

Winter 1994

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Mark Reutlinger, *When Words Fail Me: Diagramming the Rule against Perpetuities*, 59 MO. L. REV. (1994)
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When Words Fail Me: Diagramming The Rule Against Perpetuities

Mark Reutlinger*

I. THE BACKGROUND

There is no shortage of creative ways in which teachers of Property law have sought to represent graphically the operation of the Rule Against Perpetuities.¹ I have myself, over the years, tried a number of methods, none of them wholly satisfactory. The reason we all keep trying is that the Rule² simply does not lend itself to mere verbal explanation. Although quite easy to state and memorize, each of its terms is saturated with difficult and interrelated concepts that operate on several planes. A future interest must "vest" or fail within 21 years of a "life in being" at the "creation" of the interest: When is an interest created? When does it vest? How? Who are possible lives in being? When does the 21 years begin and end? And so on.

The time when I most need a graphic representation of the operation of the Rule is when I am teaching it, that is, when I am standing before a classroom of semi-bewildered³ law students and attempting to elicit by Socratic dialogue or explain by straight lecture just how and why John and Elizabeth Jee's four daughters were denied the benefits of Edward Audley's will, despite the facts that all four were alive and kicking and were clearly intended by Audley to take.⁴ Most often I have employed a simple time line to illustrate the

* Professor of Law, University of Puget Sound School of Law. A.B., 1965, J.D., 1968, University of California, Berkeley. Copyright (c) 1993 by Mark Reutlinger. My thanks for their review and comments to my colleagues Geoffrey Watson, who purports to know nothing about the Rule Against Perpetuities, and John Weaver, who admits to knowing quite a bit about it.

1. See, e.g., FREDERIC S. SCHWARTZ, A STUDENT'S GUIDE TO THE RULE AGAINST PERPETUITIES (1988); ROBERT LAURENCE & PAMELA B. MINZNER, STUDENT'S GUIDE TO ESTATES IN LAND AND FUTURE INTERESTS 5-12 to 5-15 (1981). Of course, these are only two of the *published* examples. Many more are used every day by teachers but have not been shared with the public (including, for all I can say, identical ones to mine).

2. I always capitalize the Rule Against Perpetuities. No one who has taken or taught the subject will doubt that, in this area of the law, it isn't just another rule of law; it is *the* Rule.

3. That is assuming that the students have thoroughly prepared for the class and are merely puzzled by what they have read. If they are poorly or unprepared, one may remove the prefix "semi-."

4. *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (Ct. of Ch. 1787). This is, of course, the famous "fertile octogenarian" case, in Leach's words "the case that launched a thousand quips." The "unborn widow" and "magic gravel pits" are no easier to explain.

Rule's application. Although it helps me to point out the time sequence of events, it does little to demonstrate or to fix in the students' minds the interrelationships of time and circumstance that the Rule embodies.

Matters proceeded this way until I was in the midst of writing a book on the subject.⁵ My editor and a reviewer or two were less than excited—perhaps "bored" would be a better word—by the time lines that I was using. Although I had used them in the draft primarily because they were the easiest to draw on my computer, their comments nevertheless made me think anew about better ways to illustrate perpetuities concepts.

First, I asked myself what were the most confusing aspects of the Rule from a student's perspective, and the ones that most needed graphic illustration. I decided that, judging from my experiences in the classroom and in grading examinations, students had the most difficulty "picturing" the time gap between creation of an interest (the beginning of the perpetuities period) and its vesting, and the relationship of the relevant lives to that gap. I then proceeded to create a series of diagrams that illustrated just those features—that "bridged the gap," if you will, for students.

