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Florida's Codification of the Rule Against Perpetuities

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Florida recently codified the common law Rule Against Perpetuities with several significant modifications. In discussing the newly enacted statute, the author focuses his analysis on provisions designed to validate interests which formerly failed under the common law Rule. This examination exposes areas of particular ambiguity in the interstices between the common law Rule and the statute. The article offers several salient insights to those called upon to deal with or construe the new statute and provides suggestions for legislative reform.

I. INTRODUCTION

A. *The Common Law Rule Against Perpetuities*

Described as "an elderly female clothed in the dress of a bygone period who obtrudes her personality into current affairs with bursts of indecorous energy,"[1] the Rule Against Perpetuities has bewildered judges and perplexed law students for decades. In re-

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1. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 725 (1952).

sponse, the 1977 Florida Legislature has codified and modified the Rule Against Perpetuities in order to "eliminate several undesirable applications of the Rule at common law."[2]

B. *Purpose of the Common Law Rule*

The common law Rule Against Perpetuities was originally designed for a primarily agrarian society in order to further the marketability and development of land. The purpose of the Rule is to prevent persons from taking property out of commerce, thereby rendering it inalienable.[3] The Rule, by invalidating interests which vest too remotely, encourages the improvement of land by promoting its marketability.[4] Ownership interests of less than fee simple absolute are difficult to convey because the interests are of questionable duration and may be subject to conditions or restrictions. Land which tends to be inalienable also tends to be unimproved because its subsequent sale may prove to be burdensome. By invalidating interests and removing restrictions on the sale of land, the improvement of real estate becomes more attractive due to its increased marketability.

Ancillary to its original context, the Rule has also been applied to the duration of private trusts, options and contracts for future payments.[5] The Rule is applied to these interests in order to prevent persons from creating undue concentrations of wealth in the hands of a few, by tying up property for generations.[6] In addition, one authority argues cogently that it is socially desirable for wealth to be controlled by the living and not the dead.[7]

C. *Failings of the Common Law Rule*

The common law Rule Against Perpetuities, however well con-

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2. FLA. STAT. § 689.22 (1977)(effective Jan. 1, 1979). The legislative intent was to codify the common law Rule Against Perpetuities and, in addition, to eliminate several undesirable applications of the Rule at common law. House Judiciary Committee Staff Summary, 1977 Florida Legislature.

3. House Judiciary Committee Staff Summary, 1977 Florida Legislature; J. GRAY, THE RULE AGAINST PERPETUITIES 4 (4th ed. 1942); ABA LEGISLATORS' HANDBOOK ON PERPETUITIES 5 (1958); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179, 190 (1953); *see* Story v. First Nat'l Bank & Trust Co., 115 Fla. 436, 156 So. 101 (1934).

4. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 709 (1955).

5. 6 AMERICAN LAW OF PROPERTY §§ 24.56-.59 (A.J. Casner ed. 1952) [hereinafter cited as ALP].

6. *Id.* § 24.11; *see* L. SIMES, PUBLIC POLICY AND THE DEAD HAND 57 (1955); Simes, *supra* note 4, at 722; Leach, *supra* note 1, at 727. It has been suggested that the problem of undue concentrations of wealth is best dealt with by the use of estate and gift taxes.

7. L. SIMES, *supra* note 6, at 58.

ceived, has failed to achieve consistent, sound results. This is due to several factors.

First, the common law Rule is read to apply (with one exception)[8] at the inception of the interest's creation with consideration only of facts and circumstances in existence at that time.[9] All possibilities, however remote or unlikely, must be considered in deciding whether the interest must vest or fail within the perpetuities period. This gives rise to possibilities which may be foreclosed by actual or highly improbable[10] events. Nevertheless, the common law Rule, with its "remorseless"[11] application, continues to invalidate interests which could possibly vest beyond the period.

Second, any interest which violates the Rule is totally void ab initio.[12] Furthermore, a prior valid interest, which standing alone would not fulfill the grantor's intentions, may also be invalidated.[13] Since the courts cannot rewrite the instrument, some beneficiaries may be completely denied a gift. Such a rigid, technical application of the Rule does violence to the disposition. It is likely that most grantors would prefer the court to partially rewrite the instrument rather than have the interests fail in their entirety.[14]

Third, possibilities of reverter and rights of re-entry[15] are excepted from the Rule.[16] Reverters and rights of re-entry hinder alienability and discourage the improvement of property as much as contingent remainders and executory interests. All create estates in grantees which are less than fee simple absolute and which may be subject to restrictions or conditions. There appears to be no valid

8. When determining the validity of appointments under special or general testamentary powers of appointment, facts existing at the date of appointment may be taken into consideration. 6 ALP § 24.35.

9. *Id.* § 24.24.

10. For some delightful yet improbable possibilities, see Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643-44 (1938).

11. J. GRAY, *supra* note 3, at 599.

12. 6 ALP § 24.47.

13. This is commonly referred to as "infectious invalidity." *Id.* §§ 24.48-.52. The rule of infectious invalidity is not a hard and fast rule and is only applied when the court concludes that the grantor would rather have the whole instrument fail than have it partially validated. Depending upon heirship, other gifts or interests created, and so forth, the grantor's purpose might be more nearly accomplished by invalidating the entire instrument.

14. Courts, however, are in no position to rewrite all instruments. They are not acutely aware of the considerations that determine the manner in which a grantor makes a certain disposition. Therefore, the courts should not have unbridled discretion in rewriting instruments.

15. Rights of re-entry are vested in the United States, 6 ALP § 24.62, but in England they are not vested and, therefore, are subject to the Rule. *Re* Hollis' Hospital Trustees [1899] 2 Ch. 540.

