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Approximately one-fifth of the jurisdictions of the United States have reformed the orthodox Rule Against Perpetuities by adopting tho "wait and see" or cy pres version of the Rule, or a combination of the latter two. In this article Professor Lynn examines the problem of raising the perpetuities question under all three versions, with particular attention to the problems of conception, adoption and the preservation of sperm. The author emphasizes that reforming the Rule does not eliminate perpetuities problems—it minimizes them. He concludes that tho courts are free under the new versions of tho Rule or under the orthodox version to interpret the Rule in light of changing conditions in order to give effect to the reasonable expectations of the grantor, settlor, or testator.

1. Introduction

Applying the orthodox, the "wait and see," or the cy pres version of the Rule Against Perpetuities presupposes analyzing the limitations in the dispositive instrument as of the time of their creation to determine whether any gifts are future, whether any future gifts are remainders or executory interests, and whether any remainders or executory interests are contingent. If a contingent future interest might vest, if it vests at all, at a remote time, it is bad *ab initio* under the orthodox form of the Rule. That being so, the perpetuities question may properly be raised at the time the contingent future interest is created—and the perpetuities question frequently is raised and settled when the contingent future interest is created because many future gifts are made by will, and construction of the instrument is sought as an incident to probate. But some courts have deferred settling a perpetuities question as long as possible.[1] The refusal of

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1. See, *e.g.*, Lauck's Estate, 358 Pa. 369, 57 A.2d 855 (1948); Miller Trust, 351 Pa. 144, 40 A.2d 484 (1945); Reed's Estate, 342 Pa. 54, 19 A.2d 365 (1941); Quigley's Estate, 329 Pa. 281, 198 Atl. 85 (1938). Mechem doubts that the practice is widespread. Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. Pa. L. Rev. 965, 979 (1959). There are occasional cases elsewhere postponing resolution of the perpetuities problem. *E.g.*, B.M.C. Durfee Trust Co. v. Taylor, 325 Mass. 201, 89 N.E.2d 777 (1950); *In re* Herrmann, 130 N.J. Eq. 273, 22 A.2d 262 (Prerog. Ct. 1941); Industrial Trust Co. v. Wilson, 61 R.I. 169, 200

the courts to settle perpetuities questions until circumstances made judgment imperative was used in Pennsylvania to buttress the case for reforming the Rule.[2] Nevertheless, the test for validity under the Rule in orthodox form is a possibilities test,[3] and generally speaking, the perpetuities question may properly be raised whenever the validity of a contingent future interest is a relevant factor in decision.

In 1947 Pennsylvania reformed the common law Rule Against Perpetuities by enacting a "wait and see" statute. It provides that

> upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void.[4]

In 1963 California reformed the Rule by enacting a cy pres statute. It provides that

> no interest in real or personal property is either void or voidable as in violation of [the Rule] if and to the extent that it can be reformed or construed within the limits of [the Rule] to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.[5]

Atl. 467 (1938). In First Portland Nat'l Bank v. Rodrique, 157 Me. 277, 172 A.2d 107 (1961), the Supreme Court of Maine acknowledged the policy but did not apply it in the case before the court.

2. Brégy, *A Defense of Pennsylvania's Statute on Perpetuities*, 23 TEMP. L.Q. 313, 320 (1950).

3. Lynn, *A Practical Guide to the Rule Against Perpetuities*, 1964 DUKE L.J. 207, 213.

4. PA. STAT. ANN. tit. 20, § 301.4 (1950). A complementary statute reads as follows: "(a) A valid interest following a void interest in income shall be accelerated to the termination date of the last preceding valid interest. (b) A void interest following a valid interest on condition subsequent or special limitation shall vest in the owner of such valid interest. (c) Any other void interest shall vest in the person or persons entitled to the income at the expiration of the period described in [the Pennsylvania statute set out in the text]." PA. STAT. ANN. tit. 20, § 301.5 (1950).

The language of section 301.4 is unnecessarily awkward. A simple form of "wait and see" is a paraphrase of John Chipman Gray's statement of the Rule. Gray's statement is as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942). Omitting *must* and changing *vest* to *vests* result in a "wait and see" version of the Rule: "No interest is good unless it vests, if at all, not later than twenty-one years after some life in being at the creation of the interest."

5. CAL. CIV. CODE ANN. § 715.5. California returned to the common law Rule relatively recently. Recent Legislation, 48 CALIF. L. REV. 134 (1960). The Rule was modified in 1963 by the repeal of §§ 693, 694, and 695 of the Civil Code (defining vested and contingent future interests), and the enactment of § 715.5 (establishing cy pres), § 715.6 (establishing a sixty-year period in gross), § 715.7 (eliminating the "unborn widow" construction), and § 715.8 (redefining a vested interest). The constitutionality of § 715.8 has been doubted. *Review of 1963 Code Legislation*, 38 CALIF. ST. B.J. 643 (1963). The repeal of § 715.8 has been demanded. Comment, 16 STAN. L. REV. 177 (1963).

