The Uniform Statutory Rule against Perpetuities: Taming the Technicality-Ridden Legal Nightmare

John D. Moore
West Virginia University College of Law

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THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES: TAMING THE "TECHNICALITY-RIDDEN LEGAL NIGHTMARE"

I. INTRODUCTION ............................................. 194

II. PRIOR LAW IN WEST VIRGINIA ......................... 196
    A. Common-Law Rule Against Perpetuities ............... 196
    B. Equitable Modification ................................ 197
    C. Cy Pres for Charitable Trusts .......................... 199

III. PRINCIPLE FEATURES OF THE USRAP .................... 200
    B. Wait and See Test ....................................... 201
        1. Saving-Clause Function ............................... 202
        2. Rationale of the 90-Year Waiting Period .......... 202
    C. Deferred Reformation of Interests that Violate the Rule ........................................... 204
    D. Prospective Application of the Rule .................. 205

IV. PRACTICAL IMPLICATIONS OF THE USRAP .................. 206
    A. Estate Planning Aspects ............................... 206
        1. Incentives to Comply With the Common-Law Rule .......... 206
        2. Use of Saving-Clausules ................................ 207
    B. Nondonative Transfers .................................... 212
        1. Commercial Transactions ............................... 212
        2. Nondonative Transfers and Title Searches in West Virginia ........................................... 214
    C. Potential Problems Created by the Uniform Act ......... 214
        1. Extension of Dead-Hand Control of Property ....... 215
        2. Preservation of Poorly Drafted Instruments ....... 216

V. ALTERNATIVES TO THE USRAP .............................. 216
    A. Immediate Cy Pres ....................................... 217
    B. Wait-and-See for the Measuring Lives ................ 218

VI. CONCLUSION .............................................. 219
I. INTRODUCTION

From the time of its emergence in the Duke of Norfolk's Case, the Common-law Rule Against Perpetuities (Common-law Rule) has been the primary means used by the Anglo-American legal system to limit a person's power to control the disposition of their wealth after their death. The Rule Against Perpetuities accomplishes this by invalidating future interests that vest too remotely. The classic statement of the Rule is deceptively simple: "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 Common-law Rule is noted for its unjust consequences because it disregards actual events and invalidates nonvested future interests entirely on the grounds of what might happen. Under the Common-law Rule's "what-might-happen" approach, reasonable dispositions can be rendered invalid by such obscure possibilities as an eighty-year old woman giving birth to additional children, a married person in his or her middle or late years later marrying a person born after the transfer, or the probate of an estate taking more than 21 years to complete. A frequently-quoted statement of Professor W. Barton Leach summarizes both the Common-law Rule and the argument for its reform:

1. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).
2. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 178 (2d ed. 1984).
The Rule Against Perpetuities is a technicality-ridden legal nightmare, designed to meet problems of past centuries that are almost nonexistent today. Most of the time it defeats reasonable dispositions of reasonable property owners, and often it defeats itself. It is a dangerous instrumentality in the hands of most members of the bar.  

West Virginia recently joined the ranks of a growing number of jurisdictions seeking to reform the Rule Against Perpetuities by adopting the Uniform Statutory Rule Against Perpetuities (USRAP), which became effective on May 10, 1992. The USRAP was promulgated by the National Conference of Commissioners on Uniform State Laws in 1986. Since then, it has been unanimously endorsed by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers. Including West Virginia, eighteen states have now adopted the USRAP.

The USRAP uses wait-and-see/deferred reformation in a three-step approach to perpetuity reform. Under step one, a nonvested future interest in property is valid at the moment of its creation if it satisfies

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7. W. Barton Leach, Perpetuities Legislation, Massachusetts Style, 67 HARV. L. REV. 1349 (1954); see also Lucas v. Hamm, 364 P.2d 685 (Cal. 1961) (holding that an attorney who drafted a will in such manner that the trust provisions violated the Rule Against Perpetuities was not liable to the beneficiaries of the trust on the basis of negligence or breach of contract).


10. USRAP, supra note 8, at 342.


the Common-law Rule.\textsuperscript{13} Step two salvages future interests that would have been invalid at common-law by providing a 90-year waiting period for the contingencies to work out harmlessly.\textsuperscript{14} Finally, step three provides for deferred reformation of future interests that violate the Common-law Rule and do not in fact vest within the 90-year waiting period.\textsuperscript{15}

This Note will examine the important aspects of West Virginia's adoption of the USRAP. First, it will review perpetuities law in West Virginia as it existed prior to the adoption of the USRAP. Second, it will analyze the principal features of the USRAP. Third, it will examine the practical implications of the USRAP, including estate planning aspects, commercial transfers, and potential problems created by the Act. Finally, it will survey alternate methods of perpetuities reform followed in other states.

II. PRIOR LAW IN WEST VIRGINIA

A. Common-Law Rule Against Perpetuities

Since its inception in 1863, West Virginia has followed the common-law and thus acknowledged the Common-law Rule Against Perpetuities.\textsuperscript{16} As early as 1869, the West Virginia Supreme Court of Appeals recognized the Common-law Rule in its traditional form explaining 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 \textit{en ventre sa}

\begin{itemize}
  \item \textsuperscript{13} W. VA. CODE § 36-1A-1(a)(1) (Supp. 1992); USRAP, supra note 8, § 1(a)(1).
  \item \textsuperscript{14} W. VA. CODE § 36-1A-1(a)(2) (Supp. 1992); USRAP, supra note 8, § 1(a)(2).
  \item \textsuperscript{15} W. VA. CODE § 36-1A-3 (Supp. 1992); USRAP, supra note 8, § 3.
  \item \textsuperscript{16} W. VA. CODE, vol. 1, Report of Code Commission at VIII explains: During 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.
\end{itemize}
mere, sufficient time to cover the ordinary period of gestation of such child. But the 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.\textsuperscript{17}

