac Island state park may appoint, by and with the consent of the board of commissioners thereof, such number of special police as the board may by resolution direct, which special police shall be under the supervision and direction of the superintendent, who shall be charged with the execution of such rules and regulations for the care and preservation of the park, and the property in and about the fort, as may be prescribed in rules duly formulated by the ~~said~~ board. Such special police shall be vested with the authority of sheriffs of ~~said~~ THE island, and may apprehend and arrest, without warrant, any person whom they may find violating the rules which shall have been published relative to good order, the preservation of property, the mutilation

of landmarks, or the destruction or injury to growing trees and shrubs. ~~Said~~ SUCH special police are authorized to make complaint against offenders against the rules of the government of ~~said~~ THE Mackinac Island state park, before any ~~justice of the peace of the township of Holmes,~~ DISTRICT COURT JUDGE OF THE JUDICIAL DISTRICT WHICH INCLUDES MACKINAC ISLAND, and such ~~said justice or justice of the peace~~ JUDGES are hereby authorized to take cognizance, hear, try and determine such complaints and pass sentence upon such offenders, in accordance with ~~said rules and the proper enforcement thereof, and in accordance with justice.~~ PROCEDURES APPLICABLE IN MISDEMEANOR CASES.

Comment:

This section provides for the appointment and duties of special police for Mackinac Island state park. The proposed amendment relates to the court before which these police may file complaints against offenders of park rules. It provides for filing before a district containing Mackinac Island. That court now has jurisdiction formerly exercised by justices of the peace. The amendment will not refer to the specific district number as that may change. The appropriate procedure would be that applicable to misdemeanor cases. Cf. M.C.L. §318.65.

Act No. 146 of 1925 (M.C.L. §§402.18, 402.19)

Sec. 18. Any person who shall bring or remove, or cause to be brought or removed, any poor or indigent person, from any place without this state, into any county within it, with intent to make such county chargeable with the support of such poor persons, shall

forfeit and pay 50 dollars, to be recovered before any ~~justice of the peace~~ DISTRICT OR MUNICIPAL COURT of the ~~county~~ JUDICIAL DISTRICT into which such poor person shall be brought, or in which the offender may be; and shall also be obliged to convey such poor person out of the state, or support him at his own expense.

Comment:

This section provides for a penalty for anyone bringing a poor person into the state with the intent to have the county support the poor person. The section is amended to replace justices of the peace with district or municipal courts of the judicial district into which the person is brought.

Sec. 19. It shall be lawful for the ~~justice or~~ court before whom such person shall be convicted for a violation of the provisions of the preceding section, to require of such person satisfactory security that he will, within a reasonable time, to be named by the ~~justice or~~ court, transport such person out of the state, or indemnify such county for all charges and expenses which may have been, or may be incurred in the support of such poor person; and if such person shall neglect or refuse to give such security when required, it shall be the duty of the ~~justice or~~ court to commit him to the county jail for a term not exceeding 3 months.

Comment:

This amendment follows from the amendment made in the preceeding section.

Act No. 229 of 1887 (M.C.L. §§426.5, 426.6 426.9, 426.10, 426.11, and 426.12)

Sec. 5. Any person or persons, or the assignee of any person or persons, having a lien ~~upon or against any of the said products~~ AS PROVIDED IN SECTION 1 may enforce the same by attachment against any of ~~such~~ THE SPECIFIED products in the circuit, ~~and justice courts of the county~~ DISTRICT, OR MUNICIPAL COURT OF THE JUDICIAL DISTRICT in which ~~said products, or~~ any portion of the ~~same,~~ PRODUCTS may be situated at the time of commencement of suit. ~~and such suit~~ SUIT may be commenced to enforce such A liens, if the same be due, immediately after the filing of ~~such~~ THE statement AS PROVIDED IN SECTION 2, and ~~such~~ THE lien claim shall cease to be a lien upon the property named in ~~such~~ THE statement unless suit ~~be~~ IS commenced within 3 months after the filing of ~~such~~ THE statement. In all such suits the person, company or corporation liable for the payment of ~~such~~ THE debt or claim shall be made the party defendant.