16. 6 ALP § 24.62.

reason for the distinction.[17]

Fourth, the common law Rule is concerned with the remoteness of vesting,[18] despite the fact that vested interests with enjoyment delayed may be as objectionable as unvested interests. In both situations the alienability of the interest is severely restricted. Likewise, improvement of the property is discouraged. To make the validity of an interest turn on a metaphysical concept, such as vesting, seems to exalt form over substance, especially where an interest is subject to alternative constructions.[19]

Reform of the common law Rule is not justified merely because it arose nearly four centuries ago in an entirely different social order. Rather, it is because the Rule reaches results which are inconsistent and unsound that reform is not only justified but necessary.[20] The best approach, based on the experience of other jurisdictions,[21] is not to rewrite the Rule completely, but to adopt the common law with such specific alterations and modifications as are necessary to deal with the problems listed above.

The Florida Legislature has agreed that this is the best approach. It has, therefore, codified the common law Rule while enacting a number of the modifications suggested by reformers.[22]

II. FLORIDA'S STATUTORY RULE AGAINST PERPETUITIES

A. *Modified "Wait and See" Provision*

The statute begins with a restatement of the common law

17. Most jurisdictions which recognize this exception to the Rule limit the duration of reverters and rights of re-entry to some specific number of years. *See* Note, *Perpetuities Reform: Approaches and Reproaches,* 49 NOTRE DAME LAW. 611, 627 (1974). Florida has limited the duration of possibilities of reverter and rights of re-entry created after July 1, 1951, to 21 years. FLA. STAT. § 689.18(4) (1977).

18. Porter v. Baynard, 158 Fla. 294, 301, 28 So. 2d 890, 894 (1946); Story v. First Nat'l Bank & Trust Co., 115 Fla. 436, 443, 156 So. 101, 104 (1934); *In re* Will of Jones, 289 So. 2d 42, 45 (Fla. 2d Dist. 1973).

19. For example, a bequest "to the children of *A* (a living person) when they reach 25 years of age," could be construed as contingent upon the children reaching age 25 (and void under the common law Rule), or vested with payment postponed until age 25 (valid under the common law Rule). T. BERGEN & P. HASKLE, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 217 (1966).

20. Recognizing the need for reform, many states have altered the common law Rule Against Perpetuities. 6 ALP § 25.1 (1952 & Supp. 1976). The types of approaches used include: reform by judicial decree, *e.g., In re* Bassett Estate, 104 N.H. 504, 190 A.2d 415 (1963), Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953), Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891); "wait and see" statutes, *e.g.*, PA. STAT. ANN. tit. 20, §§ 301.4-.5 (Purdon 1975); modified "wait and see" statutes, *e.g.*, MASS. GEN. LAWS ANN. ch. 184a, §§ 1-6 (West 1977); and "cy pres" statutes, *e.g.*, VT. STAT. ANN. tit. 27, § 501 (1975).

21. The difficulties inherent in rewriting the Rule Against Perpetuities are illustrated by New York's experience. *See generally* 6 ALP § 25.6 (1952 & Supp. 1976).

22. *See* Simes, *supra* note 3.

Rule[23] and then provides that the validity of the interest is to be determined at the end of lives in being or after twenty-one years if no lives in being are used.[24] This section alters the common law approach which determined the validity of an interest at the time of its creation. Under the statute, the interest is viewed in light of facts which exist at the end of lives in being or after twenty-one years if no lives in being are used.[25] This is called a modified "wait and see" statute.[26] The statute will satisfactorily handle most questions which arise; however, several problems are created by the "wait and see" doctrine, and the proper treatment of certain interests is unclear.

Under the common law Rule, the validity of a future interest is certain from the outset; whereas during the "wait and see" period, the interest's validity is uncertain. The uncertainty arises because one must wait until the end of some life in being, or twenty-one years, before the courts will determine whether the gift is valid. For example, assume that in a private trust, the trustee is attempting to embezzle the corpus. Under the common law Rule, the beneficiary of a contingent future interest may protect his future right by proceeding with a court action. However, under the "wait and see" doctrine, since the validity of the interest cannot be determined until the end of lives in being, or twenty-one years, and may be found void ab initio, there is nothing for the court to protect.[27] A solution would be for the legislature or courts to grant potential beneficiaries standing to sue for protection of contingent future interests.[28]

Another problem arising from the "wait and see" rule's period

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23. STATEMENT OF THE RULE.—No interest in real or personal property is valid unless it must vest, if at all, not later than 21 years after one or more lives in being at the creation of the interest and any period of gestation involved. The lives measuring the permissible period of vesting must not be so numerous or be designated in such a manner as to make proof of their end unreasonably difficult.

FLA. STAT. § 689.22(1) (1977)(effective Jan. 1, 1979).

24. BASIS FOR DETERMINING VALIDITY OF INTEREST.—(a) Except as provided in sub-subparagraph (5)(d) 1.a, in determining whether an interest violates the rule against perpetuities, the validity of the interest is determined on the basis of facts existing at the end of the lives in being used to measure the permissible period or, if no life in being is used, the facts existing at the end of the 21 year period.

FLA. STAT. § 689.22(2)(a) (1977)(effective Jan. 1, 1979).

25. Under a pure "wait and see" doctrine, the parties must wait until the interest vests and then see if there are any lives in being which could validate the interest. Note, *supra* note 17; *e.g.*, PA. STAT. ANN. tit. 20, §§ 301.4-.5 (Purdon 1975).

26. 1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 22.07 [2] [a], at 142 (Supp. 1977).

