Winter 1995

Freeing Property Owners from the Rap Trap: Tennessee Adopts the Uniform

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FREEING PROPERTY OWNERS FROM THE RAP TRAP: TENNESSEE ADOPTS THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

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I. INTRODUCTION

> No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.[1]

Most second year law students will immediately recognize the above as the classic statement of the Rule Against Perpetuities (Rule). The Rule in this form is more than 300 years old; the Lord Chancellor of England articulated it first in *The Duke of Norfolk's Case*[2] in 1682.[3]

The traditional justification for the Rule is that public policy demands that property owners not be permitted to control property indefinitely.[4] On the other hand, public policy also permits property owners to provide responsibly for their dependent or incompetent descendants by placing property in trust for a beneficiary's lifetime plus the period of minority of the child of the first beneficiary.[5] To implement these two policies, the traditional Rule mandates that all contingent future interests must pass a test from the moment of their creation. The test is concerned only with remoteness of vesting. It focuses solely on how long the interest will remain contingent, not on the nature of the contingency nor on how long

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1. JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

2. 22 Eng. Rep. 931, 946 (Ch. 1682).

3. W. BARTON LEACH & OWEN TUDOR, THE RULE AGAINST PERPETUITIES § 24.4 (1957) (containing an excellent detailed history of the Rule); *see also* GRAY, *supra* note 1, §§ 123-200.1 (containing another exemplary, thorough history of the Rule).

4. LEACH & TUDOR, *supra* note 3, § 24.4; *see also* 1 RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) note 1, div. I, pt. I, at 8 (1983); ROBERT J. LYNN, THE MODERN RULE AGAINST PERPETUITIES 10 (1966).

5. LEACH & TUDOR, *supra* note 3, § 24.14.

any given piece of property will remain in trust. Any contingent future interest that will either vest or fail before the end of the acceptable period passes the test and is valid. The intended beneficiaries of the interest receive exactly what the grantor gave them. This is called the *validating side* of the Rule.[6] Any interest that might still be contingent when the acceptable time period ends fails the test and is invalid immediately, as if it had never been created. The intended beneficiaries receive nothing. This is called the *invalidating side* of the Rule.[7]

The effect of the Rule on contingent future interests is illustrated by the following simple example. Suppose a property owner wishes to create a testamentary trust for the benefit of her grandchildren for their lives, with the remainder passing free of trust to the issue of her grandchildren living at the death of the last grandchild to die. An estate planner might write such a bequest as follows:

> My Trustee shall hold the property as a single trust for the benefit of all of my grandchildren, for life, and shall pay the income from the property to my grandchildren, in equal shares, at least quarterly. Upon the death of the last of my grandchildren to die, this trust shall terminate, and my Trustee shall distribute the principal as then constituted, per stirpes, to my grandchildren's issue who are then living.

The remainder interest of the testator's greatgrandchildren and more remote descendants is a contingent future interest because the remainder beneficiaries must survive the testator's grandchildren in order to receive a share of the trust. Therefore, the remainder interest must pass the Rule's test to be valid. Unfortunately, it does not, because a grandchild could be born after the death of the testator, and that grandchild could then live more than twenty-one years after the death of all of the testator's grandchildren who were alive when the testator died.[8] The remainder would not vest until this afterborn grandchild died. In other words, the remainder interest in the trust potentially remains contingent until the death of someone who was not a "life in being" when the trust was created and who might die more than twenty-one years after the death of everyone with an interest in the trust who was alive when the trust was created ("the measuring lives").[9] Thus, the remainder interest of the all of the grandchildren's issue—even those

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6. *See generally* LYNN, *supra* note 4, at 7.

7. *See generally id.*

8. *E.g.*, Hassell v. Sims, 141 S.W.2d 472, 475 (Tenn. 1940).

9. A detailed explanation of the method for determining measuring lives and testing a nonvested future interest for compliance with the Rule is beyond the scope of this Article. Excellent explanations of the mechanical application of the Rule can be found in JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 760-67 (4th ed. 1990), and in THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 178-90 (2d ed. 1984).

who are themselves alive when the testator dies—is invalid ab initio; it fails completely.[10]

On the other hand, the remainder would survive the Rule if the drafter had simply confined the class of income beneficiaries to the testator's grandchildren who were living when the testator died, and had provided that the trust would terminate when the last such grandchild died. So limited, the remainder must either fail completely (if none of the issue of the grandchildren alive when the testator died survives the last income beneficiary to die) or vest (if at least one greatgrandchild or more remote descendant of the testator survives the last income beneficiary to die) within the period of the Rule.[11] The difference between the two dispositions is that an afterborn grandchild is a potential measuring life under the example as drafted, but not under the alternative disposition. Thus, the Rule invalidates the first remainder and validates the alternative despite identical donative intent.[12]

Not only is the intent of the transferor in creating the interest irrelevant to the application of the traditional Rule deliberately targets intent.[13] This targeting originates in the belief that property owners must not, regardless of their intent, be permitted to place conditions upon the absolute ownership of property for longer than the stated period, as a matter of public policy.[14] The Rule applies to both real and personal property, as well as to equitable interests, such as interests in trusts, and legal interests.[15]

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10. This harsh result is caused by the "all-or-nothing" rule governing application of the Rule to class gifts. If the class has not closed when the contingent future interest is created, then the interest of all possible members of the class must be proven to vest or fail within the perpetuities period or none of them is valid. Crockett v. Scott, 284 S.W.2d 289 (Tenn. 1955); Ross v. Stiff, 338 S.W.2d 244 (Tenn. Ct. App. 1959); LEACH & TUDOR, *supra* note 3, § 24.26; *see also* McCarley v. McCarley, 360 S.W.2d 27, 29 (Tenn. 1962) (construing an ambiguous bequest of a contingent future interest to grandchildren to apply only to grandchildren living at the testator's death, thus eliminating the Rule violation).

