Equitable Modification: Ameliorating the Harsh Consequences of the Commonlaw Rule against Pepetuities While Eliminating the Uncertainty Rule against Perpetuities

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EQUITABLE MODIFICATION: AMELIORATING THE HARSH CONSEQUENCES OF THE COMMON-LAW RULE AGAINST PERPETUITIES WHILE ELIMINATING THE UNCERTAINTY OF THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

I. INTRODUCTION

By the end of their first year in law school, most students have been introduced to the rule against perpetuities and recognize John Chipman Gray’s famous statement of the rule: “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.”

The rule dates back to seventeenth century England and has served as a means of properly limiting a person’s control over the disposition of their property after

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death. Almost since its inception, the rule against perpetuities has been a thorn in the sides of law students, practicing attorneys, and judges alike. Analysis under the common-law rule has been described as "quirky, difficult to justify, and unfair" in light of doctrines such as the fertile octogenarian, the unborn widow, and the administrative contingency. Thus, over the years, many jurists have argued for the reformation of the rule.

Reformation of the rule against perpetuities finally came on a large scale in 1986 when the National Conference of Commissioners on Uniform State Laws approved the Uniform Statutory Rule against perpetuities (USRAP). The Uniform Statutory Rule adopted a three-step process in performing perpetuity analysis: (1) analysis under the common-law rule; (2) a ninety-year "wait-and-see" period for interests that violate the common-law rule; and (3) deferred reformation for interests that fail to vest within the ninety-year period. Thus, for interests that are initially invalid under the common-law rule, the uniform statutory rule places ownership of the property in limbo for as much as ninety years after the interest is created. Therefore, while the uniform statutory rule may have solved some of the injustices that existed under the common-law rule, it also nullified the predictability

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3 See THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 183 (2nd ed. 1984).

4 David M. Becker, If You Think You No Longer Need to Know Anything About the Rule against perpetuities, Then Read This!, 74 Wash. U.L.Q. 713, 713 (1996).

5 The fertile octogenarian rule has been defined as "[t]he conclusive presumption of fertility of any person, male or female, regardless of age or medical history." W. Barton Leach, Perpetuities: The Nutshell Revisited, 78 Harv. L. Rev. 973, 992 (1965). For cases discussing the fertile octogenarian rule, see Connecticut Bank & Trust Co. v. Brody, 392 A.2d 445, 450 (Conn. 1978); Turner v. Turner, 196 S.E.2d 498, 501 (S.C. 1973) (When applying the common-law rule against perpetuities "[t]he possibility of childbirth is never extinct"); Crockett v. Scott, 284 S.W.2d 289 (Tenn. 1955) (recognizing the presumption that a woman age 50 is capable of having children); Die v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (1787).

6 The unborn widow rule refers to the invalidity of a gift to A’s issue who survive A and his widow due to the possibility that A may marry a woman unborn at the testator’s death, “thus making the gift . . . contingent on termination of a life not in being.” W. Barton Leach, Perpetuities: The Nutshell Revisited, 78 Harv. L. Rev. 973, 992 (1965). For cases involving the unborn widow doctrine, see Dickerson v. Union Nat'l Bank, 595 S.W.2d 677 (Ark. 1980); Lanier v. Lanier, 126 S.E.2d 776 (Ga. 1962); Perkins v. Iglehart, 39 A.2d 672 (Md. 1944); Brokover v. Grimm, 190 S.E. 697 (W. Va. 1937).

7 The administrative contingency doctrine makes a gift “only to [those] persons who are living at the time when administration is completed and distribution is made” invalid due to the possibility that “it is mathematically possible that it [the administration of his estate] will take more than the period of perpetuities.” W. Barton Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, 644 (1938). For cases involving the administrative contingency doctrine, see Prime v. Hyne, 67 Cal. Rptr. 170 (Cl. App. 1968); Ryan v. Beshk, 170 N.E. 699 (Ill. 1930).


and certainty that were the hallmarks of the common-law rule.\textsuperscript{11} As a result, the uniform statutory rule created new difficulties in situations involving real property because it defers reformation of the interests for as much as ninety years and creates uncertainty of title for the wait-and-see period,\textsuperscript{12} thus increasing the inalienability of land,\textsuperscript{13} which has long been against public policy and the policy of the courts.\textsuperscript{14}

This Note will examine the anomaly created by the adoption of the Uniform Statutory Rule against perpetuities where real property is involved. Furthermore, it will attempt to provide for a judicial resolution of this problem in West Virginia where the doctrine of equitable modification\textsuperscript{15} remains good law.

