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HOW TO DO A PERPETUITIES PROBLEM

JOHN MAKDISI*

No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.

—J. Gray

The most difficult aspect of the rule against perpetuities is figuring out a sure-fire way to determine whether an interest created in a conveyance is valid or invalid. The meaning of the rule itself is not hard to fathom. Whenever the interest might vest too remotely it is invalid, and it becomes possible to vest remotely if there is a chance that it could vest more than twenty-one years after everyone alive at the time of the conveyance has died. Whether the interest violates the rule against perpetuities is determined at the moment the conveyance creating the interest becomes effective. The problem is to demonstrate that, at the time of the conveyance, there exists or does not exist at least one possible future situation in which the interest could vest too remotely. It is a problem that has caused many a law student more than a few “Gray” hairs.

Since a perpetuities problem is concerned with “vesting too late,” we should immediately note that certain interests present no problem because they are considered vested from the moment they are created. Present interests, vested remainders and reversionary interests are always vested under the rule against perpetuities and thus are always

* B.A. (1971), Harvard College; J.D. (1974), University of Pennsylvania; S.J.D. (1985), Harvard Law School; Associate Professor of Law, Cleveland State University. Since this study aid is designed to help students master a methodology after they have learned the rules governing estates and future interests, including the basic aspects of the rule against perpetuities, footnotes as well as many of the particularities of the rule against perpetuities governing class gifts, powers of appointment, and several other aspects of estates and future interests have been omitted. For authority on the rule against perpetuities, see J. GRAY, *THE RULE AGAINST PERPETUITIES* (4th ed. 1942); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965). Cf. Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867 (1986) (suggesting that today executory interests are being assimilated into remainders). For authority on the rules governing estates and future interests, see C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* (2d ed. 1988); T. BERGIN & P. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* (2d ed. 1984). Practice problems and a brief review of these rules may be found in J. MAKDISI, *WORKBOOK ON ESTATES AND FUTURE INTERESTS* (1987).

valid. For example, O conveys Blackacre "to A for as long as Blackacre is used as a farm." A has a present interest in fee simple determinable. O has a reversionary interest called a possibility of reverter. Both interests are valid. Even though it may be five hundred years before Blackacre ceases to be used as a farm and O's possibility of reverter is transformed into a present interest, O's interest is vested from the time of its creation. It is the quality of being vested, not merely possessed, that makes the interest valid.

The only interests that are not vested at the time of creation are contingent remainders and executory interests. These future interests are potential perpetuities problems because they might vest too late. They might vest more than twenty-one years after the death of everyone alive at the time of the conveyance (henceforth called lives-in-being). For example, O conveys "to A for as long as Blackacre is used as a farm, then to B and his heirs." The attempted conveyance to B is an executory interest. Since executory interests do not vest until they vest in possession, B's executory interest is invalid because it may vest too late. To demonstrate its invalidity we hypothesize that years from now, say five hundred, Blackacre may not be used as a farm and thus B's executory interest would transform into a present interest at a time beyond the perpetuities period. Since B's executory interest is invalid, it is struck from the conveyance, leaving a present interest in fee simple determinable in A and a possibility of reverter in O.

This example demonstrates an important point in perpetuities problems. The focus of attention is on the *interest* created in the conveyance and not on the *person* to whom it is conveyed. In the conveyance "to A for as long as Blackacre is used as a farm, then to B and his heirs," A has a present interest in fee simple determinable that continues to be valid even after A conveys it to X, wills it to X, or leaves it to X by succession. Since the present interest is a vested interest at the time it is created, it does not matter who holds the interest nor for how long thereafter. On the other hand, B's executory interest is invalid even though B, the designated taker of this future interest, is a life-in-being at the time of the conveyance. What matters is that the executory interest may vest when it is held by one who is not a life-in-being, more than twenty-one years after everyone alive at the time of the conveyance has died.

