

Rule Against Perpetuities Exercises — Explained

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(1a) O conveys to A and his heirs for so long as alcohol is not sold on the premises; but if alcohol is sold on the premises, then to B and his heirs.

In the absence of the RAP, we'd have:

O: nada

A: fee simple subject to an executory interest

B: shifting executory interest

B's interest is subject to the RAP. And it violates the RAP — that is, there's no person alive on the planet at the time of the conveyance about whom it can be said with utter certainty that B's interest will vest (or ultimately fail to vest) not more than 21 years after that person dies.

Umm... like alcohol *might* be sold on the premises 1,000 years after the conveyance — many centuries after all lives in being at the time of the conveyance have been extinguished (except for Walt Disney and Ted Williams, who are taking long, cryogenically-assisted naps — I kid).

Thus, after applying the RAP (and striking out the grant to B), we're left with the following interests:

O: possibility of reverter

A: fee simple determinable

B: nada

(1b) Variation on (1a): O conveys to A and his heirs; but if the Detroit Tigers ever win the World Series, then to the Detroit Tigers Ballplayers Emeriti Beneficent Society in fee simple absolute.

Here, too, the shifting executory interest fails (same reasoning as in (1a) — and, given the Tigers' recent history, 1,000 years may be overly optimistic*). After the dust settles, A winds up with a fee simple absolute.

Note: this result in no way frustrates O's intentions (at least vis-à-vis A), since O's apparent intention was to reward the ballplayers, not to punish A. (Contrast this with (1c).)

*I created this series of exercises in 2002, a period of seemingly terminal bleakness for the Detroit Tigers. But in recent years, the Tigers have amassed an impressive record. Oh me of little faith! Note, however, that this is a lovely (albeit unwitting) illustration of the fact that, in performing the classic RAP analysis, we do not wait and see.

(1c) A twist on (1b): O conveys to A and his heirs; but, if alcohol is sold on the premises, then to B and his heirs.

Just as in the previous examples, the shifting executory interest fails. But here, I *might* have thought that the law would find some way to respect O's booze aversion, lest A open a liquor store on Blackacre tomorrow. (Perhaps the conveyance could be reformed so as to give A a fee simple determinable or a fee simple subject to condition subsequent, neither of which would pose any RAP problem.) Indeed, I *did* used to think this.

Alas, I was wrong. I have it on extremely good authority that (at least under the classic, bare-knuckle, common law RAP) A winds up with a fee simple absolute — notwithstanding that this outcome utterly demolishes O's intentions. (Trust me, you don't want to go toe-to-toe with Professor Brian Simpson on matters of olde tyme English law.)

Of course, modern American property law has basically jettisoned the classic RAP — replacing it with boring things like the 90-year-wait-and-see and let's-just-reformulate-the-grant-to-better-effectuate-the-grantor's-intent approaches. So don't lose too much sleep over poor O; he's being looked out for. The determination of whether this is actually a good thing, I leave as an exercise for the reader.

(2) O conveys to A for life, then to the last of A's children to attain the age of 21.

O: reversion [in fsa/fs subj. to an exec. int.*]

A: life estate

Last of A's kids to attain 21: contingent remainder

The future interest held by the last of A's kids to attain 21 is subject to the RAP. A is a valid measuring life, because any child of A who attains age 21 will do so no later than 21 years after A kicks the bucket. Even if A dies of a heart attack in the very act of conceiving his last kid, that child will (or won't) make it to age 21 within 21 years of A's (ecstatic) death. (Recall that gestation periods are ignored in reckoning time under the RAP. It's as if A's death coincides with the very instant of the child's birth; obviously, this is a legal fiction, since, as a biological reality, a baby may indeed be born months after his father has died.)

Note that A is the *only* valid measuring life in this case. It's not that I have anything against anybody else. It's just that no one else happens to work here. Many students seem to believe that the search for the measuring life is limited to people named in the grant. This is not true (see, e.g., (4) below). Any dude (or chick) alive on the planet at the time the interest is created is eligible for consideration. In most cases, however, Ted Koppel winds up not working (not because his hair doesn't try).