II. THE HISTORY OF THE RULE AGAINST PERPETUITIES IN WEST VIRGINIA

A. The Common-Law Rule Against Perpetuities

The common-law rule against perpetuities has been the law in West Virginia ever since the state was created in 1863.\textsuperscript{16} As early as 1869, the West Virginia Supreme Court judicially recognized the traditional form of the common-law rule, stating that:

An executory devise, either of real or personal estate, is good if limited to vest within the compass of a life or lives in being and twenty-one years afterwards, adding thereto, however, in case of an infant en ventre sa mere, sufficient time to cover the ordinary period of gestation of such child. But the

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\textsuperscript{11} The common-law rule against perpetuities created predictability of results and certainty of title due to the fact that the rule was applied at the time the interest was created. It was the harshness of these results that the uniform statutory rule was designed to remedy. See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1 cmt. A, 8B U.L.A. 342.
\textsuperscript{12} See Dukeminier, supra note 10, at 1049-1050.
\textsuperscript{13} See id. at 1043-44.
\textsuperscript{14} See LEWIS M. SIMES, LAW OF FUTURE INTERESTS 237 (8th Reprint 1993) (2nd ed. 1966) ("In general, it may be said that the law has always favored the free alienability of property.").
\textsuperscript{15} The doctrine of equitable modification provides for judicial reformation of certain non-charitable devises that, on their face, violate the rule against perpetuities but which could be modified to manifest the general intent of the testator and to conform with the underlying policy of the rule. See Berry v. Union Nat'l Bank, 262 S.E.2d 766 (W. Va. 1980).
\textsuperscript{16} See W. VA. CODE, Vol. I, Report of the Code Commission at vii (explaining that "[d]uring the Civil War the State of West Virginia was created and, by section 8, of Article XI of its Constitution of 1863, such parts of the common law and of the laws of the State of Virginia as were in force within the boundaries of the State of West Virginia when the Constitution became effective, and were not repugnant thereto, were declared to be the law of this State until altered or repealed by the legislature.") See also Higgenbotham v. Rucker, 6 Va. 313 (1800) (establishing the existence of the rule against perpetuities in Virginia); Pleasants v. Pleasants, 6 Va. 319 (1800); Griffith v. Thomson, 28 Va. 321 (1829); Jiggetts v. Davis, 28 Va. 368 (1829).
limitation, in order to be valid, must be so made that the estate, or whatever is devised or bequeathed, not only may, but must, necessarily vest within the prescribed period.\(^\text{17}\)

Historically, the purposes of the common-law rule could be stated as follows:

When future interests in specific land or other things are involved, the purpose and policy of the rule may properly be said to be the furtherance of marketability. But if the future interests are interests in a revolving fund, such as corporate shares or beneficial interests in trusts, a further rationale must be recognized, namely: the rule strikes a fair balance between the desires of the living generation to dispose of the property which it enjoys and the desires of future generations to dispose of the property which they will enjoy.\(^\text{18}\)

Thus, as one can see, free marketability and the desire for the wealth of the world to be controlled by living persons and not by the dead have been major motivating factors in the operation of the rule. West Virginia courts strictly adhered to the common-law rule\(^\text{19}\) until the 1930's,\(^\text{20}\) when the first modifications to the rule against perpetuities were made in West Virginia.

B. \textit{Cy Pres for Charitable Trusts}

The first important deviation from the common-law rule against perpetuities in West Virginia came indirectly as a result of the recognition of the doctrine of cy pres, which applies to charitable trusts.\(^\text{21}\) In 1931, the West Virginia Legislature enacted § 35-2-2 of the West Virginia Code, which applies cy pres to charitable trusts and gives the court:

full power to appoint or designate a trustee or trustees to execute the trust, or to designate the beneficiaries in, or the objects of, any such trust, or