11. *See McCarley*, 360 S.W.2d at 29.

12. The drafter could also assure the remainder's validity under the Rule by adding a perpetuities savings clause to the testator's will. *See infra* notes 21-23 and accompanying text.

13. *See, e.g.*, Marks v. Southern Trust Co., 310 S.W.2d 435, 437 (Tenn. 1958) ("[T]he rule against perpetuities is not a rule of construction. . . . It is not a test to determine intention; its object is to defeat intention." (citations omitted)). *See also* LYNN, *supra* note 4, at 9-10.

14. Several commentators prudently emphasize that the Rule is concerned with the remoteness of vesting of interests in property, not with restraints upon the alienation of interests in property. *E.g.*, LEACH & TUDOR, *supra* note 3, § 24.3; LYNN, *supra* note 4, at 9. This is important because contingent remainders, the principal targets of the Rule, are generally freely alienable under modern property law. *See* LEACH & TUDOR, *supra* note 3, § 24.3.

15. GRAY, *supra* note 1, §§ 202, 202.1.

In addition to destroying the estate plan of any property owner whose transfers might remain contingent beyond the permissible period, the traditional Rule is quite harsh in two other respects. First, as noted in connection with the above example, the Rule invalidates any nonvested interest immediately upon creation if it fails to satisfy the rule.[16] Second, the traditional Rule is a rule of "what-may-happen." That is, it invalidates any interest when any possibility—no matter how remote—exists that the interest may neither vest nor fail within the time period. The example above demonstrated this aspect of the Rule. If all the testator's children are beyond child-bearing age, the possibility that a grandchild of the testator will be born after the testator's death is extremely remote. Nevertheless, the possibility exists.[17] Therefore, the remainder interest is invalid immediately. Similar logic dictates that a contingent future interest may be void because of the possibility that a decedent's estate may take longer than twenty-one years to administer;[18] that a living married man may divorce or outlive his current wife then marry a woman who is not living when the document is executed;[19] or that a child two years of age may give birth to a child.[20]

The second of the traditional policy considerations articulated for the Rule—that a property owner should be able to place property in trust long enough to provide for incompetent, profligate, or minor children and grandchildren—justifies the validating side of the Rule. Neither policy consideration, however, justifies the force of the invalidating side and its total, immediate invalidation of all contingent interests that *might* not vest

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16. *E.g.*, Crockett v. Scott, 284 S.W.2d 289, 291 (Tenn. 1955); *see also* LEACH & TUDOR, *supra* note 3, § 24.4.

17. *See, e.g.*, McCarley v. McCarley, 360 S.W.2d 27, 29 (Tenn. 1962); *Crockett*, 284 S.W.2d at 293-94. This possibility is commonly referred to as the "fertile octogenarian," because it envisions the possibility that a woman of 80 may give birth to a child. For a detailed explanation of the history of this application of the Rule and its modern ramifications, *see* LEACH & TUDOR, *supra* note 3, § 24.22; *see also* GRAY, *supra* note 1, §§ 215, 215.1; LYNN, *supra* note 4, at 58.

18. This possibility is sometimes referred to as the "slothful executor," because it envisions an estate that is still in administration more than 21 years after the death of the testator. *See* LEACH & TUDOR, *supra* note 3, § 24.23; LYNN, *supra* note 4, at 59-60.

19. This possibility is commonly referred to as the "unborn widow" because it invalidates the contingent future interests of A's widow and their children in the following disposition: "To A for life, and then to A's widow for life, and then to those of the children of A who survive the survivor of A and A's widow." *See* LEACH & TUDOR, *supra* note 3, § 24.21; LYNN, *supra* note 4, at 58-59.

20. This possibility is commonly referred to as "the precocious toddler." It would invalidate a disposition that directed a trustee, for example, to "pay the principal of this trust to those of the testator's grandchildren living at the testator's death or born within five years thereafter who shall attain the age of 21 years." LEACH & TUDOR, *supra* note 3, § 24.22; LYNN, *supra* note 4, at 60-61.

or fail within the acceptable period. Indeed, both policy considerations can be accommodated satisfactorily by permitting interests in property to remain contingent for the period of the Rule and invalidating them only at the expiration of the period, if they have neither vested nor failed naturally under the terms of the creating document by that time. The traditional Rule, in other words, is too big for the job it was created to do. It suits its task much as did the proverbial sledgehammer used to kill a fly.

