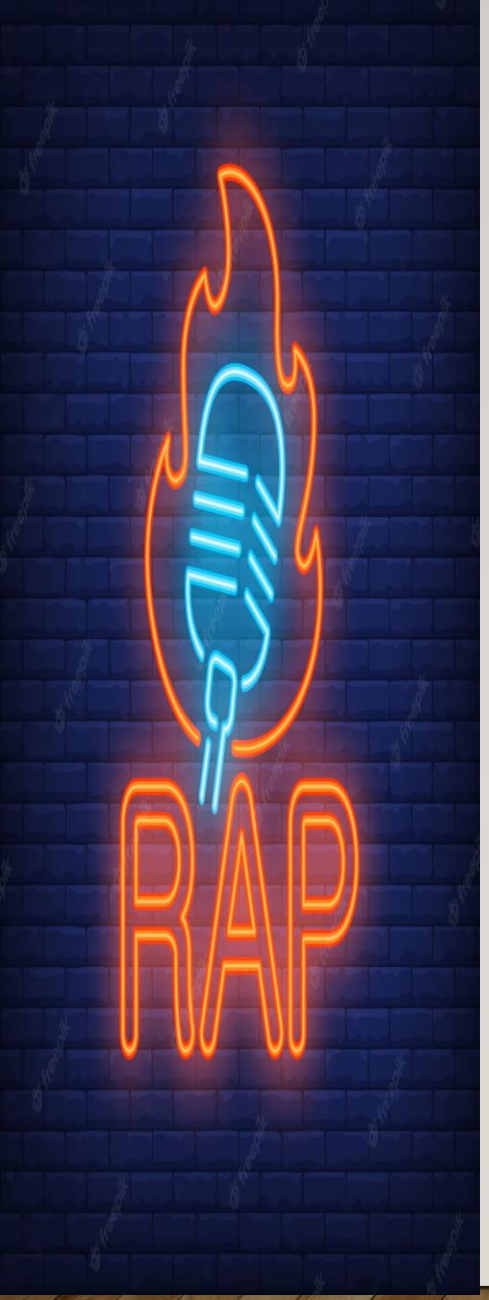


R.A.P.'n FOR THE BAR

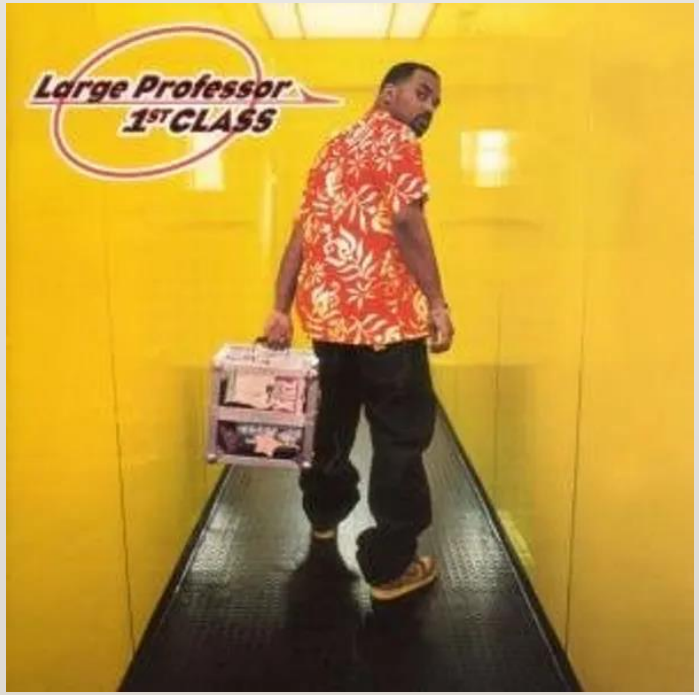
THE COMMON LAW RULE AND BEYOND

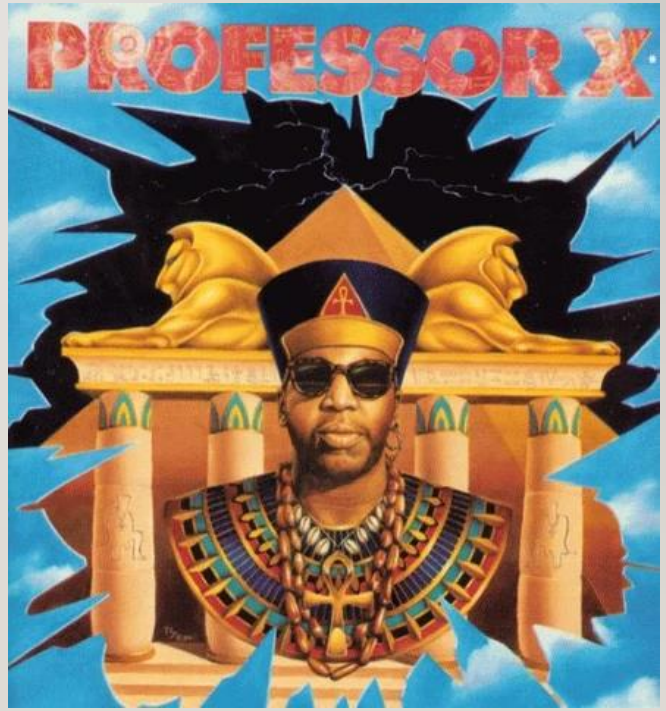
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RAP'n FOR THE BAR

- There have been a number of "famous RAP Professors" such as;







THE RULE AGAINST PERPETUITIES

- And varied efforts at presenting the R.A.P. that have been "entertaining" to some but quite a bit less than Professorial such as these rather (in)famous contributions;
- **NOTE -TRIGGER WARNINGS IN EFFECT HERE;**
  - https://www.youtube.com/watch?v=1dVW8im_7bc
  - https://www.youtube.com/watch?v=iqr9E-YrrKQ
  - https://www.youtube.com/watch?v=uQHcHprI-J0



THE RULE AGAINST PERPETUITIES

- The Common Law Rule
  - *No interest is good unless it must vest, **if at all**, not later than 21 years after some life in being, at the creation of the interest.*
    - *It is NOT just a 21-year rule.*
    - *It does NOT require proof an event will happen.*
    - *One must only be able to say one knows for sure that the condition "will or will not" occur within the time period under consideration.*

R.A.P. HAS LIMITED APPLICATION

- **RECOGNIZE** the rule only applies to (5) grantee future interests;
  - Executory Interest – condition subsequent must occur
  - Contingent Remainder – condition precedent must be met
  - Vested remainder subject to partial/open – class gifts
  - Options to purchase residential property
    - Optionee has right if 3rd party makes offer
  - Powers of Appointment – wills & trusts situations



R.A.P. HAS LIMITED APPLICATION

- The Common Law Rule - First
  - **RECOGNIZE** the rule applies to (5) grantee future interests;
