Corporate Lives and the Rule Against Perpetuities

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Control of future dispensation of land by current owners is a popular concern by owners worried about what will happen to it (and on it) after their death. Restrictions made on future dispensations, however, were found to limit the usefulness and value of land in the ensuing decades and even centuries. Soon the quick challenged the dead and courts were asked to make law. In 1682, *The Duke of Norfolk's Case*[1] launched the Rule Against Perpetuities (hereinafter, "the Rule") into the common law tradition.

Norfolk established that executory interests are only valid and enforceable if they were sure to become possessory within a certain span of years. The *Norfolk* court and subsequent courts held that the point in the future at which possession must have been achieved was set according to the lives of the people involved in the grant—the so-called "lives in being." Subsequent evolution of the Rule converged on a certain number of years measured such that no interest passed muster under the Rule save those that "must vest, if at all, within 21 years following a life or lives in being at the creation of the interest."[2] If the Rule is applicable, the "life in being," the measuring life, typically must be a life that is relevant to the interest being conveyed. It cannot be an arbitrary life chosen by the contracting parties.[3]

The purpose of the Rule is to reign in the application of executory interests so that tracts of land are not encumbered by perpetual interests that could potentially switch a tract's ownership at the occurrence of some event many years later. In practice, in states like Texas where the Rule is applied immediately, clauses that violate the Rule are simply crossed out, leaving the instrument to be read without the struck clause(s) but with all other clauses intact.

Recent oil and gas cases in Texas have heightened worry and interest in the Rule.[4] Article I, section 26 of the Texas Constitution expressly provides: "Perpetuities . . . are contrary to the genius of a free government and shall never be allowed . . . ."[5] Texas courts, seeing that strong brew of words in the state constitution, have seen to it that application of the Rule comes immediately. Per case law in Texas, the Rule states that no interest is valid unless it must vest, if at all, within 21 years after the death of some life or lives in being at the time of the conveyance.[6] The Rule requires that a challenged conveyance be viewed as of the date the instrument is executed, and the violative clauses are void if by any possible contingency the grant or devise

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[1] 3 Ch. Cas. 1 (1681).

[2] While similarly described in many sources, this particular quote of the Rule's vesting period was taken from Robert Laurence and Pamela Minzer's *A Student's Guide to Estates in Land and Future Interests* (2d ed., LexisNexis, 1993).

[3] This author agrees with Texas title examiner Terry Cross that, unless the Kennedy family is actually involved in the captioned transaction, lives in beings should not include "the survivor of all now living descendants of Joseph E. Kennedy, father of the late President of the United States" as is commonly used in transactional practice as a ham-fisted dodge of the Rule. *See* Terry I. Cross, *The Ties That Bind: Preemptive Rights and Restraints on Alienation That Commonly Burden Oil and Gas Properties*, 5 TEX. WESLEYAN L. REV. 193, 227 n.202 (1999).

[4] *See, e.g.*, ConocoPhillips v. Koopmann, 547 S.W.3d 858 (Tex. 2018).

[5] Tex. Const. art. I, § 26

[6] Foshee v. Republic Nat'l Bank of Dallas, 617 S.W.2d 675, 677 (Tex. 1981).

could violate the Rule.[7] The Rule is harsh as it unravels instruments upon execution and therefore can be a trapdoor to malpractice for unwary attorneys.

The Rule's proper application pops up in some bizarre circumstances and has given rise to macabre-sounding rules.[8] One less crazy situation to consider is where one or more of the lives in being are corporate entities or partnerships or the like—raising the question of what length of time could be tacked on to 21 years for these entities if there are no individuals involved. Perhaps the first encounter many lawyers have with this question occurs in the first year of law school and is found in the case of *Symphony Space, Inc. v. Pergola Properties, Inc.*,[9] an excerpt of which is included in the most widely used Property casebook.[10] In this case, two entities—a non-profit and a corporation—entered into an agreement wherein the non-profit was sold a commercial tract in Manhattan but the tract remained subject to a repurchase option that could be exercised on any one of four express future dates. Three of the dates fell within 21 years of the effective date of the agreement, but the fourth fell outside 21 years. The corporation later assigned its interest to another corporation who then chose to exercise the option at the earliest opportunity. At that point, the non-profit successfully challenged the option held by the successor corporation as violative of the New York version of the Rule.[11] The court held that, since the option's last date fell outside the 21-year window allowed by the Rule, that the entire option was killed off by the Rule in an opinion that signaled that corporations in New York got 21 years under the Rule but no more.[12]