*Note: Whether O's reversion would be in fee simple absolute ("fsa") or in fee simple subject to an executory interest ("fs subj. to an exec. int.") depends on whether the jurisdiction adheres to the (old-school) Destructability Doctrine or instead opts to "save" the remainder by transforming it into a springing executory interest. Now you'll know what "fsa/fs subj. to an exec. int." means throughout this document.

(3) O conveys to A for life, then to the last of A's children to attain the age of 22.

In the absence of the RAP, we'd have:

O: reversion [in fsa/fs subj. to an exec. int.]

A: life estate

Last of A's kids to attain 22: contingent remainder

The future interest held by the last of A's kids to attain 22 is subject to the RAP. It is void. There is no one who can "save" it.

Even A can't get the job done here. If A dies in the act of conceiving his last child, we may have to wait 22 years more to get the answer to our question. Na!

Thus, after applying the RAP, we are left with the following interests:

O: reversion in fsa

A: life estate

Last of A's kids to attain 22: nada

(4) O devises to A for life, then to the last of O's children to attain the age of 21.

O: nada (if the latest-born of O's children is 21 or older); otherwise, reversion [in fsa/fs subj. to an exec. int.]

A: life estate

Last of O's kids to attain 21: vested remainder in fsa (if the latest-born of O's children has already attained 21 — since, in that case, this person is ascertained at the moment of O's death); otherwise, contingent remainder

Note: "O devises" means that O is dead, an extremely salient point!

The contingent remainder would be subject to the RAP. It is valid. Measuring lives are in abundance here! Ted Koppel will work. Magic Johnson will work. Even your neighbor will work. As will 6 billion-ish other humans walking around the planet at the time of O's death. Think about it: Any child of O will be born at or before O's death (recall that gestation is ignored). That means that any child of O who makes it to 21 will do so no more than 21 years after O's death — that is, after "right now." So any person who's alive "right now" will work.

Please note that one person who will not work is O, since he is dead. (George Washington, Louis Armstrong, and Mahatma Gandhi will also not work, for the same reason.)

(5) O devises to A for life, then to the last of O's children to attain the age of 22.

O: nada (if the latest-born of O's children is 22 or older); otherwise, reversion [in fsa/fs subj. to an exec. int.]

A: life estate

Last of O's kids to attain 22: vested remainder in fsa (if the latest-born of O's children has already attained 22 — since, in that case, this person is ascertained at the moment of O's death); otherwise, contingent remainder

The contingent remainder would be subject to the RAP. But the RAP analysis depends on the ages of O's surviving kids.

If the youngest of O's surviving kids is 1 year old (or older), then we'll have the answer to our question no later than 21 years from "right now." So the analysis becomes identical to (4) above.

But, if the youngest of O's surviving kids is, say, 6 months old, then we might have to wait 21 years and 6 months from "right now" to get our answer. Note: This *doesn't* mean that the interest is void. It just means that Ted Koppel no longer cuts it. Why? Because — God forbid! — Ted could drop dead 2 weeks from now, and we'd still have to wait 21 years, 5 months, and 2 weeks to get our answer. (This is beginning to sound like that Bare Naked Ladies song.) So...

Actually, the interest is valid. We can use the closed class of O's kids alive at his death as the measuring life. (It's closed because O, being dead, can't have any more kids.) Check it out: Suppose that at his death O has three kids who survive him. One of those kids will be the last of them to die. (We don't know which one, but we do know that it will be one of them.) The longest we could possibly have to wait to get our question answered is the moment the last one dies — and, if they all live to a ripe old age, we won't have even had to wait that long; we'll just have to wait till the last one celebrates his/her 22nd birthday. Note that we'll get our answer *during* the life in being; we're not even dipping into the "extra" 21-year reservoir. Capiche?

