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The Rule Against Perpetuities – A rule against common sense?

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The rule against perpetuities – not a friend of the law student

A Google search for "The rule against perpetuities" in quotation marks, limiting the search to the exact search string, returns 191,000 results. So, it must be important. Using Google trends and depicting interest over time the curve is anything but smooth, and certainly not trending, it exhibits frequent recurrent spikes where the interest peaks, increasing from the baseline level several fold to just drop down back to a measly few queries. It appears that the periodicity is

caused by the start of new law school property or wills and trust courses across the country. Even so, only a minority of students seems to search for the rule.

Some of the bar prep providers brazenly advise their customers that only vague familiarity with the rule is required and that one should not spend very long on it [1].

However, it is my impression that people who do not wish to understand the Rule against Perpetuities will also have problems with future estates that trigger the rule. In other words, knowledge of the RAP is a bellwether of the understanding of future interests. And, future interests are tested on the bar exam.

It has been argued that the rule is so hard to understand because it contradicts so many things law students and lawyers take for granted, for example that facts matter, that one should concentrate on probable or likely events, the custom, expectations and efficiency matter and that important people actually named in legal documents[2]. All of this is contradicted by the rule.

The importance of the rule in trust and estate law

Claims that the RAP was violated are typically used by heirs to try and get property outright when it was left in a trust. Most infractions of the rule involve class gifts. The rule is very important in drafting even though reported cases alleging a rule violation are few. Perhaps, because attorneys drafting wills pay attention. This underscores the importance of the knowledge of the rule for an attorney who wishes to specialize in trusts, wills and estates.

Those who only have a superficial acquaintance with the rule tend to use heuristics to avoid traps thereby potentially shortchanging their clients. Examples[3] follow:

1. "Beware of gifts to grandchildren." However, gifts to grandchildren very desirable if the trust settlors do not want probably to pause out right to children for tax or other reasons.
2. "Describe beneficiaries by name rather than by class designation." This may exclude after born grandchildren, will certainly often not in the interest of the testator.
3. "Beware of gifts contingent upon the taker attaining an age over 21". At age 21 many beneficiaries may not be mature enough to administer a large fortune and instead squander it.
4. "Avoid gifts conditioned on the survival of the 'widow' of a named person". Naming the current spouse intended by name avoids this trap, however, later spouses of a relative would not be considered.

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[1] https://www.jdadvising.com/understand-rule-perpetuities-pass-bar-exam/

[2] Donald Gjerdingen. 2017. *Gjerdingen's A Short & Happy Guide to the Rule: The Little Book on Perpetuities*. p 10-11

[3] MacGovern, William M., and Sheldon F. Kurtz. 2017. *Wills, trusts and estates: including taxation and future interests*.p 506-507

How it all began: The Duke of Norfolk's case

This judgment before the House of Lords in 1682 established the Common Law Rule against Perpetuities.

The earldom of Arundel was established in 1138, a included a castle and a large portion of Sussex. In 1647 Henry Frederick Howard was the 22nd Earl of Arundel. He wanted to preserve his large estates in the family but his eldest son, Thomas, was mentally ill and unlikely to marry and have children. After Thomas's passing everything would go to his second son, Henry, but not before. Thomas and Henry were both in their 20s when the Earl of Arundel was making arrangements for his succession. It was therefore not clear whether Henry would outlive Thomas or vice versa.

To support Henry, the Earl wanted to give the Barony of Grostock to Henry is so that he would have an income until the future of the earldom was decided.

If Niall Hendry would eventually inherited the earldom, he had no need for the Barony of Grostock, the barony was then to go to Charles, his third son.

The Earl of Arundel hired Sir Orlando Bridgeman, 1st Baronet of Great Lever, one of the leading jurists of his time, who drew up an instrument which conveyed Grostock to Henry subject to a shifting executory limitation in favor of Charles.

A few years after the instrument was created the Earl died, 25 years after his death, Thomas had died without leaving children while Henry was still alive. It was now time for the barony to shift from Henry to Charles, but Henry decided to keep the barony of Grostock emboldened by recently having been named the sixth Duke of Norfolk, a politically very important peerage.

Charles went to court and the case was handled by Lord Chancellor Nottingham, a personage who knew how to navigate high politics.

Chancellor Nottingham was sympathetic to the succession plans of the Earl of Arundel who wanted to provide for the contingencies of his own family and provision for the needs of his several sons. He opined that in the Chancery Court the equities were balanced towards Charles rather than Henry and that the question was fundamentally how far into the future this managing of contingencies should extend. His answer was that here "within the compass of a life" was not too long. Concrete, in this case, the life of Thomas the lunatic, was the compass of a life. If the contingency was resolved within the compass of a life there was no risk of a perpetuity.