The treatment of executory interests and possibilities of reverter under the rule against perpetuities raises an interesting anomaly. In the first example above where O conveys "to A for as long as Blackacre is used as a farm," O creates a possibility of reverter in himself which is valid at the time it is created. If O conveys this possibility of reverter to B in a second deed, it remains valid. A then has a present interest in fee simple determinable followed by a possibility of reverter in B. On the other hand, B does not take a valid interest in the conveyance "to A for as long as Blackacre is used as a farm, then to B and his heirs." The executory

interest in B is invalid. O can accomplish in two conveyances what O cannot accomplish in one—a sobering thought for the efficiency-minded experts of our legal system.

There are many ways in which an interest may vest too late. It is often helpful to examine a conveyance on its face to see if one of these ways suggests itself. If one cannot be found it may be that the interest is valid. The effort then is to demonstrate that the vesting of the interest is restricted to occur, if it occurs at all, within twenty-one years of a life-in-being. Below are some of the methods by which the validity of an interest can be demonstrated.

(1) *If vesting is dependent only on the birth of the interest-holder and if the parent of the interest-holder is a life-in-being, then the interest is valid.* This situation is easy to determine if the parent is a designated life-in-being. For example, O conveys Blackacre “to my first child.” Vesting will occur, if it occurs at all, upon the birth of O’s first child. The parent, O, is a designated life-in-being. Therefore, the interest of the “first child,” even if it is born fifty years from now, is valid because it cannot be born (and take a vested interest) more than twenty-one years after the death of a life-in-being. (Artificial insemination is not taken into consideration under the rule against perpetuities.) Note that it is possible that O may not have any children at all. This possibility does not affect validity under the rule against perpetuities because the rule is concerned only with vesting too late, not with the failure to vest at all.

If the parent may be one of a group of people, one must determine whether all members of the group are lives-in-being. For example, O conveys Blackacre by inter vivos deed “to my first grandchild.” At the time of the conveyance O has two children, A and B, but no grandchildren. The interest of the “first grandchild” is an executory interest in fee simple absolute which will vest, if at all, upon birth of the first grandchild. The parent of the interest-holder may be any child of O. It is possible that the first grandchild may be born to A or B, but it is also possible that it may be born to another child of O not yet born at the time of the conveyance. Therefore, the parent of the interest-holder may not be a life-in-being. This does not prove that the interest is invalid, but strongly suggests it. To prove that the interest is invalid one needs to hypothesize a situation in which the executory interest would vest too late. The interest in this case is invalid because O may have another child, C; then O, A, B and all lives-in-being may die; C may continue to hold Blackacre as O’s heir, and then twenty-two years later C may bear O’s first grandchild. At that point the executory interest in the grandchild would vest in possession but it would vest too late. Therefore, the interest is invalid from the moment the conveyance is made. In effect O has conveyed nothing.

If O devises Blackacre “to my first grandchild,” instead of conveying it by inter vivos deed, the executory interest is valid. The inter vivos deed

is effective upon delivery of the deed. The devise is effective upon the death of the testator. Since perpetuities problems are determined from the time a conveyance is effective and O cannot have any more children after his death, all of O's children are lives-in-being. Therefore, the "first grandchild" can only be born to a life-in-being. (O's children in gestation at the time of his death are considered lives-in-being at the time of his death as long as they are later born alive.) Vesting will occur, if at all, upon the birth of the first grandchild. Therefore the executory interest is valid. It cannot occur more than twenty-one years after the death of every life-in-being.

