

**THE IOWA RULE AGAINST PERPETUITIES--REFORM AT LAST, RESTATEMENT  
STYLE:**

**WAIT-AND-SEE AND CY PRES**

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On July 1, 1983, Iowa joined the ranks of a growing number of states that have reformed the common-law Rule Against Perpetuities. [FN1] This arcane Rule, which historically has befuddled both bench and bar, no longer should plague the estate planning community and defeat in unexpected ways the dispositive goals of property owners inadvertently caught in the Rule's seamless web. The Iowa statutory reforms, based largely on the recently approved reforms of the American Law Institute, [FN2] adopt both the wait-and-see analytical approach and the equally important cy pres doctrine. [FN3]

**\*706** Under the wait-and-see analytical approach, a nonvested interest [FN4] is good under the Rule if it actually vests within the permissible period. This approach is contrary to the traditional might-have-been approach under which a nonvested interest was void under the Rule if, based on facts and circumstances in existence when the interest was created, [FN5] any possibility **\*707** existed that the nonvested interest might vest after the permissible period had run.

Under the cy pres doctrine, a court may reform a nonvested interest to assure that it will vest within the permissible period. In exercising this reformation power, courts are directed to fashion a reform 'to most closely approximate the intention of the creator of the interest in order that the nonvested interest will vest . . . within the period of the rule.' [FN6] Both reforms, as reflected in the new Iowa statute, will be discussed and analyzed in detail below.

At the onset, however, it should be made clear that the new Iowa statutory rules have not repealed the common-law Rule. Furthermore, the legislature, by its adoption of the two reform measures, in no way explicitly or implicitly has indicated that the policies underlying the Rule no longer serve a useful societal function. To the contrary, the Rule continues to serve its most important function: to compromise the conflict between the interest of property owners in disposing of property in a manner of their own choosing and the interest of living beneficiaries in utilizing that property in whatever manner they determine most beneficial in light of present facts and circumstances.

Thus, if reform is not intended to undercut the basic policy underlying \*708 the Rule, the question legitimately is asked: 'Why reform?' With respect to the wait-and-see approach the answer in part is to eliminate much foolishness in the law resulting from the courts' application of the might-have-been approach to void nonvested interests that actually do, or can, vest within the permissible period under the Rule. Judicial foolishness sometimes results from surmising the most preposterous of events which actually have not occurred to illustrate that a nonvested interest might vest too remotely. Furthermore, nonvested interests that actually vest on time but conceivably might not have vested on time should not be voided, because such interests do not offend the delicate balance the Rule constructs to compromise the conflicting interests of the living and the dead. Additionally, the common-law Rule is primarily a trap for the unwary that, because it is easily avoided by those fortunate enough to retain competent counsel, penalizes those with less capable counsel. 'The adoption of the wait-and-see approach . . . is largely motivated by the equality of treatment that is produced by placing the validity of all non-vested interests on the same plane, whether the interest is created by a skilled draftsman or one not so skilled.' [FN7]

The statutory cy pres reform permits a court to refashion a gift most closely to approximate a creator's intent without doing violence to the policies underlying the Rule. By doing so, the court prevents the property from which the nonvested and otherwise void interest was carved from being distributed in a manner wholly inconsistent with the creator's intent. In most cases cy pres will result in the reformation of an unfulfilled condition that cannot occur or fail to occur within the permissible period under the Rule.

In order to understand the reforms, the reader should have a fundamental understanding of the operation of the Rule in the absence of the wait-and-see and cy pres reforms. To the extent the reader needs a refresher, this author's treatment of the unreformed common-law Rule in an earlier article [FN8] is must reading. This Article will not attempt to retrace old ground unless it is necessary to assist the reader in understanding the impact of the statutory reforms.

In undertaking the analysis of the new statute, this Article first proceeds with the one change that

reflects no alteration of existing law--the codification of the common-law Rule. [FN9] Next, the wait-and-see doctrine is introduced, including an extended discussion of the role of the measuring lives [FN10] and how they are to be ascertained. The cy pres doctrine then is introduced [FN11] and the Article concludes with a number of illustrations \*709 in which the two statutory reform rules can be applied to validate nonvested interests that might otherwise be void.

## I. THE IOWA RULE AGAINST PERPETUITIES

### **558.68 Perpetuities.**

1. A nonvested interest in property is not valid unless it must vest, if at all, within twenty-one years after one or more lives in being at the creation of the interest and any relevant period of gestation. [FN12]

This newly enacted section of the Iowa Code is merely a codification of the common-law Rule as courts had interpreted the former perpetuities statute in the State of Iowa. [FN13] Thus, in no sense does section 558.68(1) represent any earth-shattering reform. Indeed, it is no reform at all. It was, nonetheless, a desirable change because former section 558.68 [FN14] did not purport on its face to be a rule directed towards the remoteness of vesting. On the contrary, the former statute only invalidated property dispositions that suspended 'the absolute power of controlling the same.' [FN15] Precisely what this meant, however, was never clear because the Iowa Supreme Court repeatedly held that the statute did not mean what it said. [FN16] Rather, the court consistently held that former section 558.68 was directed to the remoteness of vesting as, of course, is the common-law Rule. [FN17] Thus, the sole purpose of section 558.68(1) is to correct the statute books to reflect the long-standing judicial construction of the prior statute.

Section 558.68(1), however, does not precisely track the language of the common-law Rule, as crystallized by Professor Gray, that '[n]o 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.' [FN18] Nonetheless, the import of section 558.68(1) and Professor Gray's classic articulation is the same. Both statements of the Rule focus exclusively on the time within which 'nonvested interests' must vest [FN19] under the Rule. Interests \*710 that are vested from the moment of their creation cannot violate the Rule. [FN20]

Like the common-law Rule, section 558.68(1) ties the vesting of the nonvested interest to a twenty-one-year period after one or more lives in being at the creation of the interest. The change in language from 'some life' in Professor Gray's statement to 'one or more lives' in section 558.68(1) is strictly cosmetic; it represents no substantive change from the traditional analysis that one or more lives may be selected to test the validity of a nonvested interest suspected of violating the Rule. [FN21] Similarly, the direction in section 558.68(1) that any 'relevant period of gestation' may be considered, although not appearing in Professor Gray's formulation of the Rule, simply codifies long-standing judicial interpretations of the common-law Rule. [FN22]

Under traditional perpetuity analysis, a child in gestation at the time the nonvested interest is created and who later is born alive is treated as a life in being at the creation of the interest and would be an appropriate measuring life under the Iowa statute. Additionally, a nonvested interest will be deemed to vest timely even though it vests in a child in gestation born more than twenty-one years after the death of the last measuring life.

Example #1: T [FN23] dies on May 1, 1980. By will, T devises property to X in trust to pay the income in equal shares to his children who survive \*711 him and shall be living from time to time during the term of the trust. The trustee is directed to distribute the corpus in equal shares to T's grandchildren who shall be living twenty-one years after the death of the survivor of the children, the issue of any deceased grandchild to take his or her parent's share. Finally, the will provides that any income earned after the death of the survivor of T's children shall be accumulated and distributed to those persons ultimately entitled to the corpus of the trust. T is survived by his pregnant spouse and three children, A, B, and C.

On October 1, 1980, T's spouse gives birth to T's child D, who is treated as being alive on May 1, 1980, the date of T's death. A, B, and C die in 1983. D dies on November 1, 1992. D is survived by a spouse who is seven months pregnant. On January 1, 1992, she gives birth to GC, a grandchild of T. GC dies on November 1, 2012, two months before his twenty-first birthday survived by a spouse who is four months pregnant. GC's spouse gives birth to GGC five months later on April 1, 2013. The interest of GGC, the issue of T's deceased grandchild, timely vests under the Rule. D is a measuring life under the Rule even though he was born after T had died because he had been conceived prior to T's death and subsequently was born alive. Ultimately, the nonvested interest vests in GGC, who also was deemed to be alive at the expiration of twenty-one years plus the period of gestation after the death of D. Actually, of course, the nonvested interest became possessory in GGC twenty-one years and five months after the death of D. [FN24]

In summary, section 558.68(1) merely represents a codification of the common-law Rule invalidating a nonvested property interest that might not vest within twenty-one years after the lives in being at the creation of the interest.

## II. THE WAIT-AND-SEE APPROACH

2. a. In determining whether a nonvested interest would violate the rule against perpetuities in subsection 1, the period of the rule shall be measured by actual events rather than by possible events, in any case in which that would validate the interest. [FN25]

The heart of the reform statute thus appears in the first sentence of section 558.68(2)(a). This 'wait-and-see' approach represents a fundamental departure from the analytical methodology under the common-law Rule, which tested the validity of a nonvested interest by events that 'might have been.' The Iowa courts followed the might-have-been analytical approach. [FN26] Under the might-have-been approach, a nonvested interest **\*712** was invalid if, based on facts and circumstances in existence when the period of the Rule began to run, there was any possibility the nonvested interest might vest too remotely. Invalidity was assured if a scenario could be fantasized under which the nonvested interest possibly might vest too remotely. The interest was invalid despite the improbability that the hypothesized scenario would occur, and even though the nonvested interest actually vested within the period allowed by the Rule.

The impact of this statutory change is easily illustrated by comparing the analysis of the validity of a gift conditioned on the probate of the testator's will under the common-law 'might-have-been' approach and the reform 'wait-and-see' approach. Suppose T, who is survived by three children, A, B, and C, and five grandchildren, D, E, F, G, and H, bequeaths \$25,000 to 'my grandchildren who are living at the time my will is probated.' The gift to T's grandchildren is a nonvested interest that is subject to the condition precedent of survivorship until T's will is probated. T's will is probated within one month of T's death.

Under a might-have-been analysis the gift to the grandchildren is void even though it vested in the five surviving grandchildren of T within one month of T's death and necessarily within twenty-one years after the lives in being. It was void because of what might have been. Consider this fantasy: Within one year of T's death A could give birth to a sixth grandchild, I. Immediately thereafter A, B, C, D, E, F, G, and

H (and any other possible measuring lives alive at T's death) could die and twenty-two years later T's will could be probated. At that time, but for the Rule, the gift would vest in T's surviving grandchild, I. While this scenario is highly unlikely to occur, the mere possibility that it could occur was sufficient under the common-law Rule to invalidate the grandchildren's nonvested interest. [FN27] Under the wait-and-see approach, on the other hand, the gift to T's grandchildren is valid. In fact, the surviving grandchildren's gift vested within their own lifetimes and, therefore, within the permissible period under the Rule. [FN28]

The wait-and-see approach is admittedly the minority view of the proper way to analyze the validity of a nonvested interest under the Rule, [FN29] \*713 although the acceptance of this analytical approach by the American Law Institute [FN30] probably will result in the recognition of wait-and-see in the majority of, if not all, American jurisdictions. [FN31]

\*714 Further analysis of the wait-and-see rule in specific factual situations follows the discussions of the new statutory rules relating to ascertaining the measuring lives under the Rule and the cy pres doctrine, which permits the courts to reform a nonvested interest that otherwise would violate the Rule to assure instead that it will vest within the permissible period. An understanding of the measuring lives concept and the cy pres doctrine is necessary to appreciate fully the scope of the statutory reforms.

2. a. For this purpose, if an examination of the facts in existence at the time the period of the rule begins to run reveals a life or lives in being within twenty-one years after whose deaths the nonvested interest will necessarily vest, if it ever vests, that life or lives are the measuring lives for purposes of the rule against perpetuities with respect to that nonvested interest and that nonvested interest is valid under the rule. [FN32]

All nonvested interests that must either vest or fail to vest within the permissible period are valid under the Rule. In other words, under the Rule an interest that timely fails is as good as an interest that timely vests. Admittedly, this result is of little consolation to the holder of a failed interest. If a nonvested interest is certain to vest or fail within the permissible period under the Rule the interest is valid. There is no need to wait and see.