The Common-law Rule was rigidly applied in West Virginia until 1980,\textsuperscript{18} when the state engaged in its first efforts to reform the Rule Against Perpetuities. In \textit{Berry v. Union National Bank},\textsuperscript{19} the West Virginia Supreme Court of Appeals judicially reformed the Rule Against Perpetuities in order to "ameliorate the harsh consequences of 'remorseless application’ of the rule."\textsuperscript{20}

\textbf{B. Equitable Modification}

In \textit{Berry}, the testatrix, Clara Clayton Post, died in 1975 leaving a will that created a private educational trust for the descendants of her late husband's brothers and sisters.\textsuperscript{21} The trustee, the Union National Bank, was given absolute discretion to provide educational expenses for class members satisfying certain criteria, and the trust was to endure for twenty-five years after the testatrix' death or until the principal was reduced to less than $5,000, whichever should first occur.\textsuperscript{22} At the termination of the trust the remaining principal and interest were to be distributed per stirpes to the then living descendants of the brothers and sisters of the testatrix' husband.\textsuperscript{23}

Realizing that the trust potentially violated the Rule Against Perpetuities, the executrix, Josephine Berry, initiated a declaratory judgment action to determine whether the trust in fact violated the Rule Against

\begin{thebibliography}{99}

\bibitem{17} Whelan v. Reilly, 3 W. Va. 597, 612 (1869).
\bibitem{19} 262 S.E.2d 766 (W. Va. 1980).
\bibitem{20} \textit{Id.} at 770.
\bibitem{21} \textit{Id.} at 767-68.
\bibitem{22} \textit{Id.} at 768 n.1.
\bibitem{23} \textit{Id.}
\end{thebibliography}
Perpetuities and whether it was proper for the executrix and trustee to enter into a trust termination agreement that amended the twenty-five year trust duration to twenty-one years. The trial court found that the trust provision did violate the Rule Against Perpetuities and was therefore void and without force. In addition, the trial court ruled that the executrix and trustee were not authorized to enter a trust termination agreement. Executrix Berry appealed these findings to the West Virginia Supreme Court of Appeals.

On appeal, the court held that the will of Clara Clayton Post should be judicially reformed to reduce the duration of the trust from twenty-five years to twenty-one years. In reaching its decision, the court adopted a doctrine of "equitable modification". This doctrine applied to certain devises that on their face violated the Rule Against Perpetuities but which could be modified to conform with the rule's underlying policy.

Under the doctrine of equitable modification, a noncharitable devise or bequest that violated the rule was modified if the following conditions were 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.

The testamentary trust in Berry met all the criteria for application of the equitable modification doctrine. First, the general intent of the testatrix was clearly expressed in Section IX of her will when she

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24. Id.
25. Id.
26. Id. at 772.
27. Id. at 770.
28. Id. at 771.
29. Id.
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 to provide funds for the education of her husband's nieces,
nephews and their families did not violate the Rule Against Perpetu-
ities. Third, there was no indication that the twenty-five year period
was a critical aspect of her testamentary scheme. Finally, the court felt
that modifying the trust to reduce the twenty-five year period to twen-
ty-one years would effectuate the testatrix' general intent, avoid intes-
tacy for that portion of her estate, and ensure that property would not
be controlled beyond the perpetuities period.

C. Cy Pres for Charitable Trusts

In addition to the doctrine of equitable modification, West Virginia
also recognizes the doctrine of cy pres, which applies to charitable
trusts. Under the trust doctrine of cy pres, if "property is given in
trust for a particular charitable purpose, the trust will not ordinarily
fail even though it is impossible to carry out the particular pur-
pose." In 1931, the West Virginia Legislature enacted section 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
where such trust does not admit the specific enforcement or literal execu-
tion, to carry into effect as near as may be the intent and purposes of the
person creating such trust.

Accordingly, the Rule Against Perpetuities is generally not applicable
to gifts to public charities in West Virginia.

30. Id.
31. Id.
33. 4A SCOTT ON TRUSTS § 399 (4th ed. 1987).
1926) ("Generally, the rule against perpetuities has no application to such gifts to public
charities, and it has no application to the particular trust involved in this case.").
To briefly summarize, prior to the adoption of the USRAP, West Virginia recognized the Common-law Rule in its traditional form. However, the Common-law Rule generally did not apply to gifts to public charities, and immediate judicial reformation was available for certain noncharitable devises or bequests that violated the rule.

III. PRINCIPLE FEATURES OF THE USRAP

The USRAP employs a three-step approach to perpetuity reform. These steps include: 1) the preservation of the Common-law Rule, 2) a 90-year wait-and-see period for interests that violate the Common-law Rule, and 3) deferred reformation of interests that do not in fact vest within the 90-year period. This section will examine in depth each of the three steps employed by the Uniform Act. In addition, it will discuss the prospective application of the USRAP.

A. Preservation of the Common-Law Rule Period

Under the USRAP a nonvested property interest is first measured against the Common-law Rule to determine whether it is initially valid. Despite the Act's express supersession of the Common-law Rule, a nonvested property interest is valid if it satisfies the Common-law Rule using the common-law methodology.