I attempted to keep my new diagrams relatively simple (although history demonstrates that nothing relating to the Rule Against Perpetuities is ever destined to be truly simple) and of a type that could not only be set out in a book but also roughly sketched by a student or instructor for purposes of study or class discussion. I tried them out on a few students who had already taken a course covering the Rule, and the reviews were positive. Next I tried them out on my Trusts & Estates class, using an overhead projector and screen, again with favorable results. As a last confirmation, I waited to see whether I would notice any improvement in my students' understanding of perpetuities concepts in their final examinations. I was pleased to find that the class did indeed perform better than usual on the portion of the exam covering the Rule. I decided the diagrams were ready for prime time and included them in my book chapter. They even made my editor happy.

There is, of course, nothing scientific about my survey of effectiveness, and different students—not to mention different instructors—will get more or less benefit from any particular pedagogical device, including this one. For what it is worth, however, and for those who wish to try it, following is an explanation and examples of my "bridging the gap" diagrams as I now use them in my classroom discussions.

II. THE DIAGRAMS

To restate the Rule, it invalidates a future interest unless the interest must certainly vest or fail before the expiration of the lifetime(s) of some person or persons already living at the date of the creation of the interest, plus 21 years.⁶

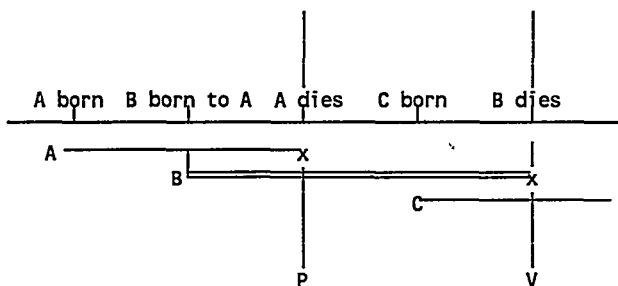
5. MARK REUTLINGER, *WILLS, TRUSTS, AND ESTATES: ESSENTIAL TERMS AND CONCEPTS* (1993). The diagrams appear in Chapter 15.

6. Plus, technically, any periods of gestation. The Rule is concerned only with possible events, not actual events: If *at the time of the interest's creation* it is theoretically possible (even if practically preposterous) that the interest will

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The object of the diagram is to illustrate the relationship between vesting and "lives in being" and at the same time to indicate whether, in the particular circumstances, the interest will necessarily vest (or fail) in time.

The basic diagram is really quite simple. A horizontal time line represents the chronological order of events: births, marriages, deaths, the exhaustion of the gravel pits, and so forth. The relevant lives (those that can affect vesting) are drawn below and parallel to the time line, from birth to either death or infinity if death is not relevant.⁷ Finally, and most important, two vertical lines are drawn: one to represent the beginning of the perpetuities period (labeled "P"), and the other to represent the vesting of the interest (labeled "V").⁸ A "generic" diagram, for a problem in which A at his death created a contingent interest in yet-unborn C, the interest vested at the death of A's daughter B, and B was therefore a validating life, might look like this:



Once the necessary persons and events are in place, it can immediately be seen whether there is or is not a validating life.⁹ If there is a relevant life line that reaches from the first vertical line ("P") to the second ("V"), or to within 21 years of the second, that line represents a validating life. (I have represented such a person with a double line, for emphasis.) If, on the other hand, no horizontal life line reaches from one vertical line to within 21 years

vest beyond the perpetuities period, it is invalid. For a more detailed explanation of the Rule and its nuances, a number of sources may be consulted, including REUTLINGER, *supra* note 5, at 183-208; LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 263-97 (2d ed., 1966); W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965); Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867 (1986).

7. The change to a horizontal format with separate representation of individual lives was originally suggested by an anonymous reviewer. My thanks to him or her.

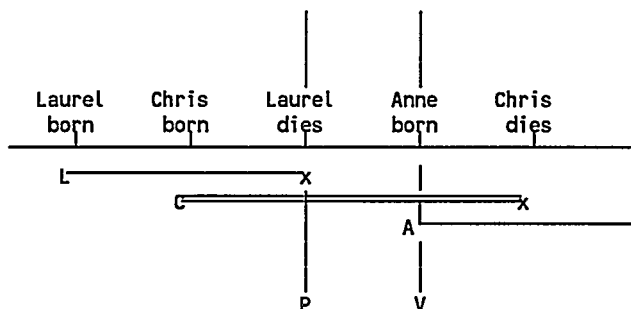
8. Part of the process, of course, is learning where to draw the vertical lines. As will be seen, these diagrams can be quite useful in illustrating not only the usual points of creation and vesting, but also such special rules for the vertical lines as when the perpetuities period begins for powers of appointment, or when it ends for class gifts.