27. Simes, *supra* note 3, at 185-86.

28. Note, *supra* note 17, at 621.

of uncertainty is the greater likelihood that the interest will be rendered inalienable. At common law, a contingent future interest holder knew from the outset whether the interest was valid and could effect a disposition immediately.[29] Under the new "wait and see" doctrine, the validity is uncertain, and few people would be willing to purchase an interest which may subsequently be invalidated.

The statute fails to mention anything about the doctrine of infectious invalidity,[30] and it is unclear whether the doctrine remains in effect. Assuming the doctrine is still in effect,[31] waiting until the end of the life in being may result in the entire disposition being invalidated. The property would then revert to the estate.[32] If the residuary legatees of the estate are different than the beneficiaries under the dispositive instrument, the property would have been in the wrong hands all along. Under the common law Rule, however, the residuary legatees could sue immediately and have the interests declared void, thus lawfully obtaining the property without "waiting to see." This anomalous state of affairs could be remedied by the legislature or the courts expressly abrogating the doctrine of infectious invalidity.

A major criticism of Florida's new "wait and see" provision is that it fails to solve the problem of who are the "lives in being." The statute provides that the validity of an interest is determined at the "end of lives in being used to measure the permissible period."[33] The lives measuring the permissible period appear to be the lives at common law, since the "wait and see" provision refers directly to the provision restating the common law Rule.[34] The only limitation is that the lives "not be so numerous or designated in such a manner as to make proof of their end unreasonably difficult."[35] Therefore, the question of whom the lives in being shall be, for purposes of the "wait and see" provision, remains unanswered.

Where the instrument expressly designates the lives in being,

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29. Simes, *supra* note 3, at 188.

30. Infectious invalidity arises where an ultimate interest clearly violates the Rule Against Perpetuities, and in order to uphold the grantor's intentions, the prior valid interests must also be invalidated. 6 ALP § 24.48.

31. This may be a valid assumption based upon FLA. STAT. § 689.22(3)(a)1 (1977), which is most logically construed as a saving clause leaving the common law Rule intact. *See* text accompanying note 61 *infra*.

32. Note, *supra* note 17. The court may also decide that the property would descend as intestate property, in which case the property may still have been in the wrong hands all along.

33. FLA. STAT. § 689.22(2)(a) (1977)(effective Jan. 1, 1979).

34. *Id.* § 689.22(1).

35. *Id.*

there is no problem; but if implied lives in being are utilized, the answer is not easily ascertainable. They need not be named in the instrument,[36] nor need they be holders of prior interests.[37] They also need not be persons taking any interest under the instrument.[38] There is no limit on their number as long as they are reasonably ascertainable.[39] As a practical matter, implied lives in being at common law are determined by searching for any life which could possibly validate the interest.[40] In other words, implied lives in being are determined by utilizing any life as long as the interest must vest within twenty-one years after the termination of that life.[41]

The common law method of determining lives in being makes the "wait and see" provision almost unworkable. Following the common law approach of determining lives in being by finding a life which will validate the interest, there is no need for a "wait and see" doctrine because the interest is already valid at common law.[42] If the common law lives are not used, then the problem of which lives in being are to be used remains unresolved.

This problem is best exemplified by a gift, "[t]o the grandchildren of *A*." At common law, if *A* were dead, the implied lives in being were *A*'s children. This is because *A*'s children will validate the interest since the class gift must vest, if at all, upon the death of the last child. Under these assumptions there is no need to wait and see since the gift to the grandchildren is already valid under the common law rule. If *A* were alive, however, his children could not be the lives in being because the interest could possibly vest in a grandchild of a yet unborn child of *A*. Since an afterborn child would not be alive at the time of the gift or deed, *A*'s children could not be the lives in being.[43] Under the "wait and see" provision, the question remains as to who are the lives in being. The statute impliedly designates the lives in being as the common law lives,[44] but in this situation there are no common law lives.[45]

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36. Leach, *supra* note 10, at 641.

37. *Id.*

38. *Id.*

39. Van Roy v. Hoover, 96 Fla. 194, 117 So. 887 (1928); Leach, *supra* note 10, at 642.

40. Allan, *Perpetuities: Who Are the Lives In Being?* 81 L.Q. REV. 106 (1965); Maudsley, *Measuring Lives Under a System of Wait-and-See,* 86 L.Q. REV. 357, 360-62 (1970).

41. Simes, *supra* note 3.

42. Maudsley, *supra* note 40, at 360-62; Note, *supra* note 17. This may also be true under FLA. STAT. § 689.22(3)(a)1 (1977). *See* text following note 61 *infra.*

43. Leach, *supra* note 10, at 641.

44. *See* notes 35 & 36 *supra.*

45. At common law and under the statute, *A* will be a relevant life in being. If, however, we use *A* as the life in being for wait and see purposes, the gift's validity is determined upon his death. Even if *A* had no more children after the testator's death, the gift must fail because

The answer to this puzzle is at least as perplexing as the common law Rule itself. Some states, recognizing this difficulty, have substituted lives in being causally related to the vesting or failure of the interest rather than retaining traditional common law determinations.[46] Others have opted for a statutory list of permissible lives in being.[47] Neither of these methods, however, solves all of the problems nor eliminates unnecessary litigation.[48]

The solutions must lie in careful draftsmanship. By expressly designating whom the lives in being will be, the problem is eliminated. However, express lives in being should be either sufficient in number or of such an age that at the end of these lives, a court can determine with certainty that the interest will vest within twenty-one years.[49]

B. *Powers of Appointment*

Under the common law, powers of appointment are classified as general powers presently exercisable,[50] general testamentary powers[51] and special powers of appointment.[52] The common law Rule operates in two ways. First, it can invalidate the power itself, so that no appointment is possible. Second, if the power is valid, the Rule can invalidate a particular appointment.[53] Florida's new Rule Against Perpetuities alters only the second part of the operation of the common law Rule. Since the statute refers to "every interest *created* through the exercise . . . of a power of appointment,"[54] the

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the children could have grandchildren more than 21 years after *A*'s death, thus creating the possibility that the gift may vest beyond a life in being, *A*, and 21 years.

