GAMETES, EMBRYOS AND THE LIFE IN BEING: THE IMPACT OF REPRODUCTIVE TECHNOLOGY ON THE RULE AGAINST PERPETUITIES

Les A. McCrimmon*

Editors' Synopsis: As the twenty-first century begins, changing technology is testing old rules of property law. In this Article, the author discusses the effect of modern technology on the Rule Against Perpetuities. This discussion includes the arguments for and against recognition of the embryo as a life in being, as well as suggestions for legislative solutions to this issue.

I. INTRODUCTION

"[W]e know not what Inventions may grow upon this; for I know Mens Brains are fruitful in Inventions . . . ."[1]

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* University of Sydney, Australia, Faculty of Law. I thank Associate Professor Rosalind Atherton for her helpful comments on an earlier draft of this Article. I alone remain responsible for its contents.

[1] The Duke of Norfolk's Case, 22 Eng. Rep. 931, 946 (Ch. 1682).

Lord Pemberton was not thinking of advances in reproductive technology when he delivered his advisory opinion in *The Duke of Norfolk's Case*.[2] However, his observations were prophetic. Ask any law student who has had to become acquainted with the so-called Rule Against Perpetuities, which one noted commentator describes as:

> so abstruse that it is misunderstood by a substantial percentage of those who advise the public, so unrealistic that its "conclusive presumptions" are laughable nonsense to any sane man, so capricious that it strikes down in the name of public order gifts which offer no offence except that they are couched in the wrong words, so misapplied that it sometimes directly defeats the end it was designed to further . . . .[3]

Law students probably have not had occasion to consider the impact of reproductive technology on the Rule.

Lord Nottingham, who laid the foundation of what has become the modern[4] Rule Against Perpetuities, held that the validity of a future interest is governed by the time within which the interest is to vest. On the facts of the case, he held that to be valid, a future interest had to vest, if it vested at all, no later than the expiration of a life in being when the interest was created.[5] As the Rule evolved, courts extended the period of time within

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[2] *See id.* The defendant, Henry Howard, Duke of Norfolk, was the premier peer of England. Hence, the case generated a substantial amount of interest. The Lord Chancellor, Lord Nottingham, received advisory opinions from three of the leading law lords of the day: Lord Chief Justice Baron Montague, Lord Chief Justice Pemberton, and Lord Chief Justice North. He also heard extensive argument from counsel for the parties involved. The Lord Chancellor, and subsequently the House of Lords, in *Duke of Norfolk v. Howard,* 23 Eng. Rep. 388 (Ch. 1683), declined to follow the advisory opinions, and upheld the validity of the testator's executory devise. For an interesting and comprehensive review of the case and its aftermath, see Herbert Barry, *The Duke of Norfolk's Case,* 23 VA. L. REV. 538 (1937). *See also* George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities,* 126 U. PENN. L. REV. 19 (1977) (discussing *The Duke of Norfolk's Case* and the history of the Rule Against Perpetuities).

[3] William Barton Leach, *Perpetuities: Staying the Slaughter of the Innocents,* 68 L.Q. REV. 35, 35 (1952) [hereinafter Leach, *Perpetuities*].

[4] To characterize a rule dating back to 1682 as modern is a misnomer; however, the prefix distinguishes this rule from the rule in *Whitby v. Mitchell*, 44 Ch. D. 85 (Eng. C.A. 1890).

[5] *See* The Duke of Norfolk's Case, 22 Eng. Rep. at 960.

which the future interest must vest—first to include any actual period of gestation,[6] and then to include any actual period of gestation plus a gross period of twenty-one years after some life in being.[7] Hence, reproductive capacity has been an integral part of the Rule since its inception. Statutory modifications to the common law Rule also have incorporated reproductive capacity. In particular, the wait-and-see provisions and the presumptions and evidence as to future parenthood reflect an "attempt to clothe lives in being with the correct gynaecological attributes."[8]

Recognition of posthumous reproductive capacity is a logical step in the evolution of the perpetuity formula. To date, the issue has remained academic;[9] however, recent developments in the law suggest judicial consideration of the issue may not be far off.[10] To avoid the potential havoc that common law recognition of reproductive technology will play with the mechanics of the Rule, pro-active statutory reform is required.

This Article examines the legal status of gametes and embryos and discusses the impact of legal classifications on the determination of the perpetuity period. In particular, this Article canvasses the arguments concerning the recognition of an embryo as a life in being, and it discusses an appropriate legislative response to the impact of reproductive technology on the Rule Against Perpetuities.

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[6] *See* Stephens v. Stephens, 25 Eng. Rep. 751 (Ch. 1736).

[7] *See* Cadell v. Palmer, 6 Eng. Rep. 956 (H.L. 1833). For an interesting account of the early development of the modern Rule Against Perpetuities, note the arguments presented by Mr. Hargrave on behalf of the widow and children of the testator in the celebrated case of *Thellusson v. Woodford*, 31 Eng. Rep. 117, 130 (Ch. 1799), *aff'd*, 32 Eng. Rep. 1030 (H.L. 1805).

[8] Ruth Deech, *Lives in Being Revived,* 97 L.Q. REV. 593, 609 (1981).

[9] *See* William Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent,* 48 A.B.A.J. 942 (1962) [hereinafter Leach, *Atomic Age*]; Carolyn Sappideen, *Life After Death—Sperm Banks, Wills and Perpetuities,* 53 AUSTL. L.J. 311 (1979).

[10] *See, e.g.*, Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992). An Australian example is *In re* the Estate of the Late K (1996) 5 T.R 365.

II. GAMETES AND EMBRYOS: FROZEN PERSONS OR PROPERTY

A. Technology Lengthens Storage Periods

The knowledge that sperm could be frozen and stored for future use dates back to the mid-nineteenth century. In the middle of the twentieth century, the recognition that the cryoprotective agent glycerol could be used to protect sperm against damage from freezing and thawing constituted a significant breakthrough in reproductive technology.[11]

From a perpetuities perspective, the length of the storage period of reproductive material[12] is important. Today, technology generally governs the maximum length of the storage period.[13] In some jurisdictions, legislation sets the limits. A uniform consensus on the appropriate length

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[11] One author notes that "[h]uman artificial insemination was first successfully performed around 1790. In 1866, an Italian scientist, Montegazza, suggested that human sperm might be frozen and stored in 'banks.'" Janet Berry, *Life After Death: Preservation of the Immortal Seed,* 72 TUL. L. REV. 231, 235 (1997). *See generally* Sappideen, *supra* note 9 (recounting the history of sperm banks).