As the Commentary to the USRAP explains, there are two sides to the Common-law Rule—a validating side and an invalidating side. Under the validating side of the Common-law Rule a "nonvested property interest is valid when it is created (initially valid) if it is then certain to vest or terminate . . . no later than 21 years after the death of an individual then alive." In contrast, the invalidating side of the

36. W. VA. CODE § 36-1A-1 (Supp. 1992); USRAP, supra note 8, § 1.
37. W. VA. CODE § 36-1A-8 (Supp. 1992); USRAP, supra note 8, § 9.
38. W. VA. CODE § 36-1A-1(a)(1) (Supp. 1992) states in pertinent part: "(a) 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 . . . ."
39. USRAP, supra note 8, prefatory note at 343.
40. USRAP, supra note 8, prefatory note at 343.
Common-law Rule invalidates a nonvested property interest when it is created if there is no such certainty that the interest will vest or terminate no later than 21 years after the death of an individual then alive.41

The USRAP preserves the validating side of the Common-law Rule and upholds the validity of property interests that satisfy the Common-law Rule. As a result, trusts and other property arrangements that would have been valid under the Common-law Rule, including instruments that are rendered valid because of a perpetuity saving clause,42 remain valid under the Uniform Act. Thus, lawyers who competently draft trusts, wills, and other property arrangements for their clients will not be affected by the Act.

B. Wait and See Test

A nonvested property interest that fails to satisfy the Common-law test under the USRAP is not immediately invalidated. Instead, the USRAP rejects the common-law "what-might-happen" approach and alters the Common-law Rule's invalidating side by adopting a "wait-and-see" test that allows a court to delay its determination of the interest's validity until 90 years have passed from the effective date of its creation.43

If the nonvested property interest does in fact vest during the 90-year period, it satisfies the USRAP. On the other hand, if the interest has not vested after 90 years, it becomes subject to the USRAP's deferred reformation feature.44 Thus, the "wait-and-see" approach adopted by the USRAP in effect recognizes all interests as valid for perpetuities purposes for at least 90 years.

41. USRAP, supra note 8, prefatory note at 343.
42. See discussion infra part IV.A.2.
43. W. VA. CODE § 36-1A-1(a)(2) (Supp. 1992) states in pertinent part: "A nonvested property interest is invalid unless: . . . (2) The interest either vests or terminates within ninety years after its creation."
44. W. VA. CODE § 36-1A-3 (Supp. 1992); USRAP, supra note 8, § 3; see discussion infra part III.C.
1. Saving-Clause Function

The 90-year "wait-and-see" period adopted by the USRAP is intended to provide, in effect, a saving clause for trusts or other property arrangements that violate the Common-law Rule. A perpetuity saving clause is a provision of an estate plan that is designed to prevent a perpetuities violation and takes effect only in the event that any nonvested interests under the plan have not vested within the perpetuities period. The typical saving clause contains two components, the perpetuity-period component and the gift-over component. These two components are best explained as follows:

The perpetuity-period component expressly requires interests in the trust or other arrangement to vest (or terminate) no later than 21 years after the death of the last survivor of a group of individuals designated in the governing instrument by name or class. The gift-over component expressly creates a gift over that is guaranteed to vest at the expiration of the period established in the perpetuity-period component, but only if the interests in the trust or other arrangement have neither vested nor terminated earlier in accordance with their other terms.

The USRAP's 90-year waiting period is designed to function as the equivalent of the perpetuity-period component of a well-drafted saving clause. The near equivalent of a gift-over component is provided by the USRAP's provisions for judicial reformation of property interests that do not vest within the 90-year waiting period.

2. Rationale of the 90-Year Waiting Period

The 90-year waiting period adopted by the USRAP is designed to represent "a reasonable approximation of—a proxy for—the period of

45. USRAP, supra note 8, prefatory note at 344-45.
46. A. JAMES CASNER, ESTATE PLANNING § 11.4.5 (5th ed. 1986).
47. Waggoner, Uniform Statutory Rule, supra note 11, at 574.
48. USRAP, supra note 8, prefatory note at 345. But see Jesse Dukeminier, The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo, 34 UCLA L. REV. 1023 (1987) [hereinafter Dukeminier, Ninety Years in Limbo] (arguing that the USRAP's 90-year wait-and-see period does not provide the equivalent of a well drafted saving clause).
49. See discussion infra part III.C.
time that would, on average, be produced by identifying and tracing an actual set of measuring lives and then tacking on a 21-year period following the death of the survivor." The framers of the Act arrived at the selection of 90 years by relying on a statistical study suggesting that the youngest measuring life, on average, is approximately six years old.51 The 21-year tack-on period was then added to the remaining life expectancy of a six-year-old child, yielding the allowable waiting period of 90 years.52

The USRAP refrains from the conventional use of actual measuring lives and instead uses a flat period of 90 years for several reasons. First, the conventional approach of using actual measuring lives has a serious drawback because of the difficulty involved in drafting statutory language that unambiguously identifies the actual measuring lives.53 Unlike an actual perpetuity saving clause that can be redrafted for each new disposition, a statutory saving clause must be drafted "so that one size fits all."54

A second serious disadvantage of the actual-measuring-lives approach is the costly administrative burden it imposes by requiring the actual tracing of individual’s lives, deaths, marriages, adoptions, and divorces in order to determine the allowable waiting period.55 The flat 90-year period used by the USRAP avoids each of these problems by applying a uniform wait-and-see period that is "litigation-free, easy to determine, and unmistakable."56

50. USRAP, supra note 8, prefatory note at 347.
52. The U.S. Bureau of Census, Statistical Abstract of the United States (1986) reported the remaining life expectancy of a six-year old child as 69.6 years. However, the drafters of the USRAP used 69 years as an approximate measure of the remaining life expectancy of a six-year old in order to arrive at an end number that is a multiple of five. See generally USRAP, supra note 8, prefatory note at 347.
53. USRAP, supra note 8, prefatory note at 345.
54. USRAP, supra note 8, prefatory note at 345.
55. USRAP, supra note 8, prefatory note at 345-46.
C. Deferred Reformation of Interests that Violate the Rule

If a nonvested property interest fails to satisfy the Common-law test and fails to vest within the 90-year wait-and-see period, the requires judicial reformation of the disposition in a way that most closely approximates the transferor's intended disposition yet complies with the statute's 90-year vesting period. The USRAP also grants the right to reformation before the expiration of the 90-year wait-and-see period when it becomes necessary to do so or when there is no point in waiting for the 90-year period to expire.