9. The synonymous terms "life in being," "validating life," and "measuring life" are all currently in vogue, and I tend to use them interchangeably.

of the second, there is no validating life and the interest fails. Now let us apply this to a simple problem:

Laurel's will leaves her house "to Christopher for his lifetime, remainder to Christopher's first child." At Laurel's death, Christopher has no children. As an interest cannot vest in an unborn person, the remainder interest of Christopher's first child (if he should have one) will not vest until the child is born. We now need to find a validating life, a person alive at the creation of the interest (the death of Laurel) within whose lifetime (plus 21 years, if necessary) the gift to Christopher's child must certainly vest. Laurel herself does not qualify, because the child (let us call her Anne) might be born more than 21 years after Laurel's death. Anne herself does not qualify, because although she will be born within her own lifetime (so to speak), she was not alive at Laurel's death. That leaves Christopher himself. Since Anne must be born (if she is to be born at all) within Christopher's lifetime (plus a period of gestation should Christopher die between Anne's conception and birth), and since Christopher was a "life in being" at the death of Laurel, Christopher himself is a validating life and the gift to Anne is valid.

The above is easy enough to state, but it is difficult to conceptualize, especially for students studying the subject for the first time. The diagram below, however, clearly illustrates that Laurel and Anne cannot be validating lives but Christopher can, and why:



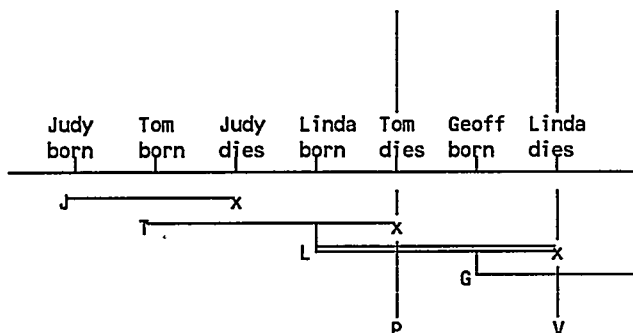
Laurel's life line ends at the first vertical line; Anne's begins at the second. Christopher's, however, begins before the first and ends after the second, thus "bridging the gap" between creation and vesting (the beginning and end of the perpetuities period) and validating the gift.

The above is helpful for the beginning student of the Rule; but the diagrams' possibly greater value is for the more advanced student, in explaining such complex concepts as the "fertile octogenarian" or the application of the Rule to powers of appointment. I shall conclude with the latter, as it is one of the best uses I have found for the diagrams.¹⁰

Assume that Judy's will gives to Tom a life estate and a general inter vivos power of appointment. Tom exercises the power by appointing "to my daughter Linda for life, remainder to her children who survive me or are born after my

10. It also is the basis for the little conceptual dilemma described in the

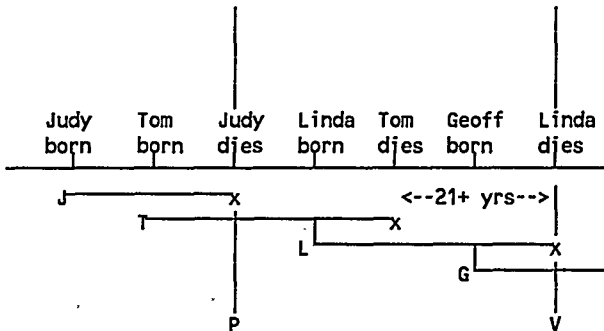
death." Linda was not alive at the time of Judy's death. She has one child, Geoffrey, after Tom's death. Is the remainder in Linda's children valid? For a general inter vivos power, the perpetuities period begins at the time of exercise (Tom's death), because Tom, the donee, is treated as the owner of the appointive property. Since Linda was alive at that time, and since all of her children will be born within her lifetime, Linda can be a validating life and the interest of her children is valid. The diagram would look like this:



