I. RULE AGAINST PERPETUITIES (CONCLUDED)

1. Perpetuities and trusts—the Rules are surprisingly unclear

   a. It is generally thought that the perpetuities period does not run on a trust if one or more people have the power to revoke it. It is pretty clear that the perpetuities period does not run on a trust if the grantor has the power to revoke it. If the trust is irrevocable, however, the period of revocability is generally thought to be limited to the perpetuities period.

   b. Spendthrift trusts. The reason for the absence of clear authority may be that most such trusts are irrevocable. Hence, the R/Perp on irrevocability probably applies, and that is somewhat clearer.

2. What if (cont'd)?

   a. G —>trustees to pay income to G for life —> G's children for their lives ->G's grandchildren whent they reach the age of 21. G retains power to revoke during his lifetime.

   b. G —>trustees to pay income to G for life —> G's children for their lives —>le G's grandchildren when they reach the age of 21 —>rdr G's great grandhcildren when they reach 21. G retains power to revoke during his lifetime. G also grants the power to any grandchild life tenant to compel the trustees to distribute to him or her the portion of the capital attributable to him or her.

3. The policy of the Rule

   a. Economic reasons for the Rule

      i. Removing an asset entirely from market forces—c rdr at common law—by and large solved today by making all interests alienable, also by use of trust. Land use restrictions can have this result too, though they are generally not included within the Rule.

      ii. Holdout problems—the longer the time before the interest falls in, the less its present value

      iii. Transactions costs (a variant, perhaps, on the holdout problem, but we can make it separate by assuming that everyone is "rational" and has something that is worth something), G —> A, B, C, D, E, F, and G

   b. dynasties—the use of the taxing power

   c. internal contradiction—the fundamental problem

   d. the basic cut of the Duke of Norfolk's case

   e. the Rule today—implication of the text that there are large number of jurisdictions that do not have the c.l. rule is probably incorrect. An increasing number of jd's have their doubts. The two basic approaches are wait and see and cy pres. Perhaps statute is more common than c.l.

but c.l. is a way to do it too. Statute may also add the notion of an expansive term in gross.

f. The future of the Rule — what I say in the text is out of date so far as trusts are concerned. When I wrote that there was a gradual move to loosening the Rule, very gradual, and the statutes and cases that I gave you was typical of what was going on. That is still true so far as legal future interests are concerned. As a result of considerable pressure from the banking industry a number of states have within the last five years enacted laws exempting trusts or enacting a perpetuties period of 500 or 1000 years. A recent count brings us up to 29 states. I think these statutes are a bad idea. More to the point, I don't think that these statutes will survive. Much depends on what Congress does when it finally gets around to reforming the estate tax code, and it is likely that it will impose such heavy taxation on these trusts that they will disappear. Also, the political power of the banking industry is not what it was when most of these statutes were passed. For a good discussion of the issues, see http://www.michiganlawreview.org/assets/fi/109/waggoner.pdf (last visited 3/3/2011).

4. Sample exam question. "I devise the Stark Farm to my son Bartholomew and his heirs in fee simple for as long as they shall farm the property; and if they shall ever cease to farm it, then to my daughter, Clarissa and her heirs in fee simple, if she shall then be living; otherwise to the Eden Audubon Society."

II. CO-TENANCIES, i.e., CONCURRENT INTERESTS

1. O —> A, B, and C

a. At common law

b. Modern law

c. A —> X

d. C dies; what is the state of the title

e. O —> A 1/3, B 1/3, C&D 1/3

f. Uniform Simultaneous Death Act, § 4 (UPC §2-104 and 2-702). In general 120 hours required (§ 3), but in the case of joint tenancies, if it cannot be shown that one of them survived by 120 hours, then distributed equally.

2. What was the NH statute all about? (p. 512): "Every conveyance or devise of real estate made to two or more persons shall be construed to create an estate in common and not in joint renancy, unless it shall be expressed therein that the estate is to be holden by the grantees of devisees as joint tenatnts, or to them and the survivor of them, or unless other words are used clearly expressing an intention to create a joint tenancy."

a. An attempt to implement intent?

b. The probate court clerks protective act?

c. *Gagnon*: “to Jules L. and Georgina T. and to the survivors of them.” Habendum and warranty: “to the granteees, their heirs and assigns.” Held: tenants in common. Case illustrates potential conflict between granting and habendum clauses. Note how changing “survivor” to “survivors” produces strikingly different results.

d. So how do we do it right? “To A & B as joint tenants with right of survivorship and not as tenants in common.” Note what this produces in Michigan.

3. A —> A

A —>A and B

A —>X —>A and B

a. At common law

b. Modern law

4. Wisconsin statutes—the problem of retroactivity

a. Wisc. 1933:

i. Any deed from husband to wife or from wife to husband which conveys an interest in the grantor’s lands and by its terms evinces an intent on the part of the grantor to create a joint tenancy, and any husband and wife who are grantor and grantee in any such deed heretofore given shall hold the premises described in such deed as joint tenants.

ii. Any deed to two or more grantees which, by the method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy.

b. In a deed dated in 1944, “Bertha Hass —> Bertha Hass and Herbert W. Hass of Marathon County, mother and son, a life estate as joint tenants during their joint lives and an absolute fee forever in the remainder—> the survivor of them in his or her own right”. *Hass v. Hass* (1946)

c. Wisc. c. 1950: Any deed to two or more grantees, including any deed in which the grantor is also one of the grantees, which, by the method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy.

d. In a deed dated in 1940, “Emil Moe —> Emil Moe and Emma Moe [his sister], joint tenants”. *Moe v. Krupke* (1949).

e. Wisc. 1969: (p. 514–15): (1) The creation a joint tenancy is determined by the intent expressed in the document of title, instrument of transfer or bill of sale. Any of the following constitute an expression of intent to

create a joint tenancy: “as joint tenants,” “as joint owners”, “jointly”, “or the survivor”, “with right of survivorship” or any similar phrase.

(2) If persons named as owners in a coucment of title, transferees in an instrument of transfer or buyers in a bill of sale are described in the document, instrument or bill of sale as husband and wife, or are in fact husband and wife, they are joint tenants, unless the intent to create a tenacy in common is expressed in the document, instrument or bill of sale. …

(5)The common law requirements of unity of title and time for creation of a joint tenancy are abolished.

5. A a jt with B—> A. This one is not covered by stat in most places. Cal. has abolished the c.l. requirement of a straw as a c.l. matter, and other states have too.

6. G—> “A and B, husband and wife.” B —> D.

How does this come out if the jurisdiction has passed a statute declaring that married women may hold and convey property as if they were *femes soles*?

7. *Holbrook*

a. O’Connell, J.

b. Who’s Eleanor L. Anderson?

c. What was the purpose of the conveyance?

d. What does the court hold?

e. A side note on the statute and on policy.

f. The statutory situation in Oregon today. P. S35.

Every conveyance or devise of lands, or interest therein, made to two or more persons, other than to a husband and wife, as such, or to executors or trustees, as such, creates a tenancy in common unless it is in some manner clearly and expressly declared in the conveyance or devise that the grantees or devisees take the lands with right of survivorship. Such a declaration of a right to survivorship shall create a tenancy in common in the life estate with cross-contingent remainders in the fee simple. Joint tenancy is abolished and the use in a conveyance or devise of the words “joint tenants” or similar words without any other indication of an intent to create a right of survivorship shall create a tenancy in common.

8. The economic relation among co-tenants.