Comments on Perpetuities Problems at Supp. 276

Note: In the Problems that follow, "→" means a grant; "⇨" means a devise. All named persons (except for testators) are alive when the interest is created, unless otherwise stated.

These comments primarily focus on how the Rule Against Perpetuities (RAP) would be applied in its classic "what might happen" form. That is, future interests that are subject to the RAP are tested as of the time they are created. The question is whether, at the time at which the future interest was created, it might vest remotely, or to put the same thing differently, whether as of the date of the creation of the interest, we can know for certain, one way or the other, whether the interest will ever vest. What *actually* happens subsequent to the creation of the interest is not relevant.

For each of the Problems in which RAP would invalidate a future interest, think also how various modern reforms might affect the analysis. Reforms to the RAP are discussed at CB 236-237 – in particular, notes (1) Specific Statutory Reforms, (2) Wait-and-See, and (3) USRAP, which a number of states including Florida [map] has enacted.[1]

To the list of reforms in the casebook, add *cy pres* or as it's also called, immediate reformation. That is, on their own, or more typically based on statutory authorization, courts may rewrite a grant in a way that avoids a perpetuities violation, but doing so in a way that gives effect as much as possible to the grantor's intent. See No. 9 below for one such example.[2]

♦ *Final exam note*: Unless an exam question tells you otherwise, for any perpetuities issue you might see, you should analyze the issues under the classic "what might happen" approach and then discuss how reforms might change the outcome.

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 RAP.

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

Note: There is no class gift here. Make sure you read the grants carefully. After A dies it goes to the first-born child of B, not to B's children. Note also that *B* has no interest in Blackacre; it's *B's first-born child*.

[1] No need to worry about the reading in (4) (Qualified Abolition of the Rule and the Rise of the Perpetual Trust). Also, with respect to USRAP, you need not be concerned with the details (including the details of the Florida USRAP) – just with the general concept: the future interest will not be invalidated before 90 years, and if it hasn't vested by 90 years, the court will, if possible, reform it so it does vest.

[2] If you google the term you may notice that "*cy pres*" is used in other contexts as well – some related to what we're studying here and some not. All you need to know about it is what's set out here.

(a) If the state has abolished the DDCR, as we will assume, the interests are:

A has a life estate. There is an executory interest *in a life estate* in the first-born child of B. O has a reversion in fee simple on executory limitation. We would call the interest in the first-born child of B an executory interest, because there could be a gap: A might die while B is still alive and childless, in which case the property would go back to O (or whomever O had sold it to, or if O were dead, O's devisee or heir under the intestacy statute), waiting to see if B had a child. If B did have a child, then that child would get Blackacre for life. If B died childless, the property would go to C. C's interest is a vested remainder (more on that below). Vested remainders are not subject to the Rule Against Perpetuities, so there is no need to apply the RAP to *C's* interest.

The executory interest in B's first-born child is valid under the Rule because it will vest, if ever, when B's first child is born; and that cannot possibly happen later than B's death (or 9 months after B's death, if B is the father). We can use B as the measuring life to validate the interest in B's first born child under the RAP.[3]

Note that while we can use *B* as a measuring life, we cannot use *A* as the measuring life. There is no guarantee that the first-born child of *B* will be born during *A's* lifetime, or within 21 years of A's death. To confirm that, construct a "remote vesting scenario." For example:

2025: O → A for life, then to the first-born child of B for life, then to C and his heirs. B has no children.
2026: A dies; B is still alive, with no children. The property reverts back to O in fee simple on executory limitation.
2056: B's first child is born. That child would now get Blackacre for life. But this is more than 21 years after A's death.

But, you might ask, how do we know – at the time the grant is made in 2025 – that this scenario will actually happen? We don't. What matters under the classic "what might happen" approach of the RAP is that *we don't know it won't happen*. Only if we are certain as of the date of the grant (or will) that there is no remote vesting scenario at all does the future interest avoid invalidation under the RAP.

