

Real Property

Session 06

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Rule Against Perpetuities

- Common Law Rule Against Perpetuities (RAP)
  - No future interest is valid unless it either vest or fails to vest within a life or lives in being plus twenty-one years.
  - Ground Rules for RAP Analysis
    - As a practical matter, the 21 year period is always extended by 10 months to account for gestation (a child that has been conceived but not yet delivered).
    - Fertile Octogenarian: Any woman, no matter how old, is presumed to be fertile and capable of having a child.
    - Everyone who is alive at the time of the grant can die instantaneously afterward.
    - The RAP tends to void future interests based on the most improbable series of imagined future events.



Rule Against Perpetuities

- Prevention of RAP Violations – The Savings Clause
  - In the real world, attorneys protect the grant by incorporating the a “savings clause” into the grant:
    - “Notwithstanding any other provisions of this document, each future interest created by this document shall vest and come into present possession not later than 21 years after the death of the last survivor of my children who are alive at the time this document becomes irrevocable.”



Rule Against Perpetuities

- Key Questions For Analyzing RAP Problems
  - Are there future interests created by the grant that implicate the RAP?
  - When does the perpetuities period begin and end?
  - Who are the relevant "lives in being" (LIB) for RAP analysis?
  - When does the future interest "vest" for purposes of the RAP?



Rule Against Perpetuities

- Are there future interests created by the grant that implicate the RAP?
  - Only three future interests must be tested under the RAP:
    - Executory Interest (EI)
    - Contingent Remainder (CR)
    - Vested Remainder Subject to Open (VRSO)



Rule Against Perpetuities

- When does the perpetuities period begin and end?
  - The perpetuities period begins when the grant becomes effective to transfer a property interest.
  - Inter Vivos Transfer
    - Made by the grantor while the grantor is still alive.
    - Perpetuities period begins on the date that the transfer becomes **irrevocable**.
  - By Terms of a Will
    - Perpetuities period begins on the date of the **death** of the testator.



Rule Against Perpetuities

- Who are the relevant "lives in being" (LIB) for RAP analysis?
  - Not all LIB matter for RAP analysis.
  - The only individual LIB who count are **those persons whose actions during life, or by their death, can somehow affect the future interest being tested.**



Rule Against Perpetuities

- When does the future interest "vest" for purposes of the RAP?
  - To be "vested" for purposes of RAP, we must know, **with certainty**, that the future interest will either:
    - Be owned by an identified individual or an identified class of individuals, or
    - The future interest will be permanently extinguished (so that we know that no one will ever own it).
  - A future interest whose ownership is till "in limbo" at the expiration of the perpetuities period is struck as void under the RAP.





Does the conveyance create a future interest?

NO → Rule against perpetuities is IRRELEVANT

YES

Is the future interest a contingent remainder or an executory interest?

NO → Rule against perpetuities is IRRELEVANT

YES

Is there any time restriction on when the future interest can vest?

NO → Rule against perpetuities is VIOLATED

YES

Is there any person whose death or event in their life is a factor in the vesting of the future interest?

NO → Must the interest vest within 21 years of the conveyance?

- YES → Rule against perpetuities is NOT VIOLATED
- NO → Rule against perpetuities is VIOLATED

YES

Does the interest vest immediately upon the death of, or upon an event in the life of, a person who is alive at the time of the conveyance?

NO → Must the interest vest within 21 years of the death of that person?

- YES → Rule against perpetuities is NOT VIOLATED
- NO → Rule against perpetuities is VIOLATED

YES → Rule against perpetuities is NOT VIOLATED

Rule Against Perpetuities

- RAP requires certainty concerning who (if anyone) owns the future interest being tested.
- That is why class gifts with an internal precondition are so vulnerable to being voided by the RAP.
  - Example:
    - "to A for life, then to the children of B who attain age 25"
    - The attainment of age 25 is an internal precondition imposed on all members of the class of B's children.
    - The RAP requires that we know **exactly** which individual members of the class have satisfied the precondition **before** the perpetuities period expires.
    - If satisfying an internal precondition could still be in limbo for some class members, **then the entire class gift is void, even for those class members who will have satisfied the internal precondition** by the end of the perpetuities period.



Rule Against Perpetuities

- RAP-vesting requirements for the three future interests (EI, CR, and VRSO) that are susceptible to being voided by the RAP.
  - Executory Interest
    - An EI RAP-vests when the future interest **comes into present possession and turns into a present interest**.
  - Contingent Remainder Held By An Individual
    - Unlike an EI, a CR held by an individual does **not** have to come into present possession within the perpetuities period to be RAP-vested. The CR only needs to **turn into a VR** within the perpetuities period to be RAP-vested.



Rule Against Perpetuities

- RAP-vesting requirements for the three future interests (EI, CR, and VRSO) that are susceptible to being voided by the RAP (cont'd)
  - CR Class Gift With No Internal Preconditions
    - Example
      - "to A for life, then to B for life, then to the children of C and their heirs"
      - At the time the grant is made, A,B, and C are alive (and are relevant LIB), but C **has never had any children**.
      - The unborn children hold a CR class gift with no internal preconditions.
    - Does not have to come into present possession and turn into a present interest within the perpetuities period to be RAP-vested.
    - The CR class gift only must **turn into a VR** within the perpetuities period to be RAP-vested.