Comment:

This is the first in a series of proposed amendments in an act providing for the establishment of a lien for labor and services provided in the manufacture of forest products. Jurisdiction was set in the circuit court or a justice of the peace court, depending upon the amount involved. See section 9, discussed infra. This particular provision sets forth the procedure for using attachment proceedings to enforce a lien against the owner of the forest products. The proposed amendments substitute district or municipal courts for justice courts. District and municipal courts were given the powers of attachment under M.C.L. §600.8306.

Sec. 6. The attachment shall require the sheriff or other proper officer to attach and safely keep the property or products described in the writ or so much thereof as is necessary to satisfy the claim of the plaintiff, with all costs and disbursements, charges and expenses, and ~~said~~ THE attachment shall also require the ~~said~~ sheriff or other proper officer, to summons the defendant therein named to appear before ~~said~~ THE court at the time and place therein specified, the same as FOR ordinary writs of attachment in circuit, ~~and justice's~~ DISTRICT, OR MUNICIPAL courts~~,~~. ~~and~~ aAny such attachment or other process issued out of ~~said~~ SUCH courts ~~of this state~~ in pursuance of the provisions of this act~~,~~ may be served in any county of this state, and if the defendant in ~~said~~ THE attachment is not the owner of the property or products described in ~~said~~ THE writ, then the officer executing ~~said~~ THE writ shall serve or cause to be served a copy of ~~said~~ THE attachment on or before the return day mentioned in ~~said~~ THE writ upon the owner of ~~said~~ THE products, or any of them, their proper agent or attorney, if such owner, agent or attorney be known ~~to him~~, and residing in this state: Provided, That no sheriff or other officer shall seize upon and detain any such property or products when in transit from the place where banked or deposited for shipment on the railroad, or for floatage in the stream or streams, or for transportation on the waters of this state, when such place of destination is within this state, but in case such products are in transit, or are in

possession of any booming company, or other person or corporation for the purpose of being driven or sorted and delivered to the owners, or to satisfy any statutory lien, then levy an attachment of ~~said~~ THE property or products may be made by serving a copy of ~~said~~ THE attachment upon the person or corporation driving or holding the same, who shall, from the time of such service, be deemed to hold the same both on their own behalf and in behalf of ~~said~~ THE sheriff or other officer, to the extent of ~~said~~ THE attachment lien, until the same can be driven and sorted out; and when driven or sorted out, and sheriff or other officer may receive ~~said~~ THE products from ~~said~~ THE person or corporation, and the statutory lien ~~of said person or corporation~~ shall not be released by the holding of ~~said~~ THE sheriff or other officer; and in case of sale by the sheriff or other officer on execution, and when the proceeds of sale shall not be sufficient to satisfy all liens in full, then ~~such~~ THE proceeds shall be distributed pro rata to all parties in interest, under the special order and direction of the court having jurisdiction in ~~said~~ THE attachment, Provided, further, If the owner of ~~said~~ THE products or any person ~~in their~~ ACTING ON THE OWNER'S behalf shall make, execute and file with the clerk of the circuit, DISTRICT, OR MUNICIPAL court ~~or before the justice of the peace~~ where ~~said~~ THE attachment is pending a good and sufficient bond in a sum double the amount claimed in ~~said~~ THE writ, signed by 2 freeholders and approved by ~~said~~ THE clerk, ~~or by said justice~~

~~of the peace,~~ running to the plaintiff ~~in said writ~~ and conditioned for the payment of all damages, costs, charges, disbursements and expenses that may be recovered by ~~said~~ THE plaintiff against defendant that may be found to be a lien upon or against the products described in ~~said~~ THE writ, and upon the approval and filing of ~~said~~ THE bond, the ~~said~~ clerk~~, or justice, as the case may be,~~ shall issue an order to the officer having ~~in~~ charge OF such products, directing their release, and upon the service of a copy of ~~said~~ THE order, ~~upon said~~ THE officer ~~he~~ shall release the same.