According to the *Restatement of Property*, at common law, a corporation did not qualify as a life in being.[13] A comment therein ponders on the meaning of "life in being:"

> The lives which can be used in measuring the permissible period under [the Rule] must be lives of human beings. For many purposes in the law a corporation is a "person," but not for the measurement of the period described in Clause (a). So also no such measurement may be expressed in terms of the life of any animal (other than man), even though the animal is one of a type having a life span typically shorter than that of human beings, as for example, a dog or a horse.

No less a property luminary as Jesse Dukeminier seemed to believe it himself, saying offhandedly in a footnote about the possible length of an option in the face of the Rule where the

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[7] Brooker v. Brooker, 106 S.W.2d 247, 254 (Tex. 1937).

[8] Among these are the Fertile Octogenarian Rule, the Unborn Widow Rule, the Precocious Toddler Rule, the All-or-Nothing Rule, and the Wait-and-See Doctrine.

[9] 669 N.E.2d 799 (N.Y. 1996).

[10] PROPERTY by Dukeminier, Krier, Alexander, Schill & Strahilevitz (10th ed., Wolters Kluwer, 2022).

[11] ESTATES, POWERS & TRUSTS (EPT) ch. 17-B, § 9-1.1(a)–(b).

[12] As the casebook authors note in the associated Teacher's Manual, the seperability doctrine was *not* employed by the parties or the court. This doctrine provides that when an instrument creates a future interest (exercise of an option in *Symphony Space*) which may vest upon either of two or more expressed events, one of which must occur, if at all, within the perpetuities period, and the other of which may not, the contingent future interest is valid if the first event occurs and void if the second event occurs. Application of this doctrine might have changed the outcome of *Symphony Space*.

[13] RESTATEMENT (FIRST) OF PROPERTY § 374, cmt. h (Am. Law Inst. 1944).

"measuring life" was a corporation: "option in a corporation, which can endure only for 21 years."[14]

The United State Supreme Court reviewed application of the Rule in the Territory of Hawaii and affirmed the Hawaii Supreme Court in *Fitchie v. Brown*.[15] This oft-cited case, in which Professor John Chipman Gray, a perpetuities expert from the hoary days of yore, appeared as counsel for the appellees, involved the validity of a clause in a will that provided for the formation of a trust that was to last "for as long a period as is legally possible, the termination or ending of such trust to take place when law requires it."

The Court held the trust valid on the ground that, while the testator had not selected the specific lives in being, the will implied that the annuitants should be the measuring lives—all 40 or more of them. On point to the present topic, the Court mentioned that a corporation or joint stock company could not constitute a life in being within the Rule and that to allow that would render the disputed trust void, and the testator intended a valid trust.[16]

Over a century later, the Supreme Court of Oklahoma ruled an agreement granting a party the right to participate in all future oil and gas wells on the captioned land, but without an express time period being provided, violated the Rule and a limited liability company could not be a "life in being" for purposes of article II, section 32 of the Oklahoma Constitution—the Rule as applied in Oklahoma.[17] In the case, American Natural Resources, Ltd. (ANR), entered into a letter agreement with the predecessor-in-interest to defendant Eagle Rock Energy Partners, L.P. (Eagle Rock) regarding the development of an area of mutual interest (AMI). ANR agreed to assign leases in the AMI, and, in exchange, Eagle Rock's predecessor agreed to, among other things, allow ANR to participate in all future wells drilled in the AMI at any time whether or not the parties held a current lease. The provision allowing ANR to participate in future wells (the "Option Provision") provided:

> 2. In all subsequent wells within the AMI, ANR shall have the right to participate in the prospect area with a twenty-five percent (25%) working interest . . . .

