WALTZING TO R.A.P.

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"One, two, three, Step, two, three, Turn, two, three. . . ."

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

Many of you recognize the latter quotation as the classic statement of the Rule Against Perpetuities (R.A.P.) stated by Professor John Chipman Gray.2 The first quotation may also be recognizable to any of you who like myself spent any time learning formal ballroom dancing steps such as the foxtrot and the waltz.3 The counting was frequently interrupted by an admonition that some of us less serious lads would soon find ourselves out of the program. However, this minor extension of the old two-step, more formally known as the waltz, was ultimately mastered by us all, albeit with a bit more grace by some individuals than others.

In hindsight, mastery of the waltz took relatively little time, though it did require a concentrated effort. Whether discussing the R.A.P. of Professor Gray or any other rap from current variations on the theme, it is safe to say that a workable appreciation requires the same type of time and effort referenced above.4 Hopefully, this Article

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2. Professor John Chipman Gray became a celebrated leader of property law at Harvard Law School where he had assiduously documented the explication, if not explanation, of the rule for several decades. The fourth edition noted above is in excess of 800 pages. Although Gray’s first book on the rule was written late in the nineteenth century, the rule originated from the Duke of Norfolk’s case (1682). For more on Gray, see generally, Stephen A. Siegal, John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law, 36 U. MIAMI L. REV. 439 (1982).

3. See Manine Rosa Golden, SHALL WE DANCE 3-13 (1997). This book exemplifies dance manuals available to those wishing to learn classical ballroom dances and provides step charts for the rhythmically challenged. For those looking for me to “bust a rhyme” on perpetuities, I must apologize that this paper does not represent that kind of party. I will say that in this “hiphop” age I am much better at those type of steps than I am at ballroom dancing, though my kids might disagree.

4. Regardless of your recognition, the present confirmation of your suspicions that this Article deals with such a sacrosanct topic is enough to cause many of you to strike this Article from your required reading list. But I say at least give it a quick read,
can assist readers in applying a system of three step approaches to Professor Gray’s R.A.P. that will leave him or her literally dancing with joy from the excitement of adding this selection to their repertoire.\(^5\)

If this introduction fails to come across as music to your ears, I ask that you stick with it for a while and try to feel the groove if you will. I never thought I would find myself writing an article on the R.A.P., however after seeing various publications advocating everything from planes to trains and automobiles as a means of explaining the rule I thought why not add my own spin to the hit list.\(^6\) Thus, give it a listen and see if it adds to the veritable cacophony of exhortations or instead soothes the savage beast that the R.A.P. itself is so often portrayed to be.

The time spent addressing the R.A.P. as part of the greater study of real property is probably the highlight of many law students’ education especially if you attended one of those law schools where it was said that no one ever really knew how to apply the R.A.P., thus it was not worth intently discussing in class. Support for such a position is often taken from poorly written cases such as Lucas v. Hamm, 364 P.2d 685 (Ca. 1961). There the court noted that few, if any, areas of the law were more complex than the California law on perpetuities and restraints thus in view of the state of the law it would not be proper to hold an attorney liable for negligence in preparation of certain documents that ultimately caused intended beneficiaries to lose their interests. Lucas v. Hamm, 364 P.2d 685, 690 (Ca. 1961). The R.A.P. is still tested on bar exams and, in most courts, failure to apply it properly will result in malpractice liability. Why, one could even face jail time if the situation was egregious enough to substantially raise another person’s body heat.

5. The three step approach is an arbitrary way of analyzing the R.A.P. however the approach seems defensible because of the rule’s focus on three time-related concepts; namely, individuals alive at the time the interest is drafted, the state of the contingency at issue when those alive at its inception die, and those alive 21 years after the death of the previously mentioned parties. “At issue” is used in the layman’s sense in the previous sentence. The period of lives in being plus 21 years and the “vesting in interest” requirement have been attacked by scholars as having questionable origins and being inherently abstruse. See Bergin & Haskell, supra note 1, at 228.

6. Academics and students go to great lengths in attempting to simplify the understanding of the R.A.P. I often say that in attempting to reach these lengths, they will use any means necessary including “planes, trains and automobiles.” “Planes, Trains and Automobiles” is actually a comedy about two fellows’ seemingly endless and hopeless attempt to reach the comfort of home. Planes, Trains, and Automobiles (Paramount Pictures 1987). Many students undoubtedly identify with the frustrations of the film’s stars John Candy and Steve Martin. See Mick Martin & Marsha Potter, Video Movie Guide 1996, 367 (1995). In R.A.P. parlance, planes is a reference to Mark Restlinger, When Words Fail Me: Diagraming the Rule Against Perpetuities, 59 Mo. L. Rev. 157 (1994). Professor Restlinger’s pictures are not airplanes in the standard sense but instead various horizontal and vertical intersecting lines drawn in space or on different spatial planes in an effort to illustrate parties and their relationships. Trains is a reference John Makdisi, Estates in Land and Future Interests 127-162 (1991). Professor Makdisi’s pictures are literally trains with various cowcatchers, smokestacks, and other indicators drafted to assist the reader’s understanding. Automobiles is a reference to the movie. When the students see I do not have any pictures of actual cars representing the variety of interests to be considered, someone is always willing to oblige me with artwork of his or her own. I will save those gems for another publication.
nitional endeavors. "But seriously folks," this Article takes a very brief look at the common law real property rule and hopefully demystifies its meaning, simplifies its application, and verifies the sour notes that students have been singing about it are really a bum rap. Shall we dance?