This may lead you to ask a second question. What do we make of the fact that B can be a measuring life who validates the interest under the RAP, but A can't be one? The answer is, that's fine. All we need is to be able to point to at least one person who can be the measuring life – that is, one person who we can point to and say, "we don't know if the interest will ever vest (i.e., whether B will ever have a child), but we do know that the question of whether B has a child will be resolved within B's lifetime, and B is someone

[3] The casebook suggests the term "validating life" rather than "measuring life." CB 230. Either is fine to use; "measuring life is more commonly used.

who was alive at the time of the grant." It doesn't matter that B is the only measuring life in this grant.

You might also wonder – maybe the spouse with whom B has their first-born child could be a measuring life? There's no practical need to think about that, because B can be a measuring life. But in fact, under the "what might happen" approach of the classic (i.e., non-reformed) RAP, we can't use B's spouse. The reason is that B's spouse might have been born *after* the grant was made in 2025.[4] Again, it doesn't matter here; B can be the measuring life.

You might also wonder about frozen embryos and the possibility that B might become a parent decades after dying. Courts don't take that into account, because the effect would be to invalidate many more interests than the classic rule would invalidate.

As to *C's* interest, you might wonder, do we need to worry about remote vesting of C's interest? No, because as noted above, C's interest is a vested remainder, and the RAP does not apply to vested remainders. Why is it vested? Because it is certain that eventually C will get Blackacre. There is no condition on C's interest other than the expiration or failure of the interest in B's first born child. Note especially that there is no requirement that C be alive at the time C's interest becomes possessory. For example, if C dies the day after the grant is made, the interest will be held by whoever C names in her will, or if there is no will, whoever gets C's property under the intestacy statute.

Finally, you might wonder why we call C's interest a remainder at all. As the grant is written, it does not directly follow a life estate; it follows B's first-born's interest, which – in light of the abolition of the DDCR – we treat as an executory interest. Isn't one of the three necessary tests for an interest being a remainder that it follow a life estate? That is correct, but it's enough that a future interest such as C's follow a life estate or *a future interest in a life estate* (*i.e.*, a future interest that will be a life estate if it becomes possessory, as is the case with B's first-born's interest).[5]

(b) In case you're wondering, if the state still observes the DDCR, then the court would read the grant as follows:

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[4] Normally, one would expect a grant like "to the first-born child of B" to be made to someone who was at or near child-bearing age. Thus for B to have a child with a spouse born after the grant was made in 2025 would imply a significant age difference between B and B's spouse. But even if that seems unlikely, the "what might happen approach" asks what is possible, not what is likely.

[5] Another way to put it is this: C's interest follows a life estate (A's or that of the first-born child of B, depending on the facts). It will become possessory immediately upon the termination of A's life estate (if B never has a child) or the life estate in B's first-born child's (if B has a child). And C's interest does not cut off any preceding estate. It is vested because there is no condition other than the death of A (or B's first-born, as the case may be) for C's interest to become vested in possession. Remember, too, that if C predeceases A and B's first-born child, C's interest would not disappear. It would be held by whoever had that interest – that is, C might have sold it someone, transferred it for free, or left it in a will, or might have gone to one of C's heirs through intestate succession under the relevant state statute.

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.

Why would the interest in the first-born child of B be referred to as a "contingent remainder"? After executory interests were created by the Statute of Uses (1536), the common law courts still sought to apply the DDCR where possible. *Purefoy v. Rogers* (1670) provided that if a future interest *could* be construed as a contingent remainder, it *would* be so construed, and made subject to the DDCR. That is so in this case, and in grants 8 and 9 (and not so in case of grants 1, 3-7 and 10-12). So where the DDCR was in effect, the Rule in Purefoy's Case would apply.

Here, A could *also* be used as a measuring life, because if B had no child by the time A died, the contingent remainder in B's first born 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 (really, within A's lifetime). As already noted, B could also be a measuring life.