Without wait-and-see the validity of a nonvested interest can be established from the moment of its creation (1) if at the creation of the nonvested interest a life in being that bears some relationship to the

vesting or failing of the nonvested interest can be selected to demonstrate that the nonvested interest will vest or fail to vest within the permissible period (a so-called 'validating life') and (2) if at the creation of the nonvested interest no life in being that has a relationship to the vesting or failing of the interest whether or not such life also is a 'validating life' can be selected to hypothesize a scenario under which the nonvested interest conceivably might vest or fail more than twenty-one years after the death of any validating life (a so-called 'invalidating life'). In effect, a nonvested **\*715** interest is good under the Rule from the moment of its creation if there is any life in being at the creation of the interest within twenty-one years of whose death there is absolute certainty the nonvested interest will vest or fail. [FN33] A validating or invalidating life need not be named in the governing instrument or related by consanguinity to the taker or takers of the nonvested interest. [FN34] Similarly, the measuring lives need not have any beneficial interest under the instrument. [FN35] If an invalidating life is in being when the period of the Rule begins to run, it will be necessary to wait and see whether the nonvested interest actually vests or fails within the permissible period to determine whether it is in all events valid or whether cy pres should be exercised to validate the gift. In the absence of any life in being having some connection to the vesting or failing of the nonvested interest that ensures the nonvested interest will timely vest or fail to vest, the permissible vesting period is limited to a gross term of twenty-one years. [FN36]

Example #2: T devises property to X in trust to pay the income to A for life and after A's death to distribute the corpus to A's children who attain the age of twenty-one. A survives T but is childless. A's life obviously is related to the vesting or failing of the nonvested interest in A's children. The only other possible life which is related to the vesting or failing of that interest is the other parent of A's children, who may or may not be a life in being at T's death.

Because the interest of A's children who attain age twenty-one is certain to vest or fail to vest no later than twenty-one years after A's death, it is good under the Rule. While it also might vest or fail to vest within twenty-one years after the death of the other parent of A's children (who may not have been a life in being), such vesting or failing will occur either in A's lifetime or within twenty-one years of A's death. Thus, neither the other parent nor an ancestor of that parent is an invalidating life. No scenario can be hypothesized under which by resort to the other parent's life or his or her ancestor's life, without resort to A's life as well, the nonvested interest could vest too remotely.

Example #3: T devises property to X in trust to pay the income to **\*716** A for life and after A's death to distribute the corpus to A's children who attain the age of forty. A survives T. Unlike Example #2, in this example the possibility exists that A's children's interest could vest or fail to vest too remotely. This would occur if A dies survived by any child under the age of nineteen; in that case the child could not attain the age of forty or necessarily fail to attain that age within twenty-one years of A's death. Thus,

under the might-have-been approach, the gift to A's children is void. [FN37] Since an examination of the facts in existence at T's death reveals an invalidating life--namely, A--the certainty-of-vesting test of section 558.68(2)(a) cannot apply. It is necessary to wait and see whether the nonvested interest of A's children is valid.

Suppose T had been survived by A and a child of A, age forty at T's death. Under the might-have-been approach the nonvested interest in A's children is void. A could have another child after T died who could be under the age of nineteen at A's death. This child could not attain age forty or necessarily fail to attain that age within twenty-one years of A's death. Under might-have-been, it was irrelevant that A's after-born child might attain age forty in the lifetime of A's child who survived T, because it also would have been possible for that child to have died before the after-born child attained age nineteen. Even though these facts did not actually occur, the gift is void because they might have occurred.

It also is irrelevant whether the interest of A's after-born child vested or failed in the lifetime of B, who also survived T. B has no relationship to the vesting or failing of the nonvested interest. B could have been made a validating life even though not related to A or A's children if T's will had provided that in all events the interest of A's children would vest no later than twenty-one years after the death of B. [FN38]

Example #4: O [FN39] conveys property to her child A for life, with the remainder to O's surviving grandchildren who attain age twenty-one. At first blush it would appear that the nonvested interest is good under the Rule because it will vest or fail to vest no later than twenty-one years after the death of A, a life in being. Under the might-have-been approach, however, the gift is bad. While A is a validating life because A bears some relationship to the vesting or failing of the interest of O's surviving grandchildren, O is an invalidating life. O's continuing life bears a relationship to the vesting or failing of the interest. A scenario can be constructed involving O to demonstrate a vesting or failing beyond the permissible period. Consider what might have been. After the conveyance O might have another child, B. A and O then might die survived by B, who dies who years later survived by a child (a grandchild of O) age one. This grandchild \*717 could only reach the age of twenty-one twenty-three years after A and O had died or the grandchild might fail to attain twenty-one more than twenty-one years after the deaths of A and O.

Suppose the gift had been created by O's will rather than by conveyance. Would the gift be valid under the might-have-been approach? The gift is valid under might-have-been and the statutory certainty-of-vesting test as well, because it will vest or fail to vest no later than twenty-one years after

the death of the survivor of O's children living at O's death. In this case O is not an invalidating life because the period of the Rule begins to run from O's death. Furthermore, O's children are validating lives even though they are not named in the governing instrument; they obviously bear some relationship to the vesting or failing of the grandchildren's interest.

If the interest is valid under the certainty-of-vesting test, there is, of course, no need to wait and see. Any interest valid under the might-have-been approach need not be tested by wait-and-see. Only if the might-have-been approach would invalidate a gift is there any need to wait and see.

Section 558.68(2)(a), incorporating the actual-events test, and section 558.68(2)(b), designating the statutory measuring lives, apply whenever no life or lives in being at the creation of the nonvested interest appear to assure that the interest will timely vest. If section 558.68(2)(b) applies, the validity of the nonvested interest is not assured from the moment of its creation. Rather, the nonvested interest is valid only if it actually is determined that it timely vests, whether of its own force or after reform, or it timely fails.

Acceptance of a wait-and-see approach necessitates a consideration of how the measuring lives should be ascertained. If the validity of a nonvested interest could be tested without any restriction on who the measuring life or lives could be, the policy underlying the Rule which permits only a limited suspension of the vesting or failing of an interest would be subverted. This subversion could occur under wait-and-see whenever the holders of the nonvested interest could find a life in being at the creation of the interest who died within twenty-one years of the vesting or failing of the nonvested interest.

Example #5: T devises property to X in trust to pay the income to A for life, remainder to A's surviving children for their lives, remainder to A's surviving grandchildren for their lives, remainder to A's surviving great- grandchildren. A's last surviving grandchild dies more than twenty-one years after the deaths of A, A's issue, and their relatives living at the time of T's death. If any measuring life could be used to validate the nonvested remainder interest of A's great-grandchildren applying a wait-and-see approach, it would be valid if the great-grandchildren could find any human being [FN40] who was living at T's death and who was living at \*718 the time the interest purports to vest or had died within twenty-one years of the date on which the interest purports to vest.

The theoretical ability to select any life, even one having no relationship to the vesting or failing of the

interest, to validate a nonvested interest raised the ire of Professor Simes, an early critic of the wait-and-see approach. He opined:

Perhaps it may be queried: Then why is not the 'wait and see' doctrine desirable for that very reason? My answer is, if you can apply it in that case you can also apply it in a case where there is a devise to such of the testator's lineal descendants as are alive 120 years after the testator's death. If a person can be found who was alive when the testator died and who lived more than ninety-nine years after the time of the testator's death, the limitation would be good. One can imagine, in such a case, remote lineal descendants patiently awaiting the termination of the 120 year period, not knowing after all this time whether the limitation is good or bad. And finally, at the end of the 120th year, the attorney for the descendants advertises for evidence concerning any person who died twenty years ago and who was at least one hundred years old at the time of his death. Doubtless the attorney will eventually find such a person. For in every year there must be at least a few persons who died at the age of one hundred. But what a fantastic way to determine the validity of a future interest! [FN41]

There are at least two ways to meet this criticism. One way would be to mandate that the measuring life or lives have a 'causal relationship' to the vesting or failing of the interest. [FN42] While the obvious intent of this causal-relationship test is to prevent the selection of extraneous lives to validate an interest, the phrase 'causal relationship' is inherently ambiguous and could require case-by-case adjudications to determine whether the life or lives selected to validate the interest were causally related. The other approach, and the one adopted by the Iowa statute, is to define precisely who the measuring lives may be. The lives selected under the adopted statute might include lives that are not causally related to the vesting or failing of the interest; thus, the class of measuring lives actually may be considerably broader than it would have been under the causal-relationship test. Broadening the class in this matter is not necessarily unwarranted. [FN43]

Section 558.68(2)(b) establishes four categories of lives in being at the creation of the nonvested interest that may be considered in measuring **\*719** the validity of the nonvested interest under the wait-and-see approach. These categories are discussed in the following sections.

2. b. If no such life or lives can be ascertained at the time the period of the rule begins to run, the measuring lives for purposes of the rule are all of the following:

(1) The creator of the nonvested interest, if the period of the rule begins to run in the creator's lifetime. [FN44]

Ordinarily the period of the Rule begins to run with respect to a nonvested interest on that date 'when no person, acting alone, has a power currently exercisable to become the unqualified beneficial owner of all beneficial rights in the property in which the nonvested interest exists.' [FN45] If the future interest is created by deed, the period begins to run from the date of delivery, assuming the grantor has not reserved a power of revocation. [FN46] The creator of the nonvested interest cannot be a measuring life if the nonvested interest is created under his or her will since the period begins to run at the creator's death. [FN47] Similarly, the creator cannot be a measuring life if the nonvested interest is created under the terms of a revocable trust if the trust becomes irrevocable by reason of the creator's death. In this case the nonvested interest is deemed created as of the creator's death. [FN48] If the creator's power of revocation is released during the creator's lifetime, however, the creator can be a measuring life because the permissible period begins to run at the date of the termination of the creator's power of revocation. [FN49] If there are multiple creators of the nonvested interest (as would be the case if joint tenants transferred property into an irrevocable inter vivos trust or if one person created a trust and subsequently another person added property to the trust), the creator is a measuring life only with respect to the portion of the trust that he or she contributed. [FN50]

Example #6: H and W own Blackacre as joint tenants with right of survivorship. They transfer Blackacre into a trust under the terms of which \*720 the income is payable to A for life and after A's death the corpus is distributable to A's children who attain the age of twenty-five. H is a measuring life with respect to one-half of the trust; W is a measuring life with respect to one-half of the trust.

Example #7: O transfers \$100,000 to T in trust to pay the income to A for life and after A's death to distribute the corpus to A's children who attain the age of twenty-five. Two years later, when the corpus of the trust has appreciated to \$150,000 in value, O-1 adds \$50,000 to the trust. O is the creator of three-fourths of the trust; O-1 is the creator of one-fourth of the trust. [FN51] Each is a measuring life to the extent that he or she is treated as the creator of the trust.

2. b. (2) Those persons alive when the period begins to run, if reasonable in number . . . [FN52]

Section 558.68(2)(b)(2) sets forth four groups of potential measuring lives: the selected-lives group, the

persons-with-a-beneficial-interest group, the relatives (grandparents and issue of grandparents) group, and the potential-appointees group. While the statute might have been more elegantly drafted, it is clear from the opening phrase that all persons qualifying as measuring lives under section 558.68(b)(2) must have been alive when the period of the Rule began to run.