Several states have combined the "wait and see" and cy pres principles. Kentucky's statute is as follows:

> In determining whether an interest would violate the rule against perpetuities the period of perpetuities shall be measured by actual rather than possible events; provided, however, the period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest. Any interest which would violate said rule as thus modified shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest.[6]

New Hampshire adopted both "wait and see" and cy pres by judicial decision.[7] In a few states, "wait and see" and cy pres exist in limited or modified form.[8] The common law Rule Against Perpetuities in orthodox form exists in about three-fourths of the jurisdictions in the United States.[9]

Raising the perpetuities question under the orthodox, "wait and see," and cy pres versions of the Rule is the subject of this article. Particular attention is given to problems of conception, adoption, and the preservation of sperm.

II. The Orthodox Rule

Under the common law Rule Against Perpetuities in orthodox form, the validity of a contingent future interest ordinarily is determined as of the time the instrument of transfer takes effect and a

6. Ky. Rev. Stat. Ann. § 381.216 (1963). Vermont has a similar statute. Vt. Stat. Ann. tit. 27, § 501 (1959). The Kentucky statute is both superseded and complemented by statutes which read as follows:

"The estate kuown at common law as the fee simple determinable and the interest known as the possibility of reverter are abolished. Words which at common law would create a fee simple determinable sball be construed to create a fee simple subject to a right of entry for condition broken. In any case where a person would have a possibility of reverter at common law, he shall have a right of entry." Ky. Rev. Stat. Ann. § 381.218 (1963).

"A fee simple subject to a right of entry for condition broken sball become a fee simple absolute if the specified contingency does not occur within thirty years from the effective date of the instrument creating such fee simple subject to a right of entry. If such contingency occurs within said thirty years the right of entry, which may be created in a person other than the person ereating the interest or his heirs, shall become exercisable notwithstanding the rule against perpetnities . . . ." Ky. Rev. Stat. Ann. § 381.219 (1963).

7. Mercbants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953); Edgerly v. Barker, 66 N.H. 434, 31 Atl. 900 (1891).

8. Limited "wait and see" and cy pres statutes exist in Connecticut, Maine, Marylaud, and Massachusetts. Conn. Gen. Stat. Ann. §§ 45-95, -96 (1960); Me. Rev. Stat. Ann. ch. 160, §§ 27, 28 (Michie Supp. 1963); Md. Ann. Code art. 16, § 197A (Michie Supp. 1963); Mass. Ann. Laws ch. 184A, §§ 1, 2 (1955). The Washington statute is applicable to interests created by trusts only. Wash. Rev. Code Ann. §§ 11.98.010-.030 (1963). The Idaho statute may include a cy pres feature applicable to interests created by trusts. Idaho Code Ann. § 55-111 (1957).

9. Lynn, *supra* note 3, at 208.

declaration of invalidity ordinarily is permissible at that time. Thus, if *A*, owning land in fee simple absolute, devises "to *B* for life, remainder to that child of *B* who first attains twenty-five," and *B* is a bachelor at *A*'s death, the invalidity of the contingent remainder is demonstrable at *A*'s death. Invalidity turns on the possibility that *B* might have a child who might attain twenty-five at a remote time. Invalidity turns on the possibility of issue even though *B* is incapable of conceiving a child at and after *A*'s death.

Although the validity of a contingent future interest under the orthodox Rule ordinarily is determined as of the time the instrument of transfer takes effect, there is a familiar exception to the general rule. The validity of an appointment made by the exercise of a general testamentary or a special power is determined by "reading back" or interpolating the appointment into the instrument creating the power, computing the perpetuities period from the time the power was created, *and considering facts existing at the time of the appointment.*[10] For example, if *A* bequeaths 100,000 dollars in trust

10. 6 AMERICAN LAW OF PROPERTY § 24.35 (Casner ed. 1952); 5 POWELL, REAL PROPERTY § 788(3) (1962); 3 SIMES & SMITH, FUTURE INTERESTS § 1274 (2d ed. 1956). A less familiar example of "wait and see" under the orthodox Rule is demonstrated by the following: *A* bequeaths $10,000 "to that son of *B* who first becomes a clergyman, but if *B* dies without having a son, or if no son of *B* becomes a clergyman, then to *C*." No son of *B* is a clergyman at *A*'s death, and "son of *B*" is construed to mean "son of *B* whenever born." The contingent executory interest to that son of *B* who first becomes a clergyman is bad under the Rule because the contingency might be resolved beyond the perpetuities period, namely, *B*'s lifetime and twenty-one years. The contingent executory interest in *C* that is expressly conditioned on *B*'s dying without having a son is good under the Rule because the contingency must be resolved at a time no later than *B*'s death, and *B* is a life in being at *A*'s death. The contingent executory interest that is expressly conditioned on no son of *B* becoming a clergyman is bad under the Rule because the contingency might be resolved beyond the perpetuities period. *If B dies without having a son, the executory interest in C becomes possessory.* If *B* has a son or sons, none of whom becomes a clergyman, the executory interest in *C* is bad under the Rule even though no son of *B* has become a clergyman at *B*'s death, and *B*'s sons surviving him all die within twenty-one years after *B*'s death, none having become a clergyman. 6 AMERICAN LAW OF PROPERTY § 24.54 (Casner ed. 1952); 3 SIMES & SMITH, FUTURE INTERESTS § 1257 (2d ed. 1956).