PROPERTY 101

The first problem associated with the R.A.P. is that most students do not truly understand the context in which it is normally taught. Of course, this lack of understanding may be due to the perceived or real deficiencies of the professor as well as the timing of the rule's introduction. The rule is often introduced to first year law students, during their first semester when they have been in law school about two months. In property, students' ability to understand the subject depends on their ability to grasp concepts involving competing interests that stand apart from the tangible thing (res) itself. Many students are simply too overwhelmed with the law school experience as a whole to feel comfortable in applying these theoretical, yet necessary, basic abstractions so soon in their graduate studies. This need for conceptual severability is something most students are facing for the first

7. The common law rule has been modified in its application by a number of states. Furthermore, some states have accepted a modern standardized approach to the rule as promulgated by the Commissioners on Uniform State Laws. This model rule is known as the Uniform Statutory Rule Against Perpetuities (USRAP) and is incorporated in the Uniform Probate Code. WILLIAM B. STOEBUCK ET. AL., STOEBUCK AND WHITMAN ON THE LAW OF PROPERTY, §§ 3.21, 3.22 (3rd ed. 2000).

8. This Article admittedly takes a simplistic view of the rule's application. It is not a legal-theorist or R.A.P.-specialist-oriented piece. In essence, it does not pass judgment on the necessity of the thousands of pages written about the rule inasmuch as it does say that first-year students are undertaking a new perspective on the world, which need not be initially clouded by the archaic dust surrounding the settled rule. Instead, a simple presentation is best and all that is required for most students' lifetime and twenty-one years beyond.

9. A number of law schools now offer options beyond the traditional mode followed at my school. We require students to take two semesters of property law with each class being three credits. Some schools have shifted to a one semester four-hour property class in which professors often opt out of teaching the estates and future interests sections. The belief is that students can or will pick up this information in upper class electives such as a Future Interests Seminar or a Trusts and Estates class.

10. Property law professors probably draw as many pictures as art professors though no doubt a great deal less aesthetically pleasing. My personal foray into draw-
time or at least the first time since they took the Law School Admissions Test (LSAT).\textsuperscript{11}

The rule against perpetuities is generally taught as a subsection of an area called estates in land and future interests.\textsuperscript{12} Estates and future interests refer to a figurative portion of title to property held by various parties at any given instant in time.\textsuperscript{13} At any given time, one or more individuals may share the present estate in a given piece of land or hold one or more future interests.\textsuperscript{14} For instance, many of you

\begin{center}
\begin{tikzpicture}
\node {Real}
child {node {Possession}}
child {node {Claim}};
\end{tikzpicture}
\end{center}

After drafting this masterpiece, I then go on to describe the distinctions between the areas traditionally covered by each topic.

11. \textit{See, e.g.,} LSAT AND LSDAS REGISTRATION AND INFORMATION BOOK 35-43 (2005). The book gives sample questions for the analytical reasoning problems section of the LSAT, which routinely requires test takers to draw graphs, representing spatial relationships, and respond to questions by association of terminology and pictures.


13. \textit{See} Roger W. Anderson, \textit{Present and Future Interests: A Graphic Explanation}, 19 SEATTLE U. L. REV. 101, 102-03 (1995). Professor Anderson's article ambitiously sets forth pictorial representations of all the interests normally present in this area of law. Professor Anderson does not go into a detailed description of the R.A.P. but as I am presuming that the readers already have some familiarity with identifying interests, it may be a good reference for those still a bit unsteady in that regard.

14. As another example, you and your spouse may share a present interest in a property or you and your siblings with future interests being held by your children. \textit{See, e.g.,} CURTIS J. BERGER AND JOAN C. WILLIAMS, PROPERTY, LAND OWNERSHIP AND USE, 378 (4th ed. 1997).
come from families in which your parents own the family home. The parents own the present estate in the property. You may be designated in the deed or trust document passing title to the parents to become the owner after they pass. Someone reading that document would identify you as the future interest holder. A parcel of land can only have one present estate and the sum of the present and future interest in property always equals the total interest available, something legally known as the fee simple absolute.\(^{15}\)

**WHAT'S REALLY UNDER R.A.P.**

A constant theme throughout the property course is an attempt by certain societal powers to hoard property, and hence wealth, for themselves and their families. These powers are forever locked in battle with those who would ensure that property is always available to those wishing to make the highest and best use of it.\(^{16}\) The R.A.P. originated as one of many approaches developed by lawmakers to achieve this goal.\(^{17}\) To this end, the rule is applied to certain property that is initially transferred in an overly binding manner, in effect nullifying the original transfer and changing the status of the property so that it is once again freed for use in society. For example, if Oscar transferred property "to Abner as long as the property is never used as a disco, then to Bill," the chance of Bill receiving the property may appear patently remote.\(^{18}\) Abner may have the property as long as he or any of his heirs live or transfer his interest in the property to some other specific individuals, all of whom adhere to the restriction. Bill

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15. While this is true, a number of individuals can concurrently hold both present estates as well as future interests. But as to the interests themselves, the sum of the present estates plus the future interests always equals the whole (or the fee). Although many of you undoubtedly chose law to avoid math, it may help to envision the analysis in a rudimentary fashion, e.g., present estates + future interests = fee simple absolute.