The number of measuring lives determined under section 558.68(2)(b) is subject to an overall 'reasonable-in-number' test. The reasonable-in-number requirement is a rule of administrative convenience. The selected lives cannot be so numerous that administrative difficulties would make it onerous to monitor the deaths of the selected lives to determine when the vesting or failing of the nonvested interest actually occurs. [FN53]

2. b. (2) . . . who have been selected by the creator of the interest to measure the validity of the nonvested interest . . . . [FN54]

**\*721** This provision is an obvious recognition of the ability to validate a nonvested interest that might otherwise be void under the Rule by the use of a so-called 'savings clause.' [FN55] A savings clause creates an alternative time period within which a nonvested interest will timely vest under the Rule; thus, the validity of the interest is assured. There is no need to wait and see. The selected measuring lives need not have a vested or contingent interest within which the nonvested interest exists; the selected lives need not be ancestors or other relatives of the persons who have the nonvested interest. [FN56]

If the savings clause is properly drafted, the nonvested interest necessarily will vest or fail within the permissible period and the nonvested interest will in all events be good under the certainty-of-vesting test of section 558.68(2)(a). On the other hand, if the savings clause is improperly drafted, the validity of the nonvested interest will not be assured under section 558.68(2)(a). Nonetheless, the selected lives, if alive at the time of the creation of the interest and reasonable in number, can be measuring lives for the purpose of applying the wait-and-see approach of section 558.68(2)(b)(2).

Example #8: T devises property to X in trust to pay the income to A for life and after A's death to distribute the corpus to A's children who attain the age of twenty-five. T's will further provides that:

Notwithstanding the foregoing provisions of this will, if the corpus of the trust has not been distributed to A's children living twenty-one years after the death of the survivor of any of B, C, D, E, F, G, and H who are living at the time of my death, then upon the twenty-first anniversary of the death of the survivor of them, the corpus shall be distributed to and vest in such one or more of A's children then living.

A, B, C, D, E, F, G, and H survive T. Under T's will the latest the interest of A's children can vest is twenty-five years after A's death or twenty-one years after the death of the survivor of B, C, D, E, F, G, and H. The gift is good without any need to wait and see because the gift necessarily vests prior to the running of the permissible period measured by the lives of B, C, D, E, F, G, and H. If twenty-one years after the death of the survivor of B, C, D, E, F, G, and H occurs before twenty-five years after A's death, the interest of A's children vests coterminously with the expiration of the designated perpetuity period even though any one or more of A's children may be under the age of twenty-five. If twenty-five years after A's death occurs before twenty-one years after the death of the survivor of B, C, D, E, F, G, and H, the gift merely vests earlier \*722 than necessary under the Rule. [FN57] With the use of a properly drafted savings clause, in no event can the nonvested interest vest more than twenty-one years after the death of the named lives in being and, therefore, the gift is valid under the certainty-of-vesting test of section 558.68(2)(a).

If the savings clause had been omitted from T's will, the nonvested interest of A's children would have been void under the might-have-been approach because it would have been possible that all of A's surviving children would not reach age twenty-five or fail to attain that age within twenty-one years of A's death. This could occur if any child of A was under the age of four at A's death. Of course, with the adoption of the wait-and-see approach, the interest of A's children might be valid even if the savings clause had been omitted from the will. [FN58]

Example #9: Suppose O conveys property to A for life, remainder to A's children who attain age twenty-four. The trust instrument further provides that in all events the remainder in A's children shall vest no later than twenty-one years after the death of the survivor of the issue of B 'living at the time of the conveyance or at O's death.' This attempted savings clause is ineffective under the certainty-of-vesting test to validate the gift to A's children who attain age twenty-four because the selected lives include lives in being at O's death. Therefore, the second sentence of section 558.68(2)(a)--the certainty-of-vesting test--cannot apply. Nonetheless, applying the wait-and-see approach, any of B's issue alive at the time of the conveyance are measuring lives. They fall within the selected lives group of section 558.68(2)(b)(2). Issue of B born after the time of the conveyance and living at O's death, on the other hand, cannot be measuring lives notwithstanding O's intent that they should be measuring lives.

Lives selected by the creator can be measuring lives under section 558.68(2)(b) as long as they are reasonable in number. Similarly, only savings clauses that select a reasonable number of measuring lives will validate a gift under the certainty-of-vesting test of section 558.68(2)(a), [FN59] even though that section does not expressly refer to a reasonable-in-number requirement. It arises under the judicial interpretation of the Rule. [FN60] If **\*723** a savings clause violates the reasonable-in-number requirement, then the certainty-of-vesting test cannot apply and the validity of the nonvested interest will be determined under the wait-and-see approach using the statutory lives listed in section 558.68(2)(b). For this purpose, if the lives selected in a savings clause are not reasonable in number, conceivably the court might reform the clause to make it administratively workable. [FN61]

Example #10: T bequeaths property to X in trust to pay the income to A for life, remainder to A's children who attain age forty. T's will also provides that the nonvested interests created in A's children shall vest in interest, if they have not vested sooner, twenty-one years after the death of the survivor of all students enrolled in the Iowa Law School on the date of T's death. Because the Iowa Law School is likely to have approximately 630 students enrolled at the time of T's death, this savings clause is administratively unworkable. [FN62] Because T's intent appears to be to maximize the vesting period, a court might reform the savings clause under T's will to select as measuring lives a group that is reasonable in number from the students enrolled at the Iowa Law School at T's death. [FN63]

Under the preceding savings clause, the corpus vests in A's children living at the expiration of the twenty-one-year period. The savings clause does not require the gift necessary to be distributed at that time. Therefore, if A is then living, the remainder would not become possessory at the time it vests and cause A to forfeit his or her life estate. The nonvested interest need not become possessory when the perpetuity period has run; it need only vest in interest. [FN64]

2. b. (2) . . . or, if none, those persons, if reasonable in number, who have a beneficial interest whether vested or nonvested in the property in which the nonvested interest exists . . . [FN65]

Resort to this group and the remaining groups covered by section 558.68(2)(b)(2)--grandparents and their issue and potential appointees--is available only in the absence of a selected lives group. [FN66] No distinction **\*724** is made between persons having a beneficial present interest and persons having a beneficial future interest. [FN67] Such persons also would include persons whose only interest is that of a permissible recipient of income or corpus resulting from the exercise of a power held by a fiduciary to determine who shall receive the income or corpus of a trust. [FN68]

In most cases the identity of persons having a vested or nonvested beneficial interest in the property will be known at the time the period of the Rule begins to run. The precise identity of those persons, however, need not be known at the time the period of the Rule begins to run. Thus, if an interest is created in a person because of that person's status, the person can be a measuring life as long as he or she was alive at the time the period of the Rule began to run. In common with the selected-lives rule, persons having a beneficial interest in the property are measuring lives if 'reasonable in number.' The reasonable-in-number requirement facilitates the proper administration of the trust.

Example #11: T bequeaths property to X in trust to pay the income to A for life and after A's death to distribute the corpus to A's children who attain the age of twenty-five. T is survived by A and A's three children, B, C, and D, all of whom are under the age of twenty-five at T's death. Under the might-have-been approach, none of A's surviving children are lives within twenty-one years of whose death it is absolutely certain the nonvested interest would vest or fail to vest because they are members of a class that is not closed at the time the period of the Rule begins to run. Since the class is open when the period of the Rule begins to run, anyone who physiologically can produce a member of the class is an invalidating life. Under the wait-and-see approach, however, A's children, B, C, and D, as well as A, are measuring lives because each has a beneficial interest in the property in which the nonvested interest exists. [FN69] Thus, if the nonvested interest vests or fails to vest within twenty-one years of the death of the survivor of A, B, C, and D, the nonvested interest is good applying a wait-and-see approach.

If subsequent to T's death A has another son, the son would not be a measuring life because he was not alive at T's death. Suppose, however, that subsequent to T's death A adopts a daughter and the nonvested interest vests or fails to vest within twenty-one years of the death of the adopted daughter, but not within twenty-one years of the death of the survivor of A, B, C, and D. Is the interest good under the Rule? If the \*725 adopted daughter of A was alive at T's death and under local law is included in the class gift to A's children who attain age twenty-five, [FN70] the answer is yes. While the precise identity of the adopted child was unknown at T's death, by reason of status she acquired an interest in the property and under the statute she would be a permissible measuring life. [FN71] If the adopted daughter had been born after T's death, however, she could not be a statutory measuring life. Example #12: T devises property to X in trust to pay the income and corpus among A, B, C, and D as X, the trustee, deems advisable. Upon the death of the survivor of A, B, C, and D, the corpus is distributable to their surviving issue. A, B, C, and D survive T but have no issue. A, B, C, and D, the permissible recipients of income and corpus, are measuring lives under the statute. [FN72] If either A, B, C, or D had issue who survived T, the issue also would be measuring lives. They have beneficial interests in the property in which the nonvested interest exists. Any issue of A, B, C, and D born or adopted after T's death would not be measuring lives even though they also have beneficial interests in the property, because they were not lives in being when the period of the Rule began to run.

Example #13: T bequeaths property in equal shares to all graduates of the Iowa Law School alive on the twenty-fifth anniversary of T's death. Persons having a beneficial interest in the property include persons who graduated from the Iowa Law School before and after T's death and also are alive on the twenty-fifth anniversary of T's death. Because the number of potential takers is substantial, [FN73] the selection of all qualified students as measuring lives could be held to violate the reasonable-in-number requirement. [FN74] In this case the court could exercise its cy pres power to reform the gift, including reforming the number of measuring lives. [FN75]

2. b. (2) . . . the grandparents of all such beneficiaries and the issue of such grandparents alive when the period of the rule begins to run . . . [FN76]

**\*726** This class of measuring lives includes persons who, but for this statute, would be wholly extraneous to the events resulting in the vesting or failing of the interest. Under a causal-relationship test, [FN77] they, or at least some of them, would be excluded from the class of measuring lives. Broadening the class of measuring lives to include these persons, however, is warranted because it accomplishes the same effect for those with less sophisticated counsel as those with sophisticated counsel accomplish with a broad savings clause. Thus, it creates equality of treatment for all wealth holders in testing the validity of dispositive designs under the Rule.

Under the statute this class also must be reasonable in number. If the class is unusually large, the court, in exercise of its cy pres power, may fashion whatever relief is necessary to avoid administrative difficulties. This extended family class is broader than the relative group permitted to be considered as measuring lives under the Restatement (Second) of Property, [FN78] which limits the relative group to 'parents and grandparents alive when the period of the rule begins to run of all beneficiaries of the property in which the non-vested interest exists.' [FN79]

Example #14: T bequeaths property to X in trust to pay the income to A for life and after A's death to distribute the corpus to A's children who attain the age of twenty-five. A and any of A's children who survive T are permissible measuring lives. Additionally, any of the following persons alive at T's death (when the period of the Rule begins to run) are statutory measuring lives: A's grandparents, the issue of A's grandparents, A's children's grandparents, and the issue of those grandparents. Under the statute, the grandparents and issue are statutory measuring lives even though they have no beneficial interest in the property in which the nonvested interest exists.

Issue should include any adopted child alive at the time the period of the Rule begins to run who, by reason of the adoption, is brought into the extended family. Since the Iowa inheritance laws treat adopted children as natural children, the legislative policy of integrating the adopted child into the family of the adopting parents should be reflected in the analysis of this statute. [FN80] Thus, if the adopted child has a beneficial interest in the property in which the nonvested interest exists, his or her grandparents through his or her biological parents and their issue should not be statutory measuring lives.