46. *E.g.*, KY. REV. STAT. ANN. § 381.215 (Baldwin 1972).

47. *E.g.*, Perpetuities and Accumulations Act, 1964, ch. 55 § 3(4)-(5).

48. Note, *supra* note 17.

49. This is because Florida's statute does not extend the perpetuities period; therefore, the interest must vest within 21 years of the date on which the last life in being terminates. FLA. STAT. § 689.22(1) (1977)(effective Jan. 1, 1979).

50. A general power presently exercisable may be exercised at any time and in favor of any appointees, including the donee. 6 ALP § 24.30.

51. General testamentary powers may only be exercised through the donee's will and are unrestricted as to possible appointees. *Id.*

52. Special powers are exercisable only in favor of a specified class of appointees, not including the donee of the power. *Id.*

53. *Id.*

54. For the purpose of the rule against perpetuities, every interest *created* through the exercise, by will, deed, or other instrument, of a power of appointment, irrespective of whether the power is limited or unlimited as to appointees, the manner in which the power was created or may be exercised, or whether the power was created before or after this section takes effect, is considered to have been created at the time of the exercise, and not at the time of the creation, of the power of appointment. No such interest is void because of the rule unless the interest would be void had it been created at the date of the exercise of the power

validity of the power itself is governed by the common law Rule as modified by the statute.[55]

The new Act does alter the common law method of determining the validity of an appointment made under a valid power. Under the new Rule, the validity of all appointments is measured from the date the power is exercised.[56] At common law, only appointments of general powers presently exercisable were measured from the date of appointment.[57] Under such a power, the donee may appoint himself at any time; therefore, these powers are the equivalent of absolute ownership.[58] The new Act is a generous liberalization of the common law approach and should result in the validation of many appointments which were invalid at common law.

The only limitation under the new provision is that no power may be exercised so as to create a special power or general testamentary power.[59] This limitation is necessary in order to prevent property from being tied up in one family forever. Without the limitation, assume *A* leaves his estate to his son, *B*, for life, remainder to such of *B*'s issue as *B* shall by will appoint. *B* then exercises the power by giving a life estate to his son, *C*, remainder to such of *C*'s issue as *C* shall by will appoint. *C* then exercises the power in the same way and so on, ad infinitum.[60] The property would thus be tied up in the family forever. The limitation in the new Act obviously makes such a scheme impossible.

The new powers of appointment provision is a proper alteration of the common law Rule insofar as appointments under a valid power are concerned. A large area, however, is left untouched since the validity of the power itself continues to be determined under the common law Rule Against Perpetuities as modified by the statute. The "wait and see" provision should help to validate some of these powers, but uncertainty during the waiting period and questions regarding the proper method for determining lives in being still leaves some unresolved problems.

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of appointment otherwise than through the exercise of a power of appointment, except that no power may be exercised so as to create another power, limited as to appointees or as to the manner in which such second power may be exercised.

FLA. STAT. § 689.22(2)(b) (1977) (effective Jan. 1, 1979)(emphasis added).

55. Therefore, a general power presently exercisable is valid only if the power vests in the donee within the perpetuities period. 6 ALP § 24.31. General testamentary powers and special powers of appointment are void if they may be exercised beyond the period of perpetuities. *Id.* § 24.32.

56. FLA. STAT. § 689.22(2)(b) (1977)(effective Jan. 1, 1979).

57. 6 ALP § 24.33.

58. *Id.*

59. FLA. STAT. § 689.22(2)(b) (1977)(effective Jan. 1, 1979).

60. Leach, *supra* note 10, at 653 n.37.

C. *Exceptions to the Rule: Non-Applicability*

1. INTERESTS VALID AT COMMON LAW OR EXCEPTED BY STATUTE

The new statutory Rule Against Perpetuities does not apply to "[a]ny disposition of property or interest therein, which disposition, as of the effective date of this section, does not violate, or is exempted by statute from the operation of, the common law rule against perpetuities."[61] This provision is sufficiently ambiguous to be construed in two ways. First, the clause "as of the effective date of this section" could be construed as a grandfather clause for those interests created prior to the Act which do not violate the common law Rule. In the alternative, the provision could be construed as a saving clause, whereby those dispositions after January 1, 1979, which would be valid at common law, do not fall under the "wait and see" requirement.

Under the first construction, the validity of all interests not falling under the grandfather clause must be determined under the "wait and see" provision. Even when a disposition after January 1, 1979 creates a future interest which would be valid under the common law Rule, one must wait until the end of lives in being or twenty-one years to determine its validity. Draftsmen, not wanting to wait and see if an interest would be valid, could no longer rely on what was valid at common law. Therefore, this construction appears overly burdensome, especially in light of the problems inherent in the "wait and see" doctrine.[62]

Under the latter construction, the common law Rule Against Perpetuities is left intact with reference to interests which do not violate the Rule. Under this construction, the statute is simply narrowing the number of possible violative interests. If a disposition after January 1, 1979 would be valid at common law, then there is no requirement to wait and see. The only time it would be necessary to wait would be when an interest violates the common law Rule. This seems to be the most logical construction of the new statutory Rule since the "wait and see" provision applies only when "determining whether an interest violates the rule."[63] In effect, this means that a court could immediately determine whether an interest would be valid under the common law Rule Against Perpetuities. If the interest violated the common law Rule, the court would then wait until the end of lives in being or twenty-one years to see if the interest must vest.