The theory behind the deferred-reformation feature is to postpone reformation until it becomes truly necessary, thereby substantially reducing the number of reformation suits. Deferring the right to reformation until after the expiration of the 90-year waiting period gives the donor's disposition every reasonable opportunity to work itself out without premature interference.

Because reformation is permitted only for dispositions that would have been invalid at common law, and because almost all trusts and

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57. W. VA. CODE § 36-1A-1(a)(1) (Supp. 1992); USRAP, supra note 8, § 1(a)(1).
58. W. VA. CODE § 36-1A-1(a)(2) (Supp. 1992); USRAP, supra note 8, § 1(a)(2).
59. W. VA. CODE § 36-1A-3 (Supp. 1992); USRAP, supra note 8, § 3.
60. Upon petition of an interested person, W. VA. CODE § 36-1A-3 requires judicial reformation of a disposition if any one of three events occur:
   (1) When, after the application of the Statutory Rule, a nonvested property interest or power of appointment becomes invalid under the Statutory Rule;
   (2) When a class gift has not yet but still might become invalid under the Statutory Rule and the time has arrived when the share of one or more class members is to take effect in possession or enjoyment; and
   (3) When a nonvested property interest can vest, but cannot do so before the allowable 90-year period has expired.
61. Waggoner, Uniform Statutory Rule, supra note 11, at 596.
62. A trust or other property arrangement that satisfies the Common-law Rule is permitted to completely run its course without the interference of a reformation suit, even if the term of the trust exceeds 90 years. Thus, one could defend a reformation suit by establishing that the disposition did not violate the Common-law Rule in the first place. See generally Lawrence W. Waggoner, The Uniform Statutory Rule Against Perpetuities: Oregon Joins Up, 26 WILLAMETTE L. REV. 259, 265 n.21 (1990) [hereinafter Waggoner, Oregon Joins Up].
other property arrangements will have terminated by their own terms before the expiration of 90 years, application of the deferred-reformation feature will be infrequent. However, if the right to reformation does arise, the court is given two criteria to work with: the transferor's manifested plan of distribution and the allowable 90-year period. In addition, the comments to section 3 of the USRAP discuss the manner in which dispositions should be reformed and provide various illustrations that can give guidance to courts in a variety of cases.

D. Prospective Application of the Rule

The USRAP effectively applies to all nonvested property interests that violate either the Common-law Rule or the USRAP. Nevertheless, the effective date of creation of the offending nonvested interest will affect the reformation process used by the court.

If the nonvested interest is created on or after May 10, 1992, the general provisions of the USRAP apply. Accordingly, if an interest created on or after May 10, 1992, violates the Common-law Rule and does not vest or terminate within the 90-year period, the court must reform the interest to satisfy both the transferor's manifested plan of distribution and the statutory 90-year period.

By contrast, if the offending interest is created before May 10, 1992, the court may reform the interest to satisfy both the

64. USRAP, supra note 8, § 3 cmt.
66. W. Va. Code § 36-1A-5(a) (Supp. 1992) states: "For the purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable."
67. W. Va. Code § 36-1A-5(a) states in pertinent part: "this article applies to a nonvested property interest or a power of appointment that is created on or after the effective date of this article." The law provides that this article take effect 90 days from passage (passed Feb. 10, 1992). 1992 W. Va. Acts ch. 74.
68. Reformation is mandatory in this situation. W. Va. Code § 36-1A-3 applies to dispositions created on or after May 10, 1992 and states in pertinent part: "a court shall reform a disposition." Id. (emphasis added).
70. Reformation of an interest created before May 10, 1992, is not mandatory:
transferor’s manifested plan of distribution and the perpetuities rule in effect when the interest was created.\textsuperscript{71} Thus, under the USRAP in West Virginia, a court may immediately reform an instrument created before May 10, 1992 that violates the Common-law Rule.

IV. PRACTICAL IMPLICATIONS OF THE USRAP

Although most lawyers do not encounter legal problems pertaining to the Rule Against Perpetuities on a regular basis, there are several practical implications of the USRAP well worth understanding. These practical implications concern estate planning, nonnondative transfers, and potential problems created by the USRAP.

A. Estate Planning Aspects

1. Incentives to Comply With the Common-law Rule

Under the USRAP, there are several incentives for estate planners to continue drafting instruments that comply with the Common-law Rule. Because the USRAP sustains the validity of trusts or other property arrangements that satisfy the Rule Against Perpetuities in its traditional form,\textsuperscript{72} significant advantages arise from compliance with the Common-law Rule.

A major advantage of compliance with the Common-law Rule is that the disposition is valid from the moment of its creation. Thus, if a nonvested property interest or a power of appointment was created before the effective date of this article and is determined in a judicial proceeding, commenced on or after the effective date of this article, to violate this state’s rule against perpetuities as that rule existed before the effective date of this article, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor’s manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.


\textsuperscript{71} In West Virginia prior to May 10, 1992, the Common-law Rule, as modified by Berry v. Union Nat’l Bank, 262 S.E.2d 766 (W. Va. 1980), was in effect; see supra part II.A-B.