\(^\text{17}\) Whelan v. Reilly, 3 W. Va. 597, 612 (1869).
\(^\text{18}\) SIMES, \textit{supra} note 14, at 253-54.
\(^\text{20}\) The common-law rule against perpetuities was indirectly modified in 1931 when the West Virginia Legislature adopted the doctrine of cy pres, which removed charitable trusts from the application of the rule. See \textit{W. VA. CODE} § 35-2-2 (1997).
\(^\text{21}\) \textit{See id.}
where such trust does not admit the specific enforcement or literal execution, to carry into effect as near as may be the intent and purposes of the person creating such trust.\textsuperscript{22}

Consequently, under the trust doctrine of cy pres, "if it is impossible, impractical or illegal to carry out the terms of a charitable trust, and the settlor has indicated a general charitable purpose, the court will authorize the substitution of another charitable scheme within the general purpose."\textsuperscript{23}

Before the enactment of this section, the doctrine of cy pres was not in force in West Virginia,\textsuperscript{24} and testamentary dispositions for charitable purposes were required to be as definite as a provision creating a private trust in order to be valid and effective.\textsuperscript{25} However, as a result of the enactment of § 35-2-2 in West Virginia, gifts to public charities are not subject to the rule against perpetuities.\textsuperscript{26} Thus, although the doctrine of cy pres was not legislatively adopted to deal with the rule against perpetuities, the rule was, nevertheless, one of the problems that cy pres "solved" where charitable trusts are involved.

C. The Doctrine of Equitable Modification

The next major change to the common-law rule against perpetuities in West Virginia came in 1980. In the case of Berry v. Union Nat’l Bank,\textsuperscript{27} the West Virginia Supreme Court of Appeals judicially reformed the rule against perpetuities by adopting the doctrine of equitable modification in order to "ameliorate the harsh consequences of ‘remorseless application’ of the rule."\textsuperscript{28} In Berry, the testatrix died leaving a will that established a private educational trust for the descendants of her husband’s brothers and sisters.\textsuperscript{29} The trustee was given discretion to provide educational expenses for class members satisfying certain conditions.\textsuperscript{30} The trust was to last for twenty-five years after the death of the testatrix or until the principal

\begin{itemize}
\item \textsuperscript{22} Id.
\item \textsuperscript{23} SIMES, supra note 14, at 275.
\item \textsuperscript{24} See Beatty v. Union Trust & Deposit Co., 13 S.E.2d 760, 761 (W. Va. 1941).
\item \textsuperscript{25} See id. at 760.
\item \textsuperscript{26} See Mercantile Banking & Trust Co. v. Showacre, 135 S.E. 9, 11 (W. Va. 1926) ("Th[e] rule [against perpetuities], while applicable to private trusts, has generally no application to public benefactions, and certainly none to public charities which are designed to be perpetual.").
\item \textsuperscript{27} 262 S.E.2d 766 (W. Va. 1980). For a discussion on the effects of the Berry decision on perpetuities reform, see generally, Donna P. Grill, Perpetuities Reform: A Signal From West Virginia, 11 Real Est. L. J. 116 (1982).
\item \textsuperscript{28} Berry, 262 S.E.2d at 770.
\item \textsuperscript{29} See id. at 767-68.
\item \textsuperscript{30} See id. at 768.
\end{itemize}
was reduced to $5,000 or less, whichever occurred first.\textsuperscript{31} At the termination of the trust, the trust res was to be distributed per stirpes to the then-living descendants of the brothers and sisters of the testatrix’s husband.\textsuperscript{32}

Realizing that the trust potentially violated the rule against perpetuities, the executrix, Ms. Josephine Berry, entered into a trust termination agreement with the trustee.\textsuperscript{33} The terms of the agreement reduced the trust duration from twenty-five to twenty-one years and required the executrix to initiate a declaratory judgment action to determine whether the trust, in fact, violated the rule against perpetuities and whether it was proper for the executrix and trustee to enter into a trust termination agreement that amended the trust duration.\textsuperscript{34} The trial court found that the trust provision did violate the Rule against perpetuities and was, therefore, void and without force.\textsuperscript{35} Additionally, the court held that the executrix and trustee did not have the authority to enter a trust termination agreement.\textsuperscript{36} Executrix Berry appealed these findings to the West Virginia Supreme Court.