If, however, Tom had been given a special (or testamentary) power, and had made the same appointment as above, the result would not be so clear. Under the "relation back" doctrine we treat a special or testamentary power as though the donee were not the owner of the appointive property but an agent of the donor, simply "filling in the blanks" in the will of the donor. The perpetuities period begins at the time of creation of the power (Judy's death), not its exercise. Thus we read Tom's appointment back into Judy's will, as follows: "to Tom for life, remainder to his [as yet unborn] daughter Linda for life, remainder to Linda's children." The interest of Linda's children will vest

indefeasibly¹¹ when Linda dies.¹² Since Linda might have a child (Geoffrey) and then might die more than 21 years after the death of Judy, Tom, and all others alive at Judy's death, the interest of Linda's children looks invalid. Now Linda cannot be a validating life because she was born after Judy's death, when the perpetuities period began, and no one else is available.

Again a diagram quickly illustrates why Linda can "bridge the gap" for a general inter vivos power but cannot do so for a special or testamentary power:

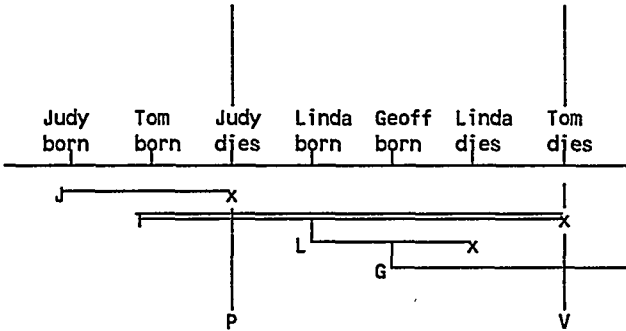


In this diagram, unlike the previous one, Linda's life line does not extend from the first vertical line to the second, nor does anyone else's. The two diagrams together illustrate that it is the difference in location of the first vertical line dictated by the "relation back" doctrine (all other features being identical) that makes the difference between a valid and an invalid interest.

But wait: We must take into account the "second look" doctrine. We are permitted in the case of a special or testamentary power to take a "second look" at actual events at the time of exercise. If these events demonstrate that the theoretical late vesting of the interest cannot in fact occur, then the interest is valid. In our example, such events might be Linda's death before that of Tom, leaving a child (Geoffrey) surviving her. Since her death physiologically closes the class of children and makes it impossible for a child's interest to vest beyond the lifetime of Tom, who was alive at the death of Judy, Tom can now be a validating life and Geoffrey's interest is valid. A slightly altered diagram easily illustrates this conceptual sleight-of-hand:

11. An interest that is vested in a child "subject to open," that is, to partial divestment upon the birth of more children, is not vested for purposes of the Rule; thus the perpetuities period does not close until Linda's death.

12. Under the "fertile octogenarian" rule, Linda will be presumed capable of having more children until she dies, no matter what her age.



"Bridging the gap" diagrams can help to illustrate all of the traditional mysteries of the common-law Rule Against Perpetuities. While they cannot substitute for a thorough grounding in the basic principles of property law, including the various vested and contingent future interests and the arcane nuances of the Rule itself, they can be a significant aid in putting those theoretical principles to practical application. They can bridge the gap not only between creation and vesting, but between verbal knowledge and conceptual understanding. When words fail, try a picture.