\textsuperscript{72} See discussion supra part III.A.
lawyer in West Virginia drafts a testamentary trust that complies with the Common-law Rule, both West Virginia courts and courts in a common-law jurisdiction will uphold the trust. Such a trust is valid not only if the client dies domiciled in West Virginia, but also if the client dies domiciled in (or owns land covered by the trust in) a jurisdiction following the Common-law Rule.\(^7\)

In addition, compliance with the Common-law Rule eliminates the possibility of a future reformation suit under the USRAP’s deferred reformation provisions. These reformation provisions apply only to dispositions governed by the Act’s wait-and-see test and are never applicable to dispositions that are initially valid under the Common-law Rule.\(^4\)

2. Use of Saving Clauses

Numerous incentives exist under the USRAP to comply with the Common-law Rule. Accordingly, lawyers should continue to use traditional perpetuity saving clauses that provide for termination of a trust 21 years after the death of the specified lives in being if the trust has not already terminated under its own dispositive provisions. By using a traditional saving clause, the property arrangement will be valid from the moment of its creation\(^7\) and any possibility of deferred reformation under the Act will be eliminated.\(^6\)

In some states that have adopted the USRAP, lawyers adjust the traditional perpetuity saving clause “to provide for termination at the later of (1) 21 years after the death of the last surviving beneficiary in being when the trust was created, or (2) [90 years].”\(^7\) These “later of” clauses are used in an attempt to turn the USRAP’s 90-year wait-

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73. See Waggoner, Oregon Joins Up, supra note 62, at 261.
74. See discussion part IIIC.
75. W. VA. CODE § 36-la-1(a)(1) (Supp. 1992); USRAP, supra note 8, § 1(a)(1).
76. W. VA. CODE § 36-la-3 (Supp. 1992); USRAP, supra note 8, § 3.
and-see period into a minimum time period in which the trust will terminate.\textsuperscript{78}

The comments to the USRAP discourage the use of "later of" clauses, explaining that "later of" clauses that achieve a "later of" result constitute "an improper use of the 90-year permissible vesting period . . . [that] is designed to approximate the period that, \textit{on average}, would be produced by using actual lives in being plus 21 years."\textsuperscript{79} In response, the National Conference of Commissioners on Uniform State Laws (NCCUSL) amended the USRAP by adding a subsection that limits the effect of "later of" clauses.\textsuperscript{80} This amendment, \textit{which was not adopted in West Virginia}, provides in essence that a trust termination clause purporting to delay termination to the longer of the Common-law or a fixed year period, operates to terminate the trust \textit{only} on the expiration of the Common-law period.

Because this amendment has not been adopted in West Virginia, lawyers drafting instruments in the state may be tempted to use "later of" saving clauses in an attempt to utilize the USRAP's 90-year wait-and-see period as a minimum time period for trust duration. However, the use of such a clause would not cure a perpetuity violation in a trust with terms that violate the Common-law Rule and would actually create a perpetuity violation if used as a provision that directly regulates a trust.

If used as an override clause in a trust that violates the Common-law Rule, the "later of" clause will not qualify the trust for validity

\begin{footnotes}
\item[78] USRAP, supra note 8, § 1 cmt. G.
\item[79] USRAP, supra note 8, § 1 cmt. G.
\item[80] USRAP, supra note 8, § 1(e) states:
\item[(e) \textit{[Effect of Certain "Later-of" Type Language.]}} If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.
\end{footnotes}
under the USRAP because the clause does not guarantee that all interests will be certain to vest or terminate no later than 21 years after the death of the specified lives in being.\(^81\) This in turn subjects the trust to the USRAP's 90-year wait-and-see test\(^82\) and makes the trust vulnerable to a reformation suit.\(^83\)

If a “later of” clause is used as a provision that directly regulates the duration of a trust, the clause does not guarantee that all interests will be certain to vest or terminate within 21 years after the death of any specified lives in being at the creation of the trust. Consequently, the use of a “later of” clause in this manner actually creates a perpetuity violation under the USRAP,\(^84\) subjects the trust to the 90-year wait-and-see test,\(^85\) and makes the trust vulnerable to a reformation suit.\(^86\)

3. Federal Generation-Skipping Transfer Tax

Since the USRAP was promulgated, several scholarly articles have discussed the existence of a possible generation-skipping transfer (GST) tax trap created by the Act.\(^87\) To best understand this potential tax trap, it is necessary to have a basic understanding of the GST tax.

The GST tax is designed to eliminate a loophole in the estate and gift tax system, where in some instances upon a child’s death, no tax is imposed on a transfer from the child’s parents that benefits the child for life and then passes to the child’s children. This loophole, in some cases, may allow property to pass through two generations while being

\(^{81}\) W. VA. CODE § 36-1A-1(a)(1) (Supp. 1992); USRAP, supra note 8, § 1(a)(1).

\(^{82}\) W. VA. CODE § 36-1A-1(a)(2) does not grant nonvested interests a permissible vesting period of either 90 years or a period of 21 years after the death of the lives in being. Instead, the nonvested interest must actually vest or terminate within 90 years after its creation.

\(^{83}\) W. VA. CODE § 36-1A-3 (Supp. 1992); USRAP, supra note 8, § 3.

\(^{84}\) W. VA. CODE § 36-1A-1(a)(1) (Supp. 1992); USRAP, supra note 8, § 1(a)(1).

\(^{85}\) W. VA. CODE § 36-1A-1(a)(2) (Supp. 1992); USRAP, supra note 8, § 1(a)(2).

\(^{86}\) W. VA. CODE § 36-1A-3 (Supp. 1992); USRAP, supra note 8, § 3.

subject only once to estate and gift taxes. The GST tax system eliminates this problem by imposing a tax on transfers to persons more than one generation below the grantor.88 When applicable, the GST tax is imposed at a flat rate of 55% across the board.89

Irrevocable trusts created before September 26, 1985, are generally exempt (grandfathered) from the GST tax.90 However, the Treasury Department has issued a regulation that revokes the tax exemption of the trust (ungrandfathers) if the exercise of a special power of appointment delays the vesting of a beneficial interest in the trust beyond the Common-law Rule period as measured from the creation of the trust.91 Once ungrandfathered, the trust becomes subject to GST taxation.