In First Portland Nat'l Bank v. Rodrigue, 157 Me. 277, 172 A.2d 107 (1961), the testator ereated a testamentary trust of shares of stock to pay annuities in stipulated sums and shares from the income to his widow and children. Principal was distributable (1) at the death of the widow, provided that (a) the trust had been in operation for twenty-five years or (b) that the stock had been sold by the trustee; or (2) at tho sale of the stock after the death of the widow and prior to the expiration of the twenty-five years; or (3) at the expiration of the twenty-five years. Principal was distributable under the following language: "first; to my son, William one hundred (100) shares of . . . stock . . . or if the same shall have been sold the equivalent money value thereof; second; the remaining portion of said trust fund shall be distributed in equal portions to my said children, Helen, Marcia, William and George, issue of a deceased child to take its parent's share by right of representation; in the event that any of my said children shall have died prior to the termination of said trust leaving no children or issue of a deceased child, his or her portion of said trust fund on the termination of said trust . . . shall be divided equally among his or her brothers and sisters . . . ."

"to pay the net income to *B* for life, and then to pay the principal to such of the children of *B* as *B* shall by deed or will appoint, and in default of appointment, to pay the principal to *C* and his heirs," and *B* by will appoints the entire principal "to such of my [*B*'s] children as attain twenty-five," the appointment is good under the Rule if the youngest of *B*'s children is at least four years old at *B*'s death. "Read back" into *A*'s will, the appointment is the equivalent of "to pay the net income to *B* for life, and then to pay the principal to such of the children of *B* as survive *B* and attain twenty-five no later than twenty-one years after *B*'s death." Even if the youngest of *B*'s children was born after the creation of the power, he will attain twenty-five, or not, within twenty-one years after the death of *B*, a person alive at the creation of the power.

A. *Preservation of Sperm Under the Orthodox Rule*

If *A* devises "to *B* for life, remainder to such of the children of *B* as attain twenty-one," and "children" is construed to mean "children of *B* alive at *A*'s death," the remainder is good under the orthodox Rule. If a child of *B* alive at *A*'s death has not attained twenty-one at *A*'s death, he will attain twenty-one, or not, within his own lifetime, and he is a "life in being" at *A*'s death. Put shortly, the ultimate number of children sharing in the remainder will be fixed within the perpetuities period, and the requirements of the Rule are satisfied. Even if "children" is construed to mean "children of *B* whenever born," the remainder is good under the orthodox Rule. A child of *B*, even a posthumous child, will attain twenty-one, or not, no later than twenty-one years after the lifetime of *B* and a period of gestation, and *B* is a "life in being" at *A*'s death. Again, the ultimate number of children sharing in the remainder will be fixed within the perpetuities period, and the requirements of the Rule are satisfied.

B, anticipating death, might preserve his sperm.[11] *B* might be survived by a widow capable of conceiving a child. Consequently, *B*'s widow might conceive a child by *B* through artificial insemination

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The testator was survived by his widow and the four children named in the will. The successor trustee under the will sought construction, and some of the parties to the proceeding argued a violation of the Rule Against Perpetuities.

The Supreme Court of Maine, noting that the widow of the testator had already survived the expiration of the twenty-five year period, found no violation of the Rule because the gift of principal was limited on alternative contingencies, and distribution would in fact be made on the basis of the contingency causing no perpetuities problem, namely, the death of the widow, a person in being at the testator's death. The court found it unnecessary to classify interests before resolving the perpetuities question. *Id.* at 296, 172 A.2d at 117.

11. Leach, *Perpetuities in the Atomic Age: the Sperm Bank and the Fertile Decedent*, 48 A.B.A.J. 942 (1962).

after *B*'s death. If no child of *B* had attained twenty-one at *B*'s death (thus "closing" the class), such posthumous child might qualify to share in the fee simple by attaining twenty-one beyond the perpetuities period. The test for validity under the orthodox Rule is a possibilities test, not a probabilities test nor an actualities test. Even so, the possibility that a posthumous child of *B*, conceived by artificial insemination after *B*'s death, might attain twenty-one beyond the perpetuities period, does not justify invalidating *ab initio* the remainder "to such of the children of *B* as attain twenty-one."