Appendix

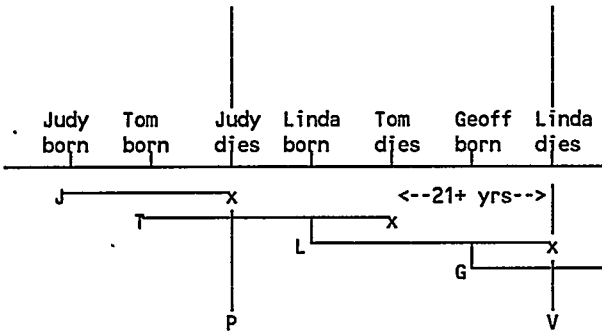
The Sleeves from Our Vest: Naming a Perpetuities Non-event

*Mark Reutlinger and John Weaver**

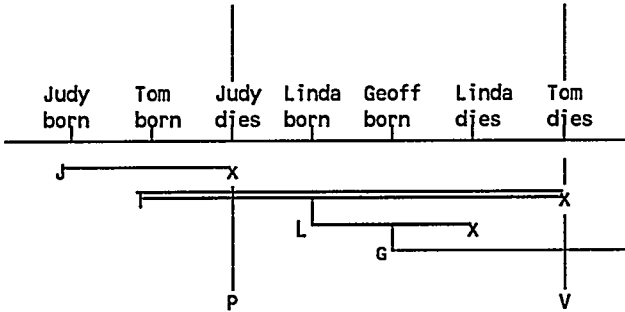
In the course of developing the series of diagrams to illustrate the Rule Against Perpetuities described in the accompanying article, I came upon a conceptual dilemma. To describe it briefly (if not simply), the perpetuities period for a special or testamentary power of appointment begins when the power is created (not exercised), and it ends when the appointed interest vests. Applying the "relation back" doctrine, the appointment is treated, for perpetuities purposes, as if it were a gift by the donor, rather than the donee. Under the "second look" doctrine, however, one may take into consideration events and circumstances existing at the time of exercise in determining whether, when viewed as of the time of creation, the appointed interest violates the Rule.

To use the example set out in the accompanying article: Assume that Judy's will gives to Tom a life estate and a special power of appointment. Tom exercises the power by appointing in his will "to my daughter Linda for life, remainder to her children who survive me or are born after my death." Linda was not alive at the time of Judy's death. She has one child, Geoffrey, born after Tom's death. Under the "relation back" doctrine we treat a special power as though the donee were simply "filling in the blanks" in the will of the donor, the perpetuities period beginning at the time of creation of the power (Judy's death). Thus we read Tom's appointment back into Judy's will, as follows: "To Tom for life, remainder to his [as yet unborn] daughter Linda for life, remainder to Linda's children." The interest of Linda's children will vest indefeasibly when Linda dies. Theoretically, Linda might have a child (Geoffrey) and then might die more than 21 years after the death of Judy, Tom, and all others alive at Judy's death, in which case the interest of Linda's children would be invalid.

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But we are permitted to take a "second look" at actual events at the time of exercise. Assume, therefore, that Linda died before Tom, leaving a child (Geoffrey) surviving her. As the next diagram illustrates, Linda's death closes the class of her children and Tom's subsequent exercise of the power at his death vests the interest in Geoffrey indefeasibly. Or does it?



In drawing my diagram, I simply drew a vertical line at Tom's death, representing the time of vesting of Geoffrey's interest. It was at this point that I noticed a small anomaly inherent in the "relation back" and "second look" doctrines. Those rules view the validity of the interest as of the time of creation of the power; but they permit us to take into account events that occurred later, at the time of exercise.

If Judy's will had *actually* read as the relation back doctrine postulates, the second vertical line would have been drawn at the date of Linda's death, not Tom's. This is because Tom would have been irrelevant to the vesting of the interest (other than its vesting in possession at the end of her life estate¹³) had the gift been directly from Judy. Since, however, in "real life" there *was* no remainder in Linda or her children until Tom died and exercised the power (thus "completing" Judy's will), in real life the remainder could not vest until Tom's death. Thus we have two times of vesting: that at which the fictional

13 The vesting that is important for the Rule Against Perpetuities is vesting in interest, not necessarily in possession. A vested remainder following a life estate may never come into the remainderman's possession, but it has vested in interest for purposes of the Rule.