Because of the harshness of the Rule, courts have created doctrines that mitigate its effect. Universally today, an otherwise invalid nonvested interest is saved by the presence in the creating document of a perpetuities savings clause that provides for the vesting or failure of any interests that remain unvested at the end of the maximum period permitted by the Rule.[21] At least one well-known law school textbook for the basic course in trusts and estates suggests that no careful lawyer ever permits a client to violate the Rule because a careful lawyer always includes a perpetuities savings clause in any document that includes a trust.[22] Thus, the Rule itself has become a "trap for the unwary," frustrating the estate plans of only those hapless property owners who hire careless or inexperienced lawyers.[23]

In addition, to save these unfortunate property owners from their unfortunate choice of lawyer, many jurisdictions have adopted methods of mitigating the Rule's harshness, such as permitting contingent interests that fail the test of the Rule to exist during the perpetuities period to see whether the interest actually vests (or fails) before the end of period,[24] or permitting

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21. An example of a perpetuities savings clause is as follows:

> Notwithstanding any other provisions in this instrument, this trust shall terminate, if it has not previously terminated, 21 years after the death of the survivor of the beneficiaries of the trust living at the date this instrument becomes effective. In case of such termination the then remaining principal and undistributed income of the trust shall be distributed to the then income beneficiaries in the same proportions as they were, at the time of termination, entitled to receive the income.

DUKEMINIER & JOHANSON, *supra* note 9, at 814.

22. *Id.* at 815; *see also* LEACH & TUDOR, *supra* note 3, § 24.7; LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS AND FUTURE INTERESTS 1029 (1991).

23. The Supreme Court of California suggested that failure to know the intricacies of the Rule Against Perpetuities was not malpractice in the celebrated case of Lucas v. Hamm, 364 P.2d 685, 689 (1961) (en banc). Whether a court would so hold today, however, is questionable. *See* DUKEMINIER & JOHANSON, *supra* note 9, at 815 (citations omitted).

24. This is called the "wait-and-see" doctrine. It is particularly useful to prevent invalidation of future interests in cases involving administrative contingencies ("slothful executor" cases), because sufficient time often elapses between the death of the testator and the decision of the perpetuities litigation such that it becomes certain that the contingent interests will vest or fail within the perpetuities period. *See, e.g., In re* Estate of Anderson, 541 So. 2d 423, 432-34 (Miss. 1989). Section 1.4 of the *Restatement (Second) of Property*

judicial reformation of the document creating the interests so that all interests satisfy the rule.[25]

The Tennessee Constitution outlaws, but does not define perpetuities.[26] Therefore, the Tennessee Supreme Court has held that the common law Rule applies to determine the validity of contingent future interests in Tennessee.[27] Furthermore, although Tennessee has long recognized the validity of perpetuities savings clauses,[28] until last year, Tennessee courts have always applied the pure common law Rule to invalidate contingent future interests not rescued by a savings clause, without attempting to reform the invalid interests judicially, or to validate (by using a wait-an-see approach) those that vest or fail by their own terms within the perpetuities period.

(Donative Transfers) advocates use of the wait-and-see doctrine to save interests that are defective because of other types of perpetuities violations. If the interest is still contingent at the end of the maximum time period permitted by the Rule, then the interest fails upon the expiration of the period. The subject property passes to the next taker as though the document had provided for the failed contingent interest to terminate at the expiration of the perpetuities period.

As will be discussed later in this Article, the Uniform Statutory Rule Against Perpetuities (USRAP) mandates the wait-and-see approach initially for all nonvested future interests that violate the Rule at their inception but that might vest within the period of either the common law Rule or a 90 year period in gross. UNIF. PROB. CODE § 2-901(a) (1993).

25. This approach was originally advocated by Barton W. Leach, *see* LEACH & TUDOR, *supra* note 3, at §§ 24.9-.11, and, as will be discussed later in this Article, is the solution advocated by the Uniform Statutory Rule Against Perpetuities if a nonvested future interest fails to vest within either the period of the common law Rule or the 90 year period in gross, *see infra* notes 50-54 and accompanying text. Courts that reform documents to conform to the Rule generally consider themselves bound to make the minimum change in the dispositive terms necessary to bring all otherwise invalid interests within the requirements of the Rule. For this reason, the doctrine permitting reformation is often said to be an application of the *cy pres* doctrine because the court must reform the document in such a way as to conform as closely as possible to the grantor's original intent. *See* DUKEMINIER & JOHANSON, *supra* note 9, at 839-45; WILLIAM M. MCGOVERN JR. ET AL., WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 534-35 (1988).

26. TENN. CONST. art. I, § 22.

27. Eager v. McCoy, 228 S.W. 709, 711 (Tenn. 1921); Franklin v. Armfield, 34 Tenn. (2 Sneed) 305, 353 (1854).

28. *See, e.g.*, Marks v. Southern Trust Co., 310 S.W.2d 435 (Tenn. 1958). In *Marks*, an inter vivos trust for the benefit of those of the grantor's grandchildren who were living at the death of the grantor's son was held valid because it contained the following clause:

> Sixth: As heretofore stated, it is hereby provided and distinctly understood, that this trust shall not continue longer than the life or lives of the beneficiaries herein-before mentioned; that is myself, my said son, his said wife, and their said three children, and twenty-one (21) years thereafter.

Id. at 443.

Although this clause was sufficient to save the nonvested interests of the grantor's grandchildren, it is not suggested as a drafter's model because it fails to provide for distribution of the trust assets upon termination.

Thus, Tennessee property owners hapless enough to choose a lawyer unskilled in the intricacies of the Rule, or unsophisticated enough to attempt to draw their own documents, created contingent future interests at their peril.