[12] Writers such as Nedelsky prefer the phrase "stages of potential life" rather than "reproductive material." Nedelsky suggests that "the phrase 'reproductive material' seriously biases the inquiry in favour of a property and commodification framework and, more generally, distances the reader from the complex and disturbing nature of the problems generated by the new reproductive technology." Jennifer Nedelsky, *Property in Potential Life? A Relational Approach to Choosing Legal Categories*, 6 CANADIAN J. OF L. & JURISPRUDENCE 343, 343 n.2 (1993).

[13] Using current technology, gametes (a sperm or egg) and zygotes (the combination of a sperm and egg) can maintain their viability in cryopreservation for an extended length of time. *See* James Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance,* 47 DEPAUL L. REV. 743, 816 (1998). In the case of sperm, Bailey notes that "[a]lthough there is some loss of motility due to the cold shock and/or dilution in the cryoprotective medium, studies have shown sperm motility remains stable when cryopreserved more than ten years." *Id.* at 818. *See also* Berry, *supra* note 11, at 232 (noting that cryopreservation provides the opportunity for posthumous reproduction for many years after the death of the biological father); Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmodern Conception, Parental Responsibility and Inheritance*, 33 HOUS. L. REV. 967, 974 n.31 (1996) (noting that the freezing of sperm for later implantation in the woman is one of the most widespread methods of assisted conception).

of the period does not exist,[14] and the statutory maximum period often depends on the nature of the reproductive material being stored.[15] Cryopreservation of gametes[16] and zygotes[17] (or embryos[18]) is now very common,[19] and researchers continue to make progress. For example, technology now exists to cryopreserve the stem cells that produce sperm.[20] Stem cells, unlike sperm cells, regenerate themselves. Chester notes that "[t]he implication is that frozen sperm can be used only once, while a frozen stem cell can be used to regenerate itself, thus giving the individual the ability to reproduce perpetually."[21] Chester goes on to suggest that "[t]he problem is that this technique could create virtually boundless inheritance problems by enabling the donee to use sperm from a stem cell *at any time* in the future."[22] These advances in reproductive technology create equally boundless perpetuity problems.

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[14] For an example of differing Australian rules, see Infertility Treatment Act, 1995, § 51 (Vict.) (ten years); Reproductive Technology Act, 1988, § 10(3)(c) (S. Austl.) (ten years); Human Reproductive Technology Act, 1991, § 24(4)(b) (W. Austl.) (three years). *See generally* BELINDA BENNETT, LAW AND MEDICINE 144-45 (1997) (summarizing the reproductive legislation in Victoria, South Australia, and Western Australia).

[15] *See* Human Fertilisation and Embryology Act, 1990, ch. 37, § 14(3) (Eng.) (ten years for gametes); *id.* § 14(4) (five years for embryos). *See also* DEREK MORGAN & ROBERT G. LEE, BLACKSTONE'S GUIDE TO THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990: ABORTION AND EMBRYO RESEARCH, THE NEW LAW 115 (1991).

> An embryo which is created from stored gametes may itself be stored for the full length of the applicable storage period. . . . Hence, an embryo could be used in the provision of treatment services or for the purposes of research for a maximum period of up to 15 years after the egg or sperm from which it derives was donated.

Id.

[16] Gametes are "the reproductive cells . . . sperm and egg, which fuse to form a zygote. . . ." MORGAN & LEE, *supra* note 15, at xi.

[17] A zygote is "the . . . cell formed by the union of sperm and egg." *Id.* at xiv.

[18] Another term for zygote in case law and literature is embryo, which is a generic term describing "the product of human conception, often understood to cover the period from fertilisation to the end of the eighth week of pregnancy, during which time all the main organs are formed." *Id.* at x. Morgan and Lee note that the term pre-embryo "is sometimes used to cover the first fourteen days' development after fertilisation. Around this point the 'primitive streak' . . . develops." *Id.* This Article uses the generic term embryo, rather than zygote.

[19] *See* BENNETT, *supra* note 14, at 144.

[20] *See* Bailey, *supra* note 13, at 745.

[21] Chester, *supra* note 13, at 974 n.31.

[22] *Id.*

B. Legal Status of Embryos

Determining the legal status of cryopreserved embryos is one of the most challenging questions arising out of the new reproductive technology. Are embryos property or persons, or do they "occupy a crepuscular legal status . . . suspended between thing and person?"[23] Are such categories appropriate when dealing with material which has the potential for human life?[24] Should a legal distinction be made between an embryo and a preembryo? All of these issues affect whether an embryo is a life in being for the purpose of calculating the perpetuity period. Three cases, two from the United States and one from Australia, provide a useful springboard for analysis.

In *Davis v. Davis*,[25] the Supreme Court of Tennessee struggled to decide the custody of preembryos following a marriage breakdown. The parties had directed a fertility clinic in Knoxville, Tennessee to cryogenically preserve seven preembryos. First, the court addressed the distinction between an embryo and a preembryo. The court reviewed the expert scientific evidence and concluded that the term "preembryo" appropriately described the cell development until fourteen days after fertilization.[26]

The court then addressed the legal status of the seven preembryos. Instead of relying on the "minuscule number of legal opinions that have involved 'frozen embryos,'"[27] the court looked to the following ethical standards set by The American Fertility Society:

> Three major ethical positions have been articulated in the debate over preembryo status. At one extreme is the view of the preembryo as a human subject after fertilization, which requires

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[23] Derek Morgan, *Rights and Legal Status of Embryos,* 4 AUSTL. HEALTH L. BULL. 61, 62 (1996).

[24] *See* Nedelsky, *supra* note 12 (discussing the argument that forms of potential life should not be considered property). *But see* Barry Brown, *Reconciling Property Law with Advances in Reproductive Science,* 6 STAN. L. & POL'Y REV. 73 (1995) (arguing that the law should view gametic and embryonic tissue as property).

[25] 842 S.W.2d 588 (Tenn. 1992).

[26] *See id.* at 592-94. *See also* MORGAN & LEE, *supra* note 15, at 64 fig. I (showing various stages of cell development through fourteen days after fertilization).

[27] Davis, 842 S.W.2d at 596.