Comment:

See the comment on section 426.5.

Sec. 9. ~~Justice of the peace within their respective counties shall have cognizance and jurisdiction of all persons found within their respective counties regardless of their place of residence and their jurisdiction shall not be limited by the provisions of section 707 of the Compiled Laws of 1897 of the state of Michigan, and~~ MUNICIPAL AND DISTRICT COURTS shall have jurisdiction of all cases arising under this act when the amount claimed over and above all legal set-offs does not exceed ~~300 dollars~~ THE JURISDICTIONAL LIMITS SPECIFIED IN PUBLIC ACT NO. 236 OF 1961 FOR CIVIL CASES BROUGHT IN A DISTRICT OR MUNICIPAL COURT. ~~and any~~ IN ANY SUCH CASE, A person ~~and persons~~ having ~~such~~ A lien shall be entitled to proceed by attachment

~~in justice courts~~ against the property on which he~~,~~ or she ~~or they~~ may have such lien for the enforcement of the same. ~~and the~~ THE writ of attachment issued by ~~any justice of the peace~~ THE DISTRICT OR MUNICIPAL COURT may be in the following form:

STATE OF MICHIGAN,
County of .....} ss.

To any constable in said county, greeting: In the name of the people of the state of Michigan you are commanded to attach the following goods and chattels (here insert a description of the property described in the required affidavit), or so much thereof as shall be sufficient to satisfy to sum of . . . . . with interest, costs, disbursements, charges and expenses of suit in whosesoever possession the same may be found and so provide that the same so attached may be subject to further proceedings as the law requires; and also summon . . . . . ., if he OR SHE be found in this state, to be and appear before me at my office in said . . . . . ., on the . . . . . day of . . . . ., 190. . ., at . . . o'clock in the . . . . noon, to answer to . . . . . to his CLAIM FOR damages OF . . . . . ., ~~of 300 dollars or under~~ and in case the above named defendant is not the owner of the ~~said~~ described logs, timber, posts, ties, poles, bolts, bark or staves you are then also commanded to serve or cause to be served a copy of this writ on or

before the return day above mentioned upon the owners of ~~said~~ THE products or his OR HER proper agent or attorney if such owner, agent or attorney be known to you and residing in this state.

Given under my hand at the . . . . . of . . . . . county aforesaid, the . . . . . day of . . . . . ., 19~~0~~ . . .

. . . . . .,

~~Justice of the Peace.~~
DISTRICT (OR MUNICIPAL) COURT JUDGE

Comment:

See also the comment supra on section 5 of this Act. The original sentence of this provision, giving the justice of the peace jurisdiction where the party does not reside in the county is now irrelevant in light of the provisions of the R.J.A. (M.C.L. §600.1601 et seq.) made applicable to district and municipal courts through §600.8312. Indeed, the successor to section 707 of the Compiled Laws of 1897 (M.C.L. §600.6645) was repealed by Public Act No. 297 of 1974. The first sentence was designed to permit the action in the place where the property was located without regard to the residence of the parties. See Burlingham v. Marble, 95 Mich. 5 (1893). Under the current venue provisions, the foreclosure of the lien similarly may be brought where the "subject of the action" is "situated." See M.C.L. §600.1605.

The dividing line between circuit and district and municipal court jurisdiction will be that generally provided in the R.J.A. for civil cases. No specific amount is stated so as to avoid the need for amendment each time that jurisdictional amount may be changed.

Sec. 10. Before any ~~justice of the peace~~ DISTRICT OR MUNICIPAL COURT shall issue any such writ of attachment, the plaintiff or person claiming such lien, or some one in his behalf, shall make and file with such ~~justice of the peace~~ DISTRICT OR MUNICIPAL COURT an affidavit stating that the defendant, or person owing the debt or claim, is indebted to plaintiff, specifying the amount of such indebtedness, as

near as may be, over and above all legal set-offs, and that such indebtedness is due for and on account of such labor or services on such products as entitled plaintiff to lien thereon, describing as particularly as may be the property on which such lien is claimed, and also stating that plaintiff has filed his statement of lien as herein required. Upon the filing of such affidavit with ~~said justice of the peace~~ THE DISTRICT OR MUNICIPAL COURT, ~~said~~ THE writ of attachment shall issue, and no further or other affidavit shall be necessary, and no bond shall be required. Such affidavit may be in the following form:

STATE OF MICHIGAN,
County of .....} ss.