Effective July 1, 1994, however, the Tennessee legislature mitigated the harsh reign of the Rule considerably when it enacted the Tennessee Uniform Statutory Rule Against Perpetuities (TUSRAP).[29] The Tennessee legislation is based closely on the Uniform Statutory Rule Against Perpetuities (USRAP), originally promulgated by the National Conference of Commissioners on Uniform State Laws in 1986 and now part of the Uniform Probate Code.[30]

II. AN OVERVIEW OF TUSRAP

The statutory rule provides for two alternative tests of vesting, the traditional common law Rule stated above and a ninety-year period.[31] It also provides for mandatory judicial reformation of property dispositions upon petition in certain circumstances.[32] The purpose of this Article is to evaluate the difference this statutory change will make in estate planning

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29. 1994 Tenn. Pub. Acts ch. 654 (codified at TENN. CODE ANN. §§ 66-1-201 to -208 (Supp. 1994)).

30. UNIF. PROB. CODE §§ 2-901 to -906 (1993).

31. TENN. CODE ANN. § 66-1-202(a) (Supp. 1994). The section provides as follows:

> (a) A nonvested property interest is invalid unless one (1) of the following conditions is satisfied:
>
> (1) When the interest is created, it is certain to vest or terminate no later than twenty-one (21) years after the death of an individual then alive; or
>
> (2) The interest either vests or terminates within ninety (90) years after its creation.

Id.

32. TENN. CODE ANN. § 66-1-204 (Supp. 1994). The section provides as follows:

> Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the ninety (90) years allowed by §§ 66-1-202(a)(2), (b)(2) or (c)(2) if any of the following conditions is satisfied:
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> (1) A nonvested property interest or a power of appointment becomes invalid under the statutory rule against perpetuities provided in § 66-1-202;
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> (2) A class gift is not but might become invalid under the statutory rule against perpetuities provided in § 66-1-202, and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or
>
> (3) A nonvested property interest that is not validated by § 66-1-202(a)(1) can vest but not within ninety (90) years after its creation.

Id.

and in litigating cases involving possible violations of the Rule in Tennessee.

A. Estate Planning

The new statute will not require estate planners to develop any new strategies. Because of its "later than" approach, the new statute will not affect documents that create contingent interests that satisfy the common law Rule, nor will it necessitate changes in the perpetuities savings clauses currently used by estate planners to prevent inadvertent violations of the common law rule. Any interest that satisfied the common law Rule will satisfy TUSRAP. In other words, TUSRAP leaves unchanged the validating side of the common law Rule. Indeed, although the addition of the ninety-year period in gross appears to provide additional estate planning opportunities, the commentary to the Uniform Statutory Rule indicates that this is not the case.[33] In fact, paragraph (e) of section 66-1-202 of the Tennessee Code will automatically convert a "later than" clause to a traditional savings clause.[34] Therefore, nothing is gained by using a "later than" type of clause and much could be lost, because the clause itself might require the document to be reformed under the reformation procedure mandated by section 66-1-204 of the Tennessee Code.[35]

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33. UNIF. PROB. CODE § 2-901 cmt. at 201 (1993).

34. TENN. CODE ANN. § 66-1-202(e) (Supp. 1994). The section provides as follows:

> If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument seeks to disallow the vesting or termination of any interest or trust beyond, seeks to postpone the vesting or termination of any interest or trust until, or seeks to operate in effect in any similar fashion upon, the later of:
>
> (1) the expiration of a period of time not exceeding twenty-one (21) years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement; or
>
> (2) The expiration of a period of time that exceeds or might exceed twenty-one (21) years after the death of the survivor of lives in being at the creation of the trust or other property arrangement;
>
> such language is inoperative to the extent it produces a period of time that exceeds twenty-one (21) years after the death of the survivor of the specified lives.

Id.

35. The commentary to § 2-901(e) of the Uniform Probate Code states that the "longer of" approach was rejected because it would change the 90 year period from the average period envisioned by the drafters into a minimum period. UNIF. PROB. CODE § 2-901 cmt. at 203-04 (1993). The commentary explains that the 90 year period was chosen as the likely average period during which a valid future interest might remain contingent because statistical studies indicate that the average age of the youngest living income beneficiary of a trust is six years, and that a six-year-old has an average life expectancy of 69 years. Thus, a "life in being plus 21 years" is the sum of 69 years and 21 years, or 90 years. *Id.*

TUSRAP eliminates one problem that would likely have caused increasing difficulties for planners and litigators in the future: the period of gestation often found in statements of the common law Rule.[36] The original purpose of including such a period was to permit a conceived but unborn child who was thereafter born alive to be treated as a life in being for purposes of the perpetuities period. However, because of the modern availability of various methods of assisted conception, an individual may "give birth" to a child years after the "parent" dies, giving rise to the possibility that a child might be born more than twenty-one years after one or both of the child's biological parents are dead. This possibility obviously raises numerous substantial and complex questions in the law of construction of wills and trusts as well as in the law of intestate succession. Until these matters are resolved generally in the law of construction of documents, the simplest way to deal with them in the context of perpetuities reform is to disregard the possibility of the birth of such a child.[37]

In addition, TUSRAP generally does not apply to any nondonative transfer, except for several enumerated transfers that (1) arise out of domestic matters, such as transfers pursuant to a premarital or postmarital agreement,[38] or (2) are related to contracts to make or to refrain from making a donative transfer.[39] Therefore, TUSRAP will not apply to such property interests as options, leases, rights of first refusal, and restrictive covenants.[40] Further, TUSRAP does not apply to fiduciary powers,

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36. TENN. CODE ANN. § 66-1-202(d) (Supp. 1994). For a discussion of the period of gestation in the common law Rule, *see* LEACH & TUDOR, *supra* note 3, at § 24.15.