> that it be accorded the rights of a person. . . . At the opposite extreme is the view that the preembryo has a status no different from any other human tissue. . . . A third view—one that is most widely held—takes an intermediate position between the other two. It holds that the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons.[28]

The court embraced the intermediate position and held that the legal status of preembryos was most appropriately reflected in the third category. "We conclude that preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[29]

The legal status of cryogenically preserved sperm came before the California Court of Appeal in *Hecht v. Superior Court*.[30] The case revolved around the disposition of fifteen vials of sperm deposited by a testator in a California sperm bank and the jurisdiction of the California Probate Court to decide the case. The court held that sperm stored by its provider with the intent that it be used for artificial insemination constituted property within the meaning of the California Probate Code.[31] However, the court noted that, according to the reasoning in *Davis*, sperm is "unlike other human tissue because it is 'gametic material' that can be used for reproduction."[32] Clearly, while cryogenically preserved sperm is not fully ensconced in the emerging legal concept of potential life propounded in *Davis*, it does not fit easily into traditional legal notions of property.[33]

The most important case of the trilogy, from a perpetuities perspective, is the decision of Justice Slicer of the Supreme Court of Tasmania in *In re*

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[28] *Id.*

[29] *Id.* at 597. *Cf.* Bailey, *supra* note 13, at 766-70.

[30] 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

[31] *See id.* at 282. The California Probate Court therefore had jurisdiction to decide the case. In reaching this conclusion, the court described the decision in *Davis* as "informative." *Id.*

[32] *Id.* at 283 (citation omitted).

[33] *See* Nedelsky, *supra* note 12 (discussing a feminist approach to the categorization of stages of potential human life); *see also* Bailey, *supra* note 13, at 751 (suggesting that the "reasoning of the *Hecht* court is seriously flawed"); *cf.* Brown, *supra* note 24 (arguing that embryonic and gametic material should be classified as property).

the Estate of the Late K.[34] The issue in that Australian case was whether a cryogenically preserved zygote is, upon birth, entitled to a right of inheritance. In holding that it is, Justice Slicer reviewed the common law rights conferred upon a fetus. He noted that the common law has consistently refused to recognize a fetus as a person in the full legal sense, and that a child *en ventre sa mere* is not a human being until it has quitted its mother in a living state. However, Justice Slicer went on to note that the fetus has contingent legal interests recognized by the law of succession and tort, which vest and become enforceable upon its live birth. This recognition is founded upon "an artificial construct or fiction based on the proposition that a child, *en ventre sa mere*, is deemed to be born at the time of an occurrence so far as it is necessary for the benefit of that child."[35]

Three themes emerge from these cases:

1. Cryogenically preserved preembryos and embryos may occupy an evolving intermediate legal category between person and property.[36]

2. Cryogenically preserved semen falls within the broad category of property; however, because of its potential to create a child after fertilization and gestation, it is a form of property that vests in the donor's decision-making authority as to the use of the sperm for reproduction.[37]

3. For inheritance purposes, a cryogenically preserved embryo should be accorded the same status as a child *en ventre sa mere*, irrespective of its stage of development.

From these themes, the following propositions relevant to the application of the Rule Against Perpetuities emerge:

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[34] (1996) 5 Tas. R. 365.

[35] *Id.* at 369. This idea, in turn, follows the civil law maxim, *nasciturus pro iam nato habetur quotiens de eius commodo agitur* (one about to be born will be held already to have been born whenever that is to his advantage). *See* Andrew Grubb, *Frozen Embryos: Rights of Inheritance. In Re the Estate of the Late K*, 5 MED. L. REV. 121, 123 (1997).

[36] *See* Davis, 842 S.W.2d 588. *But see* Bailey, *supra* note 13, at 813 (concluding that preembryos and embryos are not properly classified as occupying such an intermediate legal category).

[37] *See* Hecht, 20 Cal. Rptr. 2d at 283; Rosalind Atherton, *En ventre sa frigidaire: Posthumous children in the succession context,* 19 LEGAL STUDIES 139 (1999) [hereinafter Atherton, *En ventre*].

1. Gametic material probably will not be accorded the same legal status as a child *en ventre sa mere*.[38]

2. The extension of the legal principles applicable to a child *en ventre sa mere* to a cryogenically preserved embryo may affect the determination of the life in being.

These propositions, if generally accepted by the courts, will affect the determination of the perpetuity period. The extent of the impact remains to be considered.

III. GAMETES, EMBRYOS, AND THE VALIDITY OF DISPOSITIONS

The existence of cryopreserved semen can void what otherwise would be a valid disposition. Other articles have explored this issue comprehensively; this Article will discuss it only briefly.[39] The question that courts and commentators have not considered in depth is whether a cryopreserved embryo can be a life in being to calculate the duration of the perpetuity period.

A. Voiding a Valid Gift

The existence of reproductive material can result in a violation of the common law Rule Against Perpetuities. A simple example illustrates this point.

Example 1:

Testator (*T*) devises Blackacre to *A* (a male) for life, then to the children of *A* who shall attain the age of twenty-one years, in fee simple (*A* is alive at the death of *T* and has two children, two year old *X* and one year old *Y*).

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[38] For a discussion of the issues of legal classification, see Bailey, *supra* note 13, at 812.

[39] *See, e.g.*, Leach, *Atomic Age*, *supra* note 9; Sappideen, *supra* note 9.

Prior to the advent of the sperm bank, this example could not have offended the common law application of the Rule. The analysis [40] begins with the proposition that the Rule Against Perpetuities applies to contingent remainders and executory interests, not to vested interests. The gift to the children of *A* is a contingent interest because the person or persons who are to take the estate in remainder are not ascertainable as of the date of the devise. Hence, the Rule applies to the contingent remainder to *A*'s children, but not to *A*'s vested life estate.

When identifying the measuring life, referred to as the life or lives in being, the following four conditions must be satisfied: (1) the measuring life or lives must be human;[41] (2) the measuring life or lives must be in existence at the date of the creation of the interest;[42] (3) if a group of persons is used as the measuring life, that group cannot be capable of increasing in number after the date of the interest's creation;[43] and (4) if a group of persons is used as the measuring life, that group must be ascertainable.[44]

Application of these conditions to Example 1 precludes the use of the children of *A* as lives in being because they do not satisfy the third condition. *A* may have more children after the date of the interest's creation, which is the death of *T* because this limitation is contained in a will.[45] *A* satisfies the four conditions, and therefore, the perpetuity period

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[40] For an explanation of how to solve a perpetuities problem, see Les McCrimmon, *Understanding the Rule Against Perpetuities: Adopting a Five Step Approach to a Perpetuities Problem,* 5 AUSTL. PROP. L.J. 130 (1997) and CARMEL MACDONALD ET AL., REAL PROPERTY LAW IN QUEENSLAND 185-97 (1998).