ANR later contended that Eagle Rock drilled and completed 17 wells in the AMI without allowing ANR to participate in breach of this provision. In the ensuing litigation, Eagle Rock filed a motion to dismiss for failure to state a claim, urging that the Rule prevented ANR from enforcing the Option Provision. ANR responded that the Rule did not apply to oil and gas operating agreements and, more specifically, did not apply to the Option Provision because oil and gas production is always of limited duration.

The trial court granted Eagle Rock's motion to dismiss. On appeal, the Court of Civil Appeals remanded the case so that ANR could amend its pleadings and for a determination of

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[14] Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1707 n.161 (1985) (citing W. Barton Leach, *Perpetuities Legislation: Hail Pennsylvania!* 108 U. PA. L. REV. 1124, 1146 (1960)). The Leach article cited there likewise assumes that to be the rule without citation to august personages such as John Chipman Gray or to any *Restatement*.

[15] 211 U.S. 321 (1908).

[16] *Id.* at 334.

[17] Am. Nat. Res., LLC v. Eagle Rock Energy Partners, L.P., 374 P.3d 766 (Okla. 2016). For more detail, see Matt Schlensker, *2016 Survey on Oil & Gas: Oklahoma*, 2 OIL & GAS, NAT. RESOURCES & ENERGY J. 275 (2016).

"whether, if alleged, a personal contract and a specific or perpetual organization life, together or separately, suffice to create an exception to the application of the [Rule] as set out in *Producers Oil Co. v. Gore*, 1980 OK 62, 610 P.2d 772."[18] In response, Eagle Rock appealed to the Supreme Court of Oklahoma.

ANR argued that an limited liability company such as itself could be a life in being for the purposes of the Rule, citing Oklahoma case law that stated rather broadly that "at the time the [Oklahoma] Constitution was adopted, the term 'person' was generally understood to include corporations."[19] The Oklahoma Supreme Court did not agree, instead opining that ANR's reasoning was "faulty due to an association fallacy: because a corporation may be a 'person' does not make it a 'life in being.'"[20] The court then held that when an instrument involves no measurable life in being, such as with a corporation or an LLC, the "only definite period permitted by [the Rule] is a term not exceeding 21 years."[21] "A provision without a measurable life in being that vests or distributes after twenty-one years violates [the Rule] and is void."[22] ANR attempted to counter, arguing that the fact a corporation can take advantage of the 21-year period in a way similar to a human being makes the corporation a life in being for purposes of the Rule. The court squelched this, reasoning that since corporations have no actual live span and could, at least theoretically, last forever, then if a corporation or an LLC was considered a life in being, the 21-year rule for entities would be superfluous.

What about Texas? Do all similar entities not get any time on top of the 21 years provided by the Rule? Firstly, trusts now do. A recent exception to "instant application" of the Rule was created in 2021 with an amendment to the property code that went into effect on September 1, 2021.[23] This change allowed the permissible duration for a trust created after September 1, 2021 (other than a charitable trust) to be 300 years.

As to other entities without a beating heart, Texas appears to follow the same approach as New York in applying a flat 21-year period for the interest to vest in order to escape application of the Rule. In May 2020, Texas Supreme Court considered *Yowell v. Granite Operating Co.*,[24] in which suit was brought to quiet title to a royalty interest carved from a mineral lease. In 1986, a lease was granted that covered a tract of land in Wheeler County, Texas. The lease was later assigned. In the assignment, an overriding royalty interest (ORRI) was reserved. The assignment provided that if the lease terminated, and the lessee obtained an "extension, renewal or new lease or leases" covering the same mineral interest, then the reserved ORRI would encumber the new lease or leases.[25] Later, new leases on the same property were granted and the original lease was released. A producing well was brought in. The owner of the ORRI was not credited with any royalty by the lessee. The lessee refused to honor the ORRI, claiming that it was voided by the

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[18] *Am. Nat. Res.*, 374 P.3d at 768–69.

[19] *Id.* at 771 (quoting Cartwright v. Hillcrest Invs., Ltd., 630 P.2d 1253, 1256 (Okla. 1981)).

[20] *Id.*

[21] *Id.* (quoting Melcher v. Camp, 435 P.2d 107, 111 (Okla. 1967)).