On appeal, the court held that the will of the testatrix should be modified to reduce the designated duration of the trust from twenty-five years to twenty-one years, thus satisfying the rule against perpetuities.\textsuperscript{37} In reaching its decision, the court adopted a doctrine of “equitable modification,”\textsuperscript{38} which applies to certain non-charitable devises that, on their face, violate the rule against perpetuities, but which could be modified to conform with the rule’s underlying policy.\textsuperscript{39}

Under the doctrine of equitable modification, a non-charitable devise or bequest that violates the rule against perpetuities will be modified if the following criteria are met: (1) the testator’s intent is expressed in the instrument or can be readily determined by a court; (2) the testator’s general intent does not violate the rule against perpetuities; (3) the testator’s particular intent, which does violate the rule, is not a critical aspect of the testamentary scheme; and (4) the proposed modification will effectuate the testator’s general intent, will avoid the consequences of intestacy, and will conform to the policy considerations underlying the rule.\textsuperscript{40}

The testamentary trust in \textit{Berry} met all these criteria.\textsuperscript{41} First, the testatrix’s

\textsuperscript{31} See id.
\textsuperscript{32} See id.
\textsuperscript{33} See Berry, 262 S.E.2d at 768.
\textsuperscript{34} See id.
\textsuperscript{35} See id.
\textsuperscript{36} See id.
\textsuperscript{37} See id. at 772.
\textsuperscript{38} See Berry, 262 S.E.2d at 770.
\textsuperscript{39} See id.
\textsuperscript{40} See id. at 771.
\textsuperscript{41} See id.
general intent was clearly expressed in her will when she stated, "I believe it was the desire of my husband that such funds as I might have at my death should be used to help such persons [who are later defined in this section] obtain educations." Second, her general intention, as expressed above, did not violate the rule against perpetuities. Third, there was no evidence that the testatrix's specific intent of having the trust last for twenty-five years was a critical aspect of her testamentary scheme. Finally, the court believed that modifying the duration of the trust from twenty-five years to twenty-one years would preserve the testatrix's general intent, avoid intestacy for that portion of her estate, and ensure that the trust property would not be controlled beyond the perpetuities period.

One final important point to make is that, in its decision, the Berry court recognized the rule against perpetuities and modified the will to conform to it, focusing on will cases and the testatrix's intent. Thus, one could argue that the Berry case was limited to testamentary dispositions. More importantly, however, one could make a strong argument that the doctrine of equitable modification addresses the will rather than operating as a subsidiary doctrine of the Rule against perpetuities.

Thus, in summary, prior to the adoption of the Uniform Statutory Rule Against Perpetuities, West Virginia recognized the common-law rule in its traditional form. However, the common-law rule was indirectly modified by the statutory recognition of the trust doctrine of cy pres, which removed gifts to public charities from the application of the common-law rule, and was later reformed by the immediate judicial reformation available for certain testamentary devises or bequests that violated the rule under the doctrine of equitable modification.

III. THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

A. Analysis Under the Uniform Statutory Rule Against Perpetuities

The Uniform Statutory Rule Against Perpetuities (hereinafter USRAP) was enacted in West Virginia in 1992. USRAP superseded the common-law rule against perpetuities and was intended to be applied prospectively, meaning that the rule "applies to a nonvested property interest or a power of appointment that is

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42 Id.
43 See Berry, 262 S.E.2d at 771.
44 See id.
45 See id.
46 See id. at 770.
47 See id. at 770-71.
48 See W. VA. CODE §§ 36-1A-1 to -8 (1997).
49 See id. § 36-1A-8.
created on or after the effective date of this article [1992].”

The rule goes on to clarify that “the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.” Thus, “[s]ince a will becomes effective as a dispositive instrument upon the decedent’s death, not upon the execution of the will, general principles of property law determine that the time when a nonvested property interest or a power of appointment created by will is created is at the decedent’s death.”

The Statutory Rule Against Perpetuities uses a three-step process in performing perpetuity analysis: (1) analysis under the common-law rule; (2) a ninety-year “wait-and-see” period for interests that violate the common-law rule; and (3) deferred reformation for interests that fail to vest within the ninety-year period. Specifically, USRAP states that “[a] nonvested property interest is invalid unless: (1) When the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive; or (2) The interest either vests or terminates within ninety years after its creation.”

