

Comments on Perpetuities Problems

Note: “→” means a grant; “⇔” means a devise. All named persons (except for testators) are alive when the interest is created, unless otherwise stated.

1. O → A and his heirs so long as the land is used for residential purposes.

A has a fee simple determinable. O has a possibility of reverter.

Future interests in a grantor are not subject to the Rule Against Perpetuities.

2. O → A and the heirs male of his body, then to B and his heirs.

If a fee tail is recognized, A has a fee tail male and B, a vested remainder. It is “vested” because it is certain to take when and if A runs out of female lineal descendants. The only condition is the expiration of the prior estate.

Vested remainders are not subject to the Rule Against Perpetuities.

3. O → A for life, then to the first-born child of B for life, then to C and his heirs. B has no children.

A has a life estate. There is a contingent remainder in the first-born child of B for life. C has a vested remainder in fee simple.

If the Doctrine of Destructibility of Contingent Remainders is in effect, then A could be used as a measuring life, because if B had no children by the time A died, there contingent remainder would be destroyed, and the property would go straight to C. In other words, the contingent remainder in B’s unborn child would have to either vest or fail within 21 years of A’s life. (B could also be a measuring life – see below.)

If there is no Doctrine of Destructibility of Contingent Remainders, O has a reversion in fee simple on executory limitation. (The reason for the last is that A might die while B is still alive and childless. The property would go back to O, waiting to see if B had a child. If B did, then that child would get the Blackacre for life. If B died childless, the property would go to C.) The contingent remainder is valid under the Rule because it will vest, if ever, when B’s first child is born. That will be no later than (possibly 9 months after) B’s death.

4. O → A and his heirs until a cure for insomnia is found, then to B and his heirs.

O has attempted to create a fee simple subject to an executory limitation in A, with a shifting executory interest in B. O would have nothing.

B’s interest violates the Rule Against Perpetuities. It will vest when a cure for insomnia is found. That might be many sleepless nights from now, taking us far beyond the perpe-

tuties period. The courts would likely say that A has a fee simple determinable and O a possibility of reverter. Note that O could have accomplished her intention by conveying a fee simple determinable to A in one grant, and conveying her possibility of reverter to B in a second grant. Since B would then have a possibility of reverter, it would not be subject to the Rule Against Perpetuities.

5. O → A and his heirs until a cure for insomnia is found during the lifetime of someone living at the time of this grant, then to B and his heirs.

Once again, O has attempted to create a fee simple subject to an executory limitation in A, with an executory interest in B. O would have nothing.

B's interest is invalid. The courts will not permit the measuring lives to consist of such a large and indeterminate group. It is not clear what the courts would do after striking down B's interest. It would likely not be sufficient simply to pencil out everything after "then." The grant would still be unacceptably vague. Possibly, the court would void the entire conveyance. Or, especially if this were a trust or will, the court might reform the instrument in some way to reflect what it thought was the grantor's intent.

6. O → A and his heirs until a cure for insomnia is found, then to B for life.

A has a fee simple on executory limitation. B has an executory interest in a life estate, which will become possessory if a cure for insomnia is found.

B's interest is valid under the Rule Against Perpetuities. Because it is a life estate, it must vest, if ever, during B's life. (A life estate cannot be devised or inherited, so there is no way that B's heirs or devisees would take the property if a cure for insomnia were found 100 years from now.) Note that in No. 2, we could *not* have used "B's children" as the measuring lives, even though they had a contingent remainder in a life estate, because they were not alive at the time of the grant. (In fact, even if B had had one child alive at the time of the grant, we could not have used the class of B's children as the measuring lives, because so long as B was alive, there might be "afterborn" children — children born after the grant.)

What about O? Whatever O has, it's a future interest in a grantor and therefore not subject to the Rule. O apparently wanted the property to come back to him after a cure for insomnia was found, with a "detour" to B for life if the cure was found while B was alive. Thus O would have a reversion and a possibility of reverter. (Another way that one might use to get around the Rule would be, "O → A and his heirs until a cure for insomnia is found, then to B and his heirs if B is alive when the cure is found." [That would, of course, give B a different interest from the one in number 6.] O would then have nothing. The essential point is to see that B's interest complies with the Rule Against Perpetuities because *if* it ever vests, it will do so during B's life.)