[22] *Id.* (citing McLaughlin v. Yingling, 213 P. 552, 564 (Okla. 1923)).

[23] TEX. PROP. CODE § 112.036.

[24] 620 S.W.3d 335 (Tex. 2020).

[25] In the oil and gas business, this is commonly called an "anti-washout" provision.

Rule because the period in which it could attach to new leases was indefinite in violation of the Rule. The trial court and the Amarillo Court of Appeals both held for the lessee, ruling the Rule eliminated the ORRI.

The Texas Supreme Court held that the language of the assignment that reserved the ORRI created a springing executory interest and therefore was eliminated by application of the Rule unless some exception applied.[26] Germane to the topic at hand, a footnote from *Yowell* provided:

> We do not suggest, however, that a corporation conveying an unvested interest could be used as a measuring life in applying the reformation statute. "At common law, a corporation did not qualify as a life in being."[27]

This agrees with the declaration from a prominent Texas legal commentator from a year earlier in an article that discussed common contractual provisions that come into play in the acquisition and disposition of oil and gas properties:

> If only corporations are involved in the transaction, and the life of no person can be identified as the measuring life, then the measuring period for perpetuities purposes is a flat twenty-one years.[28]

As a coda, however, one more point from *Yowell* bears mentioning. The court went on to say that the doctrine of cy pres may have applied, allowing for the reformation of the interest—as nearly as the actual words of the grant or reservation allow—so that the interest might not run afoul of the Rule.

This required the court to consider application of section 5.043 of the Texas Property Code. This statute can be applied to reform instruments that may be otherwise affected by the Rule. Section 5.043 provides:

> (a) Within the limits of the rule against perpetuities, a court shall reform or construe an interest in real or personal property that violates the rule to effect the ascertainable general intent of the creator of the interest. A court shall liberally construe and apply this provision to validate an interest to the fullest extent consistent with the creator's intent.
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> (b) The court may reform or construe an interest under Subsection (a) of this section according to the doctrine of cy pres by giving effect to the general intent and specific directives of the creator within the limits of the rule against perpetuities.
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> (c) If an instrument that violates the rule against perpetuities may be reformed or construed under this section, a court shall enforce the provisions of the instrument that do not violate the rule and shall reform or construe under this section a provision that violates or might violate the rule.
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> (d) This section applies to legal and equitable interests, including noncharitable gifts and trusts, conveyed by an inter vivos instrument or a will that takes effect on or after September 1, 1969 . . . .[29]

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[26] For an excellent synopsis of *Yowell*, see Paul Yale, "*Yowell v. Granite Operating et al.*—Texas Supreme Court Puts Perpetuities in Limbo in Anti-Washout Cases," *Nat. Resources L. Network* (Found. for Nat. Resources & Energy L. Aug. 2020), https://www.fnrel.org/natural-resources-law-network/august-2020.

[27] *Yowell*, 620 S.W.3d at 351 n.10 (quoting *Am. Nat. Res.*, 374 P.3d at 771).

[28] Cross, *supra* note 3, at 227 n.202.

[29] TEX. PROP. CODE § 5.043.

The court of appeals had declined to apply this statute, holding it did not reach commercial instruments and that, in any event, its use would be barred by the residual four-year statute of limitations. The supreme court disagreed and held that section 5.043, being a judicial mandate to which limitations does not apply, required reformation of commercial instruments creating property interests that violate the Rule. But in addition, as the statute requires courts to "liberally construe and apply [it] to validate an interest to the fullest extent consistent with the creator's intent,"[30] a "strained or narrow construction" of the statute would exclude virtually all commercial transactions from consideration for the statute's application. Ultimately, the court remanded the case for the court of appeals to consider whether the ORRI could be reformed to comply with the Rule. This move aligns with the general trend of cases in Texas where application of the Rule to oil and gas interests has been met with reluctance.[31]

In summary, a corporation would seem to be unable to be used as a "life in being" for the purposes of the Rule. As a result, the time allotted for the interest to vest is likely just a flat 21 years in circumstances where all the identifiable entities involved are not living individuals.

[30] *Id.* § 5.043(a).

[31] Yale, *supra* note 26.