. . . . . being duly sworn, says that . . . . . ., defendant is indebted to . . . . . plaintiff in the sum of . . . . . ., as near as may be, over and above all legal set-offs, for work and labor performed by . . . . . in manufacturing, cutting, hauling, skidding, falling, scaling, banking, driving, running, rafting or booming (as the case may be), the following named property (here insert a description of the products upon which a lien is claimed); that the last day's work of ~~said~~ THE labor was done on the . . . . . day of . . . . . ., 19. . ., in the county of . . . . . ., and the ~~said~~ described property, or a part

of it, is now situated in the county of . . . . . ., state of Michigan, and that a statement of lien required by law was on the . . . . . day of . . . . . ., 19..., duly filed with the clerk of the county of . . . . . ., where said labor was performed.

Subscribed and sworn to, etc.

Comment:

See the comment supra on section 5 of this Act.

Sec. 11. All writs of attachment issued under the provisions of this act by any ~~of the~~ circuit, DISTRICT or ~~justice~~ MUNICIPAL courts ~~of this state~~ shall be served and returned as ordinary writs of attachment are served and returned ~~in said courts, respectively,~~ FOR THE PARTICULAR COURT, except as herein otherwise provided; and the pleadings and all subsequent proceedings shall be the same as in other cases of attachment, except as herein otherwise provided. The declaration in all suits brought under this act may be in the following form:

TITLE OF COURT AND CAUSE.

County of . . . . . ., ss.

Whereas, ..., the defendant herein, has been duly summoned to appear in this cause to answer the plaintiff herein in an action of assumpsit for labor and services done and performed by . . . . . ., plaintiff, for said defendant, in manufacturing,

cutting, skidding, scaling, falling, hauling, banking, driving, running, rafting or booming (as the case may be) the following described property to wit: (here insert the same description of property as set forth in writ) for which ~~said~~ labor and services there is now due ~~said~~ plaintiff the sum of . . . . . ., for which ~~said~~ amount a claim of lien has been duly filed with the clerk of the county of . . . . . ., being the county in which ~~said~~ THE labor was performed, and the ~~said~~ defendant on the . . . . . day of . . . . . ., 19..., in consideration of the premises undertook and promised the plaintiff to pay ~~him the said~~ SUCH sums of money on request; yet the ~~said~~ defendant has neglected so to do, or any part thereof, to the plaintiff's damages of . . . . . ., and THE PLAINTIFF therefore ~~he~~ brings suit, etc., and claims a lien upon ~~said~~ THE described property for ~~said~~ SUCH amount.

Comment:

See the comment supra on section 5 of this Act.

Sec. 12. In all suits on attachments prosecuted under the provisions of this act, the court OR jury, ~~or justice of the peace~~ who shall try the same or make an assessment of damages therein, or make an inquest therein, shall, in addition to finding the sum due the plaintiff, also find that the same is due for labor and services performed upon the products described in the declaration, and is a lien upon the same, and the court ~~or justice of the peace, as the case may be,~~ shall render

judgment in accordance with such finding, and execution shall issue therefor, and such execution, in addition to the commands in ordinary executions, shall command that the said products, or so much thereof as shall be necessary for that purpose, be sold to satisfy such judgment and all costs, charges and disbursements: Provided, however, That if the court~~,~~ OR jury~~, or justice of the peace~~ shall find that the amount due the plaintiff is not a lien upon the property described in the declaration, the plaintiff shall not be non-suited thereby, but shall be entitled to judgment as in other civil actions; but in such cases ~~said~~ THE plaintiff shall not recover or tax any costs arising from the filing of the statement of lien, nor for officers' fees, or expenses arising from the service of ~~said~~ THE writ of attachment, or expenses incurred relative to the property seized; and in those cases where the amount due is found to be a lien upon the property (or any portion of it) mentioned in plaintiff's declaration, the finding or verdict may be in the following form:

(The court~~, justice~~ or jurors, as the case may be) . . . . . say . . . . . that there is due the plaintiff the sum of . . . . . dollars from ~~said~~ THE defendant, and that ~~the same~~ THIS SUM is due for work and labor performed by . . . . . in manufacturing, cutting, skidding, scaling, driving, running, hauling, banking, rafting or booming (as the case may be) the property mentioned in plaintiff's

declaration (or a portion of it, specifying the same) and the plaintiff has a lien upon ~~said~~ THE described property for ~~said~~ SUCH amount.

Comment:

See the comment supra on section 5 of this Act.

Act No. 263 of 1861 (M.C.L. §§426.52, 426.53)

Sec. 2. If any person claiming such logs, timber or lumber for himself or another, shall execute and deliver a bond to the party claiming such lien in a penal sum, to be not less than double the sum claimed, or such other sum, not less than the value of the property taken, as the circuit judge ~~or the circuit court commissioner~~, approving such bond shall direct, conditioned for the payment to the party claiming such lien, such sum as any court of competent jurisdiction shall find and determine to be due for such charges and expenses in breaking such jams, and running, driving and clearing such logs, timber or lumber, aforesaid, and providing for the care and safety of the same, with sufficient sureties, to be approved by any circuit judge, ~~or circuit court commissioner,~~ unless such approval shall be waived by the claimant of such a lien, such lien shall thereupon be discharged.

Comment:

This Act governs the floating of logs and timber in streams of the state. This particular provision (section 2) sets up the procedure for the discharge of a lien on such floating timber by payment of a bond. The proposed amendment deletes references to approval of the bond by a circuit court commissioner as this position was eliminated by M.C.L. §600.9921. It is not necessary to add any other court of jurisdiction, as the section requires that a circuit court approve the bond.

Sec. 3. Any person, company or corporation claiming any lien, as aforesaid, may bring an action of assumpsit against the owner of such property to determine and satisfy the amount of such lien. If the amount claimed shall not exceed ~~300 dollars,~~ THE JURISDICTIONAL LIMITS SPECIFIED IN PUBLIC ACT NO. 236 OF 1961 FOR CIVIL CASES BROUGHT IN A DISTRICT OR MUNICIPAL COURT, THE ACTION SHALL BE BROUGHT IN THE DISTRICT OR MUNICIPAL COURT OF THE JUDICIAL DISTRICT in which the property, or any part thereof, may be situated; and if the amount claimed shall exceed ~~three hundred (300) dollars,~~ THAT LIMIT, then the action shall be brought in the circuit court for ~~such~~ THE county. The proceedings in such action shall be in accordance with the practice of the courts in which such action is commenced, in actions of assumpsit, and the property so held may be levied upon and sold to satisfy any judgment which may be rendered against such owner, together with all costs of such suit, including the costs and expenses of providing for the care and safety of such property.

Comment:

The jurisdictional dividing line for civil suits is substituted for the $300.00 current limit. Reference is made to the statute to avoid the necessity of amending the provision each time the dollar amounts are changed. The current limits are found in §600.8283 (district courts) and M.C.L. §600.6521 (municipal courts).

Act No. 63 of 1913 (M.C.L. §436.203)

Sec. 3. The conductor of any railway train or interurban car, may summarily arrest, with or without warrant, any person violating any of the foregoing provisions, and for such purpose shall have the same power to summon assistance; and such conductor shall further have power to deliver any such person to any PEACE OFFICER ~~policeman, constable, or other public officer~~ at the next station stop where such can be found, and it shall be the duty of such officer to bring the person charged with such offense before the nearest JUDGE OF THE DISTRICT OR ~~justice of the peace or~~ municipal court of the JUDICIAL DISTRICT IN WHICH ~~county where said~~ THE offense was committed, and to make a complaint against such person, and such complaint made upon information and belief of ~~said~~ THE officer, shall be sufficient.