[41] For a discussion of this issue, the Irish case of *In re Kelly,* [1932] I.R. 255, is illustrative.

[42] Children *en ventre sa mere* can be lives in being. *See In re* Stern, 1962 Ch. 732 (Eng. 1961); *In re* Wilmer's Trusts, [1903] 2 Ch. 411 (1903) (Eng. C.A.); Thellusson v. Woodford, 31 Eng. Rep. 117, 169 (Ch. 1799), *aff'd,* 32 Eng. Rep. 1030 (H.L. 1805); Long v. Blackall, 30 Eng. Rep. 119 (Ch. 1797). What constitutes life at the date of the creation of the interest is discussed in greater detail below.

[43] For an Australian case, see Hardebol v. Perpetual Trustee Co. (1975) 1 N.S.W.L.R. 221. For English cases, see Thellusson v. Woodford, 32 Eng. Rep. 1030 (H.L. 1805), *aff'g,* 31 Eng. Rep. 117 (Ch. 1799) and Humberston v. Humberston, 24 Eng. Rep. 412 (Ch. 1716).

[44] *See* Hardebol, 1 N.S.W.L.R. at 221; Thellusson, 32 Eng. Rep. at 1040 (MacDonald, C.B.); *id.* at 1043 (Eldon, L.C.); *In re* Villar, [1929] 1 Ch. 243 (Eng. C.A.); *In re* Moore, [1901] 1 Ch. 936 (Eng.).

[45] *See In re* Mervin, [1891] 3 Ch. 197 (Eng.); Vanderplank v. King, 67 Eng. Rep. 273 (V.C. 1843).

applicable to the gift to the children of *A* is the life of *A* plus twenty-one years. If, at the commencement of the perpetuity period, circumstances that would cause the vesting of the fee simple interest in the children of *A* to occur outside of the period are theoretically possible, then the Rule Against Perpetuities is violated, and the gift is void at common law. In this example, *A* cannot have any more children after his death, and any children alive at *A*'s death will reach the age of twenty-one within twenty-one years of *A*'s death. Therefore, because the gift to the children of *A* must vest within the perpetuity period, the gift is valid.

But what if *A* made a sperm donation prior to his death?[46] Under the common law, a theoretical possibility that the gift may vest outside the perpetuity period is all that is required to invalidate the gift.[47] In Example 1, circumstances may be posited that could cause the fee simple interest in the children of *A* to vest more than twenty-one years after the death of *A*. For example, a child, *Z*, could be born through artificial insemination (*e.g.*, AIH[48]) two years after *A*'s death. *Z* would not reach the age of twenty-one within twenty-one years of *A*'s death. The Rule Against Perpetuities is infringed upon and the contingent remainder to the children of *A* is void at common law. As Sappideen has noted, "The advent of sperm banking now makes it possible for children to be born more than twenty-one years after the death of their male parent, thus allowing the possibility in many cases . . . of a vesting occurring outside the perpetuity period."[49]

Today, many jurisdictions have enacted perpetuities legislation that modifies the common law application of the Rule. In many instances, the wait-and-see provisions or the ninety year period of Uniform Statutory Rule Against Perpetuities[50] will save the gift.[51] Further, some jurisdictions have

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[46] Alternatively, his sperm may be harvested after his death. For a discussion of post-mortem harvesting of sperm, see Bailey, *supra* note 13, at 760.

[47] *See* Jee v. Audley, 29 Eng. Rep. 1186 (M.R. 1787); *In re* Dawson, 39 Ch. D. 155 (1888); Ward v. Van der Loeff, 1924 App. Cas. 653 (appeal taken from Eng.); *In re* Gaite's Will Trusts, [1949] 1 All E.R. 459 (Ch.).

[48] AIH is the "[a]rtificial insemination (of a woman) using [the] husband's sperm." MORGAN & LEE, *supra* note 15, at ix.

[49] Sappideen, *supra* note 9, at 312.

[50] 8B U.L.A. 333 (1993).

[51] Although Sappideen notes that "[w]here there has in fact been a sperm bank deposit and as the storage life of sperm increases, the 'wait and see' rule will not provide the solution." *Id.* at 317.

adopted statues that do not include the artificially conceived child in the previous example as a child of *A*. Under this framework, the Rule is not violated and the contingent remainder to the children of *A* will be valid.[52] This type of legislation may provide a convenient, short-term solution to this particular perpetuities problem. However, the decision in *In re the Estate of the Late K*[53] highlights that courts may be reluctant to interpret legislation to exclude the artificially conceived, genetic child of the posthumous donor.[54]

An interpretation of legal rules or statutory provisions that is justifiable from a legal perspective, but indefensible from a policy perspective, inevitably leads to legislative reform. The statutory modifications to the Rule Against Perpetuities provide a pertinent example. Professor Atherton highlighted an issue that may soon capture the attention of law reform commissioners:

> If a child is born to a man's widow which is genetically his child—and he was a willing participant in the process—then it should be considered his child if indeed the child is born alive. *Not* to reach such a conclusion is historically regressive: placing the children back in the era of bastards, with all their disabilities. . . . In the United States and the constitutional equal protection

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[52] *See generally* Atherton, *En ventre*, *supra* note 37, at 153-55 (summarizing relevant legislation in the United States, the United Kingdom, and Australia); MORGAN & LEE, *supra* note 15 (discussing United Kingdom legislation); Grubb, *supra* note 35 (discussing United Kingdom legislation).

[53] (1996) 5 Tas. R. 365.