♦ *Final exam notes*:
(1) You will not need to apply the DDCR on the final exam; you may assume the relevant jurisdiction has abolished it. In these comments, I will generally also set out what would happen if the state had not abolished the DDCR. The contrast between how the RAP operates when the DDCR is in effect and how the RAP operates when it is not in effect *may* help you better understand how the RAP operates. If it does, read the explanations below as to how the RAP would operate if the DDCR were in effect. If it doesn't help you, then there is no need to read them.
(2) As noted, don't think about frozen embryos when you're applying the RAP in the context of a birth contingency.
(3) For accuracy, I should note that the RAP does need to be considered in the case of vested remainders subject to open and vested remainders subject to divestment. But you are *not* responsible for those two types of interests.

3. 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 perpetuities period. The courts would likely say that A has a fee simple determinable and O a possibility of reverter. In other words, the effect of applying the RAP would be this:

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

Note that *today* 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. That is:

Step 1: O → A and his heirs until a cure for insomnia is found.
Step 2: O → B.

After Step 2, A would have a fee simple determinable, and B would have a possibility of reverter. (Remember that a future interest keeps the label it has when first created.) Since B would then have a possibility of reverter, it would not be subject to the Rule Against Perpetuities. (It's also worth noting that this approach would not have been possible during the period when the English courts fashioned the RAP, because at that time a possibility of reverter could not be alienated *inter vivos* or devised; it just passed on to the holder's heirs. As noted, when we are doing estates and future interests and the RAP today, you should consider all future interests to be fully alienable, devisable, and descendible by intestate succession.)

You also need to remember to apply the rule *as of the date the interest is created, not in light of later actual events* – the "what might happen approach." Suppose grant in Problem 3 had been made in 2025, and in 2026, a cure for insomnia were found. Would B get Blackacre because the executory interest became possessory within the lifetime of someone who was alive in 2025 (here, O, A, and B, assuming all are still alive)? The answer is no, not under the "what might happen approach." At the time the interest was created (2025), there was no way to know, one way or the other whether B's interest would become possessory in 2026, 2036, 2136, or never. Suppose the cure for insomnia were found in the year 2225, two hundred years after the grant was made. That is well beyond (certainly more than 21 years beyond) the lifetime of anyone alive in 2025. So the interest is invalid. It does *not* matter, in the "what might happen approach" of the common law, what actually happens.

4. 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. (Note: "executory limitation" and "executory interest" are two different and acceptable ways of saying the same thing.)

B's interest is invalid. This is an example of an attempt to put in a perpetuities savings clause (see CB 234): that is, first create a present possessory interest that could go on for a very, very long time, together with a future interest that would be a prime candidate for possibly vesting some very, very long time from now ("O → A and his heirs until a cure for insomnia is found, then to B and his heirs"), and then add some condition that will put a time limit on the duration of the condition, while allowing it to last as long as possible.

The best way to accomplish this aim is to pick a large group of people as the measuring life. For example, the late Queen Elizabeth had four children, eight grandchildren, and fourteen great-grandchildren (all of whom are currently alive). So the condition could be created this way: "O → A and his heirs until a cure for insomnia is found within the lifetime of any of Queen Elizabeth II's descendants living at the time of the grant, then to B

and his heirs." Out of this group of 26 people, at least one person is likely to live to a very old age, potentially making the duration of the condition around a century. Further, given the status of Queen Elizabeth and of people who are members of the royal family generally, it's reasonable to expect that it will be possible to learn when the last of them dies.

Why not just pick, say, the youngest of her descendants alive at the time the grant is made to be the measuring life? That might seem to give the longest time, but life is fleeting. Sadly, the youngest might happen to die at a young age, cutting the interest short. A group is safer.