First, the possibility of a posthumous child conceived by artificial insemination should be rejected if the preservation of sperm were the result of a scheme by *B*, successor in interest of *A* under the statute of descent and distribution, to secure the land by invalidating the remainder under the Rule Against Perpetuities.[12] A court that accepts as a legitimate child of *B* a posthumous child conceived by artificial insemination after *B*'s death,[13] can nevertheless refuse to recognize such child as that of *B* for the purpose of applying the Rule Against Perpetuities to the limitation in *A*'s will.

Second, the possibility of a posthumous child conceived by artificial insemination after the death of the donor husband is a fantastic one, judged by ordinary standards. The doctrine of fantastic possibilities is dying out in the perpetuities field.[14] That being so, it should not be extended.

Third, the construction of "children" turns on the presumed intention of the testator. "Children whenever born within *B*'s lifetime and a period of gestation" is a construction of "children" consistent with the presumed intention of the testator in the ordinary case. "Children whenever born to *B* irrespective of the time of conception" is not a construction within the presumed intention of the testator in the ordinary case, and should be rejected.

B. *Adoption Under the Orthodox Rule*

A devises to "*B* for life, then to *B*'s children for their lives, remainder to the grandchildren of *B*." Although "grandchildren" is construed to mean "grandchildren whenever born," the gift to grandchildren is good under the orthodox Rule if "children" is construed

12. A court may refuse relief to one violating conscience or good faith. McCLINTOCK, EQUITY § 26 (2d ed. 1948); 2 POMEROY, EQUITY JURISPRUDENCE § 398 (5th ed. 1941); WALSH, EQUITY § 53 (1930).

13. For a bizarre case holding a child conceived by artificial insemination *illegitimate* despite consent by the mother's husband to use of semen of a third party donor, see Gursky v. Gursky, 242 N.Y.S.2d 406, 39 Misc. 2d 1083 (Sup. Ct. 1963). Note, 1964 DUKE L.J. 163.

14. Lynn, *Reforming the Common Law Rule Against Perpetuities*, 28 U. CHI. L. REV. 488, 494-99 (1961).

to mean "children of *B* who predeceased *A* or were alive at *A*'s death." The ultimate number of grandchildren sharing in the gift will be known at the end of lives in being at *A*'s death, namely, at the death of the survivor of *B*'s children.

"Children" might be construed to mean "children of *B* who predeceased *A* or were alive at *A*'s death" because *B* was a woman past the menopause at the execution of *A*'s will, or because *B* was a man incapable of conceiving a child at the execution of *A*'s will.[15] The construction of "children" which saves the gift to grandchildren from invalidity under the Rule should not be rejected because *B* might adopt a child after *A*'s death who was unborn at *A*'s death.

The construction of "children" turns on the presumed intention of the testator. When we construe "children" to mean "children of *B* who predeceased *A* or were alive at *A*'s death," we are excluding from the group of "children" both the child of *B* fantastically born to *B* after the execution of *A*'s will and the child adopted by *B* after *A*'s death, irrespective of whether or not the adopted child of *B* is hypothetical, and irrespective of the language of the statutes regulating adoption and the effects of adoption. We could appropriately so construe "children" even though we construe "children" to mean "children of *B* who predeceased *A* or were alive at *A*'s death, whether born to *B* or adopted by *B*."

Suppose that an examination of the will and the circumstances under which it was executed leads us to construe "children" so as to exclude from the group the child of *B* fantastically born to *B* after the execution of *A*'s will. But we are in doubt with respect to excluding a child unborn at *A*'s death who might be adopted by *B* after *A*'s death. *A* is presumed to know the law, including the law of adoption. If we turn to the statutes regulating adoption for help in construction, we find no uniformity in statutory language. Adoption is relatively new to the law. The statutory language may be relatively sweeping in scope:

> For all purposes under the laws of this state, including without limitation all laws and wills governing inheritance of and succession to real or personal property . . . a legally adopted child shall have the same status and rights, and shall bear the same legal relationship to the adopting parents as if born to them in lawful wedlock and not born to the natural parents . . . .[16]

15. *E.g.*, Worcester County Trust Co. v. Marble, 316 Mass. 294, 55 N.E.2d 446 (1944). "Thus we have a case [*Marble*] where an estate which on its face obviously violated the Rule was saved by a construction adopted to carry out the presumed intention of the testator. I suppose only a lawyer steeped in the technicalities of the common law would criticize it." Newhall, *Nibbling at the Rule Against Perpetuities*, 29 MASS. L.Q. 29, 30 (1944).