[54] *But cf.* Rosalind Atherton, *Between a Fridge and a Hard Place: The Case of the Frozen Embryos or Children en Ventre sa Frigidaire,* 6 AUSTL. PROP. L.J. 53, 56-59 (1998) [hereinafter Atherton, *Between a Fridge*] (arguing that Justice Slicer's interpretation of the relevant provision of the Status of Children Act, 1974 (Tas.) was not correct in law because proper interpretation of the statute is that the biological father should not be considered the father of any child born as a result of the fertilization procedure). Andrew Grubb suggests that "the real issue is whether the law *ought* to extend the rule to frozen embryos. There are very good practical reasons why it should not in the area of inheritance where certainty is particularly important. . . . The common law in England would almost certainly have . . . opted for certainty." Grubb, *supra* note 35, at 123; *see also* Human Fertilisation And Embryology Act 1990, ch. 37, § 28(6)(b) (Eng.) (defining father); MORGAN & LEE, *supra* note 15, at 156-60, 202-03 (discussing how § 28(6)(b) creates a legally fatherless child); Atherton, *En ventre*, *supra* note 37, at 161 (discussing the paternity of posthumously conceived children); Chester, *supra* note 13, at 1008-11 (discussing the inheritance rights of artificially conceived children and the rights and responsibilities of their parents).

provisions, there may also be a constitutional objection in excluding posthumously conceived children.[55]

The existence of reproductive material may affect the validity of an otherwise valid disposition. Because the problem requires a legislative response, lawmakers must first address a related and equally perplexing issue—whether to recognize an embryo as a life in being.

B. Embryo as a Life in Being

Can an argument be made that the existence of reproductive material should be taken into consideration when ascertaining the life in being to calculate the perpetuity period? The simple answer is yes—a conclusion that will not surprise perpetuity scholars. Almost forty years ago, Barton Leach advocated that the duration of a male life in being under the Rule should "be defined as the period of his reproductive capacity, including any post-mortem period during which his sperm remains fertile."[56] Concordant with his style, he couched this conclusion in the form of a draft judicial opinion, which relied on the unassailable authority of Lord Nottingham in *The Duke of Norfolk's Case*. When considering the scope of the Rule against the remoteness of vesting, Lord Nottingham stated, "I will stop where-ever any visible [i]nconvenience doth appear . . . [and] the first Inconvenience that ariseth upon it will regulate it."[57] From this statement, Barton Leach's hypothetical court concluded that no "visible inconvenience" would result from the recognition of post-mortem reproductive capacity.[58]

In 1962, when the hypothetical court rendered its decision, protecting the reproductive capacity of America's space pioneers was the embryologists' primary concern.[59] Today a perpetual ability to reproduce has evolved from the twilight zone to the ionosphere. In light of these advances, advocates must look beyond an absence of visible inconvenience when formulating a persuasive legal argument for the recognition of an

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[55] Atherton, *En ventre*, *supra* note 37, at 161.
[56] Leach, *Atomic Age*, *supra* note 9, at 944.
[57] The Duke of Norfolk's Case, 22 Eng. Rep. at 960.
[58] Leach, *Atomic Age*, *supra* note 9, at 944.
[59] *See id.* at 943.

embryo as a life in being.[60]

1. The Argument for Recognition

The argument for the recognition of an embryo as a life in being evolves from the legal status of a child *en ventre sa mere*. Courts have long treated a child *en ventre sa mere* as a life in being for the purpose of the Rule. Master of the Rolls Lord Alvanley was unequivocal on this point in his advisory opinion in *Thellusson v. Woodford*.[61] During the period of gestation, the child *en ventre sa mere* is cloaked with a legal fiction "by which a non-existent person is to be taken as existing."[62] In *In re the Estate of the Late K*,[63] the court applied this legal fiction to the legal status of an embryo for the purpose of inheritance. In that case Justice Slicer considered whether, as a matter of policy, the law should "distinguish between a child, *en ventre sa mere*, and his or her sibling who was at the

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[60] For those tempted to rely on a visible inconvenience argument when advocating that the application of the Rule should either be expanded or restricted, consider the opinion of the House of Lords in *Thellusson v. Woodford,* 32 Eng. Rep. at 1039:

> When [Lord Nottingham] declares, that he will stop, where he finds an inconvenience, he cannot, consistently with sound construction of the context, be understood to mean, where Judges arbitrarily imagine, they perceive an inconvenience; for he has himself stated, where inconvenience begins; namely, by an attempt to suspend the vesting longer than can be done by legal limitation. I understand him to mean, that, wherever Courts perceive, that such would be the effect, whatever may be the mode attempted, that effect must be prevented; and he gives the same, but no greater, latitude to executory devises and executory trusts as to estates tail.

[61] Lord Alvanley stated,

> It remains then to be considered, whether a child *en ventre sa mere* is a life in being. I considered the case of *Long v. Blackall* a complete decision upon that point. I believe, the Counsel for the family are right in saying, that was the first case, in which such child was taken both at the beginning and at the end of executory devise.

Thellusson v. Woodford, 31 Eng. Rep. at 169, *aff'd*, 32 Eng. Rep. 1030 (H.L. 1805); *see also In re* Stern, 1962 Ch. 732 (Eng. C.A. 1961) (treating conception as equivalent to birth); *In re* Wilmer's Trusts, [1903] 2 Ch. 411 (Eng. C.A.) (treating conception as being alive).

[62] Schofield v. Orrell Colliery Co., [1909] 1 K.B. 178, 182 (Eng. C.A. 1908). *See also In re* the Estate of the Late K (1996) 5 Tas. R. at 369 (discussing the legal fiction that "a child, *en ventre sa mere*, is deemed to be born at the time of the occurrence so far as it is necessary for the benefit of that child.").

[63] (1996) 5 Tas. R. 365.

time a frozen embryo[?]"[64] In concluding that no such distinction should be made, Justice Slicer held:

> If an in vitro child, born posthumously, is at birth the biological child of the father and mother, irrespective of the date of implantation, and in all other respects (except time) identical to a child *en ventre sa mere* then the legal principles applicable to a child *en ventre sa mere* should likewise be afforded to an in vitro child.[65]

Justice Slicer also refused to distinguish between a preembryo, an embryo, and a developed fetus.