Comment:

This section is part of an Act dealing with drunkenness in trains. It was not amended when the disorderly persons statute was altered to define that action that constitutes a criminal offense. See M.C.L. §750.167(e) (requiring that the intoxicated person endanger the safety of another person or property or act in a manner that causes a public disturbance). This section provides that a conductor can arrest any person who has violated the act (i.e., is in an "offensive state of intoxication" or is drinking in a place where drinking is not allowed) and then turn that person over to a peace officer. These violations are misdemeanors, see M.C.L. §436.205. Accordingly, the appropriate courts of jurisdiction are district or municipal courts, and the individual should be brought before the court of the judicial district in which the offense was committed.

Act No. 39 of 1889 (M.C.L. §455.62)

Sec. 12. The marshal shall have authority to take any person arrested before ~~some justice of the peace or police magistrate~~ A DISTRICT OR MUNICIPAL COURT JUDGE of the ~~township~~ JUDICIAL DISTRICT in which the association lands are situated, to be dealt with according to law.

Comment:

This provision is part of an act which authorizes and sets guidelines for associations establishing summer resorts. This section gives association-appointed marshalls the authority to arrest violators of the association's by laws, and to bring them before a justice of the peace or police magistrate. M.C.L. §455.62 makes any violation of the bylaws a misdemeanor. The proposed amendment substitutes "district or municipal court judge" for "justice of the peace or police magistrate."

Act No. 137 of 1929 (M.C.L. §455.216)

Sec. 16. The marshal shall have authority to take any person arrested before a ~~justice of the peace or police magistrate~~ DISTRICT OR MUNICIPAL COURT JUDGE of the ~~township~~ JUDICIAL DISTRICT in which the lands of the corporation are situated, to be there dealt with according to law.

Comment:

This provision gives marshalls in a corporate-owned resort the authority to take violators of the resort bylaws before a justice of the peace or police magistrate. Violation of the bylaws is designated in M.C.L. §455.214 as a misdemeanor. The proposed amendment substitutes "district or municipal court judges" for justice of the peace or police magistrate.

Act No. 198 of 1893 (M.C.L. §§466.10, 467.10)

Sec. 10. Any person who shall, while riding in the car either of a freight or passenger or other train, on any railroad in this state, use or utter indecent, obscene, or profane language in the hearing of other passengers, or riotously or boisterously conduct himself or herself to the annoyance of other passengers, or who shall obtain any money or property from any passenger or person in such car by means of any game or device, or attempt so to do, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding 100 dollars, or imprisonment in the county jail for a period not exceeding 90 days, or both, in the discretion of the court. Railroad conductors are hereby invested with the powers of sheriffs and constable in regard to offenses under this section occurring upon trains or cars in their charge, and are empowered to arrest and detain any person violating any of its provisions until the car or train arrive at some usual stopping place, where a ~~sheriff, deputy, or undersheriff of any county, or constable, or marshal, or policeman of any city or village in this state~~ PEACE OFFICER may be, to whose custody ~~he~~ THE CONDUCTOR may deliver such offender, with a written statement specifying generally in what respect such person has misbehaved; or if there be no such officer present to receive the offender, the conductor may deliver him to the ticket or freight

agent at such stopping place, with such statement, who shall detain the offender in his custody, and may exercise the powers of sheriffs and constables in regard to persons charged with crimes in doing so, until such officer may be obtained to take charge of the offender~~,~~ to whom he shall be delivered, with ~~such~~ THE statement made by the conductor~~,~~. ~~and such officer shall take the person so offending~~ THE PEACE OFFICER TO WHOM THE OFFENDER IS DELIVERED SHALL TAKE THE OFFENDER into custody, and it shall be ~~his~~ THE OFFICER'S duty to institute a complaint against such person ~~for such offense~~ before ~~a justice of the peace in his county,~~ A JUDGE OF THE DISTRICT OR MUNICIPAL COURT OF THE JUDICIAL DISTRICT IN WHICH THE OFFENDER IS DELIVERED, and ~~justice~~ THAT JUDGE shall have jurisdiction to try such offender, and to impose the judgment authorized by this section.