Rule Against Perpetuities

- RAP-vesting requirements for the three future interests (EI, CR, and VRSO) that are susceptible to being voided by the RAP (cont'd)
  - VRSO With No Internal Preconditions
    - Example
      - "to A for life, then to B for life, then to the children of C and their heirs"
      - At the time the grant is made, A,B, and C are alive (and are relevant LIB), but C **has had a child** that is born, alive, and ascertainiable.
      - The child has a VRSO with no internal preconditions.
    - Does not have to come into present possession and turn into a present interest within the perpetuities period to be RAP-vested.
    - The VRSO only must **turn into a VR** within the perpetuities period to be RAP-vested.



Rule Against Perpetuities

- RAP-vesting requirements for the three future interests (EI, CR, and VRSO) that are susceptible to being voided by the RAP (cont'd)
  - CR Class Gift or VRSO With Internal Preconditions
    - Example
      - "to A for life, then to B for life, then to the children of C and their heirs who attain the age of 25"
    - Does not have to come into present possession and turn into a present interest within the perpetuities period to be RAP-vested.
    - The CR class gift only must turn into a VR **for all class** members within the perpetuities period to be RAP-vested.
    - Each and every member of the VRSO class must also be able to satisfy the precondition within the perpetuities period.



Rule Against Perpetuities

- Striking A Void Future Interest
  - If a future interest is void under the RAP, the laguage in the grant that creates the void future interest must be struck.
  - **No consideration is given to how the revised grant language, and the present and future interests that remain after the offending language is struck, may be inconsistent with the original intent of the grantor.**



Rule Against Perpetuities

- Modern Approaches To The Rule Against Perpetuities
  - Wait-and-See Approach
    - A future interests that is void under the common law version of the RAP is not struck immediately from the grant language. Rather, one waits to see if the future interests does in fact RAP-vest within the perpetuities period.
  - USRAP Approach
    - If the future interests is void under the common law version of the RAP, one must wait for 90 years (measured from when the grant is made) to determine if the future interests does in fact RAP-vest within the 90-year period.



Rule Against Perpetuities
Checklist

- Classify The Future Interests And Determine Whether The Granting Instrument Contains A Savings Clause.
- Determine The Perpetuities Period And The Relevant Lives In Being.
  - Perpetuities Period Begins?
    - Inter Vivos Grant.
    - Devise In A Will.
  - Relevant LIB?
    - LIB Expressly Named Or Described In Grant.
    - LIB Implied From Grant Language.



Rule Against Perpetuities
Checklist

- Testing An Executory Interest.
  - When Must The EI Turn Into A Present Interest?
  - When Must The EI Be Extinguished?
  - Is The EI Valid?



Rule Against Perpetuities
Checklist

- Testing A Contingent Remainder.
  - Cr Held By An Individual.
    - Doctrine Of Destructability Applies.
      - Must The Natural Termination Of The Prior Present Interest (LE Or TY) Occur Within The Perpetuities Period (Relevant LIB Plus 21 Years)?
        - If Yes, The CR Is Valid.
      - Could The Prior Present Interest (LE Or TY) Naturally Terminate After The Perpetuities Period (Relevant LIB Plus 21 Years)?
        - If Yes, The CR Is Void Unless The Ability To Satisfy The Precondition Is Held Or Controlled **Solely** By Persons Who Were **Alive** At The Time The Grant Was Made (Your **Relevant** LIB).



Rule Against Perpetuities
Checklist

- Testing A Contingent Remainder.
  - CR Class Gift.
    - Doctrine Of Destructability Applies.
      - Must The Natural Termination Of The Prior Present Interest (LE Or TY) Occur Within The Perpetuities Period (Relevant LIB Plus 21 Years)?
        - If Yes, The CR Is Valid.
      - Could The Prior Present Interest (LE Or TY) Naturally Terminate After The Perpetuities Period (Relevant LIB Plus 21 Years)?
        - If Yes, The CR Is Void Unless The Class Will Close And All Internal Preconditions (If Any) Imposed On The Class Members Will, Under All Circumstances, Be Satisfied By All Class Members Within The Perpetuities Period Under The All-or-Nothing Rule For Class Gifts.



Rule Against Perpetuities
Checklist

- Testing A Vested Remainder Subject To Open
  - Must The Class Close Within The Perpetuities Period?
    - Does The Class Close By Natural Termination Of The Prior Present Interest?
    - Does The Class Close By Death?
  - Is An Internal Precondition Satisfied By All Class Members Within The Perpetuities Period?
    - Are Only Persons Who Were Alive When The Grant Was Made Able To Determine Or Influence Whether The Internal Precondition Is Satisfied?
    - Could A Person Born After The Grant Is Made Determine Or Influence Whether The Precondition Is Satisfied For A Class Member?



Rule Against Perpetuities
Checklist

- Under The Common Law RAP, Strike Any Void Future Interest And Re-analyze The Grant.
  - Strike The Void Future Interest.
  - Reclassify The Interests Created By The Revised Grant.
  - Analyze The Facts Using The Revised Grant Language.



Rule Against Perpetuities
Checklist

- Modern RAP Approaches.
  - Wait-And-See Approach.
  - USRAP Approach.