    - **Executory Interest** – O to A for life then to B but if B uses the land for farming, then to C…C has a shifting executory interest.
    - **Contingent Remainder** – O to A for life then to B if B has finished his classes on farming…B has a contingent remainder.
    - **Vested remainder subject to partial/open** – O to A for life then to B's kids…if B has kids B's kids' interest is vested subject to open since more can be added as long as B is alive.
    - **Options to Purchase (residential property)**
    - **Powers of Appointment**

THE RULE AGAINST PERPETUITIES

- The Common Law Rule - Second
  - **ASSEMBLE** those "humans" who affect the condition noted in the transfer to determine who might be a validating life regarding that condition.
  - There are basically 3 choices;
    - The life estate holder *(lifer)*
    - The grantee of the affected interest *(taker)*
    - Those that affect identities or occurrences related to the condition *(i.d.o. maker)*
      - **NOTE!** *Sometimes there will be no validating life. If not, that transfer is void.*
      - *Validating lives, a/k/a, lives in being, include a child in the womb*
      - *Validating lives do not have to be mentioned in the transfer language*

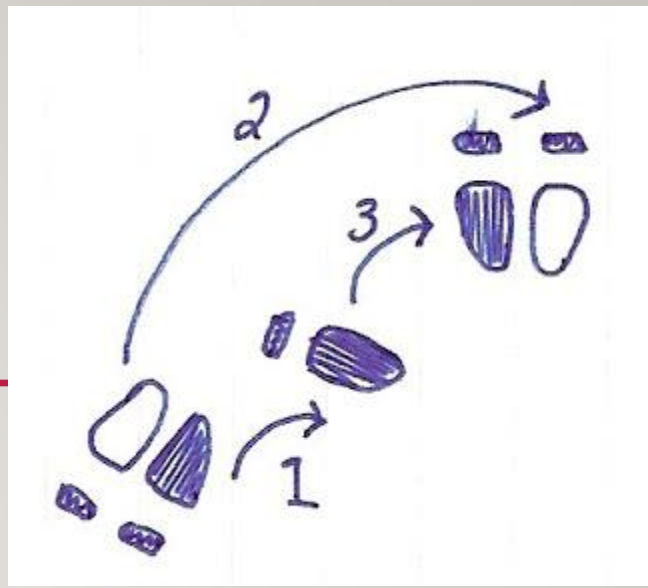
VALIDATOR

THE RULE AGAINST PERPETUITIES



- The Common Law Rule - Third
  - **PROVE** whether the validating lives give you a yes or no, definitive answer, regarding the condition affecting the transfer. In an orderly fashion ask whether you know the condition will or won't be met;
    - During the life of the validating life or lives
    - At the death of the validating life or lives
    - No later than 21 years after the death of the validating life or lives
      - NOTE! If it's *possible* for the condition to occur later than all of the above, RAP kills it!