Example #15: T bequeaths property to X in trust to pay the income among A, B, and C and their spouses living from time to time during the term of the trust and in such shares as X, the trustee, deems advisable, and on the death of the survivor of them to pay the income to any one \*727 or more of their surviving issue for a term of twenty-five years. On the death of the survivor of A, B, and C and their spouses or the expiration of the twenty-five-year term, as the case may be, the trust property is distributable in equal shares among T's then surviving issue. A, B, C, and any of their spouses alive at T's death are statutory measuring lives. Any spouse of A, B, or C would be a statutory measuring life even if the marriage to that spouse occurred after T's death, as long as the spouse was alive when T died. The precise identity of the spouses need not be determined at T' death. Additionally, any of their issue alive at the time of T's death are statutory measuring lives. They also have a nonvested interest in the property. Finally, the grandparents and their issue who are alive at T's death of all of the persons having a beneficial interest in the property alive at T's death are statutory measuring lives. [FN81] If this group is not reasonable in number to the effect that 'an undue administrative burden is imposed in determining the survivor, the number should be cut down to a reasonable number by an appropriate judicial proceeding and such reasonable number should be regarded as the measuring lives.' [FN82]

2 b. (2) . . . and those persons who are the potential appointees of a special power of appointment exercisable over the property in which the nonvested interests exist who are the grandparents or issue of the grandparents of the donee of the power and alive when the period of the rule begins to run. [FN83]

The Restatement (Second) of Property has no provision similar to this clause of the new Iowa statute. A power of appointment may be defined as 'the authority, other than as an incident of the beneficial ownership of property, to designate beneficial interests in property.' [FN84] Powers of appointment may be classified as general or special. A general power is a power under which the donee of the power may exercise the power in favor of himself, his estate, his creditors, or the creditors of his estate. [FN85] According to the original Restatement of Property, a special power is power exercisable in favor of one or more persons, other than the donee or the donee's estate, 'who constitute a group not unreasonably large.' [FN86] The Restatement (Second) of Property defines all powers as general or

nongeneral. A nongeneral power is any power of appointment other than a general power. [FN87] Either definition of a power is broad enough to include a power exercisable by the donee solely as a fiduciary and a power exercisable by a donee in a \*728 nonfiduciary capacity. Thus, if the Iowa courts accept these definitions, a power held by a trust to apply income or principal to one or more persons would be a power of appointment and the trustee would be a donee of a power under the statute. [FN88]

Under section 558.68(2)(b)(2), potential appointees of a special power alive when the period of the Rule begins to run may qualify as measuring lives in two different ways: either (1) they have a nonvested interest in the property and therefore qualify under the beneficial-interest rule [FN89] or (2) they do not have a beneficial interest merely because they are potential appointees, but nonetheless are measuring lives because they are the grandparents or issue of the grandparents of the donee of the special power. [FN90]

Under the Restatement (Second) view, potential appointees of a special power held by a fiduciary are 'beneficiaries of the trust property' and, if alive at the time the period begins to run, are measuring lives as well. [FN91] Their position is more like a contingent interest than a mere expectancy. Although the Iowa statute does not provide expressly that the potential appointees of a special power held in a fiduciary capacity have a beneficial interest in the property, courts probably will accept the Restatement's position for the purposes of construing the statute.

The potential appointees of a special power of appointment held in a nonfiduciary capacity under the Restatement rule are 'not beneficiaries of the property subject to the power until the power is exercised and then the individuals in whose favor the power is exercised become beneficiaries and [are] eligible for consideration as measuring lives,' [FN92] assuming they were alive when the period of the Rule began to run. Under section 558.68(2)(b)(2), however, potential appointees of a nonfiduciary special power who are the grandparents or issue of the grandparents of the donee of the power are permissible measuring lives even if the special power is not exercised in their favor, subject to the reasonable-in-number requirement. [FN93] These potential appointees have a sufficient nexus to the property to warrant their inclusion in the broadened class of measuring lives. If potential appointees of a nonfiduciary special power of appointment are not grandparents or issue of grandparents of the donee of the power, the potential appointees, assuming they are not otherwise measuring lives, can only be measuring lives if their interest as appointees is viewed as a beneficial interest. If courts adopt the Restatement (Second) view, [FN94] potential \*729 appointees of a nonfiduciary special power will not be deemed to have a beneficial interest in the property. Therefore, unless they are the grandparents or issue of the grandparents of the donee of the nonfiduciary special power, they will be excluded from the class of measuring lives. In all probability courts will adopt the Restatement (Second) view. Otherwise,

if the class of potential appointees extends beyond grandparents and issue of grandparents of the donee of the power, the number of potential appointees under a nonfiduciary special power will be unreasonably large.

To the extent a person having a beneficial interest in the property also has a special power exercisable in a nonfiduciary capacity, section 558.68(2)(b)(2) does not expand the class of measuring lives if the power is not exercised; the grandparents of the donee and their issue in all events are included in the class of measuring lives. If the special power is exercised, however, the class of measuring lives could be expanded to include appointees who were not the grandparents of the donee or grandparents' issue who were alive when the period of the Rule began to run. These persons are measuring lives because, after the exercise of the power, they have a beneficial interest in the property. [FN95]

The potential appointees of a donee of a general power who are the grandparents of the donee or the grandparents' issue are not permissible measuring lives under the potential-appointees group. To the extent the general power is exercised, however, the appointees under the power who acquire a beneficial interest in the property are permissible measuring lives if they were alive when the period of the Rule began to run. [FN96] The potential appointees under a general power who are the grandparents of the donee or the grandparents' issue were not initially included in the class of measuring lives because, in all likelihood, the donee of the general power would have had a beneficial interest in the property in addition to the general power and his or her grandparents and their issue already would have qualified for inclusion in the class. This is not necessarily true with respect to the holder of a special power, particularly if the special power is held in a fiduciary capacity. Perforce, all potential appointees under a general power were not included in the class of measuring lives because including them would be a per se violation of the reasonable-in-number requirement.

Example #16: T transfers property to X in trust to pay the income to A for life and on A's death to distribute the corpus to and among one or more of A's husband, A's issue, and A's brother's issue, as A appoints by will. If A fails to exercise the special power, the corpus is distributable after A's death to A's children who attain the age of twenty-five. X is an individual not related to A and as trustee can invade the corpus to provide for A's support and maintenance.

**\*730** A and A's two children, ages fifteen and twenty-seven, who survive T are measuring lives because, among other things, they have a beneficiary interest in the trust. A has a beneficial interest both as income beneficiary of the trust and potential appointee of X's fiduciary power; A's children have a beneficial interest as takers in default [FN97] of A's special power of appointment. Their grandparents

and their grandparent's issue alive at T's death also would be measuring lives. In addition, A's brother's children are measuring lives because they are potential objects of A's special power who fall within the class of 'grandparents and issue of grandparents of the donee of the power.' [FN98]

A's husband is not a measuring life merely because he is a permissible potential appointee. A's husband is not A's grandparent or the issue of A's grandparents. [FN99] If A exercises the power in favor of her husband and the husband was alive when T died, the husband becomes a measuring life because he has acquired a beneficial interest in the trust and the husband's grandparents and their issue alive when the period of the Rule began to run also become measuring lives. [FN100] Furthermore, X, as donee of a fiduciary special power is a measuring life. [FN101] None of X's grandparents or their issue alive at T's death are measuring lives, however, because they are not potential appointees under X's special power.

Example #17: Same as Example #16 except X can appoint the corpus to his brothers or sisters. Subject to the reasonable-in-number requirement, if the potential appointees of a power exercisable in a fiduciary capacity are deemed to have a beneficial interest, X's brothers and sisters are measuring lives and their grandparents and issue alive when the period of the Rule began to run are measuring lives. If X also could appoint the corpus to persons employed by X at the time of T's death, X's employees and their grandparents and their grandparents' issue alive when the period of the Rule began to run also would be measuring lives because the employees have a beneficial interest in the trust. If the courts construe the statute to exclude potential appointees of a fiduciary power from the class of persons having a beneficial interest in the trust merely because \*731 of their status as potential appointees, X's brothers and sisters still would be measuring lives under the potential appointees group because they are issue of X's grandparents. X's employees who are neither X's grandparents nor the grandparents' issue would not be permissible measuring lives.

In many cases, when potential appointees who are the grandparents of the donee or the grandparents' issue are included within the class of measuring lives, the class actually will not expand because the grandparents and issue are already within the class of measuring lives under the preceding provisions of section 558.68(2)(b)(2). Thus, if A is the income beneficiary of a trust and has a broad tax-free special power of appointment to appoint to anyone other than herself, her estate, her creditors, or the creditors of her estate, A's grandparents and their issue would be measuring lives even if A did not have the power. On the other hand, if A had no interest in the trust other than as the donee of a special power and as donee had a broad tax-free power, A's grandparents and their issue would be included in the class of measuring lives through the potential-appointee provision, subject to the reasonable-in-number requirement.

2. b. (3) Those other persons alive when the period of the rule begins to run, if reasonable in number, who are specifically mentioned in describing the beneficiaries of the property in which the nonvested interest exists. [FN102]

In most cases this 'mentioned lives group' will not result in any further expansion of the class of measuring lives as that class is composed under the preceding subsections of section 558.68(2)(b). This follows from the fact that a mentioned life more often than not will be a grandparent or issue of the grandparents of the named beneficiary. Thus, if O conveys to A's children who attain the age of twenty-five, A is a measuring life for wait-and-see purposes because A is an issue of his children's grandparents. A is also a person specifically mentioned in describing the beneficiaries of the property. In some cases, however, beneficiaries may be described by reference to their relationship to someone who is not a grandparent or issue of the grandparent of the beneficiary. For example, suppose O conveys property to the eldest surviving child who attains age twenty-five of each person enrolled in Professor Kurtz's estate planning course in the 1982-83 academic year. Professor Kurtz would be a measuring life even if he is not a grandparent or issue of the grandparents of the beneficiary because he is a person specifically mentioned in describing the beneficiaries of the property.

2. b. (4) The donee of a general or special power of appointment if the donee is alive when the period of the rule begins to run and if the exercise of that power could affect the nonvested interest. [FN103]

This provision actually will not broaden the class of measuring lives **\*732** if the holder of the power is already in the class under the preceding subsections of 558.68(2)(b). Primarily, this provision will operate to include within the class of measuring lives persons holding a fiduciary power over the property. The donee of the power is included in the class only if the donee's exercise of the power could affect the nonvested interest. If the donee's exercise of the power could not affect the nonvested interest, the donee is excluded from the class of measuring lives under section 558.68(2)(b)(4), although he or she may be included under other subsections of section 558.68(2)(b).

Example #18: T devises property to X to hold in trust for A's life and after A's death to distribute the corpus to A's children who attain age twenty-five. X is not related to A or A's children. X, as trustee, has the power to pay income among A, B, and C. In measuring the validity of the contingent remainder interest limited in favor of A's children who attain age twenty-five, X would not be a measuring life because the exercise of X's power cannot affect the nonvested remainder interest. On the other hand, if X could accumulate income for ultimate distribution to the remaindermen or could invade the corpus for A's benefit, X would be a measuring life because the exercise of X's fiduciary power could affect the

remainder interest.

Section 558.68(2)(b)(4) is broader than its Restatement (Second) counterpart. [FN104] Under the Restatement (Second) rule, only the donee of a nonfiduciary power is included in the class of measuring lives. No reason appears, however, to exclude the donee of a fiduciary power if, like the donee of a nonfiduciary power, exercise of the power will affect the nonvested interest.