(2) *If vesting is dependent only on the ascertainment of the interest-holder and if the ascertaining event must happen, if at all, within twenty-one years of the death of a life-in-being, then the interest is valid.* For example, O conveys Blackacre "to the heirs of A." Vesting will occur when the heirs of A are ascertained, that is upon A's death. Since A is a life-in-being, the ascertaining event must happen within twenty-one years of the death of a life-in-being. Therefore the interest is valid. If O conveys Blackacre "to the heirs of A's first child," the interest is invalid. The ascertaining event may happen more than twenty-one years after the death of every life-in-being. To prove that the interest is invalid one may hypothesize that A may have a child, X; then O, A and all lives-in-being may die; O's heirs (who may also be born after the conveyance) may continue to hold Blackacre from O, and then twenty-two years later X may die leaving heirs. At that point the executory interest would vest too late, and thus it is invalid *ab initio*.

(3) *If vesting is dependent only on the happening of a condition precedent and if the condition must be realized, if at all, within twenty-one years of the death of a life-in-being, then the interest is valid.* For example, O conveys "to A and her heirs, but if B gets married, then to C and his heirs." A has a present interest in fee simple subject to executory limitation, and C has an executory interest in fee simple absolute. The executory interest is valid because it is dependent only on the condition precedent of B getting married and B can only get married within his lifetime. If the executory interest vests, it must vest within the lifetime of a life-in-being.

On the other hand, if O conveys "to A and her heirs, but if A's first child goes to law school, then to C and his heirs," C's executory interest is invalid (assuming A has no children at the time of the conveyance). Although vesting is dependent only on the happening of the condition precedent (A's first child going to law school), the condition need not happen until after the perpetuities period. A's first child may go to law school more than twenty-one years after the death of every life-in-being. This, in itself, does not prove the interest invalid. To prove the interest invalid, one may hypothesize that A will have a child, X; then O, A, C and all lives-in-being may die; A's heir may continue to hold the present

interest in Blackacre, and then twenty-two years later X may go to law school. At that point the executory interest in C would vest in possession, but it would vest too late. Therefore it is invalid *ab initio*.

Note that each of the three above-mentioned methods by which the validity of an interest can be demonstrated involve a contingency by which remainders are considered contingent. A remainder is contingent if the interest-holder is unborn or unascertained or the interest is subject to a condition precedent. Yet the methods pertain to both contingent remainders and executory interests.

(4) *If vesting is dependent on more than one of the above contingencies and if all the contingencies must happen, if at all, within twenty-one years of the death of a life-in-being, then the interest is valid.* For example, O conveys "to A and the heirs of her body, then to B's children if A's children reach twenty-one." Assume that neither A nor B has any children at the time of the conveyance. A has a present interest in fee tail; B's children have contingent remainders. Vesting is dependent both on B's children being born and on A's children reaching twenty-one. Since both these contingencies must occur, if they occur at all, no later than twenty-one years after the death of A and B who are lives-in-being, vesting cannot occur beyond the perpetuities period. Therefore the contingent remainders are valid.

On the other hand, if O conveys "to A and the heirs of her body, then to B's children living when the line of A's issue runs out," the contingent remainders in B's children are invalid. The two contingencies are the birth of B's children and the survival of B's children at the expiration of A's issue (at which point A's fee tail will end). Birth, if it occurs, will occur to a life-in-being and thus is not a problem. However, the survival of B's children to the end of A's line may occur more than twenty-one years after the death of every life-in-being. To prove the invalidity of the contingent remainders let us hypothesize that A and B may bear children; then O, A, B and all lives-in-being may die; then A's children may hold the fee tail from A for more than twenty-one years; then A's children may die (without having had children) and B's surviving children may take their interests in present possession. The contingent remainders would then vest in present possession too late. Consequently, they are invalid *ab initio*.

(5) *If the interest cannot last longer than twenty-one years after the death of a life-in-being, then the interest is valid.* For example, O conveys "to A and his heirs, but if Blackacre is ever used as a farm, to B for life." B has an executory interest which will not vest until the condition precedent (Blackacre used as a farm) happens. Although the condition may occur more than twenty-one years after the death of a life-in-being, B's executory interest can only vest during the course of B's lifetime, because the interest in a life estate terminates upon the death of the life tenant. Another example: O conveys "to A and his heirs, but if B has a child and

Blackacre is ever used as a farm, then to B and his heirs until B's first child dies or reaches twenty-one, whichever occurs first." In this case B's estate lasts no longer than twenty-one years after the death of B. (The twenty-one year period under the rule against perpetuities is defined more exactly as twenty-one years plus any period of gestation that actually occurs.) Since the interest cannot vest after it terminates and it terminates no more than twenty-one years after the death of a life-in-being, the interest is valid.