Comment:

This section is part of an Act dealing with Railroad, Bridge, and Tunnel Companies. Section 9 of the Act provides that a disorderly passenger may be convicted of a misdemeanor for any offenses listed in that section. The proposed amendment deals with where those charges should be filed. It substitutes district or municipal court of the judicial district of delivery for the current reference to a justice of the peace of the county of delivery. The use of the district of delivery rather than the district of the offense is unusual (compare M.C.L. §436.203, discussed supra), but consistent with the limited scope of this series of amendments, no substantive change is made.

Sec. 10. All penalties incurred under this act, when not otherwise provided for, may be sued for in the name of the people of the state of Michigan, and ~~if such penalty be for the sum not~~

~~exceeding 100 dollars, then~~ such suit may be brought ~~before a justice of the peace.~~ IN AN APPROPRIATE COURT AS SPECIFIED IN PUBLIC ACT NO. 236 OF 1961.

Comment:

This section provides for suits for penalties under this Act. The proposed amendment deletes reference to an outdated jurisdictional amount and replaces it with a more general statement that suits may be brought in an appropriate court as specified in the Revised Judicative Act. That Act will assign the court according to the jurisdictional limits and the venue provisions set forth there. This provision does not set forth a special venue requirement.

Act No. 244 of 1881 (M.C.L. §471.36)

Sec. 36. All penalties incurred under this act, when not otherwise provided for, may be sued for in the name of the people of the state of Michigan, and ~~if such penalty be for a sum not exceeding 100 dollars, then~~ such suit may be brought ~~before a justice of the peace.~~ IN AN APPROPRIATE COURT AS SPECIFIED IN ACT NO. 236 OF 1961.

Comment:

This section provides for suits for penalties under an act applicable to Union Depot Companies. The proposed amendment is similar to that provided for M.C.L. §467.20, discussed in the preceeding comment.

Sec. 7. The person having such lien may commence a suit for the recovery of such charges~~, by summons, in the usual form, before any justice of the peace of the township or city in which he resides, or in any court, as the case may require,~~ against the person liable for payment thereof IN ANY APPROPRIATE COURT AS SPECIFIED IN ACT NO. 236 OF 1961.

Comment:

This provision comes from an Act dealing with horseshoers. The amendment is similar to that provided for M.C.L. §467.10, discussed supra.

Sec. 12. In all suits or attachments prosecuted under the provisions of this act, the court OR jury ~~or justice of the peace~~ who shall try the same or make an assessment of damages therein, shall, in addition to finding the sum due the plaintiff, also find that the same is due for the cost of shoeing the horse, mule, ox or other animal described in plaintiff's declaration and is a lien upon the same: Provided, however, that if the court OR jury ~~or justice of the peace~~ shall find that the amount due the plaintiff is not a lien upon the property described in the plaintiff's declaration, the plaintiff shall not be non-suited thereby, but shall be entitled to judgment as in other civil actions; but in such case ~~said~~ THE plaintiff shall

not recover or tax any costs other than those allowed and taxable in such a case; and in those cases where the amount due is found to be a lien upon the property mentioned in plaintiff's declaration, the finding or verdict may be in the following form: (The court OR jurors, ~~or justice,~~ as the case may be) say that there is due the plaintiff the sum of . . . . . dollars from the ~~said~~ THE defendant, and that the same is due for his reasonable charges for shoeing the animal mentioned in plaintiff's declaration (giving a description sufficient for identification of the animal), and that the plaintiff has a lien upon said amount.

Comment:

This section provides for findings in cases involving liens for shoeing animals. The proposed amendment deletes references to justices of the peace, leaving the procedure to be carried out by "the court or jury."