16. OHIO REV. CODE ANN. § 3107.13 (Page Supp. 1963).

Or the language may be relatively narrow in scope: "A lawfully adopted person and his heirs shall inherit from and through the adoptive parents the same as a natural born child. . . ."[17]
Or the language may be quite explicit:

> A child lawfully adopted is deemed a descendant of the adopting parent for purposes of inheritance from the adopting parent and from the lineal and collateral kindred of the adopting parent. . . . For the purpose of determining the property rights of any person under any written instrument executed on or after September 1, 1955, an adopted child is deemed a natural child unless the contrary intent plainly appears by the terms thereof. . . .[18]

Clearly it is hazardous to generalize about construction solely on the basis of fragments from three statutes. But does the possibility that *B* might adopt a child after *A*'s death who was unborn at *A*'s death compel an Illinois court under the language of the Illinois adoption statute to invalidate the remainder to grandchildren if *A* devises to "*B* for life, then to *B*'s children for their lives, remainder to the grandchildren of *B*"? Although "plainly appears" will cause some misgivings, the possibility of such an adoption should be rejected for perpetuities purposes.

The language of statutes regulating adoption is general, not specific. Statutes tend to take the adopted child from the family into which he was born and put him into the family of his adopting parent or parents.[19] However laudable the objective of the statutory language, it ought not to be read into contexts where it causes more harm than good. From the fact that we frequently construe "child" or "children" to include an adopted child or adopted children, it does not follow that we do so invariably.[20] Adoption is still the exception, not the rule, just as the perpetuities question is still the exception, not the rule. The exceptional circumstance of adoption should not jeopardize dispositive instruments generally. When policies of the law conflict, a sensible resolution of the conflict is called for. *For perpetuities purposes,* a child adopted after the death of the testator does not qualify as an object of his bounty.

III. "WAIT AND SEE" *and* "WAIT AND SEE" COUPLED WITH CY PRES

It is commonly assumed that under "wait and see," or "wait and see" coupled with cy pres, a determination of the validity of a contingent

17. IOWA PROBATE CODE § 223 (West 1963).
18. ILL. ANN. STAT. ch. 3, § 14 (1961). See generally Fleming, *Inheritance Rights of Adopted Children,* 35 CHI. B. REC. 221 (1954).
19. HARPER & SKOLNICK, PROBLEMS OF THE FAMILY 214 (rev. ed. 1962).
20. Oler, *Construction of Private Instruments Where Adopted Children Are Concerned* (pts. I-II), 43 MICH. L. REV. 705, 901 (1945); Annot., 86 A.L.R.2d 12 (1962).

future interest is deferred to a time beyond that at which the instrument of transfer takes effect.[21] Thus, if *A* devises "to *B* for life, remainder to that child of *B* who first attains twenty-five," and *B* is a bachelor at *A*'s death, the contingent remainder is not necessarily bad *ab initio*. A child may be born to *B* and attain twenty-five within the perpetuities period, namely, *B*'s lifetime and twenty-one years. If so, the interest "vests" within the perpetuities period, is "good" or "valid" under "wait and see," and no reformation is required if cy pres is coupled with "wait and see."[22] If no child of *B* attains twenty-five within the perpetuities period, the contingent remainder is "bad" or "void" or "invalid" under "wait and see" alone.

Suppose that *B* is a bachelor incapable of conceiving a child at and after *A*'s death. Under the orthodox Rule it is improper to recognize the fact that the contingent remainder will necessarily fail by its own terms, and invalidity turns on the fantastic possibility that *B* might have a child who might attain twenty-five at a remote time.

Under "wait and see," the inability of *B* to conceive is a fact that justifies a declaration of invalidity at *A*'s death. For example, if *B* and the successor in interest of *A* wish to join in a sale of the land, and marketability turns on securing a declaration of the invalidity of the contingent remainder, the declaration of invalidity should be made. To refuse to declare the contingent remainder invalid because the perpetuities period has not run is absurd unless a case can be made for deferring the determination of invalidity. What are the arguments for deferring the determination of invalidity under "wait and see?"

A. *Statutory Language and Traditional Practice*

The words of the applicable statute, if any, may lend support to the case for deferred determination of invalidity. The Pennsylvania statute, for example, says that "upon the *expiration* of the period allowed by the . . . rule against perpetuities as measured by actual . . . events any interest not then vested . . . shall be void."[23] Despite the common inclination to read the Pennsylvania statute as if it requires a deferred determination of invalidity, the statute does not tell us when the determination of invalidity is made. Rather, it tells us the time at which a contingent future interest *capable of vesting* is deemed bad. Under the Pennsylvania statute, the deter-

21. The assumption that under the Pennsylvania legislation we must invariably defer the determination of invalidity is not always made. Mechem, *Further Thoughts on Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965, 974 (1959).