16. See Siegal *supra* note 2, at 441; In England during feudal times, though property may have been attended to by any number of individuals, ownership was limited to royalty. The R.A.P. and other legal theories were devised to extinguish the ownership interest of those seeking to simply hold property for wealth building purposes in favor of those seeking to actually use the property in a manner more beneficial to society as a whole. See also Amy M. Hess, *Freeing Property Owners from the RAP Trap: Tennessee Adopts the Uniform Statutory Rule Against Perpetuities*, 62 TENN. L. REV. 267 (1994).

17. Some of the other theories developed to free property interests include the Rule in Shelley's Case, the Doctrine of Worthier Title, and the Doctrine of Contingent Remainder Destructibility. See *Dukeminier supra* note 12 at 294, 298, 300.

18. Abner holds a fee simple subject to executory limitation and Bill holds a shifting executory interest. Oscar holds a reversion. See Berger *supra* note 14, at 130-31 discussing the Statute of Uses in 1536, which recognized a new kind of future interest in a grantee known as an executory interest. Historically executory interests are said to follow a gap in seisin in which case they "spring," or cut short a vested interest in a prior grantee in which case they "shift." I tell my students to think "springer" and "shiftee" since in the first instance the "grantor" loses the interest and in the latter the "grantee" loses out.
may die before the property is used as a disco. In fact, the property may never be used as a disco. Applying the rule wipes out Bill's interest as well as the restriction, thus making it easier for Abner personally or his assigns and successors to make better use of the property.  

With the foundation set on the basis of the rule and what it seeks to accomplish, one can move to an analytical approach premised on simple core questions. Whenever there is an alleged bum rap afoot, it is necessary to either dispute or justify the characterization based on the surrounding circumstances. Nothing is as basic as who, what, where, when, and how. In discussing the R.A.P., the why is the availability concern set forth above. The who is the parties typically identified in the transfer. The what is the interest in property mentioned in the document of transfer. It is the where, when, and how that demand special attention. A proper evaluation requires a sharp focus on the language of the transaction. Since the rule against per-

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19. Oscar "to Abner as long as the property is never used as a disco, then to Bill," becomes Oscar "to Abner." Once the R.A.P. is enforced, the offending language is literally struck from the grant. Abner and his heirs now have a fee simple absolute which is the best possible estate as the parties holding it have the complete ability to transfer it in a manner they desire. Id. at 154-155. See also, ROGER BERNHARDT, REAL PROPERTY IN A NUTSHELL, 69-70 (3d ed. 1993).

20. For instance "to Able for life, then to Bob if he reaches 30," gives Able a life estate and Bob a contingent remainder meaning an interest in the property based on him meeting the condition in the instrument of transfer. Bob's interest is subject to the R.A.P., however, it is valid under the test. Though Bob may never reach 30, we will know, for sure, whether he meets the condition or not during his lifetime, or at his death.

21. See infra notes 69-71 and accompanying text.

22. Property is generally transferred amongst the living (inter vivos) via deed or after the death of the grantor pursuant to a will or laws covering circumstances where no will is present (intestate succession). The R.A.P. refers to descriptions in deeds as well as wills. Wills instruct individuals regarding specific conveyances to be made to certain identified parties after an individual passes away. The deed and the will both offer a transferring party the option of giving away all of their interests or a smaller legally recognized portion. For purposes of the R.A.P. when analyzing a transfer by will, the validating life(s) must be person(s) alive at the testator's death. For transfers by deed it must be a person alive at the time of transfer. See supra DUKEMINIER, note 12 at 300.

23. See LAWRENCE W. WAGGNER, ESTATES IN LAND AND FUTURE INTERESTS IN A NUTSHELL (2d ed. 1993) (cautioning readers not to be confused by terminology noting that while present and future are used to distinguish between interests, the interests are in fact created simultaneously and it is the holders' right of possession that is actually being referenced). Another student hangup occurs when they realize that parties can hold an interest known as a life estate. Since we all live one life, the question becomes why doesn't everyone have a life estate? Other questions arise with non-freehold (leasehold) estates such as, how can one hold a leasehold interest for 150 years when it is known they will not live that long? Answers to these questions are based on historical foundations of the feudal system and need to be addressed in that context. However, I do not believe it necessary to become a legal historian since little to none of the reasons have any practical current significance. I tell students they must become adept with theory first and then focus on the practical implications of estates and interests receiv-
petuities destroys certain transfers we need to know if a given transfer is in fact subject to the rule. The primary characteristic of a potentially susceptible transfer is that it be conditional in some respect. In applying the R.A.P., one looks for conditional language in a transfer and asks where, when, and how it will occur.