Note also that one could make the above grant a little longer: "O → A and his heirs until a cure for insomnia is found within 21 years of the death of the last of Queen Elizabeth II's descendants living at the time of the grant, then to B and his heirs." This, too, would mean the interest would satisfy the common law Rule Against Perpetuities.

What's wrong with the grant as written in Problem 4? The measuring life group encompasses literally billions of people. The courts will not permit the measuring lives to consist of such a large and indeterminate group. It would be too hard to know with certainty when the last of that group died.

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.

♦ *Final exam note*:
You are not responsible for perpetuities savings clauses on the final exam.

5. 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. (Why is B's interest not a contingent remainder in a life estate? The reason is that B's interest does not follow a life estate, so it can't be a remainder. Since it's not a remainder, it can't be a contingent remainder. Therefore, it's an executory interest.)

O's future interest is one created in a grantor and is therefore not subject to the Rule (see below for details).

B's interest is valid under the RAP. Because the executory interest is in 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.)

What would we call O's interest? There are two ways that O's future interest could become possessory:

1) B dies at a time when no cure for insomnia has been found. At that point, for the reason noted above, B's executory interest is extinguished. Now the grant reads: O→ A and his heirs until a cure for insomnia is found. O's interest is a possibility of reverter.

2) A cure for insomnia is found while B is alive. At that point, B has a life estate, and O has a reversion.

Thus we would say that at the time the grant was created, O would have a reversion and a possibility of reverter. As noted earlier, O's interests, being created in a grantor, are not subject to the RAP.

6. 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. (We are ruling out the possibility of a deceased A divulging the cure from the beyond at a séance.) Note that B cannot be a measuring life. Suppose the grant is made; the next year B dies; and the next year after that, A finds the cure. Whoever holds the executory interest at that point (perhaps B sold it during his life; perhaps B's will left it to X) will get Blackacre.

7. 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? If the future interest is in a non-charitable entity, then the exemption won't apply because doing so would not benefit a charity – just A. Even worse would be "O → A, but if the land isn't farmed, to the Insomnia Institute." Here, any benefit to a charity could be far off in the future. So for this exemption to apply, it must be a gift to charity, with a gift over to another charity.

Notice the policy similarity to and difference from this exception to the RAP and Florida Stat. § 689.18(5), Supp. 245. While Florida limits "reverter or forfeiture provisions" to 21 years, it makes an exception for conveyances to "any governmental, educational, literary,

scientific, religious, public utility, public transportation, charitable or non-profit corporation or association." The similarity lies in encouraging public-spirited or publicly useful conveyances. The differences are (a) the statute is a lot broader than just charities, and (b) the statute would exempt from the 21-year limit a conveyance that read "O → The Insomnia Institute, provided that if a cure for insomnia is found, then to A." It says nothing about who has the future interest. (The statute might not exempt "O → A, but if the land isn't farmed, to the Insomnia Institute" – this doesn't look like much of gift to the Insomnia Institute, though the latter might argue that it is a "conveyance of real property" – a conveyance of a future interest to it.

How would the statute interact with the RAP in relation to the above grant ("O → The Insomnia Institute, provided that if a cure for insomnia is found, then to the Society to Cure Sleeping Sickness"). The statute on "reverter or forfeiture provisions" not limit it to 21 years, and the common law RAP would not invalidate the future interest. Nor would the Florida Uniform Statutory Rule Against Perpetuities (USRAP), Fla. Stat. § 689.225(5)(e), Supp. 248, which mirrors the common law rule about charities.[6]

♦ *Final exam note*: You should know the common law exemption from the RAP for gifts to a charity with a gift over to another charity, and you should also know what § 689.18 provides. You are not responsible for knowing the details of the USRAP (including as adopted in § 689.225 (Statutory Rule Against Perpetuities)), but you should be aware that in general, the USRAP provides for a 90-year wait and see period, and that at the end of that period, if the future interest still remains unvested, the court will if possible modify the grant so the interest vests, and if not possible, the court will strike the interest.