Thus, under USRAP, a nonvested property interest is still initially valid if, at its creation, it is certain to vest or fail within a life in being plus twenty-one years. However, this is where USRAP departs from the old common-law rule. “The validity of a nonvested property interest that is not initially valid is in abeyance. Such an interest is valid if it vests within the permissible vesting period after its creation.” Thus, “[a] nonvested property interest that is not initially valid becomes invalid (and subject to reformation under Section 3) [only] if it neither vests nor terminates within the permissible vesting period [90 years] after its creation.

In performing the first step of USRAP’s perpetuity analysis (the old common-law analysis), there are several important things to remember. First, “initial validity under Section 1(a)(1) can be established only if there is an individual for whom there is a causal connection between the individual’s death and the interest’s vesting or terminating no later than 21 years thereafter.” Such an individual is often referred to as a “measuring life” or “validating life.” These

50 Id. § 36-1A-5(a).
51 Id. § 36-1A-2(a).
54 W. VA. CODE § 36-1A-1(a) (1997). Similarly, W. VA. CODE § 36-1A-1(c) provides that: “A nongeneric power of appointment ... is invalid unless: (1) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than twenty-one years after the death of an individual then alive.”
56 Id.
57 Id. cmt. B.
individuals will vary from situation to situation but often include beneficiaries and individuals who are related to them. Second, in cases where more than one nonvested property interest is created, the validity of each interest must be determined individually. Consequently, different validating lives may be used for each separate interest.

The final issue to be addressed in the analysis of an interest under USRAP is the issue of reformation. Section 3 of USRAP has codified a deferred reformation for interests that fail to vest within the ninety year "wait-and-see" period. However, according to the statute, there are only three situations where reformation is appropriate. The first situation is in the event that an interest "becomes invalid pursuant to the provisions of section one of this article [after the ninety year wait-and-see period]." The second scenario applies only if a class gift might become invalid and "the time has arrived when the share of any class member is to take effect in possession or enjoyment." Finally, a disposition may be reformed if the interest "is not validated by the provisions of subdivision (1), subsection (a), section one [§ 36-1A-1(a)(1)] of this article [and] can vest but not within ninety years after its creation."

B. Advantages of USRAP

The Uniform Statutory Rule Against Perpetuities arguably offers some vast improvements over the common-law rule. First, USRAP eradicates the harshness and injustice of the common-law rule by waiting to see whether or not certain contingencies actually play out, as opposed to invalidating future interests on the mere possibility that a certain event will take place. Thus, cases of unfair "technical violations," such as the fertile octogenarian, the unborn widow, and the administrative contingency will no longer haunt law students or the intended

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60 See id.
61 See W. VA. CODE § 36-1A-3 (1997).
62 See id.
63 Id. § 36-1A-3(1).
64 Id. § 36-1A-3(2).
65 Id. § 36-1A-3(3). This scenario applies only where it would be impossible for the interest to vest within the ninety year period. The best example of this would be a 100 year trust. In certain situations, the court would have to reform the terms of the trust to make it last for ninety years.
beneficiaries of interests that would have violated the common-law rule. In addition, USRAP also eliminates the problems created by the "actual-measuring-lives" approach, namely, identification and tracing of the measuring lives. Furthermore, USRAP advocates argue that wait-and-see makes estate planning somewhat easier by essentially operating as a universal perpetuity saving clause. Thus, USRAP does have its good points.

C. Disadvantages of USRAP

With such important advantages, why would anyone want to apply any rule but USRAP to a nonvested property interest? The reasons are threefold, particularly when the interest at issue is an interest in real property: (1) the wait-and-see period leaves titles "in a state of uncertainty for an indefinite period of time pending the happening of [a] contingency;" (2) USRAP restricts the free marketability of land; and (3) wait-and-see extends the period of dead hand control.

First, regarding uncertainty of title, wait-and-see "cause[s] a particularly acute problem in the case of legal future interests in land." This is due to the fact that the title is neither valid nor void until the expected contingency occurs or until it becomes apparent that the contingency could not possibly occur within the period of the rule. Second, the state of West Virginia has long recognized that "restraints upon alienation [of property] are against the policy of our law." Similarly, the West Virginia Supreme Court has also held that "the law favors the vesting of estates and, as a necessary corollary, does not favor restricting the power of alienation." There are four main objections to restraints on alienation:

First, such restraints make property unmarketable.