To answer these core questions one finds what is known as the validating life. In introductory materials to the R.A.P., the condition and the validating life are usually inextricably intertwined. Thus, we need to specifically address this elusive and sometimes illusory, being.

THE VALIDATING LIFE: THE WAITING IS THE HARDEST PART

Students and experts agree that the greatest difficulties with the rule against perpetuities involve the attempt to find the validating (a.k.a. measuring) life. Students constantly search for the equation that will allow them to "find the validating life every time." These efforts are routinely exacerbated by other students, as well as numer-

24. This Article only addresses three categories of affected interests. At common law, affected interests were executory interests, contingent remainders, and class gifts. While other interests can be characterized as being subject to the R.A.P., those interests have traits that normally allow them to be encompassed by one of the three broad common law classes. Thus, for example, today, options to purchase real estate are commonly held to be subject to the R.A.P., see, e.g., BERGIN, supra note 1 at 207 (citing several cases from various jurisdictions holding as such). This option to purchase can be viewed under the umbrella of the common law concept of either the executory interest or the contingent remainder because the option involves a condition that must occur at some point in the future.

25. For example: “To Wilson’s Dance School, heirs and assigns, so long as the land is used for a dance school to teach waltz, then to B and his heirs.” Dance School has a defeasible fee and B has an executory interest, which is conditioned on the Dance School’s use of the land.

26. Thus, in the example above, the condition that must be met in order for B to receive his interest in the land is Wilson’s Dance School must cease teaching the waltz. This action may take place, if at all, at any time, be it one or one hundred years after the drafting of the conveyance. Thus, the conveyance to B fails under the R.A.P.

27. See WAGGONER supra note 23 at 191.

28. Id. at 191-92 (citing the Uniform Statutory Rule Against Perpetuities (1986) indicating the process “for determining whether a validating life exists is to postulate the death of each individual connected in some way with the transaction, and ask the question: Is there with respect to this individual an invalidating chain of possible [post creation] events? If one individual can be found for whom the answer is no, that individual can serve as the validating life . . . ”).

29. Always elusive, the validating life may in fact be illusory, since it is possible that no such individual(s) can be found in a transaction. See infra note 78 and accompanying text.

30. The validating life includes anyone who can affect vesting: the life tenant, the taker of the contingent interest(s), and “anyone who can affect the identity of the taker” or the condition precedent. DUKEMINIER supra note 12 at 303.
ous study aids, that promise to provide this magical formula. Unfortunately no such formula exists because the goal, while admirable, is in fact unachievable.31 There are occasions when there will be no validating life.32 Like the rule itself, which focuses on whether the estate in question “must vest (or fail)” within the perpetuities period, one must recognize that finding the validating life is a high probability as opposed to a guarantee.33 The application of the rule in essence calls for “finding or not finding” the validating life.34

If the validating life cannot be found, then the challenge is basically over.35 It is only when a validating life is found that we test the condition against the time elements of the R.A.P. The more cynical readers may attack these statements as being too artificial or even invalid. Some say that the determination of a validating life is in fact dependent on whether the party chosen meets the time constraints.36 However, this approach leads to the cart getting ahead of the horse.

31. Id. at 303, 304 (stating “[i]nasmuch as a validating life will be found, if found at all . . .” and noting at 301, “If you understand how to find the validating life, you have mastered the fundamental working principle of the rule.”).
32. Id. at 303-04 (providing the example of a transfer from “O to A for life, then to A’s first child to reach 25” and explaining that A’s first child to meet the condition may be someone born a year before A dies as opposed to anyone alive at the time of transfer). While A is the party who must have a child, the condition must be met by the child not A, thus A cannot be the validating life. The validating life must be someone alive at the time of the creation of the interest and not someone born in the future. Note, however, that if the condition was that “A’s first child to reach 21” the transfer would not be void under the R.A.P. because A now qualifies as the validating life. Even if A has no children now or ever, the fact is that no child, if born, will meet or fail the condition more than 21 years after their birth.
33. The R.A.P. requires that an estate must vest, if at all, within the perpetuities period. We need only know that it is possible for the estate to vest in interest and not possession. Thus, “O to A for life, and then to B if he reaches 30,” when B is alive and currently 7, we know that the interest will be good if at all during B’s lifetime. He may die at age 8, never having an opportunity to possess the property, but the portion of the conveyance giving him the interest does not violate the R.A.P. If B turns 30 during A’s lifetime, the estate becomes a vested future possessory interest since the contingency has been met. B may die at 31 preceding A in death and still never actually possess the property, but B’s heirs, if any, will have the opportunity to do so.
34. It is possible to not have a validating life named in the transfer and still have a valid interest when the condition at issue focuses on events as opposed to individuals. For instance, “to my children alive at the completion of probate proceedings for my estate” is void because there is no way to prove that anyone alive at present will be alive when probate proceedings are complete, a process that could be finished more than 21 years after the death of the transferor. However, a conveyance “to my children alive at the end of 20 years after my death or the completion of probate proceedings for my estate” is valid, even if I do not have any children. I will have children (or not) during my lifetime and they will be alive (or not) at my death and therefore able (or not) to claim an interest in my property during the perpetuities period of during the life, at the death, or 21 years after the death of a life in being at the time of the estate’s creation.
Though the determination of a validating life is inextricably intertwined with the time element of the rule, we must first grasp what types of individuals to look for so that testing can take place.\(^{37}\)