> If a child *en ventre sa mere* is not regarded as living (in terms of law) but has a contingent interest dependent on birth, then in logic the same status should be afforded an embryo. That would be so whether or not two cells, four cells or a developed foetus was existent.[66]

If the observations of Justice Slicer are correct,[67] an argument exists that, in a perpetuities context, the legal principles applicable to a child *en ventre sa mere* should apply equally to an embryo, irrespective of its stage of development. Recognition of an embryo as a life in being for the purpose of the Rule should not be denied simply because "medicine and technology have overtaken the circumstances existent in the 19th century when the legal fiction was applied."[68]

Recognition of an embryo as a life in being faces one more legal hurdle. The legal fiction that deems a child *en ventre sa mere* as born at the

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[64] *Id.* at 371.
[65] *Id.* at 373.
[66] *Id.*
[67] *Cf.* Atherton, *Between a Fridge, supra* note 54, at 57-60 (suggesting that Justice Slicer's interpretation of the relevant provisions of the Status of Children Act, 1974 (Tas.), was incorrect in law, but not suggesting that Justice Slicer's conclusions concerning the status of cryogenically preserved embryos were incorrect as a matter of perpetuities policy).
[68] *In re* the Estate of the Lake K, (1996) 5 Tas. R. at 371.

time of the occurrence[69] is applied "so far as is necessary for the benefit of that unborn child."[70] Some have suggested[71] that recognition is predicated on the civil law maxim: "[O]ne about to be born will be held already to have been born *whenever that is to his advantage*."[72] Should it be necessary to show a benefit flowing to the embryo designated as a life in being? The answer is no. For the purposes of the Rule, no need exists to show that the child *en ventre sa mere*, once born, will receive a benefit under the devise.[73] "Conception is treated as equivalent to birth,"[74] and the existence or non-existence of a benefit to the life in being is irrelevant. The same reasoning should apply to an embryo.

If a court is prepared to deem an embryo an existing person for inheritance purposes, the same reasoning logically could apply in a perpetuities context. Applying the legal fiction used for a child *en ventre sa mere*, an embryo satisfies the relevant conditions necessary to be a life in being—it is human and living at the death of the testator. Although internally consistent, this reasoning fails to take into account the wider policy reasons for the Rule's continued existence.

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[69] In a perpetuities context, the time of the occurrence will depend on the nature of the instrument containing the gift. If a will contains the gift, the occurrence is the death of the testator. *See In re* Mervin, [1891] 3 Ch. 197 (Eng.); Vanderplank v. King, 67 Eng. Rep. 273 (V.C. 1843). If an instrument inter vivos contains the gift, the occurrence is the date the instrument takes effect. For example, if a deed contains the gift, the instrument will take effect from the date of the execution and delivery of the deed. *See* Pilkington v. Inland Revenue Comm'r, 1964 App. Cas. 612 (1962) (appeal taken from Eng.); *see generally* MACDONALD ET AL., *supra* note 40, at 186 (explaining the Rule Against Perpetuities and the wait-and-see principle); RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 38 (1979) (explaining the Rule Against Perpetuities as it operates today and an extended discussion of the wait-and-see principle).

[70] *In re* the Estate of the Late K, (1996) 5 Tas. R. at 369. *See also*, Schofield v. Orrell Colliery Co., [1909] 1 K.B. at 181.

[71] *See* Grubb, *supra* note 35, at 123.

[72] "*Nasciturus pro iam nato habetur quotiens de eius commodo agitur*." *Id.*

[73] In *Thellusson*, the court considered, but rejected, the argument that the posthumous child designated as a life in being must receive a benefit under the devise. *See* Thellusson v. Woodford, 32 Eng. Rep. at 1042. The English Court of Appeal reached the same conclusion in *In re* Wilmer's Trusts, [1903] 2 Ch. at 421, when Lord Justice Romer stated:

> [T]here is, in my opinion, an established rule that a child *en ventre sa mere* at the time of the testator's death, who is subsequently born, must be treated as having been alive at the death of the testator. And I do not think that rule should be departed from merely because, for some reason, it is in the interest of the child to contend that the gift is void as infringing the rule against perpetuity.

[74] *In re* Stern, 1962 Ch. at 737.

2. The Argument Against Recognition

From a policy perspective, the concept of a life in being should not be extended to an embryo. Historically, the Rule reflected the judicial policy of ensuring that land, while not completely alienable, could not be tied up for a perpetuity.[75] Lord North, elevated to Lord Keeper of the Great Seal following the death of Lord Nottingham in December 1682, encapsulated the prevailing judicial opinion when he said, "A perpetuity is a thing odious in law, and destructive to the commonwealth: it would put a stop to commerce, and prevent the circulation of the riches of the kingdom; and therefore is not to be countenanced in equity."[76]

Today, the rationale for the continued existence of the Rule rests on social, rather than economic, policy grounds. Deech notes:

> The most convincing modern explanation of the functions of the Rule is the so-called Dead Hand Rationale. According to this doctrine, the Rule is necessary in order to strike a balance between on the one hand the freedom of the present generation and, on the other, that of future generations to deal as they wish with the property in which they have interests. If a settlor or testator had total liberty to dispose of his property among future beneficiaries, the recipients, being fettered by his wishes, would never enjoy that

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[75] *See* George Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities,* 126 U. PA. L. REV. 19, 44 (1977). Haskins notes that Lord Nottingham's decision in *The Duke of Norfolk's Case* was, unlike the advisory opinions which were a clear victory for free alienability, "a compromise between complete alienability and the power to tie up land for a perpetuity." *Id.* He concludes that "the new rule was a clear victory for the 'dead hand,' not for free alienability. The rule served the fathers, not the sons and if it did not attempt to make lawful a whole panoply of perpetuities, it did at least allow most that were needed." *Id.* at 46.

[76] Duke of Norfolk v. Howard, 23 Eng. Rep. at 389. Lord North, who delivered one of the advisory opinions in *The Duke of Norfolk's Case*, reversed Lord Nottingham's decree. Although the House of Lords subsequently reversed Lord North's decree and affirmed Lord Nottingham's opinion on June 19, 1685, Lord North's comments reflect the prevailing judicial opinion concerning the perpetual extension of dead hand control. For an interesting discussion of *The Duke of Norfolk's Case* and the subsequent litigation related to it, see Barry, *supra* note 2.

same freedom in their turn.[77]

Second, the Rule Against Perpetuities is a rule of certainty designed to invalidate interests that vest too remotely in the future. Under the common law, once a court masters the Rule's intricacies, it can apply the Rule "with remorseless logic and predictable outcome."[78] Recognition of a cryogenically preserved embryo as a life in being will promote uncertainty and will produce an outcome that is incompatible with the policy reasons that proponents have used to justify the Rule's continued existence. In particular, this recognition has the potential to tip the scales radically in favor of dead hand control. Moreover, it may allow the Rule to be used for the very purpose it is currently designed to prevent—fettering the ability of future generations to deal freely with property. Consider the following example.