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67 See id.
69 See Lawrence W. Waggoner, Perpetuities: A Perspective on Wait-And-See, 85 Colum. L. Rev. 1714, 1718 (1985). But see David M. Becker, If You Think You No Longer Need to Know Anything About the Rule against perpetuities, Then Read This!, 74 Wash. U. L. Q. 713 (postulating that knowledge of the common-law rule is still required to effectively practice property law and advocating preventive perpetuities compliance).
72 See id. at 1050.
73 See SIMES, supra note 14, at 271.
74 See id.
The particular land may be made unavailable for its highest and best use. Second, restraints tend to perpetuate the concentration of wealth by making it impossible for the owner to sell property and consume the proceeds of sale. The restrained owner cannot dissipate the capital and, perhaps, fall out of the ranks of the rich. Third, restraints discourage improvements on land. An owner is unlikely to sink his money into improvements on land that he cannot sell. If a mortgage cannot be placed on the land (giving the moneylender the right to sell the land if the borrower defaults on the loan), lenders will not make money available to finance improvements. Fourth, restraints prevent the owner's creditors from reaching the property, working hardship on creditors who rely on the owner's enjoyment of the property in extending credit.77

Finally, the wait-and-see provisions of USRAP extend the period of dead hand control during the waiting period beyond what is perceived as an acceptable period.78

IV. HYPOTHETICAL DISPOSITION AND ANALYSIS UNDER THE UNIFORM STATUTORY RULE

Perhaps the best way to demonstrate the operation of the Uniform Statutory Rule Against Perpetuities, and the anomaly created by it, is to begin with a hypothetical disposition of property.79 Testator died on August 2, 1993, and was survived by three children, ten grandchildren, and one great grandchild. He had executed a Will dated June 1, 1988. In his Will, Testator devised all of his property, consisting of one large tract of land 300 acres in size, to his children for life, then to his grandchildren for their lives, and upon the death of his grandchildren, the property was to go to their respective children and grandchildren. Specifically, the Will states:

It is my wish and desire that all of my real estate, consisting of one large tract of 300 acres, be retained by the members of my family for as long as it is legally possible to do so. I have three (3) children, ten (10) grandchildren, and one (1) great grandchild

79 This hypothetical was adopted from an actual disposition taken from a real case with the names and relevant information changed.
as of the writing of this Will and may have great-great grandchildren born within twenty-one (21) years of any living great grandchild. Therefore, I devise and bequeath unto my oldest son, Bill, who has four children, unto my son, Fred, who has three children, and unto my daughter, Jane, who has three children, all of said tract of approximately 300 acres for and during their respective lifetimes and upon their death, their share will then pass to and become the property of their children for their lifetime and upon their death to their respective children or grandchildren for their lifetime and upon their death to their children.

The Will goes on to indicate the Testator’s concern about keeping the land in the family, stating that “I realize the difficulty in retaining the land in this manner [alluding to the rule against perpetuities], all of which has been explained to me, but I am especially anxious and desire to keep this property in the family for as long as legally possible to do so. If any of my three children do not want his or her share, then they can sell it during their lifetime to any other children or grandchildren, but I still want it to stay in the family.”

Although the Testator executed his Will in 1988, before the enactment of USRAP in West Virginia, the interests created by the testator’s Will would be analyzed under USRAP because the testator died in 1993, one year after the rule took effect. In the hypothetical, the testator’s first devise of his 300 acre tract is to his children “for and during their respective lifetimes.” According to the testator’s Will, each of his children would receive a one-third undivided interest in the land. Thus, the testator’s conveyance of the land to his children represented a class gift, creating a vested interest in each child and providing each child with a life estate in his or her share of the 300 acre tract. This devise represented a valid conveyance, and since it created a vested interest in the class of the testator’s children, and the class closed at the testator’s death, the disposition was not subject to analysis under the rule against perpetuities (USRAP), which applies only to nonvested property interests.