The validating or measuring life may or may not be specifically mentioned in the transfer, however, this is obviously a good place to start looking. Since the transfer contains language indicating some requirement prior to a future party enjoying his or her estate, it is common for the language to identify the validating life.\(^{38}\) If not specifically mentioned, it is often a simple inference from the language to deduce outside parties who may affect the condition and therefore assume the measuring life role.\(^{39}\)

The validating life has to be someone who is presently alive or whose existence is directly related to someone alive at the time of transfer.\(^{40}\) If it seems impossible to point to such an individual(s) who may in fact affect the condition, then there is no validating life and the workings of the rest of the R.A.P. serve to validate the truism that you cannot dance if you cannot keep time.\(^{41}\)

Once the validating life is found, it becomes necessary to test the life against the period of perpetuity.\(^{42}\) Essentially, we ask if the condition will be met (or not) during the lifetime of the validator, or perhaps upon the validator's death.\(^{43}\) If the answer to the question remains equivocal, we must then discern whether or not the condition

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37. For our purposes, I usually lump the potential validating into three categories, the life estate holder, the potential recipient of the estate as identified by the transfer document, and those parties who have some role in affecting the condition mentioned in the transfer document or who have some role in bringing to life the recipient of the estate. See infra note 69 and accompanying text.

38. For example, "to Mary for life, then to John's children." John presently has no kids. The validating life is John, for John will have to produce children before or by the time of Mary's death.

39. For example, "to Mary and her heirs, then to Tom, but if Tom returns from Spain, then to Fred and his heirs." The condition at issue is Tom's return from Spain. This condition must be satisfied before Fred's interest will vest. See Waggoner, supra note 35, at 1722, n.9.


41. The ability of an individual to qualify as a validating life is also tied to the type of transfer involved. In a standard conveyance a deed is used and the perpetuities period begins when the deed has been delivered. Only individuals alive at that time can be validating lives as opposed to those who may be born while others are currently alive or within the next 21 years. If the type of transfer involves a will the perpetuities counting period begins at the time of the death of the testator, thus someone born after the will was drafted but before the testator died can be a validating life. If the method of transfer involves a trust then one must determine the type of trust, specifically whether it is testamentary in nature or an inter vivos trust and if the latter when the trust becomes irrevocable since that is the point when one begins counting for purposes of the rule. See John G. Sprankling, UNDERSTANDING PROPERTY LAW 188 (2000).

42. See Waggoner, supra note 35, at 1721-24.

43. Id.
may occur (or not) within 21 years after the death of the validator(s). If the "possibility" exists for the estate to vest beyond 21 years of the death of our validator(s), that conditional part of the transfer fails under the rule. Normally, the failed portion is extricated from the conveyance and the policy underlying the rule is fulfilled as alienability is furthered. It is essential to understand that our analysis, and the R.A.P. itself, do not require an affirmation that the condition at issue "will" ever be met. We are only seeking a "yes" to our question of whether we will know, at any of the three time intervals, for sure that the condition "may" or "may not" be met. An answer yes makes the interest good. An inability to answer yes at any time interval makes the interest bad.

The timing portion of the R.A.P. is of utmost importance and as such requires that it be understood and applied in context. One cannot, as tempting as it may seem, simply refer to the R.A.P. as the 21 year rule. Scores of confused students seize on the number 21 and try to apply it at the outset of every R.A.P. problem they see. This

44. There can be more than one validating life and it is often helpful if one is uncertain as to which party in the transaction is the validating life to measure the condition as it relates to all the parties living once the counting commences. If questions remain, one must still go outside the parties mentioned to see who else might affect the occurrence of the condition.


46. Thus, "Oscar to Abraham for life, then to Abraham's first child to reach 28," exemplifies a situation in which the conditional transfer fails to meet the requirements of the rule and is struck, leaving us with "Oscar to Abraham for life." Oscar or his successors hold the reversion in fee which is freely inheritable, alienable, and devisable without the fear of the estate being lost to some unknown child of Abraham.


48. This is true, of course, only in the context of the traditional rule. R.A.P. reform has manifested itself in numerous ways that have usually focused on removing and/or replacing the common law 21 year period. For instance, the Uniform Statutory Rule Against Perpetuities (USRAP) provides for a 90 year vesting period. USRAP has been adopted by approximately half the states. The "wait and see" principle has been adopted by the American Law Institute and included in its Restatement (Second) of Property, Donative Transfers (1983). The "wait-and-see" approach requires interested parties to wait until the death of life tenants, parents of potential class members, prospective recipients of conditional grants, and other parties affecting the identity of transferees or the occurrence of the condition at issue in the instrument of transfer. Wait and see says actually wait to see which interests vest or fail within 21 years (or more) after lives in being. A. James Casner et al., Cases and Text on Property 346-347 (4th ed. 2000).