(6) O devises to A for life, then to the last of O's children to attain the age of 92.

This one is essentially the same as (5).

If the latest-born of O's kids has already celebrated his 92nd birthday, then the remainder is vested.

If the youngest of O's surviving kids is at least 71 but less than 92, then bring Ted Koppel out for another bow.

Otherwise, we avail ourselves of the closed class of O's surviving kids.

(7) O devises to A for life, then to the last of O's grandchildren to attain the age of 21.

O: nada (if the latest-born of O's grandkids has already attained 21 *and O has no surviving kids*); otherwise, reversion [in fsa/fs subj. to an exec. int.]

A: life estate

Last of O's grandkids to attain 21: vested remainder in fsa (if the latest-born of O's grandkids has already attained 21 *and O has no surviving kids* — since, in that case, the person is ascertained at the moment of O's death); otherwise, contingent remainder

The contingent remainder would be subject to the RAP. But the RAP analysis depends on whether O has any surviving kids.

If O has no surviving kids, then any grandkids of O who will ever be born have already been born. Thus, if they reach 21, they will do so no later than 21 years from "right now." Ted, do your thing!

But, if O has any surviving kids, then O's grandkids remains an open class — i.e., it can admit additional members. (Note that this is not a legal fiction, but rather a biological reality: you can have additional grandkids after you're dead and buried, since it would be your surviving children — and not you — who would be doing the actual baby making.) Ted Koppel no longer works, because O's surviving kid could have another child, say, 25 years from now, and we might have to wait 21 years beyond then to get our answer. If Ted were to keel over next Tuesday, we might wind up waiting around for almost 46 years after his death to get our answer.

However, the closed class of O's surviving kids will save the interest. Any grandkid of O will be a child of O's child. Any child of O who may have additional kids after O's death is obviously alive at O's death — and thus is eligible for consideration as a measuring life. Any grandkid of O who attains 21 will do so no later than 21 years after the death of the last of O's children to die.

(8) O devises to A for life, then to the last of O's grandchildren to attain the age of 22.

In the absence of the RAP, we'd have:

O: nada (if the latest-born of O's grandkids has already attained 22 and O has no surviving kids); otherwise, reversion [in fsa/fs subj. to an exec. int.]

A: life estate

Last of O's grandkids to attain 22: vested remainder in fsa (if the latest-born of O's grandkids has already attained 22 and O has no surviving kids — since, in that case, the person is ascertained at the moment of O's death); otherwise, contingent remainder

The contingent remainder would be subject to the RAP. But the RAP analysis depends on whether O has any surviving kids and also on the ages of his surviving grandkids.

If O has no surviving kids, and his latest-born surviving grandkid is age 1 (or older), then Ted Koppel saves the interest. (This is just another 21-years-from-right-now situation.)

Alternative: If O has no surviving kids, but his latest-born surviving grandkid is, say, 6 months old, then Ted Koppel won't work. However, the closed class of O's surviving grandkids will work. (And this closed class would work for "age of 92" just the same.)

Alternative: If O has any surviving kids, the interest is void. No one can save it. Because of the possibility of an after-born (a bizarre term) grandkid, the surviving grandkids is an open class and is thus ineligible for consideration as the measuring life. And we can't use O's surviving kids, because we might have to wait 22 years after the death of the last of them to die. In this case, after the dust settles, the interests left standing would be as follows: O has a reversion in fsa, and A has a life estate.

(9) O conveys to A for life, then to A's widow.

O: reversion [in fsa]

A: life estate

A's widow: contingent remainder

First, note that A's widow has a simple, tidy, traditional,

well-behaved contingent remainder. We should not even let the term "springing executory interest" enter our thoughts, since there's no possibility of the Destructability Doctrine complicating our task: If A winds up having a widow, we'll know who she is at the instant of A's death (and her remainder will become possessory); alternatively, if A winds up not having a widow, we'll know that fact at the instant of A's death as well (and the property will revert to O in fsa). Therefore, either way, it's analytically impossible that we could face a "gap" in possession.