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

(a) *Suppose C is alive at the time of the grant and has 2 children.*

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 "conquer" 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.

[6] That section exempts 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."

Note, by the way, that C's children have no interest in Blackacre. Just because you see the phrase "C's children," that doesn't mean there's a class gift here here. This is *not* a case where a gift of any kind is made to someone's children. The relationship of C's children to Blackacre is simply that their success (or lack thereof) in conquering diabetes is pivotal to what happens to ownership of Blackacre after A dies.

(i) Assuming, as we will, that the DDCR is not in effect, the property interests would be as follows:

> A has a life estate. B has an executory interest in fee simple. O has a reversion in fee simple subject to an executory interest.

What's important to see is that there is no condition that the conquering of diabetes by one of C's children take place within A's lifetime. O didn't say, "if any of C's children conquers diabetes while A is alive." That's why B's interest would not qualify as a remainder: there could be a gap between the end of A's life estate and the time that the executory interest in B becomes possessory; under the terms of the grant, B's interest would not be destroyed if A died before any of C's children conquered diabetes. Instead, the property would go back to O, in fee simple on executory limitation, with B holding an executory interest that would become possessory whenever one of C's children conquered diabetes.

This executory interest violates the RAP, because there is no guarantee that we will know – during the lifetime (plus 21 years) of anyone who was alive at the time of this grant – whether or not diabetes is conquered by one of C's children. The problem is that C, being alive, could have another child born a year after the grant. (Keep in mind that a child born to a father within 9 months after the grant would qualify as a "life in being" — *i.e.*, as 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.

You might think – wouldn't that that would take place within the lifetime of the third child of C? The answer is yes, but that third child couldn't be a measuring life because she was not in existence at the time the grant was created.

Thus, there is no one you can point to and say, that person was alive at the time of the grant *and* will without a doubt be alive (or dead no more than 21 years) when (if ever) one of C's children conquers diabetes.

(ii) If the DDCR were in effect, then courts would characterize the interest as follows:

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

Under the DDCR, B's interest must vest (*i.e*, one of C's children must conquer diabetes) no later than the time that A dies; otherwise, B's interest will be destroyed. Thus, B's contingent remainder would be valid under the RAP, because A could be the measuring life. We don't know whether any of A's children would ever conquer diabetes. Nor do we know what year it might happen if it does, or which of the children it might be, or whether the child who conquered diabetes would have been alive at the time of the grant. We don't know any of this as of the time the grant was made, but that doesn't matter. What we do know is that (assuming the DDCR is in effect) it will be resolved within A's lifetime, so we can point to A as the measuring life.

(b) ***Suppose C is dead at the time of the grant, and is survived by 2 children.***

Here, B's interest is valid. The question whether either of C's two children (the only two that will ever be born because C is dead at the time of the grant) will ever conquer diabetes will be resolved one way or the other within their lifetimes. (We will ignore any possibility that one of them would reveal the cure (if that's what the phrase means) via séance years after their death.) 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.

9. 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).

This is a case of an age contingency – *i.e*., where there is a future interest conditioned upon someone reaching a certain age. See CB 230-231. As with all other grants, be careful how you read it.

First, this grant does not create an interest in A's children as a class; it creates an interest in the first of A's children to reach age 25. By its terms, that will only be one of them. (What about twins, you might ask? That's not an issue under the above set of facts, but in a different set of facts involving twins, a court would consider O's intent. It could decide that O mainly meant for the interest to go to just one child of A, in which case it would probably look to the birth order of the twins. Or it could decide that O meant to benefit the oldest of A's children, in which case it might be open to reading the grant as creating an interest in the twins if they were the first of A's children to reach age 25. This interpretive question wouldn't have any bearing, though, on how the RAP applies.)

Second, this is *not* a future interest in A_1 and A_2. A, being alive at the time of the grant, might always have more children (*i.e*., A_3 or A_4). And *any* of A's children 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 A_1 or A_2 in particular be the first to reach age 25.