49. For some states the timing period has been arbitrarily adjusted to offset other policy concerns. See James W. Singer, New Developments in Property Law: Some States Abolish the Rule Against Perpetuities, at <http://www.law.harvard.edu/faculty/singer/developments/stateperprules.php> (last visited Feb. 5, 2005) (noting fifteen states have changed their statutes for purposes of certain trusts meant to generate income for beneficiaries in perpetuity). These "equitable" variations on the law often contrast greatly
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misstep often leads to disastrous consequences and is probably the main culprit in creating the false impression that the rule is impossible to understand.  

IS MY PICTURE WORTH A THOUSAND WORDS?  

Diagrams are an integral part of my property class along with a substantial number of supplemental handouts. I use these handouts and diagrams primarily to maintain a constant parallel of current realism in the course, since property is generally associated with dusty old cases and concepts. In divulging my belief that a practical side of the course needs to be maintained, I realize that I do so at the peril of marginalization. Though there is wide disagreement on school rankings, one well known view holds that practical instruction with the standard "legal" provisions. Cf. e.g. Fl. Stat. Ann. § 689.225(2)(a) and (2)(f) (substituting 360 years for the former statutory provision of ninety years).  

50. Another approach to finding the validating life that causes substantial confusion is "the count everyone" method. There you look at everyone alive mentioned in the conveyance as a possible validator for the requirement in the transfer. The problem is that only people with some connection to the transfer or those named in the transfer really count. Furthermore, the validating life can be someone not named in the transfer. Thus, focusing on everyone named in the transfer can sometimes be a frustrating, time-wasting approach.  

51. There is some debate as to whether or not the affirmative statement of this old saying originated as a Chinese proverb or from some other ancient society; however, one resource indicates that the phrase was coined as recently as 1921 by Fred R. Barnard in Printers' Ink who called it "a Chinese proverb so that people would take it seriously." See Burton Stevenson, The Home Book of Proverbs, Maxims and Familiar Phrases, 2611 (1948).  

52. These handouts are shrinking a bit now with the advent of more progressive casebooks. Over twenty-five years ago when I took Property, students could go through a whole year without seeing basic items like deeds, wills, real estate sales contracts, title policies, and broker agreements. These types of documents have now become more commonplace in classroom texts; but it always helps to have handouts from your own jurisdiction.  

53. There are, of course, cases that are still regularly decided based on the application of the R.A.P.; however, those cases rarely involve standard deed transfers of the type indicated in the examples used throughout this paper. See White v. Hayes, No. W2002-006069-COA-R3-CV, 2003 Tenn. App. Lexis 683 (Apr. 23, 2003) (agreeing with the trial court that the testator's will devising his estate to his grandchildren violated Tennessee's Uniform Statutory Rule Against Perpetuities and recommending the case reconsider Tennessee's USRAP); Meduna v. Holder, No. 03-02-00781-CV, 2003 Tex. App. Lexis 10568 (3rd Dist. Dec. 18, 2003) (finding a provision in a deed violative of the rule against perpetuities did not render the entire deed void).  

54. There has long existed a controversy between schools regarding the ratio of theory to practice in the law school curriculum. This issue led to the establishment of a task force on law schools and the profession that undertook a three year study including an evaluation of the full range of skills and values necessary for a lawyer to assume professional responsibility for handling a legal matter. See American Bar Association Section (ABA) of Legal Education and Admissions to the Bar, Office of the Consultant on Legal Education to the ABA, Memorandum D9293-20, October 22, 1992.
and references in a class are the work of the less noteworthy. In essence, teach the students theory and they will pick up practical training once they actually enter the field. Such a view has gained much disfavor over the last decade in legal education and more experiential learning is now being supported. But whether my pictures truly have any practical value is of course a matter for you to judge.

I tell my students that learning the rule is as easy as counting to three. I match my assertion with pictures that exemplify the three step approach, or at least I believe that is what I am doing. Thus the old one, two, three is illustrated as such:

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<tr>
<td>Recognize</td>
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1. \( R = \text{Recognize (the affected interest)} \)

Earlier I mentioned the need to focus on the conditional language of transfer. The conditional language is often characterized as a contingency. The term contingency has a dual meaning in real property law. The laymen's meaning basically indicates the possibility of some event or a result dependent on something that may or may not occur. The greater significance in property law deals with the char-

55. For a particularly harsh critique of this view see David Karys, The Politics of Law 49 (1990) reproducing Duncan Kennedy, Legal Education as Training for Hierarchy, in which Professor Kennedy notes that law schools teach legal reasoning distinct from practice, thus disabling students from any future legal positions other than apprentices in law firms organized like law schools.

56. But see, J.P. Ogilvy, et al., Learning from Practice viii (1998) (noting the history of attorneys reading the law until the 19th century, prior to the establishment and popularity of the modern law school, and the late 20th century recognition that practical training needed to return as a significant part of the law school experience).