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61. FLA. STAT. § 689.22(3)(a)1 (1977)(effective Jan. 1, 1979).

62. *See* text accompanying notes 27-49 *supra.*

63. FLA. STAT. § 689.22(3)(a)1 (1977)(effective Jan. 1, 1979).

Under Florida law, the dispositions or interests which would thus be excepted from the new Act include: charitable trusts of indefinite duration and gifts from one charity to another on remote contingencies;[64] perpetual care trusts for the maintenance of cemetaries;[65] reservations;[66] vested interests;[67] and possibilities of reverter and rights of re-entry.[68]

2. POWERS OF TRUSTEES

Florida's new Act is not applicable to a broad range of powers of trustees. Powers of a trustee to sell, lease, mortgage, administer, or manage trust assets, and powers to appoint a successor are exempted.[69] Under common law in the United States, these powers are generally not subject to the Rule Against Perpetuities.[70] They are, however, subject to the Rule in England,[71] and since the English view has been espoused by prominent American commentators,[72] the best approach is to expressly exempt the powers. Such powers in trustees actually promote commerce and the alienability of property because the trustee can sell and reinvest the trust assets without restriction.

Furthermore, the new Rule exempts both mandatory powers of trustees to distribute income and discretionary powers to distribute principal to vested beneficiaries.[73] Discretionary powers to allocate income and principal among beneficiaries are also exempted.[74] Es-

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64. Pattillo v. Glenn, 150 Fla. 73, 7 So. 2d 328 (1942); Holsey v. Atlantic Nat'l Bank, 115 Fla. 604, 155 So. 821 (1934); Montgomery v. Carlton, 99 Fla. 152, 126 So. 135 (1930); *In re* Jones, 318 So. 2d 231 (Fla. 2d Dist. 1975).

65. FLA. STAT. § 689.13 (1977).

66. Robinson v. Speer, 185 So. 2d 730 (Fla. 1st Dist. 1966).

67. Reimer v. Smith, 105 Fla. 671, 142 So. 603 (1932).

68. 6 ALP § 24.62. Note that the duration of these interests, with some exceptions, are limited in Florida to a period of 21 years. FLA. STAT. § 689.18(4) (1977).

69. The Rule Against Perpetuities does not apply to: "Powers of a trustee to sell, lease, or mortgage property or which relate to the administration or management of trust assets, including, without limitation, discretionary powers to determine which receipts constitut principal and which receipts constitute income and powers to appoint a successor trustee." FLA. STAT. § 689.22(3)(a)2 (1977) (effective Jan. 1, 1979).

70. 6 ALP § 24.63.

71. J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 13-18 (1956).

72. *See* J. GRAY, *supra* note 3, at 477-80.

73. The Rule Against Perpetuities does not apply to: "Mandatory powers of a trustee to distribute income, or discretionary powers of a trustee to distribute principal, prior to termination of the trust, to a beneficiary having an interest in the principal, which interest is irrevocably vested in quality and quantity." FLA. STAT. § 689.22(3)(a)3 (1977) (effective Jan. 1, 1979).

74. The Rule does not apply to: "Discretionary powers of a trustee to allocate income and principal among beneficiaries, except that any exercise of such power after the expiration of the period of the rule against perpetuities is void." FLA. STAT. § 689.22(3)(a)4 (1977)(effective Jan. 1, 1979).

sentially, these provisions provide that the trustee's powers will be upheld so long as the trust is valid.[75]

No interest is deemed created for purposes of the new Rule as long as the creator of the instrument has the power to revoke or to transfer the entire ownership interest to himself.[76] This is consistent with the underlying rationale of the common law Rule, since the creator always has the power to make himself the sole owner of the property.[77] The property is freely alienable and not burdened with any restrictions or conditions. Therefore, these revocable instruments should be exempted from the new Act.

3. LEASES

Under the traditional common law Rule, leases to commence upon the completion of a shopping center or commitments to enter into such leases could be held to violate the Rule[78] because the contingency may not occur within twenty-one years, and the lease would not vest in possession until that time.[79] This type of invalidation hinders commercial flexibility and frustrates the policies underlying the Rule. The Florida Legislature, recognizing this problem, has excepted leases commencing on the occurrence of a future contingency (provided the term actually commences in possession within forty years), as well as exempting commitments to enter into leases or subleases.[80] This is a sensible provision since the exceptions apply to standard business practices involving the construction, development, organization and financing of rental property.[81]

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75. 1 R. BOYER, *supra* note 26, at 144.

76. The period of perpetuities does not commence to run in connection with any disposition of property or interest therein, no instrument is considered to be effective for purposes of the rule against perpetuities, and no interest or power is considered to be created for purposes of the rule against perpetuities so long as, under the instrument, the maker of the instrument has the power to revoke the instrument or to transfer or direct transfer to himself of the entire legal and equitable ownership of the property or interest therein.

FLA. STAT. § 689.22(3)(b) (1977)(effective Jan. 1, 1979).

77. Leach, *supra* note 10, at 662-63.

78. Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 979 (1965).

79. Note that executory interests do not have the capacity of vesting in interest before they vest in possession. Leach, *supra* note 10, at 648. Therefore, the leaseholds must become possessory within 21 years, since no lives in being are used.

80. The Rule does not apply to:

Leases to commence in the future or upon the happening of a future event, but no such lease is valid unless the term thereof actually commences in possession within 40 years from the date of execution of the lease.