(a) If the DDCR is not in effect, as we will assume, the interests would be as follows:

A has a life estate. There is an executory interest in the first of A's children to reach age 25. O has a reversion in fee simple subject to an executory interest.

The executory interest would be invalid under the RAP. 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 executory 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 A_2 (who's 22 in 2025, when the grant is made) would be the first to reach age 25. Unless A_2 dies before his 25th birthday, he'll be the first. Even if A_2 died in 2027 at age 23, we would still know within 21 years of A's death if A_1 were going to be the first to reach age 25. A_1 is 18 at the time of the grant (2025), so we would have to wait only another 7 years to find out whether she'd be the one.

But there's a problem: A, being alive at the time of the grant in 2025, could have another child born (say) a year after the grant. We will call that child born in 2026 "A_3." Then in 2027 everyone else — O, A, A_1, A_2, your neighbor (basically, any given individual you might think of) — could die. Then 25 years later, in 2052, that last child A_3, born shortly *after* the creation of the executory interest, 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 A_3, of course. But A_3 cannot be a measuring life because she was not in existence at the time the grant was created. There is just no one specific person we can point to – not O, A, A_1, A_2, your neighbor, a random stranger – who was alive in 2025 and as to whom we can be certain that the interest won't vest or become possessory more than 21 years after their death.

You might be thinking that there must be *someone* alive in 2025 who would also be alive in 2052. That's overwhelmingly likely. (If it's not, there's very little reason to be concerned about property anyway.) But to validate a future interest under the RAP, you have to find a specific person (or a small group of specific persons) to whom you can point and say, we'll know one way or the other, by the time that person dies (or at worst within 21 years of their death) whether the interest is ever going to vest or become possessory.

This is a good example where, if the courts were authorized to use *cy pres*, they might revise the grant to refer to the first of A's children to reach age 21 (rather than 25).

(b) If the DDCR were in effect, the grant would be read to provide:

A has a life estate. There is a contingent remainder in the first of A's children to reach age 25. O has a reversion in fee simple.

The contingent remainder would be valid. We would know, no later than A's death, whether the interest would vest. If A_1 or A_2 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. For example:

2025: O → A for life, then to the first of A's children to reach age 25.
2026: A dies, leaving A_1 (aged 19) and A_2 (age 23) behind.
2028: A_2 becomes the first child of A to reach age 25.

As of 2025, O would own a fee simple, and that would not change in 2028. A_2 would get nothing, even though A_2 was the first child of A to reach age 25, because A_2 did not reach age 25 during A's lifetime.

10. 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 RAP. 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. See Supp. 281-283. 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. (Remember that there is no requirement in the grant in No. 10 that A be alive a day after B is buried; we are, as noted before, assuming that all future interests are fully descendible, devisable, and transferrable. That is why A can't be a measuring life.)

♦ *Final exam note*: You are not responsible for knowing the difference between shifting and springing executory interests.

11. O ⇨ A and his heirs upon A's graduation from law school.

O is dead. O's devisee has a fee simple on executory limitation. A has a springing executory interest that will become possessory (and end O's interest) when A graduates from law school.

A's interest is valid. Even if it took A 50 years to get around to graduating from law school, the interest could never vest beyond A's lifetime.

12. 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.

You might ask why A couldn't be the measuring life. A could not serve that function because the grant does not make A's executory interest becoming possessory depend upon A being alive 25 years from now. Suppose the grant were made in 2025. Then in 2026, A died. All future interests are fully transferrable, devisable, and descendible by intestate succession. So whoever A left the interest to (or maybe even A sold it in in 2026 before dying) would hold the interest. And then in 2050, that interest would become possessory. That would be 24 years after A's death in 2026 – *i.e.*, more than 21 years.

♦ *Final exam note*: You are not responsible for this Problem.