The GST tax trap arises because under the USRAP, the validity of the exercise of a special power of appointment over the assets of a trust is governed by the provisions of the USRAP, even if the power itself was created prior to the effective date of the Act.92 Therefore, the USRAP permits the exercise of a special power of appointment in a trust that has been grandfathered from the GST tax to allow the vesting of a nonvested interest beyond the Common-law Rule period. This in turn may cause the revocation of the exempt status of the trust.

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91. Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B) (1988) provides as follows: (B) Special rule for certain powers of appointment. The release, exercise, or lapse of a power of appointment (other than a general power of appointment as defined in section 2041(b)) will not be treated as an addition to a trust if—
   (1) Such power of appointment was created in an irrevocable trust that is not subject to Chapter 13 under paragraph (b)(1) of this section, and
   (2) In the case of an exercise, such power of appointment is not exercised in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years. If a power is exercised by creating another power, it will be deemed to be exercised to whatever extent the second power may be exercised.
92. See discussion supra part III.D; see also USRAP, supra note 8, § 5 cmt.
and subject it to the GST tax. The GST tax trap has been summarized by Professors Bloom and Dukeminier as follows:

If the donee of a special power of appointment in a grandfathered trust exercises the power by appointing the trust principal so as to violate the common law Rule against Perpetuities, although nevertheless valid under USRAP, the trust will lose its GST tax exemption because the exercise may postpone vesting beyond lives in being plus 21 years.93

In response to the GST tax trap claim, the NCCUSL filed a formal request with the Treasury Department asking that measures be taken to coordinate the Treasury regulations with the USRAP.94 The Treasury Department answered this request by stating that it "will amend the temporary regulations to accommodate the 90-year period under USRAP as originally promulgated [in 1986] or as amended [in 1990 by the addition of subsection (e)]."95

According to the drafters of the USRAP:

This should effectively remove the possibility of loss of grandfathered status under the Uniform Act merely because the donee of a nongeneral power created in a grandfathered trust inadvertently exercises that power in violation of the Common-law Rule or merely because the donee exercises that power by creating a second nongeneral power that might, in the future, be inadvertently exercised in violation of the Common-law Rule.96

However, the Treasury Department has stated that any effort by the donee of a nongeneral power in a grandfathered trust to obtain a "later-of" specified lives-in-being plus 21 years or 90 years approach will bring the grandfathered status of the trust to an end, unless the effort to obtain the "later-of" approach is nullified by state law.97 Despite the fact that West Virginia has not adopted the NCCUSL's pro-

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93. Bloom & Dukeminier, Tax Trap, supra note 87, at 205.
94. USRAP, supra note 8, § 1 cmt. G.
95. USRAP, supra note 8, § 1 cmt. G (citing letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990) [hereinafter Treasury Letter]).
96. USRAP, supra note 8, § 1 cmt. G.
97. USRAP, supra note 8, § 1 cmt. G (citing Treasury Letter).
posed amendment which nullifies attempts to achieve such a “later-of” result, lawyers can easily avoid the potential GST tax trap. Lawyers in the state should simply advise clients not to exercise special powers in grandfathered trusts that would delay vesting beyond the Common-law Rule period.

B. Nondonative Transfers

1. Commercial Transactions

Section 4 of the USRAP lists seven exclusions from the statutory rule. The most important exclusion, in terms of commercial

98. See discussion supra part IV.A.2.
100. W. VA. CODE § 36-1A-4 states:

The provisions of section one (§ 36A-1-1) of this article do not apply to:

1. A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of: (A) A premarital or postmarital agreement; (B) a separation or divorce settlement; (C) a spouse’s election; (D) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties; (E) a contract to make or not to revoke a will or trust; (F) a contract to exercise or not to exercise a power of appointment; (G) a transfer in satisfaction of a duty of support; or (H) a reciprocal transfer;

2. A fiduciary’s power relating to the administration or management of assets, including the power of a fiduciary to sell, lease or mortgage property, and the power of a fiduciary to determine principal and income;

3. A power to appoint a fiduciary;

4. A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

5. A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

6. A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an
transactions, is nondonative transfers. According to the drafters of the USRAP:

[T]he Rule Against Perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule—a life in being plus 21 years—is not suitable for nondonative transfers, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Section 1 . . . .

Thus, by excluding nondonative transfers from the statutory rule, the USRAP is contrary to numerous decisions holding the Common-law Rule to be applicable to commercial transactions such as options, preemptive rights in the nature of a right of first refusal, leases to commence in the future at a time certain or on the happening of a future event such as the completion of a building, and top leases and top deeds with respect to interests and minerals.

When section 4 of the USRAP (which excludes nondonative transfers from the statutory rule) is read in conjunction with section 9 (which repeals the Common-law Rule), it becomes evident that nondonative transfers are not subject to any rule against perpetuities. The comments to the USRAP support this conclusion by explaining that "[s]ince the Common-law Rule is superseded by this Act . . . a

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101. The comments to the USRAP explain that:
A transfer can be supported by consideration and still be donative in character and hence not excluded from the Statutory Rule. A transaction that is essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration.

USRAP, supra note 8, § 4 cmt. A.
102. USRAP, supra note 8, § 4 cmt. A.
106. Peveto v. Starkey, 645 S.W.2d 770 (Tex. 1982).
108. W. VA. CODE § 36-1A-8 (Supp. 1992); USRAP, supra note 8, § 9.
nonvested property interest, power of appointment, or other arrangement excluded from the Statutory Rule by this section is not subject to any rule against perpetuities, statutory or otherwise.\textsuperscript{109}

2. Nondonative Transfers and Title Searches in West Virginia

The West Virginia Supreme Court of Appeals previously has held that the Rule Against Perpetuities is applicable to a renewable option for the purchase of land,\textsuperscript{110} an option to repurchase the minerals obtained in a deed,\textsuperscript{111} and the provisions of a deed giving the grantees the right to purchase the surface of the land.\textsuperscript{112} However, under the USRAP, each of these transactions could be considered nondonative and hence may not be subject to any rule against perpetuities. Accordingly, lawyers performing title searches in the state should not assume that any nondonative transactions that may affect a deed are void as a violation of the Rule Against Perpetuities.