Example 2:

> Testator (*T*) devises Blackacre to Trustees upon trust for the children of the genetic progeny of *A* and *B* (both deceased), whenever born, who shall attain the age of 21 years. (At the death of *T*, *A* and *B* had two children, *X* and *Y*, living, and one cryogenically preserved embryo, *Z*. No gametic material of *A* and *B* is in existence.)

In this example, if the existence of reproductive material is ignored, the gift to the children of the genetic progeny of *A* and *B* will be valid. Given

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[77] Deech, *supra* note 8, at 594. *See also* THE LAW COMMISSION, THE RULES AGAINST PERPETUITIES AND EXCESSIVE ACCUMULATIONS 4-6 (1998) (Law Comm. No. 251) (outlining the arguments that have been advanced to justify the Rule Against Perpetuities); David Allan, *The Rule Against Perpetuities Restated*, 6 U.W. AUSTL. L. REV. 27, 32-33 (1963) (explaining the changes made to the Rule Against Perpetuities in the Law Reform (Property, Perpetuities, and Succession) Act of 1962); Ira M. Bloom, *Perpetuities Refinement: There is an Alternative*, 62 WASH. L. REV. 23, 25-26 (1987) (discussing the Rule Against Perpetuities and its limitations as applied to beneficiaries). *But cf.* Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705 (1990) (discussing the benefits, costs, unfairness, defects, and economic effects of the Rule Against Perpetuities).

[78] PETER BUTT, LAND LAW 168 (3d ed. 1996). *Cf.* John Mee, *Land Law—The Rule Against Perpetuities Return of the Fertile Octogenarians*, 14 DUBLIN U. L. J. 182, 191 (1992) (arguing that the Rule is not always applied logically because subsequent changes in the law often are ignored).

the death of *A* and *B*, *X* and *Y* will be the lives in being, and their children, if any, will have to attain the age of twenty-one within twenty-one years of the death of the survivor of *X* and *Y*. However, if the existence of *Z* is recognized, a theoretical possibility exists that *Z* may be born more than twenty-one years after the death of *X* and *Y*. Alternatively, *Z* may be born but not have a child within the perpetuity period. In either case, the gift to the children of the genetic progeny of *A* and *B* will offend the Rule.

But what if *Z* is recognized as a life in being? Arguably, this will save the gift. The measuring lives, for the purpose of the Rule, may be expressly or impliedly designated in the will. No express designation is contained in this example; however, *X*, *Y*, and *Z* are impliedly designated, and they have some connection with the ultimate vesting of the gift. Assuming the acceptance of the legal argument for recognition of an embryo as a life in being, *X*, *Y*, and *Z* satisfy all of the following criteria necessary to constitute lives in being:[79] (1) X and *Y* are human, and *Z* is deemed to be human; (2) *X* and *Y* are alive, and *Z* is deemed alive at the date of the creation of the interest; (3) given the death of *A* and *B* and the nonexistence of any gametic material, their number cannot increase;[80] and (4) their number is ascertainable.[81] The gift to the children of the genetic progeny of *A* and *B* must vest, if at all, within twenty-one years from the death of the survivor of *X*, *Y*, and *Z*— assuming that *Z* successfully survives gestation and birth. The possibility that *Z* may not subsequently be born alive, or even be implanted, will not affect the validity of the gift. Under the common law, the Rule is only concerned with initial certainty, not subsequent events.[82]

But when might the gift actually vest? Assuming storage techniques continue to improve, *Z* may not be born, much less have children for decades or possibly centuries. During this time, if the law deems *Z* to be alive as of the date of the interest's creation (the death of *T*), vesting may

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[79] *See supra* Part III.A. Example 1.

[80] This example does not account for the potential for cloning. That this qualification is necessary highlights one of the many difficulties inherent in the continued use of the life in being in the perpetuities formula.

[81] The children of the genetic progeny of *A* and *B* cannot be lives in being. After the date of the interest's creation (the death of *T*), *X*, *Y*, and *Z* (once born alive) may have more children. Therefore, the conditions necessary to constitute a life in being are not satisfied.

[82] *See* Jee v. Audley, 29 Eng. Rep. 1186 (M.R. 1787); *In re* Dawson, 39 Ch. D. 155 (1888); Ward v. Van der Loeff, 1924 App. Cas. 653 (appeal taken from Eng.); *In re* Gaite's Will Trusts, [1949] 1 All E.R. 459 (Ch.).

be postponed indefinitely. While the class-closing rules may exclude the children of *Z*, the testator may stipulate that all members of the class, whenever born, share in the gift. If such an intention is manifest,[83] the class-closing rules will not assist those beneficiaries that have satisfied all of the prerequisites to the vesting of their share of the gift.[84]

The statutory modifications to the Rule are woefully inadequate to curb the expansion of dead hand control that will accompany the recognition of an embryo as a life in being. Each jurisdiction has designed its perpetuities legislation to save gifts that would be void under the common law. If the Rule is not violated, courts do not need to resort to statutory modifications designed to save an otherwise invalid gift. For example, consider the wait-and-see provision in the English statute, which provides:

> Where, apart from the provisions of this section and sections 4 and 5 of this Act, *a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time*, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the rule against perpetuities.[85]

If the disposition is not void under the common law, the prerequisite necessary to trigger the application of the saving provisions is not established. Only a period-in-gross provision, which substitutes a fixed perpetuity period, will abrogate the common law Rule.

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[83] *See* J.H.C. MORRIS & W. BARTON LEACH, THE RULE AGAINST PERPETUITIES 124 (2d ed. 1962) (noting that "the rule [in *Andrews v. Partington*] can be excluded if a particular testator manifests a contrary intent. But the rule is so well established that his language must be very clear if it is to have this effect."); *see also* Sappideen, *supra* note 9, at 314 (suggesting that "class closing rules will apply unless the will evinces a contrary intent").

[84] *See* S.J. Bailey, *Class-Closing, Accumulations and Accelerations,* CAMBRIDGE L.J. 39, 45 (1958); J.H.C. Morris, *The Rule Against Perpetuities and the Rule in Andrews v. Partington*, 70 L.Q. REV. 61, 63, 72 (1954); Sappideen, *supra* note 9, at 314.

[85] Perpetuities and Accumulations Act, 1964, ch. 55, § 3(1) (Eng.) (emphasis added) (alluding to § 4, the "reduction of age and exclusion of class members to avoid remoteness" provision, and § 5, the "condition relating to death of surviving spouse" provision).