Admittedly, the class of persons who may be considered in testing the validity of a nonvested interest under the Rule is potentially very broad in the new Iowa statute, although with the available evidence of the declining birth rate in this country this may not be a real concern. Nonetheless, in order to assure that the class of measuring lives is not so large that it makes the wait-and-see approach administratively unworkable, section 558.68(2)(b)(2) imposes a 'reasonable-in-number' requirement. The reasonable-in-number requirement will operate to restrict the number of persons included in the class of measuring lives. Under the cy pres doctrine, if the number of measuring lives is determined to be unreasonable the court may reform the class of measuring lives by restricting membership in the group to as many persons as the court determines to be reasonable in number.

Example #19: O conveys property to T in trust to pay the income to A for life and after A's death to distribute the corpus to A's issue who attain age twenty-five. A has a special power to appoint the corpus to anyone other than herself, her estate, her creditors, or the creditors of \*733 her estate. T, the trustee, is a half-brother of A and in his fiduciary capacity is authorized to invade the corpus for any one or more of A and T's whole or half brothers and sisters as T deems advisable. A, T, two whole brothers of T (B-1 and B-2), C-1 (a child of A), and GC-1 (a grandchild of A), are alive at the time of the conveyance. All of these persons who have beneficial interests in the property and any person alive at the time of the conveyance in whose favor A exercises the special power are measuring lives. In addition, all of their grandparents and their grandparents' issue are measuring lives. O, the creator of the trust, is also a measuring life.

The large size of the class of measuring lives should minimize the number of cases in which persons will seek to invalidate a nonvested interest under the Rule. If a challenge was raised, in all probability the persons entitled to the nonvested interest would be able to find a measuring life under the statute that would validate the interest. In this sense, section 558.68(2)(b) will inhibit lawsuits that challenge the validity of a nonvested interest under the Rule.

The statute implicitly imposes on either the trustee of a trust or the persons having the nonvested interest the responsibility of monitoring the deaths of the measuring lives in order to determine the latest point in time when the nonvested interest will vest. This responsibility is, of course, no different than the duty imposed on such persons if the will incorporates a broad savings clause, although the number of lives that may affect the time when the nonvested interest must vest or fail to vest may be different. It would be advisable for the trustee or some other person to ascertain who the measuring lives are, if section 558.68(2)(b) applies, and to monitor their deaths. If the trustee or other persons ascertain the identity of the measuring lives but fail to monitor their deaths, in most cases no harm will result because in all likelihood the nonvested interest will have vested in the manner provided in the dispositive instrument. Thus, only if the validity of the nonvested interest is challenged will it be necessary actually to ascertain whether any one of the measuring lives is then living or had died within twenty-one years of the time of vesting.

Example #20: T devised property to X in trust to pay the income to A for life and after A's death to distribute the property to A's children who attain the age of twenty-five. The will does not contain a savings clause and the trustee determines that under section 558.68 there are at least forty-eight measuring lives, in addition to A and A's children, living at T's death. Most of these measuring lives, while related to A and A's children, have no actual bearing on whether A's children reach age twenty-five within twenty-one years of the deaths of A and any children of A living at the time of T's death. If A's children attain age twenty-five within twenty-one years of the deaths of A and A's children living at T's death, determining whether any of the other lives in being are living or have died within twenty-one years of the vesting of the children's interest is unnecessary. Merely keeping track of A and his children living at T's death is sufficient. If the interest of A's children actually were to vest more **\*734** than twenty-one years after the death of the survivor of A and A's children living at T's death, however, the interest still would be good as long as any one of the other measuring lives in being were then living or had died within twenty-one years.

An additional administrative burden arises because the precise identity of all beneficiaries of a nonvested interest may not be known at the time the nonvested interest is created. Common examples are interests in a class which is open when the interest is created, interests created in appointees of a power upon the later exercise of the power, and interests created in individuals because of status (such as a gift to A's surviving spouse). As previously noted, such beneficiaries will be measuring lives if they were alive when the period of the Rule began to run. [FN105] Additionally, the beneficiaries' grandparents and the grandparents' issue who were alive when the period of the Rule began to run also will be measuring lives. On the other hand, neither the beneficiaries who were not alive when the period began to run nor their grandparents or issue of their grandparents are measuring lives. This construction is based upon the general survival requirement in the opening phrase of section 558.68(2)(b)(2) and the reference to 'such beneficiaries' in describing whose grandparents and grandparents' issue may be

measuring lives. Therefore, if O conveys to A for life and after A's death to A's grandchildren who attain age twenty-five, only A and A's grandchildren alive at the time of the conveyance and their grandparents and grandparents' issue are measuring lives. If a child of A marries after the time of the conveyance and has a son--a grandchild of A--even though the grandson is a beneficiary, neither the grandson nor any of his grandparents or their issue who are not also the grandparents or issue of grandparents of A and any of A's grandchildren living at the time of the conveyance can be measuring lives. [FN106]

Suppose, however, that O conveys to A for life, then to A's spouse for life, then to their surviving children. At the time of the conveyance A is not married to the spouse who survives A. The spouse who survives A, however, was alive at the time of the conveyance; therefore, the spouse is a measuring life under the statute. Additionally, the spouse's grandparents and their issue alive at the time of the conveyance are measuring lives. Thus, the class of measuring lives includes persons alive when the period of the Rule began to run whose identity was unknown at that time. Admittedly, this necessitates revising the list of measuring lives to determine the outside limit on when the children's remainder interest must **\*735** vest or fail to vest. If the list were compiled at the time of the conveyance, it now would need to be revised. Revision of the list does not result in any unwarranted expansion of the number of measuring lives. If the identity of the surviving spouse of A were known at the time O made the transfer, the same persons who are added to the list when A's surviving spouse actually is determined would have been on the original list, assuming A's spouse was a life in being. Thus, the revision of the list merely increases the administrative responsibilities of the person monitoring the vesting or failing of the nonvested interest. In this example, of course, resort to any life in being other than A or A's surviving spouse is unnecessary because the children's interest vests or fails no later than the death of the survivor of them. Suppose, however, the remainder had been limited to their children who attain age twenty-five. If one of their children is under the age of four at the death of the survivor of them, the children's interest nevertheless will be valid if it vests or fails to vest within the lifetime of all other measuring lives or within twenty-one years of the death of the survivor of them. Grandparents of A's surviving spouse and their issue alive at the time of the conveyance would be included as measuring lives if A's spouse was alive at the time of the conveyance. Thus, the additional administrative responsibility of adding these persons to the list may be necessary to validate the children's interest.

In summary, section 558.68(2)(b)(2) imposes a 'reasonable-in-number' requirement on the class of measuring lives. In interpreting this provision, courts should keep in mind that in defining the measuring lives as broadly as it has the legislature anticipated a broad class of measuring lives. This suggests that a liberal interpretation of the reasonable-in-number requirement was intended. If courts balk at the number of measuring lives included in the class, the number can be reformed under the judicial cy pres power [FN107] to reduce the number of measuring lives to encompass a group that the court concludes is reasonable in number. The obvious group to be honed would be the relatives group, to the

extent any of those persons have no actual relationship to the vesting or failing of the nonvested interest.

Notwithstanding the provisions of section 558.68(2)(b), many instruments will continue to use a perpetuity savings clause to assure that all nonvested interests vest within the permissible period under the Rule. If the savings clause is properly drafted, the nonvested interest will be valid under the certainty-of-vesting test of section 558.68(2)(a). Section 558.68(2)(b) cannot apply in such case; it only applies if no lives in being can be ascertained under section 558.68(2)(a).

### III. THE CY PRES DOCTRINE

3. A nonvested interest that would violate the rule against perpetuities **\*736** whether its period is measured by actual or by possible events shall be judicially reformed to most closely approximate the intention of the creator of the interest in order that the nonvested interest will vest, even though it may not become possessory, within the period of the rule. [FN108]

While specific application of this statutory cy pres rule will be discussed later, some initial general comments are warranted. [FN109] First, if the nonvested interest is to be reformed to assure its timely vesting under the Rule, the reform must be made by the courts. While not entirely clear, the cy pres doctrine adopted in the Restatement (Second) of Property appears to permit a nonjudicial reformation. It provides that 'the transferred property shall be disposed of in the manner which most closely effectuates the transferor's manifested plan of distribution.' [FN110] While the Restatement's language does not mandate judicial reformation, presumably any nonjudicial reformation ultimately would be subject to judicial review.

Second, the statutory language permits reformation of the nonvested interest 'whether [the period of the Rule] . . . is measured by actual or by possible events.' [FN111] It might be argued that the phrase 'by actual or possible events' should have read 'by actual and by possible events.' Otherwise, the argument goes, the courts have the power to reform a nonvested interest that would fail under the might-have-been approach but would be valid under the wait-and-see approach. In other words, the courts could reform a nonvested interest that actually vests within the period of the Rule, presumably causing it to vest in one or more unintended beneficiaries. This construction of the statute obviously was not intended, as evidenced by the statutory dictate that judicial reform shall be used to assure the nonvested interest vests within the permissible period. If the nonvested interest actually vests within the

period there is no need to reform it to assure that it will timely vest.

**\*737** The 'possible events' language was included in the statute to avoid the argument that if no measuring lives could be ascertained under the statute, the validity of the nonvested interest would continue to be tested by the might-have-been approach and that the interest, if measured by possible events that could demonstrate invalidity, could not be reformed to assure its timely vesting under the Rule. Perhaps this language represents an overabundance of caution, but given the courts' historical interpretation of the Rule, such caution nevertheless may be advisable. Additionally, the statute permits judicial reformation of those interests which cannot possibly vest within twenty-one years after the lives in being.

Example #21: T devised property in equal shares 'to the issue of A living twenty-five years after the death of the survivor of A and the grandparents of A and A's issue and the issue of those grandparents living at the time of my death.' Under section 558.68(2)(b)(2) the measuring lives are A and the grandparents of A and A's issue and the issue of those grandparents living at the time of T's death. Since the property is distributable only to A's issue living twenty-five years after the death of the survivor of the selected measuring lives, it is not possible for this nonvested interest to vest within the permissible period under the Rule. No amount of waiting and seeing can validate this gift. Nonetheless, the nonvested interest in A's issue could be reformed to vest in A's issue living twenty-one, rather than twenty-five, years after the death of the survivor of the selected measuring lives.

Section 558.68(3) provides that the judicial reform need not be fashioned to make the reformed interest possessory. All that is required is a judicial reform which assures that the nonvested interest will vest within the permissible period. The statute recognizes that the Rule is directed to the remoteness of vesting, not the remoteness of possession. On the other hand, the statute should not be construed to constrain the courts from vesting an interest by making it possessory if that would most closely approximate the creator's intent.

Example #22: T devises property to X in trust to pay the income to A for life, remainder to A's surviving son for life, remainder to the son's issue who attain the age of twenty-one. A, the last surviving member of his family, survives T and is childless. After T dies A has a son. The remainder to A's grandchildren would be valid under the wait-and-see approach only if it vested within twenty-one years after the death of A. If at the expiration of the perpetuity period A's surviving son was living and had issue, the court could reform the gift to vest the remainder in the son's then-living issue without disturbing the son's life estate. Of course, the son's later born issue would be excluded from the class

gift as judicially reformed. [FN112]

Suppose, however, that at the expiration of the twenty-one-year period **\*738** A's son has no living issue. To what extent, if any, can the courts exercise their reform power? The problem in this case is that no reformation is possible to vest the interest in any one or more of the designated takers-- the issue of A's son. If the court failed to exercise the reform power, the nonvested interest would revert to T's heirs. [FN113] Under the statute, however, **\*739** the court is directed to reform the nonvested interest 'to most closely approximate the intent of the creator,' [FN114] and no statutory constraints are placed on the exercise of this power. Thus, the court might conclude that T's intent would be most closely approximated by vesting the contingent remainder interest in A's son on the theory that T's heirs were excluded as beneficiaries under the will and that A and A's family were the preferred takers.