C. Potential Problems Created by the Uniform Act

Despite the USRAP's widespread adoption,\textsuperscript{113} legal scholars have advanced several criticisms of the Act.\textsuperscript{114} These criticisms focus on both wait-and-see in general and the 90-year period.


\textsuperscript{110} We hold that the Uniform Statutory Rule Against Perpetuities as adopted in New Jersey abolishes the common law and embodies the State's entire law on the rule. We further conclude that, while the statute is not retroactive and applies only to property interests 'created on or after the effective date of this act,' Section 5, the nondonative commercial transaction for consideration executed before the Act's effective date in this case is no longer subject to the common-law rule against perpetuities.

\textsuperscript{111} Id. at 815.

\textsuperscript{112} Starcher Bros. v. Duty, 56 S.E. 524 (W. Va. 1907).

\textsuperscript{113} Woodall v. Bruen, 85 S.E. 170 (W. Va. 1915).

\textsuperscript{114} West Virginia-Pittsburgh Coal Co. v. Strong, 42 S.E.2d 46 (W. Va. 1947).

\textsuperscript{115} See supra text accompanying note 12.

\textsuperscript{116} See Dukeminier, Ninety Years in Limbo, supra note 48; see also Ira M. Bloom, Perpetuities Refinement: There is an Alternative, 62 WASH. L. REV. 23 (1987).
1. Extension of Dead-Hand Control of Property

Opponents of the USRAP argue that the Uniform Act will extend dead-hand control of property because they maintain that 90 years is longer than the period generally produced by an actual saving clause.\textsuperscript{115} This criticism is based on the belief that the drafters of the USRAP incorrectly assumed that the average age of the youngest person who is a life in being under a saving clause is approximately six years old.\textsuperscript{116} Professor Jesse Dukeminier explains:

Mathematically, such an average is highly improbable. To reach an average of six years requires an enormous percentage of trusts with infant beneficiaries to balance all the Rule-violating trusts for fertile octogenarians, unborn widows, and others where the youngest beneficiary may well be 20, 30, 40, or 50 years old.\textsuperscript{117}

Accordingly, Dukeminier and other opponents of the USRAP believe that a well drafted saving-clause will often produce a period of time substantially less than 90 years.\textsuperscript{118}

Professor Lawrence Waggoner, the Reporter for the Uniform Act, has responded to this criticism by explaining that although the drafters' method of determining the 90-year waiting period "may not be scientifically accurate to the nth degree, the Drafting Committee considered it reliable enough to support a waiting period of 90 years, given the margin-of-safety function that it performs."\textsuperscript{119} As Waggoner further points out, the fact that the USRAP's wait-and-see period is 90 years does not mean that all trusts or property arrangements falling under the wait-and-see period will last for the full 90 years.\textsuperscript{120} In fact, most trusts and other property arrangements will terminate much earlier.\textsuperscript{121}

\begin{footnotes}
\item[115] See Dukeminier, Ninety Years in Limbo, supra note 48, at 1032-33.
\item[116] Id.; see also supra text accompanying notes 50-52.
\item[117] Dukeminier, Ninety Years in Limbo, supra note 48, at 1033.
\item[118] Id. at 1033-35.
\item[119] Waggoner, Rationale, supra note 56, at 167-68.
\item[120] Waggoner, Uniform Statutory Rule, supra note 11, at 579.
\item[121] Waggoner, Uniform Statutory Rule supra note 11, at 580 ("As with a perpetuity
\end{footnotes}
2. Preservation of Poorly Drafted Instruments

Another potential problem created by the USRAP involves wills or trusts drafted by unskilled laypersons or careless lawyers. Opponents of the USRAP argue that instruments containing violations of the Common-law Rule, and therefore subject to the USRAP 90-year wait-and-see element, often also contain poorly drafted dispositive provisions.\(^1\) Thus, families burdened by the inept work of a thoughtless drafter may be unable to obtain relief for 90 years because judicial reformation under the USRAP is generally not available until the end of the 90-year waiting period.\(^2\)

However, the USRAP does grant the right to reformation before the expiration of the 90-year wait-and-see period in at least two situations: first, when a class gift is not yet but might later be invalidated under the Uniform Act and the time has arrived when the share of one or more class members is to take effect in possession or enjoyment, and second, when a nonvested property interest can vest, but cannot do so before the expiration of the 90-year waiting period.\(^3\)

V. ALTERNATIVES TO THE USRAP

There are several alternatives to the USRAP. The two most popular alternatives to the Uniform Act are immediate *cy pres*, which was followed in West Virginia prior to the adoption of the USRAP\(^4\) and wait-and-see based on measuring lives.

\(^{122}\) Dukeminier, *Ninety Years in Limbo*, supra note 48, at 1036-38.
\(^{123}\) See discussion supra part III.C.
\(^{124}\) W. VA. CODE § 36-1A-3 (Supp. 1992); USRAP, supra note 8, § 3.
\(^{125}\) The West Virginia Supreme Court of Appeals labeled this method of reform “equitable modification” instead of immediate *cy pres*, although the underlying principle is the same. See discussion supra part II.B.
A. Immediate Cy Pres

Under the doctrine of immediate cy pres, an interest that violates the Rule Against Perpetuities is subject to immediate reform by a court in a manner that carries out the transferor's intent as closely as possible within the perpetuities period. Courts exercising immediate cy pres generally have followed a conservative school of thought when reforming instruments that violate the Common-law Rule. Thus, courts using cy pres "construe perpetuities violations out of the instrument, reform offending language, reduce any excessive age contingencies to 21, and in general eliminate uncertainties that cause perpetuities problems."