37. UNIF. PROB. CODE § 2-901(d) cmt. at 202-03 (1993).

38. TENN. CODE ANN. § 66-1-205(1)(A) to (D), (G) (Supp. 1994).

39. TENN. CODE ANN. § 66-1-205(1)(E), (F), (H) (Supp. 1994).

40. With respect to rights of first refusal and options in gross, TUSRAP may represent a change in Tennessee law. In Hall v. Crocker, 241 S.W.2d 548 (Tenn. 1951), the Tennessee Supreme Court held that a grantor's reservation of a right to repurchase certain property should the grantee wish to sell was subject to the Rule but did not violate it because the right had to be exercised within the grantee's lifetime. *Id.* at 549. *See also* Powell v. Sumner County Bd. of Educ., No. 01-A-01-9005CH00190, 1990 WL 170446, at *2 (Tenn. Ct. App. Nov. 7, 1990) (holding a right of repurchase invalid for violation of the Rule).

Although the author has found no Tennessee case dealing with the application of the Rule to an option in gross—that is, an option not granted in connection with a lease—the court in *Hall* refers to the interest retained by the grantor as an option, and cites with approval the provisions of the *Restatement of Property* stating that an option is void if it may extend beyond the perpetuities period. *Hall*, 241 S.W.2d at 550. The general rule nationally, before USRAP was promulgated, was that the Rule covered options in gross. LYNN, *supra* note 4, at 15 (footnote omitted).

On the other hand, Tennessee courts had previously held the Rule inapplicable to restrictive covenants, Commerce Union Bank v. Warren County, 707 S.W.2d 854, 864-65 (Tenn. 1986); Elm Hill Homes, Inc. v. Jessie, 857 S.W.2d 566, 569 (Tenn. Ct. App. 1993), and to leases, Hamblen County v. City of Morristown, 584 S.W.2d 673, 677 (Tenn. Ct. App.

including powers of administration and discretionary powers to distribute principal,[41] nor does it apply to the power to appoint a fiduciary.[42] Lastly, TUSRAP explicitly exempts from its application any property interest that was not covered by the common law Rule.[43]

This last provision has several highly desirable results. First, Tennessee case law previously excluded from compliance with the common law Rule several types of interests retained by a grantor, including possibilities of reverter[44] and mineral royalty rights reserved in a grantor,[45] and statutes excluded certain charitable future interests,[46] and employee benefit trusts.[47] Second, the common law Rule has never applied to vested property interests.[48] Tennessee courts have long held that an interest that can be construed two ways, one of which requires compliance with the Rule and one of which does not, should be construed so as to avoid application of the Rule.[49] Therefore, TUSRAP does not apply to any interest that can reasonably be construed to be vested at the time of creation. Furthermore, TUSRAP does not define "vested" or "nonvested." Therefore, any interest that is vested under prior Tennessee case law remains vested after the enactment of TUSRAP.

1979). TUSRAP preserves such common law exclusions from the Rule. TENN. CODE ANN. § 66-1-205(7) (Supp. 1994).

The drafters of USRAP apparently considered adding provisions to the statute dealing with these nondonative transfers, but decided against doing so because "[t]he Rule Against Perpetuities is an inappropriate instrument of social policy to use as a control of such arrangements." UNIF. PROB. CODE § 2-904 cmt. at 212 (1993).

41. TENN. CODE ANN. § 66-1-205(2), (4) (Supp. 1994).

42. TENN. CODE ANN. § 66-1-205(3) (Supp. 1994).

43. TENN. CODE ANN. § 66-1-205(7) (Supp. 1994).

44. Commerce Union Bank v. Warren County, 707 S.W.2d 854 (Tenn. 1986); Mountain City Missionary Baptist Church v. Wagner, 249 S.W.2d 875 (Tenn. 1952).

45. J.M. Huber Corp. v. Square Enters., 645 S.W.2d 410, 413 (Tenn. Ct. App. 1982). Although no Tennessee case law exists on the applicability of the common law Rule to other future interests retained by a grantor, the common law Rule, and, therefore, TUSRAP, is unlikely to apply to these interests in Tennessee because they are universally excluded from coverage under the common law Rule in those jurisdictions that have considered the question. An example of such an interest is a right of entry for condition broken.

46. TENN. CODE ANN. § 35-1-114 (1991); *see also* TENN. CODE ANN. § 66-1-205(5) (Supp. 1994).

47. TENN. CODE ANN. § 35-50-106 (Supp. 1991); *see also* TENN. CODE ANN. § 66-1-205(6) (Supp. 1994).

48. *E.g.*, BERGIN & HASKELL, *supra* note 9, at 180-81; JACK W. ROBINSON & JEFF MOBLEY, PRITCHARD ON THE LAW OF WILLS AND ADMINISTRATIONS OF ESTATES EMBRACING THE LAW AND PRACTICE IN TENNESSEE 285-87 (5th ed. 1994).

49. *E.g.*, Sands v. Fly, 292 S.W.2d 706, 711 (Tenn. 1956).