58. See supra note 25-26 and accompanying text.

acterization of certain types of interest held by transferees hoping for a certain occurrence. This event determines whether their interest will ultimately become vested, as opposed to reverting back to the grantor or going elsewhere.60

The rule against perpetuities applies to a limited number of interests and by first being able to recognize these, one may short-circuit the initial anxiety of determining whether to apply the rule.61 Fortunately, only three interests are affected by the rule.62 Thus, our picture grows by another “step, two, three.”

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Executory Interest63

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60. Interests that are designated to go to a living party(s) without first having to meet any prerequisites are said to be vested. In the parlance of present and future estates, all interests are either contingent or vested.

61. See Black's Law Dictionary 828, 829 (8th ed. 2004) (defining a contingent interest as a future interest whose vesting is dependent upon the occurrence or nonoccurrence of a future event and defining a vested interest as a present and certain right to the present or future enjoyment of property).

62. The R.A.P. also applies to “options” but these are treated like an executory interest, which is one of the normal interests affected by the rule. Thus, “D to A an option to purchase O's condominium when its fair market value exceeds $300,000,” presents a situation in which the R.A.P. will apply. We will not be looking at options in depth. For additional instances in which the R.A.P. may be applicable, see John K. Phoebus, The Rule Against Perpetuities - The Implication of a Reasonable Time for the Performance of a Contingency to the Vesting of Future Interests in Commercial Transactions - Maryland's Hybrid Approach to the Rule Against Perpetuities in Commercial Contexts, 101 Dick. L. Rev. 619 (1997).

63. Executory interests are transferee's interests that are said to divest some prior vested estate. The vested estate can be one held by a transferor or a prior transferee. If a transferor is involved, it is known as a springing executory interest. As opposed to a shifting executory interest when a transferee is divested. For example, O "to A in fee but if liquor is sold on the premises, then to B" gives B a shifting executory interest since B will divest A's fee simple subject to executory limitation if liquor is sold. Compare O to A in fee but if liquor is sold on the premises then one day thereafter to B. B now holds a springing executory interest because once liquor is sold, O (or his heirs) will have a reversionary interest vest for one day and B will then divest the transferor.
Contingent remainders\textsuperscript{64}

Class Gifts (a.k.a.\textsuperscript{65} vested remainders subject to open)

2. \textbf{A = Assemble (the validating lives)}

Once it is recognized that you have an interest that is affected by the rule, your next step is to assemble the "validating lives." Validating lives are parties who are necessary to determine whether the transferee's interest vests or fails under the application of the rule.\textsuperscript{66} In many instances, certainly most of those in law school, problems that are offered will only have one validating life per transfer examined.\textsuperscript{67} However, there can be more than one validating life in a given situation.\textsuperscript{68} But for a basic understanding, this area can also be approached in a "one, two, three step process."

\textsuperscript{64} Contingent remainders are interests held by transferees who are either unascertained or who have to meet some condition(s) prior to their interest becoming vested. For example, O "to A for life then to B's heirs" while A and B are alive creates a life estate in A and a contingent remainder in B's heirs. This is because no one alive can have heirs. B's heirs will only be known at B's death; thus they are unascertained at the time of the grant. A transfer from O "to A for life then to B when B reaches 30" while A and B are alive and under 30, creates the same type of interests in the parties. A has a life estate and B has a contingent remainder because he has to meet the condition (turn 30) prior to having his interest vest. In both scenarios the grantor O retains a reversion.

\textsuperscript{65} These are transfers to a group. For instance, from O "to A then to A's children." If A has no children, then the future interest created is a contingent interest. If A has one or more children, then the interest created is a vested one subject to open or partial divestment since other children may come along later and share in the estate. At common law, the R.A.P. was quite harsh in its treatment of these types of interests applying an "all or nothing" rule that if the class had not vested as to all members by the time they were to take possession, the gift was invalid. In the above example, "A's children" should be identified at A's death; thus the gift is good. However, O to A then to A's children who reach 25 is invalid. Do you see why?

\textsuperscript{66} See Waggoner, supra note 35, at 1721-24.

\textsuperscript{67} Normally, this is done for the sake of more simplistic exams. Most professors realize the difficulty of the R.A.P. and do not try to further confuse the students. Thus, for example, O "to A for life, then to A's first child to reach the age of 21." A has no children. Here A is the validating life because A will (or will not) have a child and that child will (or will not) reach age 21 during A's life, by the time of A's death, or within 21 years after A's death. It is impossible for the event to happen, or us to be unsure whether it happened (or not) outside the perpetuities period so the transfer is good under the rule.