(6) *If the interest is a contingent remainder designated to take upon the termination of one or more preceding life estates, all of which are measured by lives-in-being, and if the jurisdiction follows the rule that contingent remainders are destroyed if they do not take immediately upon the termination of the preceding estates, then the interest is valid.* For example, O conveys "to A for life, then to B's children for the life of B, then to C and her heirs if Blackacre is ever used as a farm." Assume that B has no children at the time of the conveyance. A has a present life estate; B's children have a contingent remainder in a life estate *pur autre vie* (measured by the life of B); and C has a contingent remainder in fee simple absolute. The contingency on C's remainder (Blackacre used as a farm) may happen more than twenty-one years after the death of every life-in-being. However, C's interest must vest, if it vests at all, upon the deaths of A and B. If Blackacre has not yet been used as a farm by that time, C's interest will never vest. If Blackacre is used as a farm on or before the deaths of A and B, C's interest will vest at the time it is so used. Therefore C's interest is valid. On the other hand, if one of the preceding estates in this conveyance had been a fee tail, C's interest would have been invalid.

These methods are only aids in determining the validity of an interest. If validity cannot be proved using these methods, it does not mean that the interest is invalid. There are so many different combinations of events and contingencies that may restrict an interest to vest, if it vests at all, within the perpetuities period that invalidity should be concluded only by hypothesizing a situation in which the interest would vest too late. Let us reexamine, for example, the conveyance "to A and the heirs of her body, then to B's children living when the line of A's issue runs out." The vesting of B's children's interest may occur beyond the perpetuities period because (1) the condition precedent of survivorship may occur more than twenty-one years after all lives-in-being are dead, (2) the preceding fee tail estate may be held for more than twenty-one years after all lives-in-being are dead, and (3) the contingent remainder interest may vest in one who is living more than twenty-one years after all lives in being are dead. If any one of these possibilities did not exist, the interest in B's children would be restricted to vest, if at all, within the perpetuities period and would be valid.

Suppose we eliminate the first possibility as in the conveyance "to A and the heirs of her body, then to B's children if B is living when the line

of A's issue runs out." The preceding fee tail estate may be held for more than twenty-one years after all lives-in-being are dead, and the contingent interest may vest in one who is not a life-in-being, but the survivorship condition may not be accomplished more than twenty-one years after all lives-in-being are dead. The contingent remainders in B's children must vest, if at all, within B's lifetime and are valid.

Suppose we eliminate the second possibility as in the conveyance "to A for life, then to B's children living when the line of A's issue runs out," and we are in a jurisdiction where contingent remainders are destroyed if they do not take immediately upon the termination of the preceding estates. The survivorship condition may be accomplished more than twenty-one years after all lives-in-being are dead, and the contingent interest may vest in one who is not a life-in-being, but the preceding estates may not be held more than twenty-one years after all lives-in-being are dead since the life estate will terminate upon A's death and no other estates are allowed to intervene between the life estate and the contingent remainders. The contingent remainders in B's children must vest, if at all, no later than A's death and are valid.

Suppose we eliminate the third possibility as in the conveyance "to A and the heirs of her body, then to B's children for life if C's children are living when the line of A's issue runs out," and B had died before the conveyance and left children. The survivorship condition may be accomplished more than twenty-one years after all lives-in-being are dead, and the preceding fee tail estate may be held more than twenty-one years after all lives-in-being are dead, but the contingent interest must vest, if at all, in one who is living during the life of a life-in-being since B cannot have more children and the interest no longer exists after B's children are dead. Therefore the contingent remainders in B's children are valid.