THE RULE AGAINST PERPETUITIES



Rule Against Perpetuities

1.	2.	3.
Recognize	Assemble	Prove
1. Executory Interest 2. Contingent remainders 3. Class Gifts (a.k.a. vested reminders subject to open)	1. The initial interest recipient most often the life estate holder. 2. The transferee or holder of the interest subject to the condition. 3. Parties who can affect the condition being met either by the conditions occurrence or identifying the party subject to the condition.	1. The interest will be good or fail within the validator's life . . . 2. . . . or we will be able to say the interest is/or will be good or not by the death of the validator. 3. that the affected interest cannot be proven to be good or fail within 21 years after the death of all potential validators.

LIFER

TAKER

I.D.O. MAKER

LIFE

DEATH

21 YEARS

THE RULE AGAINST PERPETUITIES



- The Common Law Rule – ***(R)ecognize…(A)ssemble…(P)rove***
  - To R.A.P. effectively know the state of title! Identify the interests held by each transferee to see if R.A.P. applies and how.
  - *O to A for life, then to A's first child to reach the age of 25. A has no children.*
    - A has a present possessory life estate and A's first child to reach 25 has a *contingent remainder in fee simple absolute*. There is a condition precedent. O has a reversion.
    - The condition may not be met during A's life, or at A's death, and not within 21 years of A's death, thus the gift over to the child is void and struck from the transfer. Even if A's alive with a child aged 24, the interest fails since that child might die before 25, and A could die leaving no children or a child aged 3 or less.
    - A now has a a.p.p.l.e and O has a reversion.

THE RULE AGAINST PERPETUITIES



- The Common Law Rule – ***(R)ecognize…(A)ssemble…(P)rove***
  - To R.A.P. effectively know the state of title! Identify what interests are held by each identified party to see if R.A.P. applies and how.

  - *O to A for life, then to B when he reaches the age of 25. B is 2 years old.*
    - A has a present possessory life estate.
    - B has a *contingent remainder in fee simple absolute*. There is a condition precedent. B must reach 25 to receive the interest.
    - O has a reversion.
    - B's condition will or will not be met during B's life, or at B's death. The interest is good under the rule.

THE RULE AGAINST PERPETUITIES



- Multiple Transferees/Interests in a single transfer…example;
- *O conveys to A for life, then to A's grandchildren that pass the bar exam, but if no grandchildren pass the bar, then to B's heirs. A and B are alive, and each have one child.*
  - A's grandchildren's gift is void under the rule. A's child may not have a child during A's life or by A's death that passes the bar exam. It also might take more than 21 years after the death of all people presently alive before a grandchild of A's passes. The class does not close until A's children's death. At common law class gifts must be proven good to all members of the class or they are void.
  - The gift to B's heirs is good. We will know at B's death whether B has heirs or not. The current child may or may not be the heir that receives the gift.

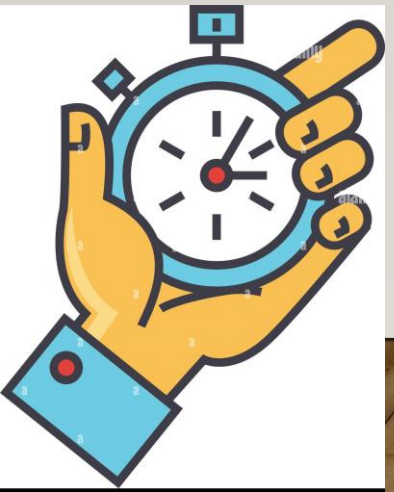
THE RULE AGAINST PERPETUITIES

- The Common Law Rule…Strike the void portion from the transfer;
  - *O conveys farmacre to A, but if farmacre is used for a disco then to B.*
    - B's executory interest is void and that part is stricken.
    - A now owns farmacre in fee simple absolute
  - *O conveys to A so long as the property is not used for a farm, then to B.*
    - B's executory interest is void here b/c there is no way we can say for sure whether A or A's successors will use the property in violation of the condition during A or B's lifetime or w/n 21 years of their death.
    - B's interest is struck, and A has a determinable fee and O has a possibility of reverter.