\textsuperscript{68} This often happens when you have grants to different parties such as to A's children and then later to B's children. Thus, O "to A for life then to A's first child to reach 21 for life, then to B's first child to reach 21." The validating life for A's children is A and for B's children, B. Note the validity of the estate for the R.A.P. is not necessarily dependent on the nature and size of the estate being analyzed. The fact that A's child has a contingent remainder for life as opposed to B's child's contingent remainder in fee simple absolute does not factor into the R.A.P. analysis.
Rule Against Perpetuities

1. Recognize
2. Assemble the Validating Lives
3. Prove

1. The initial interest recipient most often the life estate holder. - a.k.a. - LIFER
2. The transferee or holder of the interest subject to the condition. - a.k.a. - TAKER
3. Parties who can affect the condition being met either by affecting the identity of the party(s) or the occurrence of the condition. - a.k.a. - I.D.O.MAKER

3. \( P = \text{Prove (within the time period)} \)

The third step requires proving that the rule against perpetuities time requirement allows the interest to exist or mandates that it be terminated. This requires the application of a three step temporal analysis and breaks out into the following: ("turn, two, three")

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69. For instance, in the example "O to A for life, then to A's first daughter," the life estate holder is the validating life. We will know for sure during A's life or at A's death whether A had a daughter.

70. In the above example, to shift the validating life to the taker, we can simply change the granting language "to A's first child to reach 25." Now A as the lifer can affect the condition by having a child (or not) but that does not answer the R.A.P. analysis in full because the specific onus of the condition is on the child to reach 25. The child is the taker or holder of the interest.

71. "O to A's grandchildren who are 21," now puts the onus on the individuals responsible for identifying whether there will be any grandchildren who meet the condition. The responsible parties will be A's children. Note a transfer does not have to include the parties responsible for identity or occurrence in the actual conveyance. Note that whether this transfer is valid or not depends on whether O transfers the property by will or deed to A's grandchildren. In the latter situation if O has died and left A as a child, the interest is good under the R.A.P. but if this is a standard inter vivos transfer by deed the interest fails. That is because O may have additional children and those children's kids may be the ones who reach 21, and all of these events may occur more than 21 years after the life of anyone currently around. See supra note 41.

72. The classic statement of the rule says "No interest is good unless it must vest, if at all . . ." (emphasis added). Thus, it is not whether the interest does vest in fact but
3. Prove

1. The interest will be good (or fail) within the validator's life. . . .73
2. . . . or we will be able to say the interest is or will be good (or not) by the death of the validator.74
3. That the affected interest will be good (or fail) within 21 years after the death of the validator.75

Thus, in total, you have our waltz.

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Thus, in total, you have our waltz.

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73. The transfer from O "to A for life, then to A's first child" is a situation in which A is the validating life. It is not certain that A will ever have a child but if A does it must happen during A's lifetime.

74. In the above example, if A dies without having a child, we know at A's death that the contingent remainder fails.

75. If the example above stated a transfer from O to A for life then to A's first child to reach 21, we would not know necessarily during A's life which of his children would be the first to reach 21. It is also possible for A to die prior to having any child reach 21. But there is no possibility that A could die and it would be necessary to wait more than 21 years for any child to reach 21. Thus, we know for sure the condition will be met, if at all, within 21 years after the death of the validating lives.
To further add to my attempt at demystification of the R.A.P., I toss in a couple of general linguistic markers for students to be wary of. First, I tell them that when they see language in transfers granting an interest to grandchildren or parties beyond the third generation, be afraid. Be very afraid, and question the viability of that transfer because it is extremely difficult to find validating lives in third generations and beyond. Second, I tell them if there are grandparents involved or similarly characterized elders potentially affecting the condition, do not automatically assume invalidation, as various interpretations of the law grant these types of people a youthful
essence that keeps them quite nimble for purposes of the rule. Finally, I tell them if the condition is something that may continue indefinitely or be indefinite regarding the period in which a finite action may take place, the estate affected by the rule is generally going to fail.

I used to tell them more, but now I feel that one last spin and dip in the three step context is enough. They usually feel it is too much and initially question whether the R.A.P. is something up tempo or instead just tempestuous. However, more often than not, despite a few itinerant wallflowers, practically applying the approach outlined above does generally tend to move the room, though not quite leave all students dancing in the aisles. For those in the aisles, I am not sure what parts of their dance are attributable to nervousness or happiness that we are finally finished with the bum R.A.P.

78. See Jee v. Audley, 29 Eng. Rep. 1186 (1787) (establishing the concept of the "fertile octagerian" whereby a woman is deemed to be able to have children until she dies); see also Waggoner, supra note 35, at 1728-29.

79. My students particularly "enjoy" the example of "O, to the first member of the class whose child passes the bar" being deemed void under the rule. There is no validating life since no class member can say when or if he or she will ever have a child that passes the bar. The first class member's child to pass the bar may be someone who is not alive and who may not be born and pass the bar until more than 21 years from the present. In fact, none of the class members may ever have a child who passes the bar. The case of "the bottomless gravel pit" is also useful here. See Simes, supra note 76, at 285-86.

80. The "slothful executor" is the oft cited example here; thus, "O to A for life, then to A's children living at the completion of the administration of my estate" leaves A with a life estate and O with a reversion in fee simple absolute after applying the rule. The interest to A's children is void under the R.A.P. because although O's estate must be subject to probate at some time, there is no way we can be certain that it will happen during A's life, at A or O's death, or within 21 years of A or O's death.