IV. THE NEED FOR LEGISLATIVE REFORM

> "If an inconvenience arise, the legislature, not the Judges, must apply the remedy."[86]

When considering legislative reform, two objectives should be paramount— establishing certainty and limiting dead hand control. With respect to the former, the common law desire to ensure initial certainty produced the "fertile octogenarian,"[87] "precocious toddler,"[88] "magic gravel pits,"[89] and "unborn widow."[90] Although such cases correctly used lives in being as part of a measuring formula, which was designed to be applied with mathematical precision,[91] many have justly criticized the result for moving the law "too far from its foundation in the ordinary lives of people."[92] Initial certainty should be achieved, but in a way that can be explained without embarrassment to a lay client.[93] The fiction that eighty year old Sarah can have a child,[94] who in turn, at age five, can have a child, may appeal to those with a mathematical disposition, but the fiction is incomprehensible to most lawyers and clients.

Only a period-in-gross provision could establish certainty and restrict a testator's ability to exercise control from the grave. The United Kingdom recently recognized this position in a Law Reform Commission Report. One of the principal recommendations in the report is a single perpetuity

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[86] Thellusson, 31 Eng. Rep. at 168.

[87] *See* Jee v. Audley, 29 Eng. Rep. at 1186.

[88] *See In re* Gaite's Will Trusts, [1949] 1 All E.R. at 459.

[89] *See In re* Wood, [1894] 3 Ch. 381 (Eng. C.A.).

[90] *See In re* Frost, 43 Ch. D. 246 (1889).

[91] *See* Deech, *supra* note 8, at 609.

[92] Mee, *supra* note 77, at 192.

[93] The legal historian, Sir William Holdsworth, noted:

> Rules of law must struggle for existence in the strong air of practical life. Rules which are so refined that they bear but a small relation to the world of sense will sooner or later be swept away. Sooner if, like the criminal law or the commercial law, they touch nearly men's habits and conduct; later if, like the law of real property, they affect a smaller class, and affect them less nearly.

1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 349 (7th ed. 1956).

[94] The following future interest haiku may interest those with a literary disposition.

> Sarah laughing at eighty,
> morning nausea

Louis Sirico, Jr., *Future Interest Haiku*, 67 N.C. L. REV. 171, 175 (1988).

period of 125 years, to which the principle of wait-and-see would apply.[95] Similar reform has been advocated in the United States.[96]

Replacing the life in being with a fixed perpetuity period negates the potential impact of reproductive technology on the application of the Rule,[97] while limiting dead hand control over the vesting of property. Although some may lament the close of an interesting chapter in the evolution of property law, most should recognize that such reform is long overdue. The focus of law reform should now be on the appropriate length of the fixed perpetuity period.

The United Kingdom Law Reform Commissioners favored the 125 year period because it is probably the longest period possible under the present law. Second, by adopting a long perpetuity period, they recognized the argument that the Rule should be abolished altogether.[98] The first reason is similar to the underlying principle of the ninety year perpetuity period in the Uniform Statutory Rule Against Perpetuities, promulgated in the United States in 1986. The ninety year period approximates the "average period of time that would traditionally be allowed by the wait-and-see doctrine."[99]

Although attractive for its simplicity, this reasoning is flawed. The appropriate period-in-gross should be calculated with reference to the underlying reason for the Rule's continued existence. Hence, the inquiry should focus on the need for certainty and the length of time a testator or settlor should be allowed to fetter a beneficiary's use of property. Calculating the perpetuity period with reference to the maximum period devised by estate lawyers over the past three centuries is not appropriate. One observer made the following analogy:

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[95] *See* THE LAW COMMISSION, *supra* note 77, at 8.

[96] *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES, § 1(a)(2) (amended 1990), 8B U.L.A. 333 (1993) (providing a ninety year period in addition to the life in being period of § 1(a)(1)); UNIF. PROBATE CODE §§ 2-901 to 2-906 (revised 1990), 8 U.L.A. 226 (1998) (incorporating the UNIF. STATUTORY RULE AGAINST PERPETUITIES); *see generally* 61 AM. JUR.2D *Perpetuities and Restraints on Alienation* § 14.5 (1999) (discussing the UNIF. STATUTORY RULE AGAINST PERPETUITIES and its reforming effect on the common law rule).

[97] *See* THE LAW COMMISSION, *supra* note 77, at 108.

[98] *See id.* at 101.

[99] Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period,* 73 CORNELL L. REV. 157, 162 (1988).

> To select the outer limits of an already too long perpetuities period as the standard measure makes about as much sense as fixing automobile speed limits at just one mile per hour under that speed which statistically is determined to be involved in the greatest percentage of fatal automobile accidents.[100]

Indeed, if the longest period possible under the present law is the yardstick, an argument exists that the maximum period is constrained only by the shelf life of a cryopreserved embryo.

Admittedly, any period will be somewhat arbitrary; however, a substantial change in the law should rest on a more solid foundation. The inquiry should center on the appropriate balance between the rights of the existing generation to dispose of property and the freedom of future beneficiaries to deal with property as they see fit.

V. CONCLUSION

A rule inextricably linked to reproductive capacity must adapt to advances in reproductive technology, but this result is neither desirable nor necessary. Continued reliance on the life in being to determine the length of the perpetuity period places us in the worst possible position. Under both the common law and the law as modified by statute, we have a rule of certainty that promotes uncertainty and that fails to achieve the objective justifying its existence—limiting dead hand control.

Legislative reform that has focused primarily on the "flesh and blood attributes of the persons involved in the gift"[101] will fail to hold us in good stead as we enter the twenty-first century.[102] A fixed perpetuity period will promote certainty, abrogate the impact of reproductive technology and

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[100] Samuel M. Fetters, *Perpetuities: The Wait-and-See Disaster,* 60 CORNELL L. REV. 380, 404 (1975).

[101] Deech, *supra* note 8, 608-09. *See also* David Harris, *En Ventre Sa Mere,* 144 NEW L. J. 980 (1994) (discussing the effect of medical advances on The Perpetuities and Accumulations Act, 1964 (Eng.)).

[102] For a critical discussion of the presumption and evidence as to future parenthood, as well as the wait-and-see provisions of the Perpetuities and Accumulations Act, see Deech, *supra* note 8, at 608-09, Fetters, *supra* note 100, at 403, and THE LAW COMMISSION, *supra* note 77.

effectively limit dead hand control.