"second look" remainder would have vested, and that at which the actual remainder vested.

It was at this point that I asked my colleague, an inveterate wordsman, what one could call the theoretical-but-not-actual vesting of the remainder upon Linda's death. That led to our coming up with the following possibilities:¹⁴

Para-vest: The prefix "para-" refers to something that is almost, but not quite, something else. The remainder is almost, but not quite, vested at Linda's death, the one little difference being that it hasn't yet been created. We particularly like this term because of its relationship to parapsychology, the science of such phenomena as clairvoyance. How better to describe a gift to Linda by Judy before Linda had been born or even conceived, and also by Tom after Linda had already died?

Quasi-vest: Here we define what happens at Linda's death as resembling vesting, and even having some of the characteristics of vesting, but lacking some crucial attribute. At Linda's death Geoffrey's remainder has most of the usual characteristics of a vested remainder: its holder is ascertained, and it is subject to no condition precedent. It is indefeasibly vested, because Linda can have no further children to share Geoffrey's interest. There is only one small attribute lacking: it does not yet exist. A small matter, but sufficient to justify the "quasi" prefix.

Hyper-vest: Something that is "hyper-" is above or over the norm; in mathematics it is an extension or complication of a basic type. In a sense, Geoffrey's interest vests twice, or at least it vests more than the normal single time. Like the shift beyond three dimensions into "hyperspace" in recent science fiction, the first vesting, at Linda's death, might be seen as existing not in the usual three dimensional world, but only in some parallel universe, beyond that which we can adequately see or explain. On the other hand, Linda's death may better be considered:

Hypo-vest: Unlike "hyper-," "hypo-" refers to something *less* than normal. Whatever happened at Linda's death, it clearly was less than sufficient to vest the interest in normal terms, Tom's death being required to complete the transaction.

Crypto-vest: "Crypto-" means hidden or secret: a cryptogram is a secret writing. In our example the vesting event turns out to be Linda's death, except that no one knew at that time that it had happened. Thus the vesting remained hidden until Tom's death.

14 The prefixes that we describe below derive from standard dictionaries. They may, however, be consistent only with one of several possible meanings of the prefix. If you thought a particular prefix meant something other than what we say, you probably are right.

Crypto-vest: "Crypto-" means hidden or secret: a cryptogram is a secret writing. In our example the vesting event turns out to be Linda's death, except that no one knew at that time that it had happened. Thus the vesting remained hidden until Tom's death.

Pro-retro-vest: "Pro-" means forward, and of course "retro-" means backward. This construction was inspired by films like "Back to the Future," in which characters travel back in time to correct or change events in the present or future. A recurrent problem such time travelers encounter is that one can never be certain what the full significance of an act in the past might be in the future. Linda's death is an event the full consequences of which (vesting Geoffrey's interest) could not be known at the time it occurred; but on our return to it via the "second look" doctrine, we can look back to what happened then and then forward to what we now know to have happened upon Tom's later death. Moreover, using the relation-back doctrine, we actually can attach significance to Linda's death that, left to its own devices, it would not have had. Truly an instance of "looking back to the future."

Meta-vest: This final entry really refers more to Tom's death than to Linda's. "Meta-" denotes something occurring after and at a higher or more specialized level than another, usually changed in form. Whatever form of vesting occurred at Linda's death (see above), that which occurred upon Tom's death certainly was more complete, more specific, and more effective.

We did consider a few other, perhaps more obvious possibilities, such as "antevesting" (since the event occurs before it affects vesting) or "bivesting" (to connote the two separate events). We decided, however, that the relative rarity and obscurity of the described anomaly warranted far more cryptic, not to mention hyper, descriptions. Nevertheless, we have not exhausted the possibilities. We welcome readers' suggestions for additions to our list.