Commitments by a lessor to enter into a lease with a subtenant or with the holder of a leasehold mortgage or commitments by a lessee or sublessee to enter into a lease with the holder of a leasehold mortgage.

FLA. STAT. § 689.22(3)(a)5, 6 (1977)(effective Jan. 1, 1979).

81. R. BOYER, *supra* note 26, at 145.

4. OPTIONS

The common law Rule Against Perpetuities is a rule of property law and, as such, should have no application to contract law.[82] But when an option is specifically enforceable, an equitable property interest subject to the Rule is created in the option holder.[83] Under Florida's new Act, options in gross, options in leases and preemptive rights are excepted from the operation of the Rule.[84] Under the new statute, however, options in gross are not valid for more than forty years.[85] As phrased, the provision is ambiguous, and two constructions regarding preemptive rights in gross are possible. First, since the statute specifically mentions only options in gross, a technical construction would exclude preemptive rights in gross from the forty year limitation. This is a strained construction at best, since at least one Florida court has equated options and preemptive rights.[86] Furthermore, preemptive rights in gross, exercisable in perpetuity, restrain the alienation of land as much as perpetual options in gross.[87] A less technical and perhaps better construction of the language would be to include preemptive rights under the term "options in gross" and limit the validity of both to forty years.

The provision excluding options in leases from the new Rule is entirely valid, but unnecessary as these interests have not been held to be subject to the common law Rule Against Perpetuities.[88] Unlike options in gross, options in leases promote rather than hinder the improvement of land. Lessees are encouraged to make improvements when they know that full ownership can be obtained by exercising the option. Since such options are a common commercial device rarely exercised beyond the period of perpetuities, they should be excepted from the new Rule.

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82. Leach, *supra* note 10, at 660.

83. *Id.*

84. The Rule does not apply to: "Options to purchase in gross or in a lease or preemptive rights in the nature of a right of first refusal, but no option in gross is valid for more than 40 years from the date of its creation." FLA. STAT. § 689.22(3)(a)7 (1977)(effective Jan. 1, 1979).

85. *Id.*

86. Blair v. Kingsley, 128 So. 2d 889 (Fla. 2d Dist. 1961) (dictum).

87. Options in gross hinder the development and alienation of land since the owner in possession will not make improvements which can be taken away without compensation by exercise of the option. Leach, *supra* note 10, at 661.

It is important to distinguish between options in gross and preemptive options in gross. In a preemptive option in gross, the only question is whether the purchaser will be the optionee (exercising his option) or another purchaser (if the optionee decides not to exercise his option). While preemptive options in gross restrain the free alienation of property, the extent to which they do so is not as significant as in the case of an option in gross.

88. Fonact Corp. v. Superior Apartments, Inc., 251 So. 2d 537 (Fla. 3d Dist. 1971); Wing, Inc. v. Arnold, 107 So. 2d 765 (Fla. 3d Dist. 1958).

D. *Reduction of Age Contingency*

Under the new Act, any interest which would be invalid because it depends upon a person reaching an age in excess of twenty-one years will be reformed and the age contingency reduced to twenty-one years.[89] This is referred to as a limited cy pres doctrine since the disposition is modified in order to validate the interest.[90] This is a desirable provision since it divests the court of any discretion that it would have under a full cy pres doctrine and specifically delineates the extent of modification allowed.

There are, however, several problems with such a rigid formula. First, when an age contingency is reduced, property is taken away from the prior interest holder before the grantor intended.[91] Furthermore, the provision places the property into the hands of beneficiaries before they may be ready to receive it.[92] The provision is also contrary to the creator's intent, since any age contingency in excess of twenty-one years implies that the creator felt that the beneficiaries were too young to receive the gift when they reached twenty-one. A question which the new Act leaves unanswered is whether one waits to determine if the gift vests before reducing age contingencies, or whether the contingencies are reduced initially to determine whether the gift would then satisfy the common law Rule.[93]

Overall, these problems are relatively minor since this provision solves the most common single cause of perpetuity violations.[94] Judging from the absence of litigation in jurisdictions where similar provisions have been adopted, reduction of age contingencies is definitely desirable.[95]

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89. REDUCTION OF AGE CONTINGENCY.—If, except for this subsection, an interest in property would be invalid because it depends for its vesting upon any person attaining or failing to attain age in excess of 21 years, the age contingency is reduced to 21 years with respect to each person subject to the contingency.

FLA. STAT. § 689.22(4) (1977)(effective Jan. 1, 1979).

90. 1 R. BOYER, *supra* note 26, at 146.

91. J. GRAY, *supra* note 3, at 757-58.

92. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683, 720 (1958).

93. Construing the Act as a whole, with its major modification of the common law Rule being the "wait and see" provision, the reduction of an age contingency would seem to occur only if necessary after waiting the appropriate period. For example, a gift "[t]o *B* for life and then to his children who reach 30" would not vest in the children when they reach 21 (in order to validate the gift under the new Act). Rather, *B* would enjoy the gift for his entire life and upon his death if he had children less than nine years old, the age contingency would then be reduced.

94. J. MORRIS, *supra* note 73, at 54.

95. *Id.* A careful draftsman could avoid all of these problems by simply not providing for any age contingencies greater than 21 in unborn beneficiaries.

E. *Rules of Construction*

The new Perpetuities Act provides several rules of construction which will govern unless the instrument's creator provides otherwise.[96] Draftsmen should be aware of the presumptions contained in the new Act and should make appropriate provisions unless the creator wishes the court to apply these rules.