The Duke of Norfolk's case is not really an illustration of the rule against perpetuities, instead, it is quite the opposite, it allowed the land to remain inalienable for the period of time the contingency was not resolved but within the compass of one live, in this particular case.

However, Chancellor Nottingham did not attempt to establish a universal rule of what was permissible as a contingency period.

As Professor Gjerdingen points out[4], the heart of RAP is "a limited period of inalienability as a concession to family unity and strategic planning. Only when in alien ability exceeds the base period do perpetuities appear". He extracts the following principles out of the Duke of Norfolk's Case:

- the rule is about donative transfers within the family
- it considers multiple possible futures which are not known at the time of the drafting
- will these contingencies be resolved?
- When will these contingencies be resolved?

The original rule which can be extracted from the Duke of Norfolk's Case is that the contingencies must be resolved within one generation defined as people alive when the conveyance was made.

The Extended Rule -Introduction

It took a century and a half from the Duke of lawful skills to the final formulation of the rule which added 21 years to the measuring life. While it is traditionally quoted in the form given by John Chipman Gray:

> No interest is good unless it must best, if at all, not later than 21 years after some live in being at the creation of the interest.

The following rendering is more explanatory [5]:

> The contingent future interest, if it is to be valid, must of logical necessity vest in interest, if it vests at all, within the lifetime of some person who was alive at the time of the creation of the future interest plus 21 years after such person's death.

The formulation "life in being plus 21 years" was initially designed to accommodate unborn children until they reach majority, later the 21 years which merely considered a reasonable time in addition to the life of the measuring individual. This extension allowed that yet to be born grandchildren could also be included. At its core, the rule allows non-alienation over two generations. The question then becomes when do generations start or end?

What interests are subject to the rule?

- Property interests

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[4] Donald Gjerdingen. 2017. *Gjerdingen's A Short & Happy Guide to the Rule: The Little Book on Perpetuities*. p 10-11 p.30

[5] Bergin, Thomas F., and Paul G. Haskell. 1992. *Preface to estates in land and future interests*. Mineola, N.Y.: The Foundation Press. P. 181

- Only interest created in the transferee, i.e., the remainder or an executory interest. Interest created in the transfer role such as reversion, possibility of reverter, or right of entry are not affected
- The interest must be subject to a contingency

A brief review of Estates

Estate	Language	Duration	Transferability	Future interest
Fee simple	"To A and his heirs" modernly "To A"	Absolute ownership of potentially infinite duration	Devisable, descendible, alienable no fee tail	
Fee tail	"To A and the heirs of his body"	Lasts as long as there are lineal descendants	Passes automatically to lineal descendants	Reversion (if held by grantor)
				Remainder (if held by third-party)
Defeasible fees				
Fee simple determinable Memory aid: term = Old French limit in **time**	"To a so long as…" "To AI until… " "To A while …" Clear **durational** language	Potentially infinite if event never occurs	Alienable, devisable, descendible subject to condition	Possibility of reverter (held by grantor) Memory: **Revert back in time**
Fee simple subject to a condition subsequent	"To A but if X event happens, grantor reserves the right to reenter and retake."	Potentially infinite, provided the condition is not breached and, if breached, until the holder of the right of entry time to exercise the power of termination	As above	Right of reentry/power of termination (held by grantor) Memory aid: **Subsequent reentry condition**
Fee simple subject to and executory limitation *executory means taking full effect*	"To A but if X event occurs, then to B." *Note that the same 'but if" language is used*	Potentially infinite as long as stated contingency does not occur	As above	executory interest (held by third-party). *Note language the present estate creates a fee simple*

at a future time, perhaps in distinction to the right of reentry which does not automatically defeat the fee.	*as above, however, here, because third parties are involved, termination happens automatically, it is not only a power or right but operates automatically by law*			*subject to an executory limitation but the future interest is an executory interest.*
Life estate	"To A for life" "to A for life of B"	Measured by life of transferee or by some other life	Alienable, devisable and descendible is for altering the in if por autre vie and measuring life is still alive	Reversion (if held by grantor)
				Remainder (if held by third-party)

Future interests

Future interest can be dichotomized into those held by the grantor or held by somebody else other than the grantor.

Future interests held by the grantor

- Possibility of reverter
- The right of entry/power of termination
- The reversion

Future interests held by a transferee

- vested remainder
    - indefeasibly vested remainder
    - vested remainder subject to complete defeasance
    - vested remainder subject to open
- contingent remainder
- executory interest
    - shifting executory interest
    - springing executory interest

The first step of the analysis consists of deciding whether a remainder is vested or contingent.