B. Litigation

The statutory rule will engender the greatest changes in practice concerning perpetuities in litigation. TUSRAP should reduce litigation brought to invalidate interests ab initio for violating the Rule. It may also increase litigation to reform initially invalid interests so that they vest within the perpetuities period because this remedy was unavailable in Tennessee before TUSRAP was adopted. Unlike its uniform prototype, the version of TUSRAP adopted in Tennessee requires reformation of a document that contains an invalid interest upon petition of any interested person, even if the interest was created before the effective date of the statute.[50]

The general rule of section 66-1-202(a)(2) of the Tennessee Code automatically mandates a "wait-and-see" approach for any interest that violated the common law Rule at its inception but that might vest or fail within the ninety-year period in gross. No litigation to test an interest before the ninety-year period is over may be entertained.[51] If an interest remains unvested after the ninety years has expired, reformation is mandatory upon petition of any interested person.[52] The reformation must conform as closely as possible to the "transferor's manifested plan of distribution," and still assure vesting within the ninety-year period in gross.[53] In addition, if an interest would otherwise be void ab initio because it violates the common law Rule and it will vest, but not within the ninety-year period in gross, then reformation is required immediately upon petition of any interested party.[54] Finally, a class gift that is not invalid when a class member's share is payable, must be reformed upon petition when the share is payable.[55]

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50. *See* TENN. CODE ANN. § 66-1-206 (Supp. 1994). USRAP permits, but does not require, a court to reform a document that created an invalid interest before the effective date of the enactment of USRAP. UNIF. PROB. CODE § 2-905(b) (1993).

TUSRAP also contains provisions clarifying that a property interest is not vested for purposes of the statute merely because it would have vested if the common law Rule were held violated; however, the statute also provides that TUSRAP does not apply to any interest the validity of which had been determined before the effective date of the statute. TENN. CODE ANN. § 66-1-206 (Supp. 1994).

51. *See* UNIF. PROB. CODE § 2-903 cmt. at 210-11 (1993).

52. TENN. CODE ANN. § 66-1-204 (Supp. 1994).

53. *Id.*

54. TENN. CODE ANN. § 66-1-204(3) (Supp. 1994). As the commentary to the Uniform Probate Code notes, reformation in this situation should be allowed immediately because the interest will certainly require reformation upon the expiration of the 90 year period in gross. Waiting 90 years to reform in such a case serves no purpose. UNIF. PROB. CODE. § 2-904 cmt. at 211 (1993).

55. TENN. CODE ANN. § 66-1-204(2) (Supp. 1994).

III. COMPARISON OF RESULTS UNDER THE RULE AND TUSRAP

To demonstrate how TUSRAP works, this Article will now apply TUSRAP to the facts of two leading Tennessee cases dealing with the common law Rule to see how the cases would be decided under TUSRAP.

In *Standard Knitting Mills, Inc. v. Allen*,[56] the Tennessee Supreme Court held that the following language in a deed to the city of Knoxville created an executory limitation in favor of the grantor's heirs.

> In the acceptance of this deed it is understood and agreed that the tract of land herein conveyed shall forever be used as a Park and be called Caswell Park. In case this is not complied with the property shall revert to the Heirs of the Party of the First Part . . . .[57]

Because executory interests are subject to the Rule, the interest of the heirs was void ab initio because it might remain contingent beyond the perpetuities period.[58] Therefore, the court held, the city of Knoxville received the land in fee simple absolute,[59] clearing the way for the city to use the tract for purposes other than as a park, or even to sell the tract to a private buyer. The court concluded:

> It is true the construction we have given to this deed will defeat the manifest intention of the grantors, which was, on the failure to use this property as a park the property was to revert to the grantors' heirs; but, no principle is better settled than that the interest of a grantor or testator, however clear, must fail of effect if it cannot be carried into effect without violation of the rules of law.[60]

The facts in *Standard Knitting Mills* provide an excellent example of the desirability of the uniform statutory rule. First, the strictures of the law of future interests in concert with the common law rule against perpetuities clearly frustrated the intent of the grantors, without serving any public purpose. The grantors could have achieved their goal by creating a fee simple determinable instead of a fee simple subject to an executory limitation. In other words, had the grantors simply conveyed the land to the city "for so long as it shall be used as a public park" and then provided that the land should revert to them if the city ever ceased to use the land as a park, the restriction would have been valid in perpetuity. This is true because the common law Rule does not apply to interests retained by a grantor.[61] Had the grantors been dead when the city ceased using the land

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56. 424 S.W.2d 796 (Tenn. 1967).
57. *Id.* at 798.
58. *Id.* at 800.
59. *Id.* at 801.
60. *Id.* (citation omitted).
61. *See supra* notes 44-47 and accompanying text.

as a public park, the land would have become the property of the residuary legatees under the grantors' wills, or, if they had died intestate, then the land would have belonged to the grantors' heirs.[62]

Under TUSRAP, the executory interest would have been permitted to exist unmolested until the expiration of the ninety-year period in gross.[63] If it vested within that period (because the city ceased to use the land as a park), the heirs would receive clear fee simple title to the land.[64] If it remained unvested at the end of ninety years, an interested party could petition a court to reform the document so that the transfer would conform as closely as possible to the grantor's plan of distribution within the ninety-year period.[65] Presumably, a court called upon to reform the document in *Standard Knitting Mills* would eliminate the executory interest after ninety years, and vest fee simple absolute title to the land in the city.[66]

This solution might be criticized on the ground that it permits the executory limitation to impede the city's use of the property for ninety years.[67] The answer to this criticism is twofold. First, the city accepted the land with the limitation; second, the grantors could have imposed a similar limitation in perpetuity if they had simply created a fee simple determinable instead of a fee simple subject to an executory limitation. Surely no useful purpose is served by permitting the city to take advantage of the grantors' ignorance of the finer points of conveyancing (or of their unfortunate choice of lawyer) to obtain a fee simple absolute immediately.