The contingent remainder is subject to the RAP, and it is valid. A is a valid measuring life: A is alive at the creation of the interest (he is receiving, by inter vivos conveyance, a life estate); and we will get the answer to our question at the moment of A's death (we don't even dip into the extra 21 years).

Note that A is the *only* valid measuring life in this case. No one else can save the interest.

(10) O conveys to A for life, then to A's widow for life, then to the last of A's widow's children to attain the age of 21.

In the absence of the RAP, we'd have:

O: reversion [in fsa/fs subj. to an exec. int.]

A: life estate

A's widow: contingent remainder for life

Last of A's widow's kids to attain 21: contingent remainder

Note that O's interest here is slightly more complicated than it was in (9) above. This is due the possibility that A's widow may die survived by one or more children under the age of 21. In that case, we'd have a "gap." This is why O's reversion may wind up being in fee simple subject to an executory limitation.

The widow's interest is subject to the RAP, and it is valid (see (9) above).

The interest held by the last of the widow's kids to attain 21 is subject to the RAP. It is void, because there ain't nobody who can save it. Ted Koppel doesn't work. O doesn't work. Even A doesn't work (he could die tomorrow, and his widow could have another child 15 years later, which means we'd wind up having to wait 36

years after A's death for the answer to our question). Finally, note that A's widow herself doesn't work. True, any child of the widow will attain age 21 no later than 21 years after the widow's death. But, since A is alive at the time of the conveyance, his widow is an unascertained person; and, therefore, we cannot know that she is alive at the creation of the interest — i.e., she might not have been born yet (think Anna Nicole Smith!). This is the infamous “unborn widow” problem.

Thus, after applying the RAP, we are left with the following interests:

O: reversion in fsa

A: life estate

A's widow: contingent remainder for life

Last of A's widow's kids to attain 21: nada

Admittedly, this example is a bit odd, given A's presumed evolutionarily-honed inclinations: to wit, why would A wish to enrich his *widow's* children per se? First, they may very well not be A's own children. And second, at the time of the conveyance, the widow is unascertained; therefore, A doesn't even know *which woman's* children we're talking about. Perhaps A fancies himself a sensitive, new-age guy — imagining that whomever he'll be married to when he drops dead, his love for her will be so complete that he'll happily shower with immense riches the children she conceives with another man a week-and-a-half after (or even before) A's own funeral. Dunno.

By the way, the usual formulation of the “unborn widow” problem looks something like this: **“O conveys to A for life, then to A's widow for life, then to A's children then living.”** Here at least, we can *sort of* discern a rationale for the grant to “A's children then living” — at least the grantees are A's children. However, the “then living” qualification seems strange: Why would A (or O) want A's children to get a fee simple, *but only if they survive A's widow*? What's the motivation for this? What objective could A (or O) possibly be trying to achieve? (If you can offer a convincing, or at least interesting, rationale for this grant — and I presume there must be a plausible one, otherwise how would the courts ever have come to adjudicate the matter — please send it along to me.) Anyway, it shouldn't be a big surprise that the contingent remainder held by “A's children then living” is void under the RAP. No one can save it — including in particular the widow herself, because of the possibility of her being not-yet-born at the time of the conveyance.

Contrast the preceding grant with this: **“O conveys to A for life, then to A's widow for life, then to A's children.”**

Here, A's intentions seem plain: He wants his widow to be provided for during her life, and then he wants Blackacre to pass to *all* of his kids — including those kids (or, more precisely, those kids' heirs, who may very well be A's grandkids) who had the misfortune to die before A's widow. A's already-born children have vested remainders subject to open, and A's yet-to-be-born children have contingent remainders. The RAP applies to both, and is easily satisfied: A is a valid measuring life — he is alive at the time of the conveyance; and at the very moment of his death, the class consisting of his children closes (recall that we ignore gestation).