1. PRESUMPTION OF VALIDITY

The creator is presumed to have intended the interest to be valid.[97] This is simply an extension of the common law practice of favoring vested over contingent interests. Even Gray was in favor of such a presumption where two alternative constructions of an interest were possible.[98] The Restatement of Property also supports this notion by suggesting that interests be construed to avoid perpetuity violations whenever possible.[99] This extension of the common law is wholly justified.[100] By presuming that an interest is intended to be valid, the courts may construe the interest so as to avoid possible perpetuity violations.

2. PRESUMPTION OF SPOUSE IN BEING

This provision attempts to reverse the so-called "unborn spouse" case where a gift is invalidated because the spouse was not specifically named in the instrument. For example, suppose *T* creates a trust "[t]o pay income to *A* for life, then to pay income to *A*'s widow for life, and then to pay the principal to *A*'s children then living."[101] Under the common law Rule, the gift to *A*'s children is invalid since *A*'s widow could be born after the creation of the trust. Hence, the gift to the children may vest beyond a life in being, *A*, and twenty-one years.

96. "RULES OF CONSTRUCTION.—Unless a contrary intent appears, the rules of construction provided in this subsection govern with respect to any matter concerning the rule against perpetuities." FLA. STAT. § 689.22(5) (1977)(effective Jan. 1, 1979).

97. "It shall be presumed that the creator of an interest intended that the interest be valid." FLA. STAT. § 689.22(5)(a) (1977)(effective Jan. 1, 1979).

98. J. GRAY, *supra* note 3, at 601-03.

99. RESTATEMENT OF PROPERTY § 375, Comment b (1944).

100. The presumption of validity embodied in the newly enacted § 689.22 may be viewed as an implied abrogation of the doctrine of infectious invalidity. The doctrine assumes that the testator would rather see the entire interest fail than have a prior interest stand alone. A presumption of validity cuts sharply into any such assumption. Although the statute does not provide for situations where both a valid and an invalid interest are conveyed by the same instrument, its expressly stated preference of validity suggests that the valid interest would not fail. However, when the testator has expressly provided that his intent is to have the disposition stand or fail as a whole, the doctrine would seem to remain in effect.

101. Leach, *supra* note 10, at 644.

Florida's new Act attempts to reverse this situation by presuming that any person referred to in an instrument as the spouse of another, is the spouse in being on the effective date of the instrument.[102] In the above example, this would validate the gift of principal to *A*'s children since the gift would vest, if at all, upon the deaths of *A* and his wife.

The section as written, however, is less than clear since it seems to validate the interest of the spouse. Not surprisingly, the section has already been misconstrued.[103] While the section seemingly aims to validate the interest of the spouse, the spouse's interest is always valid, whether or not the spouse is in being on the effective date of the instrument. The section should focus its attention on a gift which is to vest (or fail) after the spouse's interest terminates. The first part of this section should, therefore, be amended to read: "If, except for this paragraph, an interest would be invalid because of the possibility that the person to whom it is given, or the person upon whom the interest is limited, may be a person not in being . . . ." There will then be no question that the section is designed to reverse the common law Rule which invalidated an interest following an interest to an "unborn spouse."[104]

Note, however, this problem arises because of sloppy draftsmanship. The "unborn spouse" case could be avoided altogether by simply naming the particular spouse in the instrument.

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102. If, except for this paragraph, an interest would be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the estate, and such person is referred to in the instrument creating the interest as the spouse of another without further identification, it is presumed that such reference is to a person in being on the effective date of the instrument.

FLA. STAT. § 689.22(5)(b) (1977)(effective Jan. 1, 1979).

103. Amundsen, *Florida's New Rule Against Perpetuities, Ch. 77-23*, 9 THE FLORIDA BAR, REAL PROPERTY, PROBATE, TRUST LAW SECTION 3, 9 (1978). In note 22 of the article, an example of a gift "to my son for life, then to my son's widow" is used to illustrate the "unborn spouse" case. The author states that the common law Rule invalidates the widow's interest. This is true but for the wrong reasons. The son, in this example, cannot be a life in being since the grantor may have other sons who are born subsequent to the effective date of the instrument. Therefore, the widow's interest is invalid, not because the widow may not be the son's present wife, but because the son is not a life in being. Had the gift been a testamentary transfer, the grantor dying with only one son, the gift to both the son and the widow would have been valid. In such a case, the widow's interest, whether she is born before or after the effective date of the instrument, would be valid since it must vest, if at all, upon the death of the son, who is a life in being.

104. If the courts were so inclined, the section as written could be construed as validating the interest following an interest to an unnamed spouse. In order to do so, the phrase "if, except for this paragraph, an interest could be invalid because of the possibility that the person to whom it is . . . limited may be a person not in being" would have to be construed to mean the person *upon* whom an interest is limited.

3. ADMINISTRATIVE CONTINGENCIES

At common law, gifts contingent upon the "probate of a will," "the appointment of a trustee" or "the payment of the estate's debts" were invalid. Since under the common law Rule a remote possibility existed that the contingency would not be resolved within twenty-one years, the interests were void.[105] Under this provision it is presumed that the creator intended the contingency to occur, if at all, within twenty-one years.[106] The provision is obviously justified since these contingencies rarely, if ever, take more than twenty-one years to resolve. However, if the contingency does not occur within twenty-one years, the interest will fail under the new Rule since the presumption will be overcome by the facts.

4. CHILDBEARING CAPABILITIES

Where the validity of a disposition depends on the ability of a person to have a child at some future time, several presumptions are created. It is presumed that males can procreate at fourteen years of age or older and that females can procreate between twelve and fifty-five years of age.[107] Evidence may be introduced to establish whether a person can have a child at the time in question,[108] but the later occurrence of contradictory facts will not affect the original determination.[109] This presumption is designed to overcome the irrebuttable presumption of fertility established in a very early English

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105. Leach, *supra* note 10, at 644-46.