Immediate cy pres has been favored by several distinguished legal scholars, and one has even asserted that "[i]f academics were forced, by some powerful monarch, to agree on one perpetuities reform, in all probability it would by cy pres." Nevertheless, immediate cy pres is not without its problems.

There are two primary arguments against immediate cy pres. First, reformation by a court requires a lawsuit, and second, cy pres unreasonably broadens a court's power to rewrite wills without any guidelines except the testator's presumed intent. The USRAP obtains the benefits of cy pres while reducing its potential problems by employing deferred-reformation at the end of the 90-year waiting period. Since most interests will in fact vest within 90 years, the USRAP diminishes the possibility that a court will have to reform an instrument which violates the Common-law Rule, yet allows reformation if the interest does not in fact vest within 90 years.

127. Immediate Cy Pres is alternatively referred to as equitable reformation, equitable approximation, or equitable modification.
128. Dukeminier, Ninety Years in Limbo, supra note 48, at 1071.
130. Dukeminier, Ninety Years in Limbo, supra note 48, at 1072.
Immediate Cy Pres previously was adopted in at least seven states either by judicial decision or statutory enactment. However, of the seven states, California and West Virginia have now adopted the USRAP, and Hawaii is in the process of adopting the Act.

B. Wait-and-See for the Measuring Lives

The wait-and-see reform movement initially proceeded on the assumption that the permissible vesting period should be determined by reference to the measuring lives in being at the creation of the interest. Accordingly, at least fourteen states previously had statutes or judicial decisions providing for a wait-and-see period based on lives in being at the creation of the interest. Even the Restatement (Second) of Property has adopted an artificial list of lives to measure the wait-and-see period.

Despite its initial attraction, wait-and-see based on measuring lives has several disadvantages. First, it is difficult to draft unambiguous and

131. Dukeminier, Ninety Years in Limbo, supra note 48, at 1071 n.125 (citing In re Estate of Chun Quan Yee Hop, 469 P.2d 183 (Haw. 1970); Berry v. Union Nat'l Bank, 262 S.E.2d 766 (W. Va. 1980)).
132. Dukeminier, Ninety Years in Limbo, supra note 48, at 1071 n.125 (citing CAL. CIV. CODE § 715.5 (West 1982); IDAHO CODE § 55-111 (1979); MO. ANN. STAT. § 442.555 (Vernon 1985); OKLA. STAT. ANN. tit. 60, §§ 75-78 (West. Supp. 1987); TEX. PROP. CODE ANN. § 5.043 (West 1984)).
133. CAL. PROB. CODE §§ 21200 to 21231 (Deering 1992); W. VA. CODE §§ 36-1A-1 to 36-1A-6 (Supp. 1992).
135. Waggoner, Uniform Statutory Rule, supra note 11, at 573.
136. Dukeminier, Ninety Years in Limbo, supra note 48, at 1073 nn.136-37 (citing ALASKA STAT. § 34.27.010 (1986); FLA. STAT. ANN. § 689.22(2)(a) (West Supp. 1986); KY. REV. STAT. ANN. § 381.216 (Baldwin 1979); NEV. REV. STAT. § 111.103 (1985); N.M. STAT. ANN. § 47-1-17.1 (Michie Supp. 1985); OHIO REV. CODE ANN. § 2131.08 (Baldwin Supp. 1985); 20 PA. CONS. STAT. ANN. § 6104(b) (1975); R.I. GEN. LAWS § 34-11-38 (1984); S.D. CODIFIED LAWS ANN. § 43-5-6 (1983); VT. STAT. ANN. tit. 27 § 501 (1975); VA. CODE ANN. § 55-13.3 (Michie 1986)); see infra note 139.
137. Dukeminier, Ninety Years in Limbo, supra note 48, at 1074 n.140 (citing Phelps v. Shropshire, 183 So. 2d 158 (Miss. 1966); Merchants Nat'l Bank v. Curtis, 97 A.2d 207 (N.H. 1953)).
138. RESTATEMENT (SECOND) OF PROPERTY § 1.3(2) (1983).
139. Iowa adopted a wait-and-see statute using the Restatement’s measuring lives but added some extra lives to the list. See IOWA CODE ANN. § 558.68(2) (West Supp. 1986).
uncomplicated statutory language that identifies the measuring lives because statutory language must be drafted to cover numerous unanticipated situations. Furthermore, the measuring-lives approach can impose costly administrative burdens because this approach requires the identification of actual individuals as the measuring lives and their lives must then be traced to identify the last survivor and the date of their death.

The USRAP's 90-year wait-and-see period eliminates these problems because it is "easy to determine and unmistakable." Three of the fourteen states that previously provided for wait-and-see based on measuring lives have now adopted the USRAP.

VI. CONCLUSION

West Virginia's adoption of the USRAP eliminates many of the unjust consequences caused by the Common-law Rule's approach of invalidating interests based on what might happen. Under the USRAP, the test of invalidity is shifted to what actually happens, and interests that violate the Common-law Rule are given 90 years in which they must actually vest or terminate. At the expiration of this 90-year period, any interests that have neither vested nor terminated are judicially reformed.

The USRAP should provide a nearly litigation-free setting concerning perpetuities matters and should be simple to administer. Best of all, West Virginia lawyers need not learn a new and complex perpetuity law under the USRAP. Lawyers practicing in the state should continue drafting instruments that comply with the Common-law Rule and should continue to use standard perpetuity saving clauses.

*John D. Moore*

140. See USRAP, *supra* note 8, at 345 (explaining that "[a]s a result of the difficulty of drafting such a one-size-fits-all clause, any list of measuring lives is likely to contain ambiguities.").