7. **O → A and his heirs until A finds a cure for insomnia, then to B and his heirs.**

A has a fee simple on executory limitation. B has an executory interest in fee simple, which will become possessory if A finds a cure for insomnia. O has nothing.

B's interest is valid under the Rule Against Perpetuities. It must vest, if ever, within A's lifetime, since the condition is that A find a cure for insomnia.

8. **O → The Insomnia Institute, provided that if a cure for insomnia is found, then to the Society to Cure Sleeping Sickness.**

The Insomnia Institute has a fee simple subject to an executory limitation, and the Society to Cure Sleeping Sickness has an executory interest. O has nothing.

The Society's executory interest is not subject to the Rule Against Perpetuities. Where there is a gift to a charity, with a gift over to another charity, the Rule does not apply. Note that both the present possessory estate and the future interest must be held by charities for the exemption to work. Why would the courts not exempt a grant like "O → The Insomnia Institute, provided that if a cure for insomnia is found, then to A", for example?

9. **O → A for life, then to B and his heirs if any of C's children conquers diabetes.**

(a) *Suppose C is alive and has 2 children.*

A has a life estate. B has a contingent remainder in fee simple. O has a reversion.

Note, to begin with, that there is an ambiguity in the grant. To "conquer diabetes" must one of C's children (a) find a cure for it, or (b) just overcome it personally? And what does "overcome it" mean? That he or she gets diabetes and then is cured of it, or that he or she gets diabetes and learns to manage it successfully? Or would it be enough if one of C's children avoided getting diabetes in the first place, beating the odds of a long family history of diabetes? Would these ambiguities matter? It turns out that it would not matter for the analysis of the Perpetuities problem, for reasons that should become clear below. But they would matter to the practical question of when the interest vests. If the grantor meant (a), then the interest would vest only if one of C's children found the cure. Further, if someone other than one of C's children found the cure, it would no longer be possible for one of C's children to find the cure (since it could be discovered only once), destroying the remainder. If the grantor meant (b), then it would depend on the particular health records of C's children.

If the Doctrine of Destructibility of Contingent Remainders is in effect, then B's interest must vest no later than the time that A dies; otherwise, it will be destroyed. Thus, B's contingent remainder is valid under the Rule Against Perpetuities.

If the Doctrine is not in effect, B's interest would not be destroyed if A died before any of C's children conquered diabetes. The property would go back to O, in fee simple on executory limitation, with B holding an executory interest. This executory interest vio-

lates the Rule Against Perpetuities, because there is no assurance that diabetes will be conquered by one of C's children during the lifetime (plus 21 years) of anyone alive at the time of this grant. The problem is that C, being alive, could have another child born a year after the grant. (Note: a child born within 9 months after the grant would qualify as a "life in being" — someone alive at the time of the grant.) Then everyone else — O, A, B, C, the two children of C who *were* alive at the time of the grant, and anyone else you might think of — could die; then 30 years from now, that last child, born a year after the creation of B's executory interest, might conquer diabetes. That would take place within the lifetime of the third child of C, but that third child cannot be a measuring life because she was not in existence at the time the grant was created. In other words, there is no one you can point to and say, that person was alive at the time of the grant, and will *certainly* be alive (or dead no more than 21 years) when (if ever) one of C's children conquers diabetes.

(b) *Suppose C is dead, and is survived by 2 children.*

A has a life estate. B has a contingent remainder in fee simple. O has a reversion.

Here, B's interest is valid, even if there is no Destructibility. It will certainly vest, if ever, within the lifetimes of C's two children. The difference between (a) and (b) is that we can use C's children as the measuring lives in (b); because C is dead, there's no possibility of an "afterborn" child of C (i.e., born after the grant) discovering the cure for insomnia at some remote time.