Another case illustrating the superiority of the statutory rule over the common law rule is *Ross v. Stiff*.[68] In *Ross*, the testator directed that his residuary estate be placed in a trust for the benefit of his wife, his two children, and his grandchildren.[69] After providing for administration of the trust and distribution of the income during the lives of the testator's wife and children, the will provided:

> *ITEM XIII*:
>
> It is my desire that my estate be kept intact until the death of my widow, Thelma Moser Ross, and as long as my grandchildren, namely the children of Thelma Ross Frazier and Nancy Ross Stiff, and any other child

62. *See* BERGIN & HASKELL, *supra* note 9, at 58-59.

63. *See* TENN. CODE ANN. § 66-1-202(a)(2) (Supp. 1994).

64. *See id.*

65. *See* TENN. CODE ANN. § 66-1-201(3) (Supp. 1994).

66. The court apparently would not have the option of rewriting the document to create a fee simple determinable, even though that disposition probably would conform mostly closely to the grantors' plan of distribution, because § 66-1-204 of the Tennessee Code requires that the court choose a reformation within the 90 year period in gross.

67. *See, e.g.*, DUKEMINIER & JOHANSON, *supra* note 9, at 834-35.

68. 338 S.W.2d 244 (Tenn. Ct. App. 1959).

69. *Id.* at 246.

> or children born to my said wife, Thelma Moser Ross, and myself shall live.
>
> *ITEM XIV*:
>
> If upon the death of my said wife, Thelma Moser Ross, and at the death of the last living grandchild and none of my children or grandchildren or their issue be then living, then I bequeath and devise all my said property absolutely and equally to my said two brothers, Dr. John Ross and Lanty M. Ross, and if they not be living the corpus of the estate shall be divided among their children.[70]

Testator died survived by his wife, two children and "numerous" grandchildren.[71] Because his two children survived him, the class of grandchildren did not close at his death.[72] The possibility remained that additional grandchildren would be born after the testator's death who would live more than twenty-one years after the death of his wife, his two children, and all of his grandchildren living at his death. Thus, the clauses providing that the trust continue until the death of the last grandchild, and then that the trust property be distributed to the grandchildren's issue or to the testator's brothers or their issue were void as violating the rule against perpetuities.[73]

Although the appellate court conceded that Mr. Ross had drafted the will himself and likely was unaware of the rule against perpetuities,[74] the court found itself compelled to apply the common law Rule and to invalidate all interests that violated it, including the contingent remainders of the grandchildren who were already alive when the testator died.[75] Thus, the court affirmed the decision of the trial court,[76] which had held that the trust would terminate upon the death of the testator's widow and the corpus would be distributed to the income beneficiaries of the trust (testator's daughters and a granddaughter), in the proportions that they were to receive the income.[77]

Like the decision in *Standard Knitting Mills*, the decision in *Ross* does not emanate from any myopic conservatism on the part of the Court of Appeals; rather, it is simply the result of a straightforward application of the common law Rule. The resulting disruption of Mr. Ross's estate plan, despite ample evidence of his intent, is entirely consistent with the traditional application of the common law Rule.[78]

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70. *Id.* at 247.

71. *Id.* at 245.

72. *See supra* note 9 and accompanying text.

73. 338 S.W.2d at 250.

74. *Id.* at 249.

75. *Id.* at 250.

76. *Id.* at 253.

77. *Id.* at 248.

78. Occasionally, a court will construe a document to avoid application of the common law Rule. For example, in McCarley v. McCarley, 360 S.W.2d 27 (Tenn. 1962),

Under TUSRAP, the continuation of the Ross trust during the lifetime of at least some of testator's grandchildren is possible, and the entire provision might actually be given effect as written. Under TUSRAP, the trust must be permitted to continue without reformation for at least ninety years.[79] The trust might terminate by its own terms before the expiration of the ninety-year period because the testator's widow, his children, and all of his grandchildren whenever born could die before the end of the period. If that were the case, then the income interests of all grandchildren and the remainder interests of the grandchildren's issue, the testator's brothers, and the testator's brothers' children, would all have vested or failed within the perpetuities period.[80]

If the ninety-year period expired and the trust were still in existence, then a reformation proceeding under section 66-1-204 of the Tennessee Code would be mandatory, upon petition of any interested party. The disposition that most closely approximates the testator's plan of disposition and that is within the ninety-year period might be to terminate the trust at the end of the ninety-year period in gross, and pay the principal in equal shares to those of the testator's grandchildren who are then the income beneficiaries.[81]

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the Tennessee Supreme Court construed the word "grandchildren" in a will to mean only those grandchildren of the testator who were alive when the testator died. *Id.* at 29. This eliminated the perpetuities problem because the grandchildren living at the testator's death became measuring lives.

