

The Kangaroo's Guide to the Rule against Perpetuities

Law 108B: Property Law | G. Morgan (Howell, Spring 2012)

<p>Step 1</p>	<p>Apply <i>Perpetuity Act</i> s.2 (Application of Act) → applicable only to instruments taking effect* after December 31, 1978 * n.b. wills take effect on the date of the death of the testator or testatrix</p>	
<p>Step 2</p>	<p>Apply <i>Perpetuity Act</i> s.6 (Rule against Perpetuities) → s.6(1) modern rule against perpetuities in effect → s.6(2) <i>Whitby v. Mitchell</i> rule abolished</p>	
<p>Step 3</p>	<p>Apply modern rule against perpetuities → Modern rule: "No interest is good [valid] unless it must vest, if at all, no later than 21 years after the expiry [death] of a life in being [living or conceived but unborn child] in existence at the creation of the interest" (<i>Duke of Norfolk's Case</i> 1693) → Generally speaking, limits a disposition to three generations: (grand)parent, child, grandchild → Application:</p> <ol style="list-style-type: none"> (1) divide up the gift/disposition if more than one interest produced (2) determine whether each interest is vested or contingent n.b. class gift = contingent (members must be ascertained prior to vesting) n.b. at common law, males and females are presumed to be capable of having children until death (3) if interest is contingent, the modern rule against perpetuities applies <ol style="list-style-type: none"> a) identify an effective life in being (someone impliedly or expressly mentioned in the gift and whose duration has some bearing on the vesting of the gift) n.b. if the beneficiary is the life in being, it will always vest within 21 years of his or her death if it will vest at all n.b. if the life in being is the parent and the beneficiary child's attainment age is 21, it will always vest within 21 years of the life in being's death if it will vest at all b) determine with absolute certainty (no wait and see) whether the contingent interest will vest within 21 years of the life in being's death <p>→ Consequences:</p> <ol style="list-style-type: none"> (1) if the contingent interest will vest within 21 years of the life in being's death, the disposition is valid (2) if the contingent interest will not or may not vest within 21 years of the life in being's death, apply the remedial provisions found in the <i>Perpetuity Act</i> 	
<p>Step 4</p>	<p>If disposition is found invalid under the modern rule against perpetuities, apply <i>Perpetuity Act</i> s.3 (Application of Remedial Provisions) → Order specified: s.14 (capacity to have children) > s.9 (wait and see) > s.11 (age reduction) > s.12 (class splitting) > s.13 (general cy pres)</p>	
<p>Step 5</p>	<p>Per <i>Perpetuity Act</i> s.3, apply s.14 (Presumptions and evidence as to future parenthood) → s.14(1)(b) If life in being is female and over 55 years, it is presumed that she is no longer able to have a child (implication: if life in being's children are the beneficiaries, they can become effective lives in being as the class is closed. This may produce a validity.) →s.14(1)(b) If a life in being is female and under 55 years, it is presumed that she may still have children (therefore her children are not a closed class) →s.14(1)(a) If a life in being is male, it is presumed that he may still have children until his death (therefore his children are not a closed class) →s.14(2) If a life is being per (1)(a) or (b) is found to be able to still have children, evidence may be given to show that the life in being is not able to have (further) children at the time in question (remaining provisions in s.14 govern remedy if a finding of no children at s.14(2) proves to be incorrect)</p>	

Step 6	<p>If no validity produced through application of <i>Perpetuity Act</i> s.14, return to s.3. Per s.3, apply s.9 (Presumption of validity) → Generally speaking, the “wait and see” provision → s.9(1) If a contingent interest is capable of vesting within or beyond the perpetuity period (within 21 years of the death of the life in being), it is presumed valid until it is invalid in actuality → Consequences:</p> <ol style="list-style-type: none"> (1) apply <i>Perpetuity Act</i> s.10 (Determination of perpetuity period) (2) if a contingent interest vests before the end of the perpetuity period, the disposition is valid. (3) if a contingent interest does not vest before the end of the perpetuity period, the disposition is void UNLESS validated by s.11, 12 or 13 (cannot go backward to s.14)
Step 7	<p>If applying <i>Perpetuity Act</i> s.9, apply s.10 (Determination of perpetuity period) → Statutory perpetuity period determined either by persons identified in s.10(2) (s.10(1)(a)) or the eighty year perpetuity period if not statutory life in being found (s.10(1)(b)) → Statutory lives in being created in s.10(2) (must be alive or conceived at creation of interest)</p> <ol style="list-style-type: none"> (a) person who made the disposition (n/a if will as testator is deceased) (b) person to whom the disposition is made: (i) a member or potential member of the class; (ii) in an individual disposition, a person to whom some conditions are met and the remainder may be met (c) person who has a child or grandchild in s.10(2)(b)(i)-(iv) (d) person who takes a prior interest in the property (e) unborn widow: regardless of whether the widow was ascertainable at creation of the interest, the widow can be the life in being spouse was alive or ascertainable at the creation of the interest
Step 8	<p>If no validity produced through application of <i>Perpetuity Act</i> s.9, return to s.3. Per s.3, apply s.11 (Reduction of age) → s.11(1) If the contingent interest vests at the attainment of an age older than 21 and the actual events show that the interest is void but it would not be void if the attainment age was 21, then the attainment age will be adjusted to the age nearest the age specified that would produce a validity → s.11(2) If a disposition specifies two different attainment ages, there are two different reductions.</p>
Step 9	<p>If no validity produced through application of <i>Perpetuity Act</i> s.11, return to s.3. Per s.3, apply s.12 (Exclusion of class members to avoid remoteness) → s.12(1) only applies to dispositions involving the application of s.11. If s.11 is prevented from operating and saving a disposition due to members or potential members of the class, exclude these members so that s.11 can have effect (and produce a validity.) → s.12(2) In a disposition where s.11 does not apply, any members or potential members of a class that make a disposition invalid may be excluded to produce a validity. n.b. common law class closing rule in <i>Andrews v. Partington</i> (1791) may apply. In this rule, a class will close as soon as a member’s interest can vest. All members alive at the time are part of the class and those born after are excluded.</p>
Step 10	<p>If no validity produced through application of <i>Perpetuity Act</i> s.12, return to s.3. Per s.3, apply s.13 (General cy pres provision) → broad/narrow discretion: only can be applied against invalidities produced by the rule against perpetuities (i.e. not against invalidities produced by uncertainty), but does not restrict the application except that it must be exercised “within the normal principles of interpretation of instruments” (i.e. “in the armchair of the testator”)</p>
n.B.	<p>→ <i>Perpetuity Act</i> s.1 defines “life in being” as “living or conceived but unborn” → Howell on application of <i>Perpetuity Act</i> s.7: likely can go straight from <i>Perpetuity Act</i> s.2 to s.7 (without detour through s.6 and s.3) if the requirements of s.7 are met: An interest that by either</p> <ol style="list-style-type: none"> (1) express terms of the disposition, or; (2) necessary implication of the terms of the disposition <p>must vest, if at all, no later than 80 years after the creation of the interest is valid. ex: “provided he or she marries within 60 years of my death” or “by December 31, 2040”</p>