If the court determined that no reform could be fashioned that would most closely approximate T's intent, then the court properly would refuse to reform and the nonvested interest would revert to T's heirs. Although the statute provides that the court 'shall' [FN115] reform the nonvested interest, this directive is tempered by the further requirement that any reform should most closely approximate T's intent. If no reform could accomplish that goal, reform should be refused.

Section 558.68(3) does not expressly provide when the courts may exercise their cy pres power. Textually, it can be argued that the courts must defer any reformation until it is clear the nonvested interest actually will not vest on time. In other words, first the courts must wait to see if the interest timely vests. This conclusion follows from the statutory direction that the court exercise its cy pres power to cause a nonvested interest to vest timely. If the interest actually has vested within the permissible period under the Rule, the exercise of a cy pres power would serve no purpose. Textual arguments aside, as a matter of policy, it may be desirable to defer the exercise of cy pres until it is clear the interest actually will not vest within the permissible period. This approach would minimize judicial intervention with the creator's dispositive plan and reduce judicial case loads and litigation to cases in which the Rule actually is violated. [FN116] **\*740** Reforming a nonvested interest prior to the time it becomes certain the interest will not vest on time could result in an unnecessary reform that conflicts with the creator's intent. While it might be argued that the earliest **\*741** possible cy pres is desirable in order to ascertain the persons in whom the interest will vest, if at all, the benefits of resolving such questions earlier than would be necessary are marginal. This is particularly true if the primary justification for an early cy pres is to make the property more marketable and the property is held by a trustee with a power of sale. Even in those cases in which the nonvested interest is a legal rather than an equitable interest, it is unlikely that an early cy pres will increase the practical alienability of the property unless the cy pres removes all contingencies from the vesting or failing of the interest. If it is clear that no amount of waiting and seeing will validate a nonvested interest, a cy pres order should

be sought as soon as possible to determine when and in whom the nonvested interest will vest.

Lastly, section 558.68(3) directs the court to reform the nonvested interest in order that it will vest within the period of the Rule. The court is not empowered to reform interests that are vested from the moment of their creation. This omission should circumscribe the courts' ability to void vested interests on the dubious theory that reformation of the nonvested interest requires reformation of the vested interest in order to most closely approximate the creator's intent. [FN117]

#### IV. ILLUSTRATIONS OF WAIT-AND-SEE AND CY PRES

The application of both the wait-and-see approach and the cy pres doctrine should result in sustaining the validity of almost all nonvested interests, although perhaps in some reformed form to assure a timely vesting under the Rule. Critics might argue that if this is the case, why not simply eliminate the Rule? This criticism is easily met. Repeal of the Rule, rather than reform, would permit property to be tied up in perpetuity. Reform, on the other hand, preserves the underlying policy of the Rule to compromise the competing interests of owners and beneficiaries and assures that nonvested interests which actually vest within the permissible period under the Rule (whether by application of wait-and-see or cy pres) are valid. The statutory period of twenty-one years after the lives in being is merely the yardstick to assure that the balance has been maintained. The wait-and-see approach recognizes that lengthening the period to take account of as many lives as it does only extends benefits to clients with less sophisticated counsel that clients with sophisticated counsel already obtain. If critics are concerned that the wait-and-see approach shifts the balance too much in favor of the creators of nonvested interests, their complaint legitimately lies with the perpetuity period, not the wait-and-see and expansive measuring lives approaches. [FN118]

**\*742** Reform through wait-and-see and cy pres will eliminate the harsh effects that followed from application of the might-have-been approach, which in its operation served neither the interests of the creator nor the beneficiaries. Too often, interests that actually vested within the period allowed by the Rule were invalidated, and more often than not those interests were vested in persons who were not the intended beneficiaries under the governing instrument. Application of these reforms can best be illustrated by examples that compare how the validity of a nonvested interest would be determined under wait-and-see and might-have-been. As is typical with articles involving a perpetuity analysis, these examples will introduce the reader to a number of improbable characters and foolish doctrines such as the unborn widow/widower, [FN119] the slothful executor, [FN120] the fertile octogenarian, [FN121] the all-or-nothing rule, and a number of subsidiary rules relating to class gifts. Hopefully, with

reform, these characters and doctrines will receive the decent burial they deserve.

#### A. The Unborn Widow/Widower

Example #23: T died in 1980. Under T's will, property was devised to X in trust to pay the income to T's daughter D for life, then to pay the income to her surviving husband for his life and upon his death to distribute the corpus to D's surviving children. T was survived by D and her husband, H. They have no children. Under the might-have-been approach the contingent remainder bequeathed to D's surviving children is void even if it actually vests upon the death of the survivor of D and H, both of whom were lives in being at the death of T. The contingent remainder in D's surviving children is void because it might vest after the death of a husband of D who was not a life in being at T's death. [FN122] Consider what might have been. H might die in 1981 survived by D. In 2000 D might marry a man, H-2, who was born in 1983, three years after T died. In 2001 D and H-2 might have a child, C-1. D might die in 2003 survived by H-2 and C-1. Upon D's death the secondary life estate would vest in H-2. He might die in 2025. Because the nonvested interest in D's surviving child could not vest until H-2's death in 2025, [FN123] this scenario demonstrates at least one possibility when the nonvested interest in D's surviving children vests too remotely. [FN124] That possibility is sufficient to **\*743** invalidate the gift. Under the might-have-been approach it is irrelevant that the interest of D's surviving children actually vests on the death of the survivor of D and H, both of whom were lives in being. Similarly, under might-have-been it is irrelevant that T was survived by children of D and H in whom the contingent remainder actually vests. Because the class interest in D's surviving children was not closed at T's death, none of their children are lives within twenty-one years of whose deaths it is absolutely certain the nonvested interest will vest or fail to vest. [FN125]

Under the wait-and-see approach the validity of the nonvested gift to D's surviving children can be tested by events that actually occur. Thus, if T is survived by D and H and the gift to D's surviving children actually vests on the death of the survivor of them, the gift is valid under the Rule. Both D and H are measuring lives under the statute. While H is not specifically named in T's will, by reason of his status he acquires a beneficial interest in the trust and accordingly is a measuring life. If H died and D subsequently married a man who was alive at the time of T's death in whom the secondary life estate vested at D's death, this man also would be a measuring life and the gift to D's surviving children necessarily would vest or fail to vest within the permissible period.

If D married a man born after T had died it nevertheless might be possible to sustain the validity of the gift under the wait-and-see approach. For example, suppose T is survived by D and H and three of

their children. The gift to the children is valid if it actually vests in the three children of D who survived T, even though that occurred after the death of D's surviving husband who was born after T had died. Similarly, the gift is valid if it vests in any children of D born after T died if it also vests within the lifetime of any one of D's children who survived T or within twenty-one years of the death of the survivor of them, H, and S. Suppose, however, that D actually marries H-2 who was not alive when T died and H-2 dies more than twenty twenty-one years after the death of all measuring lives survived by a child of D and H-2 born after T had died. In this case, the nonvested interest will not vest within the permissible period. The gift, therefore, is void unless it is judicially reformed to vest in interest in D's children living twenty-one years after the death of the survivor of the measuring lives.

This unborn widower case is an excellent vehicle to demonstrate why courts should wait to see whether a nonvested interest timely vests before exercising their reformation power. If the court had exercised its cy pres power shortly after T had died, consider some of the reformations that might have been made. First, the gift could have been reformed to limit the secondary life estate to H, thereby excluding any other husband to whom D might later be married. The validity of the remainder limited to D's children is assured by this reform because it will vest or fail no \*744 later than the death of the survivor of H and D, both of whom were lives in being. Of course, it is not entirely clear that T intended to exclude a subsequent husband of D from taking the secondary life estate, which is precisely what would happen under this reform if D actually remarried after H died or D and H were divorced. Furthermore, this reform might not be permissible under the statute since it is a reform of an interest other than the nonvested interest that might violate the Rule.

Second, the gift to D's children might have been reformed by limiting the remainder to D's children who survived T and also survived the survivor of D and her husband. This reform saves the children's interest because it assures that the interest will vest or fail no later than the deaths of D's children who were lives in being. However, any after-born child of D would be excluded from the gift under this reform.

Finally, the court might have reformed the gift to vest in D's children living at the death of the survivor of D and her surviving spouse but not later than twenty-one years after the death of the survivor of the measuring lives determined under section 558.68(2)--precisely what would have happened if the court had waited to see if the interest timely vested rather than reform the gift before the wait-and-see period expired. By waiting, however, a judicial proceeding actually may be avoided. By not waiting, a judicial reform might be made that is narrower than necessary, resulting in an exclusion of takers from the gift who otherwise might have shared in the gift.

## B. The Slothful Executor

Example #24: T dies in 1980. T devises Blackacre to 'X's issue who are living at the time the final report for my estate is approved by the court having jurisdiction of my estate.' While the final report is judicially approved within three years to T's death, under the might-have-been approach the gift to the issue of X then living is void. Consider what might have been. In 1981 X could have a child. In 1982 X and the issue of X living at T's death could die. In 2005 T's 'slothful executor' [FN126] could file the final report for the estate with the court and have it approved in that year. Because the interest of X's issue might not vest until 2005 when the final report is judicially approved, it is void. [FN127]

**\*745** Under wait-and-see, on the other hand, the gift to X's issue living when the final report is approved is good if the final report is approved within twenty-one years of T's death. Indeed, the gift is good as long as the final report is approved within twenty-one years of the death of the survivor of X, X's issue, their grandparents, and their grandparents' issue living at the time of T's death.

## C. The Fertile Octogenarian

For perpetuity analysis purposes it is assumed, absent a statutory direction to the contrary, [FN128] that all persons are capable of having children without regard to their age or physical condition. This assumption can result in invalidating gifts under might-have-been even in those cases in which the probability that a person will have a child is so remote as to be negligible. Professor Leach encapsulated this particular absurdity through the immortal 'fertile octogenarian.' [FN129]

Example #25: T devises property to A for life and after A's death to A's children who attain the age of fifty. A, age eighty, a widower, and A's four children, ages forty-six through fifty-eight, survive T. Under the might-have-been approach the gift to A's children is void. [FN130] Consider what **\*746** might have been. A's four children who survived T might die within one year of T's death. A, age eighty, then might have another child (no doubt with a wife born after T died) and then die when the after-born child was under the age of twenty-nine. Because the after-born child of A could not attain age fifty within twenty-one years of A's death, the gift to the child is void. The gift to any of A's children who attained age fifty within the permissible period under the Rule, including their own lifetimes, also is void. [FN131] If the law had not presumed A capable of having more children, but rather assumed A incapable of having children for perpetuity analysis purposes, the gift to A's children who attain age fifty

would have been good since it necessary would vest or fail to vest in the lifetime of A's children who survived T.

Under a wait-and-see approach, A and A's four children who survive T are measuring lives. If the gift actually vests in A's four children at or after A's death, it is good under the Rule. Even if the promiscuous octogenarian did have another child (by birth or adoption), the gift would be good as long as it vested in interest [FN132] or failed to vest within twenty- one years of the death of the survivor of A, A's children, their grandparents, and the grandparents' issue living at the time of T's death.