- Please note that remainders are always created in a grantee, not the grantor or originator.
- Also, remainders never follow defeasible fees this is because a remainder cannot cut short or divest a prior transferee. As Professor Franzese puts it, the remainderman is always patient and polite [6].

A remainder is vested if it is both created in and ascertained person and not subject to a condition precedent.

A remainder is contingent if it is created in unascertained or unknown person or is subject to a condition precedent or both.

The second step consists of distinguishing the three types of vested remainders.

- The indefeasibly vested remainder. This is self-explanatory.
- The vested remainder subject to complete defeasance. The remainderman's right to possession or time with the land could be cut short because of a condition subsequent
- The vested remainder subject to open. The remainder is vested in a class of takers at least one of whom is qualified to take possession but as the additional takers, not yet ascertained, may be added to the class. According to the rule of convenience, the class closes whenever any member can demand possession.

The third step consists of distinguishing remainders from executory interests

Memory aid: An executor cuts off your head, and executory interest cuts off the enjoyment by a transferee through another transferee, this is called a shifting executory interest, or cut short the enjoyment by the originator or grantor, this is called a springing executory interest.

Another memory aid: The executioner is the holder of an executory interest who can cut short somebody else's otherwise limitless entitlement to property.

"No interest is good unless it must vest, if at all, …"
Memory aid: "Will the contingency be or not be, that is the perpetuities question" adapted from Hamlet.

What does this mean? Something must happen during the measuring life plus 21 years, but what exactly? The formulation is a little bit obscure. The key is to understand that the contingency must be resolved and resolved means the following: At the time when the instrument took effect one could know with certainty that during the contingency period (life in being plus 21 years) the contingency would either happen or not happen. If it is determined that the contingency will not be resolved as either to happen or not to happen, in other words,

[6] Franzese, Paula A. 2012. *A short and happy guide to property.* p, 28

any amount of uncertainty will invalidate the interest or make it “un-good”. The approach is one of mathematical logic, not everyday common sense.

The effective date for the instrument is in case of wills the death of the testator, the same applies for a testamentary trust or a revocable inter vivos trust. In contrast, for a revocable trust in deeds the effective date is the date the instrument was executed. The practical consequence of this is that the revocable trust shifts the effective date forward one generation.

How long is the period?

The rule against perpetuities essentially carves out out two generations for non-alienability. The first generation is the life in being, validating life or measuring life. The second generation is encompassed by the 21 year. Gestation period is added to the 21 years, so it could be 21 years plus 9 months.

What is the measuring life?

The measuring life must be a real person, not a corporation or some long living animal. However, the measuring life and does not need to be a single person but could be a class of persons and “the life in being” would be the last person to die. For example, in one famous case all the then living relatives of Queen Victoria, more than 100 persons, were named as the measuring life. It would also be possible to name 10 healthy newborns.

Strangely confusing is the fact that the measuring life need not be mentioned in the instrument. There is a simple explanation for this phenomenon, the drafter may not have actually considered the Rule against Perpetuities, and it is up to the court to decide whether there was a rule violation.

If there is no measuring life stated, what is one to do?

The measuring life must in some way connect to the contingency. That person may not even be mentioned in the instrument and people who are mentioned may not connect to that specific contingency. In other words, the question is what contingency are we expecting, what is to happen, and who could influence this?

In fact, to make the contingency valid, the person examining the instrument must find that validating life, the measuring life which makes the interest “good”.

Application of the Rule

In any RAP case either validating life can be found or an invalidating story be told, these are mutually exclusive. When confronted with an instrument it does matter how one proceeds. For example, if one tries to validate the rule by finding the measuring life which validates it and there is none, one may go down the garden path and lose valuable time. The reverse is true if one tries to concoct an invalidating story, but this is the wrong approach because of validating life exists.

Professor Gjerdingen recommends to make a good first guess which way to turn by using three rules of thumb[7] :

1. Valid. Does Nottingham's rule apply? Remember in the Duke of Norfolks's case the contingency was limited to one living named person, the mentally ill Thomas. Resolution was possible during the "compass" of one person's life.
2. Invalid. More than two generations are involved in resolving the contingency.
3. Classic traps. There are only six of them and they will be mentioned in the following.

Proving the validating side by naming a validating life

The task is to find a person who is alive on the effective date - remember, for a will the death of the testator, for a inter vivos trust the date of the execution of the instrument - during whose life plus 21 years the contingency will be resolved. For example, the gift is to the testator's grandchildren who reached the age of 21. The children of the testator are living at the time of the death of the testator, they are measuring lives, 21 years after their death, there are grandchildren or not who have reached the age of 21. Now assume, that the grandchildren have to reach the age of 25. Here in invalidating story could be told as follows, none of the children then alive at the time of the testator's death have children of their own until one year before the death. Air 21 years and none of the grandchildren could have reached the age of 25.