Understanding the operation of the rule against perpetuities is dependent upon understanding what contingencies affect the vesting of an interest and how they may or may not occur after the death of the lives-in-being. While some insight may be gained by using the methods described above, mastery is achieved only by repeated problem-solving. In this regard it may be helpful to conclude with a discussion of five examples in which O attempts to create an executory interest in a class. (Assume in each of the examples below that O, A, B, and one child of O are alive at the time of the conveyance.)

EXAMPLE #1: O conveys Blackacre "to A for life, then at least one year later to B's grandchildren." O has attempted to create an executory interest in fee simple absolute in B's grandchildren, leaving a reversion in O for the period of time between the end of the present interest in A and the vesting in possession of the executory interest. Vesting in possession will take place in each grandchild when it is born and at least one year has passed since the termination of A's life estate. Since the rules pertaining to class gifts demand that the interest of every grandchild must be able to vest within the perpetuities period, if at all, in order

for the interest of any grandchild to be valid, all we need find is that one grandchild's interest could vest too late. B can have more children. (We must assume this possibility as long as B is alive, even if he is eighty years old. Professor Leach has called this the case of the fertile octogenarian.) Therefore, a grandchild of B may be born to one who is not a life-in-being. Since vesting is dependent only on the birth of the interest-holder (if no grandchildren are born until one year after A's death) and the parent of the interest-holder is not a life-in-being, we should look for a hypothetical that will prove the interest invalid. It is possible for O and B to bear children after the conveyance; then for O, A, B and all lives-in-being to die and for O's children to inherit O's reversion as a present interest as his heirs; then for one of B's children to have B's grandchild more than twenty-one years later. It is thus possible for the interest in one of B's grandchildren to vest too late, and the executory interest in B's grandchildren is invalid.

EXAMPLE #2: O conveys Blackacre "to A for life, then at least one year later to B's children." In this conveyance, O has attempted to create an executory interest in B's children rather than B's grandchildren. Since vesting after one year following A's death is dependent only on the birth of the interest-holder to a parent, B, who is a life-in-being, the interest in B's children is valid. The birth of B's child cannot occur more than twenty-one years after the death of B.

EXAMPLE #3: O devises Blackacre "to A for life, then at least one year later to O's grandchildren who reach twenty-five." Vesting in each grandchild after one year following A's death is dependent on the grandchild being born and reaching twenty-five. Although the grandchild is born to O's child, who is a life-in-being at the time of O's death, it is possible that the condition (reaching twenty-five) could occur more than twenty-one years after the death of every life-in-being. Therefore we should look for a hypothetical situation that would prove the interest in O's grandchildren to be invalid. It is possible for O's child to bear O's grandchild after the conveyance; then for O's child, A and all lives-in-being to die; then for O's reversion to be held by one who is not a life-in-being and who had purchased the reversion from O's child who had received it in O's will; and then for O's grandchild to reach twenty-five more than twenty-one years later. At this point the executory interest in O's grandchild would vest in possession too late. Therefore, it is invalid.

EXAMPLE #4: O conveys Blackacre "to A for life, than at least one year later to B's grandchildren for the life of B." The executory interest of B's grandchildren is a life estate pur autre vie. Since the interest will terminate no later than the death of B, a life-in-being, vesting of the interest in any member of the class cannot take place after this point in time. Therefore, the interest is valid.

EXAMPLE #5: O conveys Blackacre "to A for life, then at least one year later to B's children as long as the land is used as a farm." Since vesting

in each child after one year following A's death is dependent only on the birth of a child to B who is a life-in-being, the interest is valid. The condition that the land be used as a farm is a condition subsequent that has nothing to do with the vesting of the executory interest. It only determines the length of time during which the estate in B's children will last.