10. O → A for life, then to the first of A's children to reach age 25. A, who is 60 and is a widower, has two children, A1 (aged 18) and A2 (age 22).

A has a life estate. There is a contingent remainder in the first of A's children to reach age 25. Note that this is *not* a contingent remainder in A1 and A2, because any of A's children — and A, being alive, might always have more children (i.e., A3 or A4) — could end up being the first to reach age 25. The contingency is that *some* child of A be the first to reach age 25, not that either A1 or A2 in particular be the first to reach age 25. O has a reversion.

If the Doctrine of Destructibility is in effect, the interest would be valid. We know, no later than A's death, whether the interest would vest. If A1 or A2 didn't manage to be the first to reach age 25 by the end of A's life, it wouldn't matter if they later did so. It would be too late. For example:

2006: O → A for life, then to the first of A's children to reach age 25.

2007: A dies, leaving A1 (aged 19) and A2 (age 23) behind.

2009: A2 becomes the first child of A to reach age 25.

As of 2007, O would own a fee simple, and that would not change in 2009; A2 would get nothing.

On the other hand, if the Doctrine of Destructibility of Contingent Remainders is not in effect, the contingent remainder would be invalid under the Rule Against Perpetuities. If A died leaving some children, but none having yet reached age 25, the property would go back to O, who would hold it in fee simple subject to an executory limitation in the first child of A to reach age 25. That condition – that a child of A be the first to reach age 25 – would be resolved at whatever time one of A’s children became the first to reach age 25.

The reason the interest is invalid is that there is no one you can point to and say, “we will know within that person’s lifetime, or no later than 21 years after their death, whether a child of A is ever going to reach age 25.” You might think that we could say that of A; after all, if A were to drop dead tomorrow, we would know within 21 years of A’s death (in fact, within 3 years of his death) whether A1 (who’s 22) would be the first to reach age 25. Unless A1 dies before his 25th birthday, he’ll be the first. Even if A1 died at age 24, we would still know within 21 years of A’s death if A2 were going to be the first to reach age 25. A2 is 18 at the time of the grant, so we would have to wait only another 7 years to find out whether she’d be the one. The problem is that A, being alive at the time of the grant, could have another child born A3 shortly after the grant. Then everyone else — O, A, A1, A2, your neighbor (basically, any given individual you might think of) — could die. Then 25 years later, that last child A3, born shortly *after* the creation of the contingent remainder, might reach age 25, and be the first of A’s children to do so. That would take place within the lifetime of the third child A3, of course, but A3 cannot be a measuring life because she was not in existence at the time the grant was created.

11. O → A and her heirs one day after B is buried.

A has a springing executory interest in fee simple, which will become valid the day after B is buried, and O has a fee simple on executory limitation. (Note: there is no substantive difference between a “springing” and a “shifting” executory interest, so you need not worry about the distinction.)

A’s interest is invalid under the traditional application of the Rule Against Perpetuities. There is no guarantee that B will be buried during the lifetime plus 21 years of anyone alive at the time of the grant. The most obvious candidate, B, cannot be a measuring life, for it might be decades after B died before he was buried. There is no basis for being certain that B will be buried within the lifetime plus 21 years of A’s life or O’s or anyone else. Consequently, O has a fee simple.

12. O ⇔ A and his heirs upon A’s graduation from law school.

O’s heir or residuary legatee has a fee simple on executory limitation. A has an executory interest.

A’s interest is valid. Even if it took more than 21 years to get through law school, the interest could never vest beyond A’s lifetime.

13. O → A and his heirs 25 years from now.

O has a fee simple on executory limitation. A has a springing executory interest.

There is some disagreement among the courts and commentators as to whether A's interest is subject to the Rule Against Perpetuities. A's interest is certain to become possessory 25 years from now, and it is like a vested remainder in that respect. Yet obviously there is no one we can point to and say with certainty that the interest will become possessory within 21 years of *that* person's death.