Next, the testator devised the respective shares of each of his children to his grandchildren for their lives upon the death of their respective parent. This conveyance represented a class gift to the testator’s grandchildren, broken up into three subclasses, with each subclass made up of the grandchildren from any one of the testator’s children. This class gift to the grandchildren was vested subject to open; vested because there were ascertainable members of the class (and each subclass) alive at the time of the testator’s death, and subject to open because of the possibility that the testator’s children living at his death may have additional children during their lifetime (i.e., testator’s grandchildren). However, “all class gifts that are subject to open are to be regarded as nonvested property interests for
the purposes of analysis under the rule against perpetuities (USRAP). Thus, the testator’s conveyance of life estates to each of his grandchildren must meet USRAP analysis. In performing the analysis, one can determine that the testator’s children can serve as validating lives for the conveyances to his grandchildren. Consequently, the life estates granted to the testator’s grandchildren are initially valid under USRAP because the class will close, and thus the interest must vest, within twenty-one years of the respective lives of the testator’s children, all lives in being at the time of the testator’s death.

Finally, the testator conveyed each child’s share to “[his grandchildren’s] respective children or grandchildren for their lifetime and upon their death to their children.” These final two devises that the testator makes in his Will are analyzed in the same manner as the gift to the grandchildren. The testator’s conveyance to his great grandchildren is initially invalid because it is a class gift that is vested subject to open with no ascertainable validating life. Subsequently, the testator’s attempted devise to his great-great grandchildren is initially invalid because it is a nonvested class gift that has no ascertainable validating life. Therefore, since the interests created by these conveyances are initially invalid under the first step of the USRAP perpetuity analysis, a determination of their actual validity is in abeyance as a result of the ninety-year “wait-and-see” period required by the second step of the perpetuity analysis. Thus, under USRAP, the Court must wait ninety years from the date of creation of the interests in order to determine the validity of these interests. If one or both of the interests vest or fail within that ninety years, then the interest or interests are valid. Any interest that is still contingent (e.g., if one of the classes is still open) at the end of the ninety year period is invalid, and the Will must then be reformed under Section 3 of USRAP.

Regarding the issue of reformation, the first reformation scenario under Section 3 of USRAP does not apply to the hypothetical Will because the only way for an interest to become invalid under this first scenario is for it to remain nonvested for ninety years after the creation of the interest, and none of the interests here have remained nonvested for ninety years. Similarly, although there

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81 There were great grandchildren alive at the time of the testator’s death, making the interest vested, and there is a possibility that more great grandchildren will be born, making the interest subject to open. As mentioned earlier in this Note, a class gift that is vested subject to open is considered to be a nonvested property interest for purposes of analysis under the rule against perpetuities (USRAP).
82 The testator could possibly have a great grandchild born more than twenty-one years after the death of the last remaining life in being to a grandchild who was not alive at the time of the testator’s death. Thus, the class would close and the interest would vest too remotely, making the interest initially invalid.
83 The gift to the great-great grandchildren is nonvested because there were no ascertainable members of the class alive at the time of the testator’s death.
84 Since the date of creation of the interests was August 2, 1993, which was also the date of the testator’s death, the last day of the ninety year period would be August 1, 2083.
86 See id. § 36-1A-3(1).
are class gifts in the hypothetical that might become invalid (the devisees to the great grandchildren and great-great grandchildren), one may assume that the time has not come for the share of any member of those classes to take effect. Thus, the second scenario under USRAP’s reformation provisions is inapplicable to the present hypothetical.\(^\text{87}\) Finally, like the other two situations, the third scenario does not apply here because it is possible for the initially invalid interests (the conveyances to the great grandchildren and great-great grandchildren) to vest within the ninety year period.\(^\text{88}\) Thus, statutory reformation of the testator’s Will under Section 3 of USRAP is not an option at this time, and the ultimate title (fee simple control) to the land will most likely remain uncertain for the entire wait-and-see period of ninety years.