22. Lynn, *A Practical Guide to the Rule Against Perpetuities*, 1964 DUKE L.J. 207, 219-23.

23. PA. STAT. ANN. tit. 20, § 301.4 (1950). (Emphasis added.)

mination of invalidity is deferred if the contingency might be resolved within the perpetuities period, and under some circumstances the determination may be deferred to a time beyond the running of the perpetuities period.[24] But it does not follow that the determination of invalidity must be deferred in all cases.

It may be traditional in a jurisdiction to refuse to declare a contingent future interest invalid under the Rule Against Perpetuities if the perpetuities question is raised "prematurely." To defer determination of invalidity is indeed a tradition in some jurisdictions.[25] The practice may be justifiable under some circumstances, but it is doubtful that courts purportedly adhering to the tradition do so consistently,[26] and it is demonstrable that adherence to the tradition is disgraceful in particular instances.[27]

B. *Adoption Under "Wait and See"*

The adoption of a child or children who prima facie qualify for the gift may raise the perpetuities question. Adoptions unquestionably do occur, and statutes regulating adoption do reflect a legislative intention to make the adopted child a member of the family of the adopting parent or parents. But it does not follow that the possibility of an adoption justifies deferring the determination of invalidity of a contingent future interest under the "wait and see" version of the Rule. If *A* devises "to *B* for life, remainder to that child of *B* who first attains twenty-five," we must determine what *A* meant by "child of *B*" under "wait and see," just as we must determine the meaning of like words under the orthodox Rule. *A* is presumed to know the law, including the law of adoption, but even so, "child" has frequently been construed to mean child *born* to the ancestor, not adopted. It should be so construed under "wait and see" unless there is a persuasive reason for adopting the more unusual construction. What do the relevant Pennsylvania statutes say?

The first, a part of the Intestate Act, reads as follows:

> The person adopted shall, for all purposes of inheritance and taking by devolution, be a member of the family of the adopting parent or parents. . . . Adopted persons shall not be entitled to inherit or take from or through their natural parents, grandparents, or collateral relatives . . . .[28]

24. Lynn, *supra* note 22, at 231 n.86.

25. *Supra* note 1.

26. Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 MINN. L. REV. 41, 74 (1957).

27. Col. Samuel P. Colt died testate in 1921. As early as 1924 his executor sought instructions respecting the construction of his will. Industrial Trust Co. v. Alves, 46 R.I. 16, 124 Atl. 260 (1924). Not until 1957 did the Supreme Court of Rhode Island concede a violation of the Rule Against Perpetuities. Bank v. Morey, 86 R.I. 15, 133 A.2d 724 (1957).

28. PA. STAT. ANN. tit. 20, § 102 (1950).

The second, a part of the Wills Act, reads as follows:

> [I]n construing a will making a devise or bequest to a person or persons described by relationship to the testator or to another, any person adopted before the death of the testator shall be considered the child of his adopting parent or parents and not the child of his natural parents: Provided, that if a natural parent shall have married the adopting parent before the testator's death, the adopted person shall also be considered the child of such natural parent.[29]

Under the Pennsylvania statutes, a child adopted by *B* would not qualify as a child of *B* under *A*'s will, because the adoption is post-mortem with respect to *A*, the testator.[30]

C. *Fertility and Sterility Under "Wait and See"*

It is possible that a person incapable of conceiving a child at a particular time may thereafter become capable of fathering or bearing a child.[31] Advances in the medical arts are the envy of the legal

29. PA. STAT. ANN. tit. 20, § 180.14(6) (Purdon Supp. 1963).

30. To defer the perpetuities question because of the possibility of an adoption leads to an absurd application of the Pennsylvania perpetuities statutes in some cases, the language of the adoption statutes apart. *A* devises "to *B* for life, then to *B*'s children for their lives, with cross remainders, remainder in fee to the grandchildren of *B*." "Grandchildren" is construed to mean "grandchildren of *B* whenever and to whomever born." *B*, and all of *B*'s children alive at *A*'s death, die survived by a child of *B* born after *A*'s death. All children born to the after-born child of *B* are in fact born no later than twenty-one years after the death of *B* and all of *B*'s children alive at *A*'s death. The after-born child of *B* is still alive after the perpetuities period has run, but is incapable of conceiving a child. Clearly in Pennsylvania the after-born child of *B* cannot invalidate *A*'s gift to the grandchildren of *B* by adopting a child after the perpetuities period has run—and thereby gain the fee under PA. STAT. ANN. tit. 20, § 301.5(c) (1950).

31. This possibility could be foreclosed by legislation: "(a) if a person is a male of the age of [55] or over, or a female of the age of [50] or over, at the commencement of the perpetuities period, he or she shall be conclusively presumed to be incapable of procreating or bearing a child or children . . . ." ABA PERPETUITY LEGISLATION HANDBOOK 14 (2d ed. 1962).