106. If the duration or vesting of an interest is contingent upon the probate of a will, the appointment of a fiduciary, the location of a distributee, the payment of debts, the sale of assets, the settlement of an estate, the determination of questions relating to an estate or transfer tax, or the occurrence of any specified contingency, it is presumed that the creator of such interest intended that the contingency occur, if at all, within 21 years from the effective date of the instrument creating the interest.

FLA. STAT. § 689.22(5)(c) (1977)(effective Jan. 1, 1979).

107. If the validity of a disposition depends upon the ability of a person to have a child at some future time, it is presumed, subject to subparagraph 2., that a male can have a child at 14 years of age or older, but not younger than age 14, and that a female can have a child at 12 years of age or older, but not older than age 55 or younger than age 12. However, in the case of a living person, evidence may be given to establish whether such person can have a child at the time in question. The possibility that a person may have a child by adoption is disregarded.

FLA. STAT. § 689.22(5)(d)1 (1977)(effective Jan. 1, 1979).

108. "The possibility of having a child by adoption is disregarded." *Id.*

109. "A determination of validity of a disposition under the rule against perpetuities by the application of this paragraph is not affected by the later occurrence of facts in contradiction to the facts presumed or determined or the possibility of adoption disregarded under this paragraph." FLA. STAT. § 689.22(5)(d)1.a. (1977)(effective Jan. 1, 1979).

case.[110] The provision is sound because the rather remote possibility of conceiving children at an early or very advanced age has at times invalidated otherwise valid gifts.[111]

The provision also provides that any possible invalidity not affected by the presumptions embodied in this newly enacted section shall be subject to the "wait and see" doctrine.[112] While this may invite the same criticisms and problems inherent in the doctrine,[113] the scheme is consistent with the overall theme of the Act. This revision works to eliminate highly improbable possibilities and to validate gifts which would otherwise fail.

F. *Acquisition of Real Property by Foreign Trust*

The new Act provides that for any foreign trust acquiring property in Florida, the law in effect at the time of the acquisition determines whether there is a violation of the Rule Against Perpetuities.[114] This provision is merely designed to provide uniformity as well as predictability to all trusts which hold, or may hold, Florida realty.

G. *Trust with Transferable Certificates*

The new Rule Against Perpetuities is not violated by trusts with transferable certificates, provided the trust may be terminated by the trustees, or beneficiaries holding a specified percentage of interest in the trust.[115] This provision relates to commercial invest-

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110. Jee v. Audley, 29 Eng. Rep. 1186 (Ex. 1787).

111. For an excellent example, see Leach, *supra* note 10, at 643.

112. "Any invalidity because of the ability of a person to have a child at some future time shall be determined in accordance with paragraph (2)(a)." FLA. STAT. § 689.22(5)(d)1.b. (1977)(effective Jan. 1, 1979).

113. *See* note 26 and accompanying text *supra*.

114. ACQUISITION OF REAL PROPERTY BY FOREIGN TRUST.—If real property situated in this state is acquired by a trust validly created under the law of another jurisdiction, the law of this state in effect at the time of the acquisition of such property determines whether there is a violation of the rule against perpetuities or whether a direction for the accumulation of rents and profits is valid.

FLA. STAT. § 689.22(6) (1977)(effective Jan. 1, 1979).

115. TRUST WITH TRANSFERABLE CERTIFICATES.—A trust with transferable certificates, heretofore or hereafter created, is not invalid as violating the rule against perpetuities, but such trust may continue for such time as is necessary to accomplish the purpose for which the trust was created if the instrument creating the trust provides that the trust may be terminated at any time by action of the trustees or by affirmative vote of the beneficiaries having a specified percentage of interest in the trust. This section applies to an investment trust, which is an unincorporated trust or association managed by trustees and which does not hold any property for sale to customers in the ordinary course of

ment trusts and the right to receive income which is transferred with the trust certificate. Since these are commercial devices designed to facilitate specific business purposes of generally limited duration, they should be exempted from the Rule. Furthermore, since the trust is readily terminated and the trust certificates freely alienable, the flow of commerce is promoted rather than hindered.

III. CONCLUSION

Florida's codification and modification of the common law Rule Against Perpetuities properly effectuates the policies underlying the Rule, while eliminating many of the anomalies of this esoteric concept. If read with a little common sense, the new statute will satisfactorily handle almost all perpetuities problems.

As noted by the late Professor Barton Leach and concurred in by the principal draftsman of the new Act:[116]

> The technicalities of the Rule Against Perpetuities are well known to the estate specialists who are found in the large law firms which more often serve clients with large estates; these specialists have less difficulty in avoiding the technicalities and carrying out their clients' wishes. However, it is more difficult for the general practitioner, who often serves the smaller property owner, to keep abreast of the intricacies of the Rule against Perpetuities while carrying on the many other types of law practice in which he engages. This bill tends to put the non-specialist on a par with the specialist and thereby to protect the small to moderate property owner who consults the general practitioner.[117]

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its trade or business, and the beneficial ownership of which trust is evidenced by transferable shares or by transferable certificates of beneficial interest which shares or certificates are offered for sale to the public.

Id. § 689.22(7).

116. Statement by Henry A. Fenn, Professor of Law at the University of Florida, to the Senate Comm. on the Judiciary—Civil, in support of FLA. STAT. § 689.22 (Apr. 8, 1977). Professor Fenn was quoting from a statement made by Professor Barton Leach of the Harvard Law School in presenting a bill for statutory modification of the Rule to the Vermont Legislature in 1957.

117. *Id.* at 3-4.