V. JUDICIAL REFORMATION OF A WILL UNDER THE DOCTRINE OF EQUITABLE MODIFICATION

Although reformation of the testator’s will is not currently possible under Section 3 of USRAP,\(^\text{89}\) the disposition should be reformed before the end of the ninety year “wait-and-see” provision to prevent the uncertainty of title, the restrictions on marketability, and the extension of dead hand control that are present under USRAP.\(^\text{90}\) Thus, one final possibility for reformation of the will would be judicial reformation under the doctrine of equitable modification.\(^\text{91}\) As mentioned earlier, equitable modification was first introduced in West Virginia by Berry v. Union Nat’l Bank.\(^\text{92}\) In that case, the West Virginia Supreme Court held that a devise or bequest that violated the rule against perpetuities could be immediately modified to conform with the rule “if the following conditions are met: (1) The testator’s intent is expressed in the instrument or can be readily determined by a court; (2) The testator’s general intent does not violate the rule against perpetuities; (3) The testator’s particular intent, which does violate the rule, is not a critical aspect of the testamentary scheme; and (4) The proposed modification will effectuate the testator’s general intent, will avoid the consequences of intestacy, and will conform to the policy considerations underlying the rule.”\(^\text{93}\)

The Berry decision has not been reversed, explicitly repealed, or otherwise replaced. Nevertheless, it is unclear as to whether or not the Berry decision could still be applied to a situation such as this in light of the subsequent enactment of

\(^{87}\) See id. § 36-1A-3(2).

\(^{88}\) See id. § 36-1A-3(3).

\(^{89}\) See supra notes 86-88 and accompanying text.

\(^{90}\) See supra Section III.C.

\(^{91}\) See supra Section II.C.

\(^{92}\) 262 S.E.2d 766 (W. Va. 1980). See supra Section II.C.

\(^{93}\) Berry, 262 S.E.2d at 771.
USRAP. This is due to the fact that USRAP states that "[t]he provisions of this article supersede the rule of the common law known as the rule against perpetuities." Thus, the question remains whether equitable modification is a subsidiary doctrine of the common law rule against perpetuities such that it was superseded by USRAP? Again, the answer is unclear. In the commentary to USRAP, which discusses subsidiary common-law doctrines that were superseded by the act, the doctrine of equitable modification is not mentioned. Furthermore, one could argue that the doctrine of equitable modification recognizes the rule against perpetuities and then modifies the will to conform to it, thus addressing the will rather than operating as a subsidiary doctrine of the common-law rule against perpetuities. Therefore, it may be possible to apply equitable modification to the situation at hand. Additionally, in a case such as the hypothetical involving real property (land) as opposed to a trust, the Court would likely favor reformation under the Berry doctrine of equitable modification as it most closely conforms to the public policy against restrictions on the alienability of land, it is not susceptible to the harsh consequences of the common-law rule (because the interests are judicially reformed), and it eliminates the uncertainty of the uniform statutory rule by determining from the outset (the time the interest is created) in whom the ultimate title to the land will vest.

Applying the doctrine of equitable modification to the above hypothetical disposition, the testator's devises to his great grandchildren and great-great grandchildren are initially invalid under the first step of perpetuity analysis (the common-law rule against perpetuities). Furthermore, the testator's intent, as clearly stated in his Will, is to keep the 300 acre tract of land in the family for as long as legally possible (general intent), and to convey the land to his children, grandchildren, great grandchildren, and great-great grandchildren as set forth in his Will (particular intent). Thus, the testator's Will meets the requirements for equitable modification as established in Berry. First, as pointed out above, the testator's intent is clearly expressed in his Will. Additionally, his general intent of keeping the land in the family for as long as legally possible does not violate the rule against perpetuities. Subsequently, the testator's particular intent, specifically the devises to his great grandchildren and great-great grandchildren, violates the rule against perpetuities, but is not critical to the testamentary scheme. Finally, modifying the Will (i.e., the remainder in the land to the grandchildren in fee simple) will effectuate the testator's general intent, will avoid intestacy, and will conform to the policy considerations underlying the rule, namely the policy against restrictions on the alienability of land.

94 W. VA. CODE § 36-1A-8 (1997).
96 See supra Section IV.
97 See supra note 40 and accompanying text.
VI. CONCLUSION

The doctrine of equitable modification should be applied to testamentary dispositions which are initially invalid under the first step of USRAP perpetuity analysis. Application of the doctrine of equitable modification would effectively ameliorate the harsh consequences of the common-law rule against perpetuities, while also eliminating the uncertainty of the Uniform Statutory Rule Against Perpetuities. Thus, equitable modification strikes the proper balance between the advantages of the common-law rule against perpetuities and the Uniform Statutory Rule Against Perpetuities.

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