In Lare's Estate, 57 Pa. D. & C. 163 (Orpbans Ct. 1946), Barnsley's Estate, 59 Pa. D. & C. 653 (Orphans Ct. 1947), and Leonard's Estate, 60 Pa. D. & C. 42 (Orphans Ct. 1947), the court ordered termination of a trust at the request of the life beneficiary where the vesting of a remainder in such beneficiary's issue was precluded by the unlikelihood of her having children and no other person or possible person had any interest in corpus. In *Lare's Estate,* petitioner was 69, had never had children, was past the menopause, and in ill health. In *Barnsley's Estate,* she was 58, had never married nor given birth to a child, was past the menopause, and in ill health. In *Leonard's Estate,* she was 57, unmarried and without issue. Expert medical testimony to the effect that she could not conceive or bear a child was received. These cases are cited in Note, 26 TEMP. L.Q. 148 (1952), as authority for the proposition that the fertile octogenarian doctrine did not obtain in Pennsylvania at about the time the perpetuities reform legislation was enacted.

Medical testimony that neither the beneficiary of a testamentary trust nor his wife was capable of conceiving was received in a recent trust termination case. *In re* Bassett's Estate, 104 N.H. 504, 190 A.2d 415 (1963). Note, 62 MICH. L. REV. 1099 (1964).

profession. We may realistically anticipate continual progress in nutrition, gynecology, and urology. We may nevertheless find *B* incapable of conceiving a child at and after *A*'s death when *A* devises "to *B* for life, remainder to that child of *B* who first attains twenty-five."

The finding is made on the basis of evidence.[32] The evidence may include opinions from experts. The opinions of experts may not be harmonious.[33] Even so, a finding must be made if the perpetuities question is otherwise properly raised.

D. *Preservation of Sperm Under "Wait and See"*

Sperm may be preserved for a period of years.[34] If *B* is personally incapable of conceiving a child at and after *A*'s death, he may nevertheless father a child by artificial insemination if he has preserved his sperm. If so, he is capable of conceiving a child at and after *A*'s death, and the perpetuities question is properly deferred to a time beyond that at which the instrument of transfer takes effect. To the extent that deferring the perpetuities question turns on the preservation of sperm, it need not be deferred beyond *B*'s lifetime for two reasons. (1) The construction of "child" turns on the presumed intention of the testator. "Child whenever born within *B*'s lifetime and a period of gestation" is consistent with the presumed intention of the testator in the ordinary case. "Child whenever born to *B* irrespective of the time of conception" is not within the presumed intention of the testator. (2) No posthumous child of *B* could attain twenty-five within the perpetuities period, namely, *B*'s lifetime and twenty-one years.

To the extent that deferring the perpetuities question turns on the preservation of sperm, that question may properly be raised during *B*'s lifetime if the effectiveness of the sperm ends.

Generally speaking, coupling cy pres with "wait and see" does not militate against the result suggested in the case put. If *B* is incapable of conceiving a child at and after *A*'s death, the contingent remainder cannot be reformed to save it from failure by its own terms. But if *B* has preserved his sperm and conceives by artificial insemination a child who is born within *B*'s lifetime and the normal period of gesta-

32. A preponderance of the evidence should be sufficient. An Australian statute requires "such evidence of a high degree of improbability of procreating or childbearing as [the court] thinks proper as establishing the incapacity." Law Reform Act, 1962, 11 Eliz. 2, No. 83, § 3 (W. Austl.). There is no persuasive reason for departing from the usual standard of proof in perpetuities cases. See generally Leach, *Perpetuities: New Hampshire Defertilizes the Octogenarians*, 77 HARV. L. REV. 279 (1963).

33. MCCORMICK, EVIDENCE 28, 32 (1954).

34. *Supra* note 11.

tion, reformation could be resorted to, if appropriate, to reduce the age contingency from twenty-five to twenty-one in order that the child of *B* might qualify for the gift within the perpetuities period.

IV. Cy Pres

If *A* devises "to *B* for life, remainder to that child of *B* who first attains twenty-five," and *B* is a bachelor at *A*'s death, personally incapable of conceiving a child, what are the arguments for reformation under cy pres at the urging of *A*'s executor, rather than a declaration of invalidity at the urging of *B* and the successor in interest of *A* who wish to join in a sale of the land?

A. *Preservation of Sperm Under Cy Pres*

If *B* has preserved his sperm, he is capable of conceiving a child. The contingent remainder may therefore be reformed at or after the probate of *A*'s will to read "remainder to that child of *B* who first attains twenty-one." The possibility of conception by artificial insemination should be indulged no longer than the effective life of the sperm or the lifetime of *B*, whichever is the shorter. For example, if reformation is sought two years after *B*'s death because sperm of *B* is in existence, reformation should be refused and the remainder declared invalid because it failed by its own terms. "Child whenever born within *B*'s lifetime and a period of gestation" is consistent with the presumed intention of the testator in the ordinary case. "Child whenever born to *B* irrespective of the time of conception" is not within the presumed intention of the testator.