#### D. The All-or-Nothing Rule

Example #26: T died in 1980. T devised property to X in trust to pay the income to A for life, remainder to A's children who attain age twenty-five. T was survived by A, age fifty, and three children of A, ages fifteen, nineteen, and twenty-seven. Subsequently, A's three children could die and then A might have a child who is under the age of four at the time of A's death. This child could not attain age twenty-five within twenty-one years of A's death. The gift to this fantasized after-born child of A might not vest or fail to vest within the permissible period, and under the 'all-or-nothing' rule that gift to this child and to all of the other children of A is void. Under the all-or-nothing rule, if a gift is void as to any member of a class, the gift is void as to all members of the class. [FN133]

**\*747** Under the wait-and-see approach, the gift to A's children who attain age twenty-five is good under any number of situations. If A never has any more children, the gift is good because it vests or fails to vest no later than the death of A's three children who were lives in being at the creation of the interest. If A dies survived by any child born after T died who is over the age of four at A's death, the gift is also good because it will vest or fail within twenty-one years of A's death. It is also good, even if A's after-born child is under the age of four at A's death, if he or she attains age twenty- five or fails to attain such age within the lifetime of his or her older siblings living at T's death or within twenty-one years after the death of the survivor of them or any of the grandparents or issue of grandparents of A and his issue living at the time of T's death.

Suppose, however, that the after-born child cannot attain the age of twenty- five within twenty-one years of the death of the survivor of the measuring lives. Would the gift to the after-born child of A necessarily be void? The answer should be no. Under section 558.68(3)--the statutory cy pres

rule--the court could reform the gift to A's after-born child to vest it in the after- born child at that age closest to the age of twenty-five, determined by adding twenty-one to the after-born child's age at the time of the death of the survivor of the measuring lives, if to do so would more closely approximate T's intent. For example, if A dies survived only by an after-born daughter who is age two at A's death, the class gift could be reformed to vest in the daughter if she attains age twenty-three. [FN134] In fashioning this reform the court implicitly assumes that T would prefer the daughter to take at this earlier age than not to take at all. Suppose, however, that A had a son who survived T but died at age twenty-four. Under the terms of the instrument the son's interest fails because he did not attain age twenty-five. Could the court, in reforming the gift to save the interest of the after-born daughter, also reduce the age contingency with respect to the son, who survived T but failed to attain age twenty-five? This is obviously a difficult question. It could be argued that the age contingency for this child cannot be reduced because reform is not necessary to save the gift to this child from a perpetuity violation. This argument would be more persuasive, of course, if A never had an after-born child under the age of four at A's death, since the interest of no child of A would be validated by reducing the age contingency. On the other hand, in this case in which A had an after-born daughter, reformation of the age contingency to save the gift to the daughter under the Rule and also to save the gift to the son that timely failed may be necessary to most closely approximate T's intent and furthermore to avoid an unequal distribution among A's children.

The harshness of the all-or-nothing rule could be ameliorated partially under the so-called subclass exception. Under the subclass exception, \*748 if the creator left gifts to separate subclasses the validity of each subclass gift was determined separately from any other subclass gift. [FN135] Because the wait-and-see approach never can operate to invalidate a gift that would have been valid under a traditional perpetuity analysis, the subclass exception, if applicable, will continue to validate a subclass gift that cannot possibly vest too remotely. On the other hand, the wait-and-see approach may operate to validate subclass gifts that otherwise would be invalid.

Example #27: T died in 1980. Under T's will, T devised property to X in trust to pay the income to A for life. On A's death T directs that the corpus shall be divided into separate shares, one for the primary benefit of each child of A who survives A and one share for the issue collectively of each child of A who predeceases A. Each share set aside for a surviving child of A shall be held in further trust. Under the terms of this further trust, all income is payable to the child and on his or her death the corpus is distributable to his or her surviving issue or, if none, to A's other issue then living per stirpes. A and three children of A-B, C, and D--survive T. In 1982 A has another child, E. The secondary life estates in A's surviving children, including E, are good in all events under the Rule. They vest or fail to vest no later than the death of A, who was a life in being. Similarly, the outright gift to the issue of any child of A who predeceased A is good since it vests or fails to vest no later than the death of A.

Under the subclass exception, the remainders following the secondary life estates in each child of A who survived T-B, C, and D--are good. They vest or fail to vest no later than the deaths of A and each child who was a life in being at T's death in 1980. The remainder following the secondary life estate in E, who was born in 1982, is void under a traditional perpetuity analysis because it is possible that the interest of E's children will not vest within twenty-one years of the death of A or any other measuring life.

Under the subclass exception, because the remainders following the secondary life estates were substantially independent from each other, the validity of each was separately determined as if T had initially created four separate trusts: one to terminate on the death of the survivor of A and B, both of whom were lives in being; one to terminate upon the death of A and C, both of whom were lives in being; one to terminate on the death of the survivor of A and D, both of whom were lives in being; and one to terminate on the death of the survivor of A and E, one of whom was not a life in being.

With respect to the remainder interest created in the issue of B, C, and D, the gifts are good without the need to wait and see because in all events they will vest or fail to vest upon the deaths of the lives in being. The wait-and-see approach would be available to measure the validity of the remainder following the secondary life estate in any child of \*749 A born after T's death. For this purpose the measuring lives would include A, B, C, and D and their grandparents and the grandparents' issue who survived T. The children of A who survived T-B, C, and D--are measuring lives because they have a contingent beneficial interest in the property held in trust initially for A's primary benefit but which ultimately may be set aside into separate trusts for the benefit of A's surviving children and their issue. This contingent interest is the additional interest they would have received in the trust property if A had not had an after-born child. Alternatively, they are measuring lives because they are issue of A's grandparents. A is also a measuring life because A is entitled to the income from the share ultimately set aside for E. Accordingly, under the wait-and-see approach, the gift to the issue of E is valid if it vests within the lifetime of B, C, or D or within twenty-one years of their deaths and the deaths of A and the survivor of any other measuring life. [FN136]

Cy pres also may be available to vest an interest in E's branch of the family. A number of possibilities exist. First, if E survives all of the measuring lives by twenty-one years, the court might terminate the trust for E and distribute the corpus to her. In this way any property distributed to E ultimately might be distributed to E's family. The difficulty with this reform is that it vests the interest in an unintended beneficiary. Reform in this manner might be justified if it were determined that T intended the property to remain in E's family rather than to pass to T's heirs. Alternatively, the court might vest the remainder following E's life estate in E's children living at the expiration of the twenty-one-year period, if any, even though that interest will not then become possessory in those children if E is then living. Reform in this

manner, of course, would exclude any subsequently born or adopted children of E. If E has no children then living, the court's choices may be limited to vesting the interest in E or in T's heirs. While section 558.68(3) mandates that reform most closely approximate T's intent, if no reform can closely approximate that intent the court has no alternative but to apply the Rule, void the interest, and vest the reversion in T's heirs.

### E. The Age Contingency Case

The age contingency problem is not confined to gifts to a class. Gifts to individuals may be conditioned expressly on the individual attaining a certain age or satisfying some other contingency that might or might not occur within twenty-one years after the lives in being.

Example #28: In 1980 O conveys property to T in trust to pay the income to X for life and after X's death to distribute the corpus to X's oldest surviving daughter if she attains the age of thirty. Under the might- **\*750** have-been approach the gift to X's oldest surviving daughter is void even if she was a life in being at the time of the conveyance. Since the identity of the daughter in whom the gift might vest could not be ascertained until X's death, any daughter of X living at the time of the conveyance could not be a measuring life. Consider what might have been. X and his daughter A are living at the time of the conveyance in 1980. A dies in 1981 and in 1982 X has another daughter who is under the age of nine at the time of X's death. This daughter could not attain age thirty within twenty-one years of X's death. Since this scenario might have occurred, the gift is void.

Under the wait-and-see approach the gift is good under any number of possible scenarios that actually occur. If X's daughter A, who was alive at the time of the conveyance, survives X and attains age thirty, the gift is good. Since A was a measuring life, the gift vests in her own lifetime. If A predeceased X, the gift is good if it vests in any other oldest surviving daughter of X who attains age thirty and was alive at the time of the conveyance. The gift is also good if the oldest surviving daughter of X was born after the date of the conveyance but was over the age of nine at X's death. If the oldest surviving daughter of X was under the age of nine at X's death, the gift is also good if the daughter attains age thirty within twenty-one years of the death of the survivor of the grandparents of X and X's daughter and those grandparents' issue living at the time of the conveyance. If the gift cannot possibly vest within that time period, it could be reformed under the cy pres doctrine to cause it to vest at whatever age is determined by adding twenty-one to the age of the daughter at the time of the death of the survivor of the lives in being. For example, if she is then age one, the gift could be reformed to vest in her if she attains the age of twenty-two. Reform, in this case, would be predicated on the assumption that O

would prefer X's daughter to take at that age rather than not to take at all. [FN137]

In exercising their cy pres power, courts are directed to decree that reformation which most closely approximates the creator's intent. Illustrative of a case in which the court applied cy pres but did not tailor the reformation most closely to approximate the creator's intent is *In re Estate of Chun Quan Yee Hop*. [FN138] The testator died in 1954. Under his will he bequeathed property into a trust and directed that the trust should terminate 'upon the death of my wife, Chun Lai Shee, or thirty (30) years from the date of my death, whichever shall last occur.' [FN139] Upon termination of the trust the corpus was distributable among the surviving children of the testator and the lawful issue of any deceased child. In 1970 a suit was brought to determine the validity of the contingent gift. [FN140] Under the might-have-been approach the gift to the children and other issue of the \*751 testator was void. Consider what might have been. Within one year of the testator's death all of his children who survived him could have children and thereafter the testator's surviving children and his wife could die. Because the corpus could not vest in the after-born grandchildren for another twenty-nine years, the gift would be void. The court did not sustain the gift by applying the wait- and-see approach. Rather, the court reformed the gift to substitute twenty-one for thirty. [FN141] Therefore, as reformed, the gift was distributable among the children and more remote issue living on the death of the testator's wife or twenty-one years after the testator's death, whichever last occurred.

While laudable for saving the gift, the actual reformation decreed is not one that most closely approximated the testator's intent. If the court could reform the will to substitute twenty-one for thirty, it could have reformed the will in another manner. A review of the testator's will discloses that the event which could have resulted in invalidity is the death of the testator's wife within nine years of the testator's death. Thus, the court could have reformed the gift without any violence to the testator's intent if it had simply decreed that if the testator's wife died within nine years of the testator's death, the trust would terminate twenty-one years after her death rather than thirty years after the testator's death. Since the testator's wife actually survived the testator by nine years this reformation validates the gift without upsetting the testator's plan at all. This criticism of the case suggests that in fashioning a reform the court should isolate the contingency which could result in invalidity and decree whatever reformation avoids that contingency. Reform in this manner should more often than not do the least possible violence to the creator's intent.

## F. Powers of Appointment

In applying the might-have-been approach to interests created by the exercise of a general inter vivos

power or interests that are to take effect upon the termination of a general inter vivos power, the period of the Rule begins to run from the date of the exercise of the power or the date the power terminates. [FN142] Any analysis of the validity of the appointment or interest in default of exercise is determined as if the donee of the power owned the appointed property in fee and, in the case of the termination of the power, exercised the power in favor of the takers in default. [FN143]

Example #29: O transferred property to T in trust to pay the income to A for life and after A's death to distribute the corpus to A's children who attain age twenty-five. A is then childless. O grants A a general inter vivos power to appoint to anyone, including A. If A exercises the power, the period of the Rule begins to run from the date of the exercise, not the date of the creation of the power. [FN144] If A dies never having exercised \*752 the power, the period of the Rule begins to run from A's death. [FN145] Thus, if A fails to exercise the power and dies survived by a child under the age of four, the interest of such child as taker in default of appointment is good under the Rule. It will vest or fail in the child's own lifetime and the child was a life in being at A's death when the period of the Rule began to run. If A had a special inter vivos power rather than a general inter vivos power, under the might-have-been approach the interest of A's children who attain age twenty-five would have been void. In this case the period of the Rule would run from the time of the conveyance [FN146] and considering what might have been, the interest of A's children would be void.