Proving the invalidating side – The perpetuities storyline

Professor Gjerdingen maintains that there is only one recurrent story of rule violation, perhaps somewhat in analogy to the so-called "Seven Basic Plots". Regardless, here is the storyline:

1. After-born persons affect the contingency. Typical example: A child is born after the effective date, the appearance of the star of Bethlehem, which makes it unsuitable for measuring life.
2. The big killing off. Now take a cue from the economists, assume everybody else away. That is everybody alive at the time of the effective date no longer exists for the analysis. Nobody else but the after born individual affects the contingency.
3. Resolution within 21 years? Can the interest be resolved within the 21 year. Note that we have simplified the situation by eliminating all possible measuring lives, they are all dead, and the after born child cannot be a measuring life. What is left is the 21 you.

Professor Gjerdingen continues to emphasize that it does not matter what did happen or what is likely to happen after the effective date but what could happen. He also alerts the unveiling about the somewhat peculiar assumptions of the common law that anybody alive on the

[7] Donald Gjerdingen. 2017. *Gjerdingen's A Short & Happy Guide to the Rule: The Little Book on Perpetuities*. p 10-11 p.53

effective date no matter age or sex is able to have children, furthermore, as assumed in item 2, any number of persons alive on the effective date can die together at any time.

The first guess

If the Nottingham's rule applies, the interest is valid. The named person is the measuring life.

Look for classic traps or whether there is more than two generations, in either case the interest is invalid.

This is just the first screen, based on the outcome, proceed with trying to find an invalidating or validating storyline.

Common cases and classical traps

1. Nottingham's rule: Any contingency affecting a designated person alive on the effective date is valid. It is okay to remember this as "first generation gifts".
2. Gifts to children – Will or Revocable Trust
   Any contingency linked to children by name is covered, i.e., valid. No children can be conceived after the effective date, the death of the donor. Therefore, even if the open term children is used, the interest is valid according to the rule. The children are the validating lives. Please note that the situation is not unlike the one given in 1. under Nottingham's rule.
3. Gifts to grandchildren – Will or Revocable Trust
   Grandchildren as second-generation are treated differently than children. Two situations are possible

   - any contingency involving grandchildren alive on the effective date and named is valid
   - for any grandchildren born after the effective date, that is unknown to the donor, the contingency must be resolved within 21 years
   - If the term grandchildren is used, then all gifts must be resolved within 21 years or fail.

4. Gifts to Children - Irrevocable Trust

   One must pay attention to whether an irrevocable trust or will is used as an instrument. As we have seen, in a will two generations are typically covered such that any contingency involving named grandchildren alive on the effective date is valid. An irrevocable trust, in contrast, adds a generation because the grantor is still alive. Putting

it another way, one generation has been used up. Therefore, it works for grandchildren if they have been named, see below, and for children as follows.

- According to Nottingham's rule for any named to children alive on the effective date the interest is valid
- For any children born after the effective date, the contingency must be resolved within 21 years
- in analogy to the above grandchildren, If the lass designator children is used, then all gifts must be resolved within 21 years or fail.

5. Gifts to Grandchildren – Irrevocable Trust

   Afterborn children are possible in an eerie revocable trust because the settlers still alive. This puts limits on what can be done for grandchildren because they are the third generation.

- Nottingham's rule covers gifts to named grandchildren
- any gift using the class designation "grandchildren" is invalid

The classic traps of the RAP

- Age contingencies in excess of 21 years
- Gifts to the grandchildren of a person now alive
- Irrevocable trust versus revocable trust of wills
- Fertile octogenarian
- Unborn widow
- Administrative contingency

Let us examine them individually.

1. Age contingencies in excess of 21 years

As we have seen, second-generation gifts must be resolved within 21 years. Second-generation gifts would be to grandchildren in a will but only to children in the trust because in a trust the first generation, the donor, is still alive. Second-generation gifts must be resolved within 21 years.

For example, "To my children, then to my grandchildren who reached the age of 25". Assume that a is the settlor or testator. Age limits in excess of 21 years for grandchildren are a red flag, the exception would be if the grandchildren are individually named.

For example, if child dies less than four years after grandchild is born, the achievement of age 25 in grandchild cannot be resolved within 21 years after the death of the child (one generation alive at the effective date plus 21 years from their death).