B. *Adoption Under Cy Pres*

Should a declaration of invalidity be refused because *B* might adopt a child who might attain twenty-one under the gift as reformed? If *B* and the successor in interest of *A* wish to join in a sale of the land, should a court at the urging of the executor reform "remainder to that child of *B* who first attains twenty-five" to read "remainder to that child born to or *adopted by B* who first attains twenty-one"? It is doubtful that such reformation ordinarily "give(s) effect to the general intent of the creator of the interest,"[35] although consulting California statutes regulating adoption and the effects of adoption as an aid to ascertaining testamentary intention shows that the California act is no insurmountable bar to including an adopted child of *B* within the purview of *A*'s will. It reads as follows:

35. Cal. Civ. Code Ann. § 715.5.

> An adopted child shall be deemed a descendant of one who has adopted him, the same as a natural child, for all purposes of succession by, from or through the adopting parent the same as a natural parent. . . .[36]

Even so, a declaration of invalidity under the "cy pres" version of the Rule is permissible at *A*'s death if *B* and the successor in interest of *A* wish to join in a sale of the land and marketability turns on securing the declaration. To refuse the declaration on the ground that *B* might adopt a child[37] who might qualify for the remainder as reformed is to stand cy pres on its head. Under the Rule in orthodox form, a declaration of the invalidity of the contingent remainder is permissible at *A*'s death. Although *B* is a bachelor incapable of conceiving a child, invalidity under the orthodox Rule turns on the fantastic possibility that *B* might have a child who might attain twenty-five at a remote time. Indulging fantastic possibilities has brought the orthodox Rule into disrepute. Why deny a declaration of invalidity under the cy pres version of the Rule on the possibility —however unlikely—that the very person seeking the declaration of invalidity might adopt a child who might qualify for the remainder as reformed?

V. CONCLUSION

It bears emphasis that reforming the Rule Against Perpetuities does not eliminate perpetuities problems—it minimizes them. It is significant that the word "vest" continues to appear in reform legislation despite the censure which that word has justifiably evoked. "Vest" has a comfortable ring, and the word dies hard. Lawyers and judges will continue to face difficult questions of construction under the Rule in orthodox, "wait and see," and cy pres forms.

There is, nevertheless, a significant new development. Both the "wait and see" and cy pres versions of the Rule require us to face facts, including those of fertility, sterility, conception, and adoption. The facts of life are relatively new to perpetuities law, but judges are clearly free under the new versions of the Rule to interpret the law in a sensible fashion.[38] Even under the Rule in orthodox form

36. CAL. PROB. CODE ANN. § 257. Succession is the acquisition of title to the property of one who dies without disposing of it by will. CAL. PROB. CODE ANN. § 200.

37. Note, 31 So. CAL. L. REV. 441 (1958).

38. "Certainly our function is not to interpret the rule [against perpetuities] so as to create commercial anomalies. . . . Our task is not to block the business pathway but to clear it, defining it by guideposts that are reasonably to be expected." Wong v. DiGrazia, 60 Cal. 2d 525, 533-34, 386 P.2d 817, 823 (1963), holding that a lease to commence upon the completion of a building by the lessor did not violate the Rule. Haggerty v. City of Oakland, 161 Cal. App. 2d 407, 326 P.2d 957 (1958), holding such a lease void because the building might not be completed within the perpetuities period, was specifically disapproved by the Supreme Court of California in *Wong*.

they are free to adapt the Rule to changing conditions. Facts should be faced in the context of a *perpetuities* question—a question that occurs infrequently, that affects few instruments, and few persons. Constructions given words in other contexts should not be used in perpetuities cases if doctrine is thereby made absurd or the reasonable expectations of the grantor, settlor, or testator defeated.

No version of the Rule tells us with precision when the perpetuities question will be raised. "Wait and see" sets the time limit within which a contingent future interest must vest, if at all, or fail under the Rule Against Perpetuities. "Wait and see" does not tell us when the declaration of invalidity is made. Cy pres tells us that a contingent future interest, bad under the Rule in orthodox form, *may* be reformed. Cy pres does not tell us that reformation will occur, nor when it occurs, if it occurs at all.

A mastery of the mechanics of the Rule will continue to be a prerequisite to solving a perpetuities question properly, irrespective of the form that the Rule takes. As outworn niceties of the Rule are discarded, new facets of the Rule appear. There is little evidence that the lot of the property lawyer has ever been an easy one. There is nothing in the perpetuities reform movement to suggest that it is about to become so.

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