As in *Ross*, the trust in *McCarley* was for the education of the testator's grandchildren, except that the remainder beneficiaries of the *McCarley* trust were the testator's children. *Id.* at 28. The court reasoned that the testator could not have intended all of her grandchildren, whenever born, to be beneficiaries of the trust because if they were, the trust could not terminate until her children were dead and could have no more children. *Id.* at 29. This interpretation would have rendered the remainder provision meaningless. *Id.*

The *Ross* court did not discuss the possibility of limiting the class of grandchildren in this way to avoid the perpetuities problem. However, the trust provisions in *Ross* are not as obviously susceptible of this interpretation as those in *McCarley*; the ultimate remainder beneficiaries of the Ross trust were the testator's brothers and their issue, beneficiaries whose death or survival had no effect on the identity of the members of the class of testator's grandchildren. *Ross*, 338 S.W.2d at 247.

79. TENN. CODE ANN. § 66-1-202(a) (Supp. 1994).

80. The income interest of the grandchildren could be reformed before the expiration of 90 years, under § 66-1-204(2) of the Tennessee Code, when the income became payable to the grandchildren.

81. Apparently, the trust must terminate after 90 years even if no grandchildren had been born after the testator's death, and the testator's children were all dead when the 90 years expired. In other words, TUSRAP does not permit the use of the traditional wait-and-see approach to validate contingent remainders under the common law Rule when subsequent deaths or other events make violation of the Rule impossible. The interest must either comply with the common law Rule when it is created, or terminate within the 90 year period. *See* TENN. CODE ANN. § 66-1-202(a) (Supp. 1994).

This result might also be criticized because it leaves ownership of the remainder of the trust uncertain for ninety years. However, if the testator in *Ross* simply added a savings clause that required termination of the trust upon the death of the last to die of his spouse and all of his lineal descendants who were living at this death, no violation would exist under the common law Rule, and the trust might well last longer than ninety years. It is hard to see how the TUSRAP solution is less desirable than use of a savings clause.

IV. CONCLUSION: IS ADOPTION OF TUSRAP A GOOD CHANGE?

Until Tennessee adopted TUSRAP last year, no remedy existed under Tennessee law to save a transfer that violated the common law Rule. Thus, any nonvested interest that might violate the Rule—no matter how unlikely the state of facts that would cause the violation—was void ab initio, as though it had never been created. On the other hand, any interest drafted to remain unvested for the maximum length permitted by the Rule without violating it was valid, no matter how many years it lasted. The Rule created obstacles to effective estate planning without implementing any public policy that could not have been implemented with substantially less disruption to the estate plans of Tennessee citizens.

A leading scholar criticized the Rule for decades.[82] The American Law Institute endorsed the wait-and-see approach to mitigating the Rule's harshness as part of the *Restatement (Second) of Property*.[83] Finally, the National Conference of Commissioners on Uniform State Laws promulgated the first Uniform Statutory Rule Against Perpetuities in 1986, now codified as part of the Uniform Probate Code.[84]

TUSRAP will not invalidate any nonvested interest that satisfied the requirements of the common law Rule. In fact, a section of TUSRAP codifies the validating side of the common law Rule.[85] Nor will it change the way conscientious lawyers create contingent future interests in their clients' estate planning documents. Further, contingent future interests saved from oblivion by TUSRAP are unlikely to endure longer than those created by sophisticated estate planners adept at drafting savings clauses that extend trusts to the maximum time permitted by the common law Rule.[86] What

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82. *E.g.*, LEACH & TUDOR, *supra* note 3, §§ 24.9-.11; W. Barton Leach, *Perpetuities in Perspective; Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952).

83. 1 RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 (1983).

84. UNIF. PROB. CODE § 2-901 to -906 (1993).

85. TENN. CODE ANN. § 66-1-202(a)(1) (Supp. 1994).

86. One scholar conducted an empirical study of all perpetuities cases decided during a five-year period in states which applied the common law Rule. She compared the results in the reported decisions with the results that would likely obtain under USRAP, and concluded that USRAP was unlikely to have extended the duration of any of the trusts that

TUSRAP does do is prevent complete frustration of the estate plans of testators who inadvertently violate the Rule, while still implementing the public policy against indefinite remoteness of vesting.

USRAP is not without its detractors. The main criticism of those who prefer the traditional Rule is that USRAP will permit grantors to keep valuable interests in the limbo of conditions precedent for as long as ninety years.[87] As we have seen, however, the common law rule has the same potential. To return to our original example:[88] a testator who wishes to create a trust for her grandchildren for their lives, with a remainder to the grandchildren's issue, can create such a trust validly under the common law Rule simply by adding a perpetuities savings clause that will terminate the trust twenty-one years after the death of the survivor of all of the testator's lineal descendants who were living when the testator died. If a grandchild of this testator is born the day before the testator's death and the grandchild lives eighty years, the trust potentially could last 101 years under the common law Rule (i.e., 80 + 21), which is longer than the wait-and-see period of ninety years under TUSRAP. Furthermore, TUSRAP will not change the effect of the perpetuities savings clause.

If a ninety-year period of remoteness of vesting is too long, then the appropriate solution is to abolish the common law Rule and substitute an appropriate maximum period in gross for the duration of all trusts. If the common law Rule is to remain part of our law of future interests, however, TUSRAP is a highly desirable and long overdue reform.

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were litigated substantially longer than they would have endured had the documents of transfer contained good savings clauses. Mary L. Fellows, *Testing Perpetuities Reforms: A Study of Perpetuity Cases 1984-89*, 25 REAL PROP., PROB., & TR. J. 597, 671 (1991).

87. *E.g.*, Ira M. Bloom, *Perpetuities Refinement: There Is An Alternative*, 62 WASH. L. REV. 23 (1987); Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985).

88. *See supra* notes 8-12 and accompanying text.