If the donee possessed either a general testamentary power or a special power, the period of the Rule begins to run from the date of the creation of the power [FN147] although a 'second look' is permitted to determine the validity of the appointment or the interests of the takers in default. Under the second-look doctrine, facts and circumstances in existence at the time of the exercise or termination of the power may be related back to the time of the creation of the power to determine the validity of the appointment or interest of the takers in default. [FN148] Second-look, in other words, serves to limit the possible scenarios that might have been concocted to test the validity of an interest.

Example #30: T devises property to X in trust to pay the income to A for life and after A's death to distribute the corpus among A's issue as A appoints by will, outright or in further trust. If A fails to exercise the power, the corpus is distributable to A's children who attain age twenty-five. Since A has only a special power, the period of the Rule begins to \*753 run from T's death. Under the second-look doctrine, however, the interest of the takers in default--A's children who attain age twenty-five--is valid if all of A's children who survive A were also alive at T's death. The interest also would be valid if any child who survived A was conceived and born after T had died and was over the age of four at A's death. In either case the second-look doctrine forecloses the necessity to hypothesize an invalidating scenario under which A might have another child who would be under the age of four at A's death.

Similarly, if A exercised the special power and appointed the property in further trust to pay the income to his surviving children for their joint lives and on the death of the survivor of them to distribute the corpus to A's grandchildren, the interest of A's grandchildren would be good if all of A's surviving children were alive at the time of T's death. In this case the remainder in A's grandchildren would vest or fail no later than the death of A and A's children, all of whom were lives in being at the time of T's death. If any surviving child of A had been conceived and born after T had died, however, the interest in A's grandchildren would have been void because, applying the might-have-been approach, their interest might vest more than twenty-one years after the death of A and A's children living at the time of T's death. For example, A's after-born child might survive A and A's children who survived T, the donor of the power, by more than twenty-one years. The second-look doctrine was not as powerful as the wait-and-see approach and did not validate the grandchildren's interest if the interest actually vested within twenty-one years of the death of the survivor of A and A's children living at T's death. With the statutory adoption of the wait-and-see approach, the validity of the interest of A's grandchildren may be tested not only by a second look, but also by the actual-events test. If the interest actually vests within twenty-one years of the death of all of the measuring lives determined under the statute alive at the time of T's death, it is valid.

## V. CONCLUSION

Admittedly, the preceding discussion has failed to consider any number of possible dispositions that might be saved from running afoul of the Rule under the wait-and-see and cy pres reforms. Nonetheless, the illustrations are sufficient to give the reader some appreciation of the reach of the new statute. Furthermore, the discussion preceding the illustrations highlights the technical operation of the statute.

Both the wait-and-see and cy pres reforms should be welcome additions to the Iowa Code. The wait-and-see approach will operate to prevent the frustration of a creator's dispositive scheme in the overwhelming number of instances in which a nonvested interest would be void under the might-have-been approach. Cy pres will be limited to those few cases when the wait-and-see approach will not save the gift. These reforms will be greeted warmly both by beneficiaries whose interests are saved by the **\*754** reforms and by attorneys who otherwise might have been held liable to beneficiaries because the nonvested interest violated the Rule. [FN149] The reforms, however, should not be viewed by the bar as a substitute for the proper drafting of instruments, because it cannot be assumed that Iowa law will apply to the construction of the dispositive instrument. Thus, a premium remains on the use of perpetuity savings clauses to validate interests that otherwise would be void under the might-have-been approach.

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FN1. Act of Apr. 22, 1983, ch. 558, 558.68, 1983 Iowa Acts 32 (amending IOWA CODE 558.68 (1983)) (effective July 1, 1983) [hereinafter cited as Iowa Act]. See *infra* note 18 and accompanying text for a statement of the common-law Rule Against Perpetuities. For an analysis of the proper capitalization of the Rule, see Dukeminier, *Perpetuities: Contagious Capitalization*, 20 J. LEGAL EDUC. 341 *passim* (1968).

FN2. RESTATEMENT (SECOND) OF PROPERTY (Tent. Draft No. 2, 1979).

FN3. *Id.* 1.4-.5. The new Iowa statute provides:

**558.68 Perpetuities.**

1. A nonvested interest in property is not valid unless it must vest, if at all, within twenty-one years after one or more lives in being at the creation of the interest and any relevant period of gestation.

2. a. In determining whether a nonvested interest would violate the rule against perpetuities in subsection 1, the period of the rule shall be measured by actual events rather than by possible events, in any case in which that would validate the interest. For this purpose, if an examination of the facts in existence at the time the period of the rule begins to run reveals a life or lives in being within twenty-one years after whose deaths the nonvested interest will necessarily vest, if it ever vests, that life or lives are the measuring lives for purposes of the rule against perpetuities with respect to that nonvested interest and that nonvested interest is valid under the rule.

b. If no such life or lives can be ascertained at the time the period of the rule begins to run, the measuring lives for purposes of the rule are all of the following:

(1) The creator of the nonvested interest, if the period of the rule begins to run in the creator's lifetime.

(2) Those persons alive when the period begins to run, if reasonable in number, who have been selected by the creator of the interest to measure the validity of the nonvested interest or, if none, those persons, if reasonable in number, who have a beneficial interest whether vested or nonvested in the property in which the nonvested interest exists, the grandparents of all such beneficiaries and the issue of such grandparents alive when the period of the rule begins to run, and those persons who are the potential appointees of a special power of appointment exercisable over the property in which the nonvested interests exist who are the grandparents or issue of the grandparents of the donee of the power and alive when the period of the rule begins to run.

(3) Those other persons alive when the period of the rule begins to run, if reasonable in number, who are specifically mentioned in describing the beneficiaries of the property in which the nonvested interest exists.

(4) The donee of a general or special power of appointment if the donee is alive when the period of the rule begins to run and if the exercise of that power could affect the nonvested interest.

3. A nonvested interest that would violate the rule against perpetuities whether its period is measured by actual or by possible events shall be judicially reformed to most closely approximate the intention of the creator of the interest in order that the nonvested interest will vest, even though it may not become possessory, within the period of the rule.

4. This section is applicable to all nonvested interests created on, before, or after July 1, 1983.

Iowa Act, *supra* note 1.

FN4. Nonvested interests for purposes of the Rule include (1) contingent remainders, (2) vested remainders subject to open, (3) vested remainders subject to open and complete divestment, (4) shifting executory interests, and (5) springing executory interests. See Kurtz, *The Iowa Rule Against*

Perpetuities: A State of Little or No Law, 65 IOWA L. REV. 177, 182-83 nn.23-25 (1979).

FN5. The Restatement (Second) of Property provides:

The period of the rule against perpetuities begins to run in a donative transfer with respect to a non-vested interest in property as of the date when no person, acting alone, has a power currently exercisable to become the unqualified beneficial owner or all beneficial rights in the property in which the non-vested interest exists.

RESTATEMENT (SECOND), supra note 2, 1.2. The following general principles accord with the preceding Restatement (Second) view:

1. A future interest created by will is deemed created at the testator's death, and a future interest created by deed is deemed created at the time of delivery.

3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS 1226 (2d ed. 1956).

2. A future interest created by a deed under which the grantor has reserved a power to revoke is deemed created only when the revocation power no longer exists.

See, e.g., *Cook v. Horn*, 214 Ga. 289, 292-94, 104 S.E.2d 461, 463-64 (1958); *Schenectady Trust Co. v. Emmons*, 261 A.D. 154, 157, 25 N.Y.S.2d 230, 233 (App. Div. 1941); see also J. GRAY, THE RULE AGAINST PERPETUITIES 524.1 (R. Gray 4th ed. 1942).

3. A future interest created by the exercise, or resulting from the nonexercise, of a presently exercisable general power of appointment which enables the donee to appoint to himself is deemed created on the date of the exercise or the date the power ceases.

See *Second Nat'l Bank v. Harris Trust & Sav. Bank*, 29 Conn. Supp. 275, 280, 283 A.2d 226, 229 (Super. Ct. 1971).

4. A future interest created by the exercise, or resulting from the nonexercise, of a special power of appointment or a general testamentary power of appointment is deemed created on the date the power was created, not the date of exercise or the date the power ceases.

See, e.g., *Hawkins v. Ghent*, 154 Md. 261, 265, 140 A. 212, 214 (1927) (special power); *Minot v. Paine*, 230 Mass. 514, 523, 120 N.E. 167, 171 (1918) (general testamentary power); *Marx v. Rice*, 3 N.J. Super. 581, 588, 67 A.2d 918, 922 (Ch. Div. 1949) (general testamentary power). In *Industrial Nat'l Bank v. Barrett*, 101 R.I. 89, 220 A.2d 517 (1966), the Rhode Island Supreme Court held that the validity of a future interest created by the exercise of a general testamentary power of appointment was measured from the date of the exercise. *Id.* at 98, 220 A.2d at 524. This holding is contrary to the weight of American authority but accords with the prevailing English view. See *Rous v. Jackson*, 29 Ch. D. 521, 526 (Ch. Div'l Ct. 1885); see also 3 L. SIMES & A. SMITH, *supra*, 1274-1275.

The distinction between presently exercisable general powers and other powers is predicated on the notion that the only thing standing between the donee of a presently exercisable power and possession of the appointive fund is a piece of paper. With respect to all other powers the donee cannot acquire possession.

While the perpetuity period runs from the creation of a special or general testamentary power, the validity of the exercise is determined under the so-called 'second look' doctrine. See J. DUKEMINIER & S. JOHNSON, *FAMILY WEALTH TRANSACTIONS* 1034-36 (1978).

5. A general testamentary power or special power limited in favor of an unborn person is void ab initio. The power is void under traditional perpetuities analysis because the donee, if born, could conceivably exercise the power beyond the permissible period.

See *Burlington County Trust Co. v. Di Castelcicala*, 2 N.J. 214, 224-25, 66 A.2d 164, 169 (1949).

FN6. Iowa Act, supra note 1, 558.68(3).

FN7. RESTATEMENT (SECOND), supra note 2, introduction at 17.

FN8. Kurtz, The Iowa Rule Against Perpetuities: A State of Little or No Law, 65 IOWA L. REV. 177 (1979).

FN9. See infra notes 12-24 and accompanying text.

FN10. See infra notes 25-107 and accompanying text.

FN11. See infra notes 108-17 and accompanying text.

FN12. Iowa Act, supra note 1, 558.68(1).

FN13. See *Butler v. Butler*, 253 Iowa 1084, 1127-28, 114 N.W.2d 595, 620-21 (1962); *Wagner v. Wagner*, 248 Iowa 353, 359, 79 N.W.2d 319, 323 (1956); *Bankers Trust Co. v. Garver*, 222 Iowa 196, 201-02, 268 N.W. 568, 571-72 (1936); *Jordan v. Woodin*, 93 Iowa 453, 465, 61 N.W. 948, 952 (1895); *Phillips v. Harrow*, 93 Iowa 92, 106, 61 N.W. 434, 438-39 (1894); *Meek v. Briggs*, 87 Iowa 610, 618-19, 54 N.W. 456, 458 (1893); *Todhunter & Williamson v. Des Moines, I. & Mo. R.R.*, 58 Iowa 205, 206-07, 12 N.W. 267, 268 (1882).

FN14. Former 558.68 provided: 'Every disposition of property is void which suspends the absolute power of controlling the same, for a longer period than during the lives of persons then in being, and twenty-one years thereafter.' IOWA CODE 558.68 (1983), amended by Iowa Act, supra note 1.