A wrinkle for the connoisseurs: it makes a difference whether it is age 21 versus 21st birthday, the latter does not comply with the rule.

This trap can be avoided by mentioning the grandchildren by name, the named person is a validating live. This sets up an effective defense.

2. To the grandchildren of a person now alive

This situation involves three generations. While a gift, either in a revocable trust or through a will, to the donor's own grandchildren who reached the age of 21 is valid, a similar gift to the grandchildren of others is not.

The reason that this is not valid is because it tries to control three generations. Typical wording: "To the children of A for their lifetimes, then to the grandchildren of A who reached the age of 21".

It is crucial to know that he is alive in this situation, if he were dead on the effective date of the instrument, the rule is not violated because only two generations are involved. In this case the children of A become the validating lives.

To examine the scenario according to the invalidating story advanced above the following steps occur:

a. The after born child. Assume that a child C is born to a after the effective date of the instrument.
b. The big killing off. Further assume that A dies and all the children who were alive at the effective date will die as well.
c. Later born grandchild. C is alive and has a child more than 21 years later. It follows, that the rule has been violated

As before, naming the grandchildren prevents anybody from assuming that there might be the afterborn grandchild.

3. Irrevocable trust versus revocable trust or will

This arrangement also involves three generations. Assume that A is the settlor of an irrevocable trust. A gift to "the grandchildren of A who reached the age of 21" violates the rule because the generations are involved. This is a version of the scenario of a gift to the grandchildren of a person now alive. If a wood writer will bequeathing the property to his grandchildren in the world would be valid because these are not grandchildren of a person than alive, because the grantor is dead. Remember the effective date for an irrevocable trust is the day the trust was executed, for revocable trusts or will it is the person's death. A dead person will not be counted in the number of generations which are controlled

4. The fertile octogenarian

The fertile octogenarian is a humorous variant of the three generation problem. We explained above that gifts to grandchildren of a person now alive violate the rule unless they are specifically named. This is because the child could be born after the effective date, the death of the testator. For the rule every person regardless of age is assumed to be fertile, i.e., able to have children.

This underscores the philosophy of the rule which does not consider likelihoods, common sense, circumstances etc. but is mechanical. In this particular case the rule is not altogether ridiculous because adopted children could assume the place of natural children. Furthermore, when is it entirely impossible to have children?

5. The unborn widow – the Rosicrucians lose

The problem with a gift to a widow is that the term is "subject to open". Assume the bequest is to "my daughter, A for life, then to my daughter's widower for life, then to the Rosicrucian Order". Assume the widower dies, then A marries a much younger man who was born after the effective date, consequently not a live in being at the effective date. According to the formula, the interest of the Rosicrucian Order cannot be resolved during the perpetuities period and will therefore fail.

6. Administrative contingencies – The slothful executor

Any provisions such as "to A after the pandemic is over", "to be when probate is settled", are time periods which are indeterminable. They should be avoided. If not, a measuring life should be identified for these events.

Five steps to attack rule problems

1. Determine the type of instrument

the type of instrument will dictate the effective date. For example, for will and revocable trust is the death of the grantor, for an irrevocable trust, the date of the creation of the trust. Measuring lives may be expressly identified by name, they should be reasonably number and easily identifiable. The instrument is valid if the contingency can be resolved within 21 years after the death of the persons named.

2. Requirements of the contingency

If measuring lives cannot be expressly identified, the requirements of the contingency and the persons satisfying the contingency need to be identified. Differentiate between named persons or persons that are identified with particularity and open term.

3. Who is alive?

Who is alive on the effective date and able to control the contingency identified above?

4. Use the heuristics or rules of thumbs described previously

- Nottingham's rule. Does the contingency involve the named living person? If this is the case, it does not violate the RAP.
- Two generations. If more than two generations on board, the contingency is invalid.
- Classic traps?

5. The instrument is valid – Name the validating live

if the contingency can be resolved according to Nottingham's rule only involves two generations, there should be at least one validating live. Identify it. Determine the relevant live still alive, this may require a look outside the instrument and investigation. Evaluating life can only be found about amongst the relevant laws. Finally, name the validating person into the proof. In other words, show that the contingency can be resolved within a period of 21 years after the date of the validating live.

6. Tell the invalidating story if above does not apply

if the contingency violates the rules of thumb, proof of invalidity should be possible. From the effective date of the instrument go forward and consider what could happen regardless of how remote. Use the special assumption about fertility and the intent of the invalidating story using the standard three-step storyline.

Conclusion

The Rule against Perpetuities is not as inscrutable as may appear upon first encounter. While there are a number of advanced topics, the above will cover most practical and hopefully examination scenarios.