

The Rule Against Perpetuities — Demystified!

BY RICH KLARMAN

Rich Klarman is a private tutor based in Ann Arbor, Michigan. Since 1992, he has helped hundreds of students conquer the LSAT, law school coursework/exams, and the bar exam. To learn more, visit <http://testguru.com>.

pub.testguru.com/rule-against-perpetuities-demystified.pdf

see also:

pub.testguru.com/rap-exercises.pdf {sans explanations!}

pub.testguru.com/rap-exercises-explained.pdf

The RAP: “Any interest must vest, if at all, not later than 21 years after a life in being at the creation of the interest.”

This short bit of legal prose has terrified law students (and saddled unsuspecting attorneys with malpractice liability) for generations. It needn't cause you any (further) distress, however, as you've come to the right place! If you'll work your way through this document and its associated set of exercises, you'll emerge with a fairly robust understanding of the rule — certainly robust enough to crush the RAP on a 1st-year property final or the Multistate Bar Exam.

So let's get to parsing the text...

“Any interest”

This doesn't actually mean *any* interest. So what does it mean? Many authorities will tell you that it refers to “contingent” interests. This is arguably correct, so long as you're careful to define the term “contingent” in such a way as to make it correct. Such a definition of contingent — in addition to smacking of circularity — will hurt your brain in other ways: e.g., how can a *vested* remainder subject to open (which everybody agrees is subject to the RAP) be a “contingent” interest? Whatever.

Actually, the best way to understand the words “any interest” is to pretend that they read “certain interests,” and then just *memorize* which interests are the “certain” ones. I'm not generally an advocate of memorizing stuff; I'd prefer to understand it. Here, though, it's impossible to understand the rationale for why the RAP applies to one interest and not to another, unless you're a scholar of the intricacies of seisin and other medieval arcana (and even then all bets may be off). I do believe that a partial understanding, however, can guide you into certain safe harbors and thus simplify your memorization task — and also help you avoid making really stupid guesses.

Note that for purposes of a final exam in real property or the bar exam, you'd be a fool to try and memorize all the gory details. There are just too many subtle (and not necessarily rational) exceptions, etc. Rather, my advice is to memorize the most important and most frequently tested interests (see my enumeration, below). Granted, if you're taking — or, God forbid, teaching — a seminar dedicated to the historical evolution of the RAP, then this advice obviously doesn't apply to you. And it's not even clear why you're reading this. Although you do sound like the kind of person I'd like to have a beer with, which probably reveals the magnitude of my nerd-cred.

Let's cultivate that partial understanding... The way to think about those “certain interests” is that they all raise a question: Will A survive B? Will alcohol ever be sold on the property? Will A have more children and thus dilute B's share? Etc. The RAP is merely an expression that the law won't tolerate questions that might go unanswered for too long a time. (“But,” you say, “the law tolerates all manner of questions that might go unanswered for too long a time — e.g., the question implicit in a fee simple determinable.” Touché!)

At the end of the day, you're gonna have to do some memorizing. Our partial understanding at least helps us with the memorization. So...

The money-in-the-bank, bread-and-butter, groundball-to-short-over-to-first-for-the-out interests to which the RAP applies are:

- contingent remainders
- executory interests

Other interests that the RAP applies to include:

- interests subject to open
- powers of appointment
- options to purchase (other than tenant's option during lease term)
- rights of first refusal (so I've heard)

If you want a freakin' exhaustive list, there are many entire books on the subject. I'd suggest not worrying about it. Seriously.

Note that the following interests are NOT subject to the RAP:

- present interests
- vested remainders (other than vested subject to open!)
- any interest retained by the grantor (reversions, possibility of reverter, right of entry)

“must vest, if at all,”

This means that we must get a *final answer* to our question. The question mark floating around must be replaced with a period. The RAP doesn't give a damn what the answer is — i.e., “it vested” and “it hasn't vested, and it ain't never gonna vest” are equally good answers, in the sense that they're both final answers. In contrast, “it hasn't vested *yet*” is not a good answer, because it doesn't lay the question to rest — tomorrow the answer might be different.

Note that it is completely irrelevant that we *might* get our question answered in time. If it's at all possible that we won't get our question answered in time, then it fails the RAP. In other words, we perform the RAP analysis *ab initio*; we do not wait and see what ultimately happens. (Note, however, that many American jurisdictions have adopted a wait-and-see approach. But the topic we're examining in this document is the common law RAP.)

“not later than 21 years after a life in being at the creation of the interest.”

This is the common law's super-freaky way of saying: “in not too long of a time.” If the RAP read “not later than 90 years after the creation of the interest,” it wouldn't be as gnarly. In fact, many jurisdictions now do something along these lines — they abandon super-freaky time reckoning, opting instead for something super-simple. Alas, the Multistate Bar Exam remains neck-deep in the super-freak. So let's take a closer look:

not later than 21 years after This means no more than 21 years after *the death* (of the measuring life). Note that exactly 21 years after that death would be just in time — i.e., it wouldn't be *later than* — and would therefore be kosher by the skin on its teeth.

Note that gestation periods do not count toward this 21-year window. Gestation periods are regarded as somehow being non-time, or time-out-of-time.

a life in being This means a living, ascertained person (any freakin' living person you can point your finger at — indeed, any closed class of living persons you can point your finger at).

Note that, here as well, gestation periods are ignored: so a zygote (indeed, even a soon-to-be-fertilized egg) in existence now that is subsequently born alive is deemed to have been alive now. This follows from the legal fiction that dead people can't have additional children (which, at least in the case of men, is indeed a fiction).

(Many students seem to harbor the mistaken belief that this person — this “life in being” guy — must be named in the grant or must be a life tenant or something. Wrong, wrong, wrong! Any freakin' living person on the planet qualifies for consideration. (Didn't I just say that in the preceding paragraph?) In many cases, we wind up using a dude mentioned in the grant, not because of some formalistic requirement that the measuring life must be a dude mentioned in the grant, but rather because he's the only guy who *works* — i.e., he's the only guy in the universe who will save the interest. But there are many trivial cases (what I refer to as the 21-years-from-right-now situations) where anybody walking down the street will work.)

But when exactly do you have to perform this finger pointing ritual, this “ascertaining”? And when exactly does this living person have to be alive? The answer to both of these questions is the same: it is...

at the creation of the interest This means at the moment in time when the interest was created, since that is precisely the moment when the question — “to vest or not to vest? that is the question” — first arose. For interests created by devise, it's the instant of the testator's death. For interests created by conveyance, it's the instant of the conveyance (presumably, delivery of the deed).

Now what am I supposed to do?

If you've made it this far, you may feel waves of ecstasy undulating through your chakras, or perhaps not. In my experience, law only makes sense when we apply it to some actual (umm, hypothetical) cases. This is always so, but perhaps especially so when we're trying to get our heads around the admittedly abstruse contours of the RAP.

So I suggest that you take what we've discussed here and apply it to some RAP exercises. I've prepared a series of such exercises, which will help clarify the rule and sensitize you to certain recurring patterns you will likely face on exams. You can find these exercises at:

<http://pub.testguru.com/rap-exercises.pdf>

This document contains only the exercises. You'd be well advised to give this one the old college try before peeking at the next one.

<http://pub.testguru.com/rap-exercises-explained.pdf>

This document contains the same exercises as rap-exercises.pdf, but it also includes extensive explanations for each exercise. I beseech you to try the exercises on your own before peeking at the "teacher's edition" — that is, don't squander this learning opportunity. (Oh yeah, and eat your vegetables!)