THE RULE AGAINST PERPETUITIES

- Proving during the Perpetuities Period requires being aware of when timing starts;
  - Deeds – on the date of effective delivery
  - Wills – on the date of the testator's death
  - Trusts
    - Revocable – on settlor's death - validating lives, if any, must be alive then
    - Irrevocable – on the date the trust is created - validating lives, if any, must be alive then
      - NOTE; Revocable trusts can be made irrevocable



THE RULE AGAINST PERPETUITIES



- Convey vs. Devise…example;
- *O* ***conveys*** *to my grandchildren who reach 21. O has one child A, and one grandchild G, who is 20.*
  - The transfer to the grandchildren is void under the rule. At the time of conveyance no one can be the validating life. We can't say we know or don't know for sure, if O will have a grandchild that reaches 21 during the life of O, A, or G or at any of their deaths or more than 21 years after their deaths. The person who can satisfy the condition may not be born yet, nor might that individual's parents.

THE RULE AGAINST PERPETUITIES



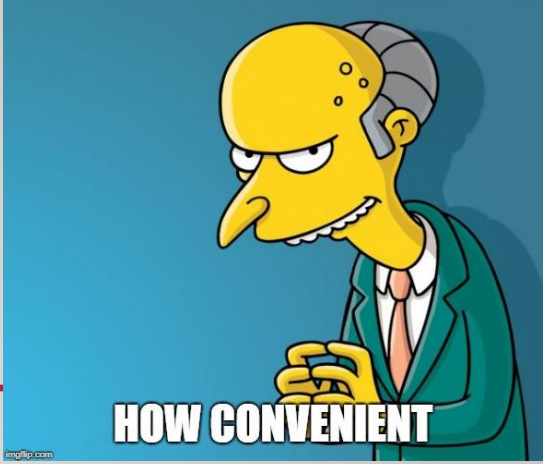
- Devise vs. Convey…example;
- *T **devises** to my grandchildren who reach 21. At T's death T has one child A, and one grandchild G who is 20.*
  - The transfer to the grandchildren is good under the rule. A is the validating life since at T's death we know T will have no more children. G may die before 21 but we will know for sure whether the condition is met, or not, no later than 21years after A's death.

THE RULE AGAINST PERPETUITIES

- Vested remainder subject to open/partial divestment – class gifts
  - Originally were void if it was possible for the gift to not vest or fail for certain against one class member.
  - If it was possible for a disposition to vest remotely with respect to any member of the class, the entire class gift was invalid.
    - *O to A for life, then to B's children who have reached the age of 25. B has 3 children aged 26 23 and 21. B dies. A dies. O's heirs now own in FSA.*
      - All of B's children have not met the condition so the whole gift to the class is struck. The 3 kids were not the sole validating lives since B could've had more children at the time of the conveyance.



THE RULE AGAINST PERPETUITIES



- ***Modifications To The Rule****…Rule of Convenience for Class Gifts*
- If told the jurisdiction follows the convenience rule, that may save a class gift.
- For example…*O conveys to A for life, then to A's grandchildren. A has 1 child, and 2 grandkids.*
  - A has the present possessory life estate, and the grandchildren have a vested remainder subject to open, thus their interests is subject to RAP. The interest is void under the common law rule because A may have a child, that has a child, more than 21 years after the death of anyone presently alive.
  - The convenience rule says the class closes at the time any member can demand a share. The class will close under that rule at A's death, as opposed to A's children's death, whoever those children may ultimately be.

THE RULE AGAINST PERPETUITIES



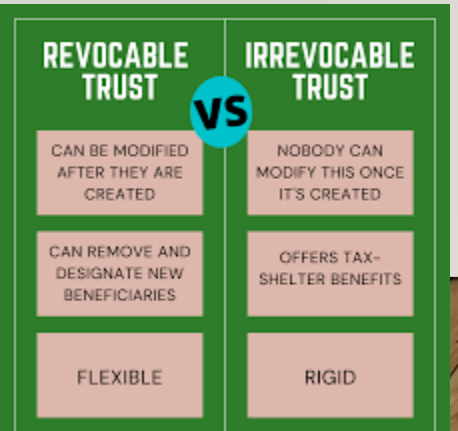
- ***Rule of Convenience***…*Class Gifts via Will*
- Outright Gift – class closes at testator's death.
  - *T wills to the children of my friend John Brown. John has 3 children. T dies and John has another child.*
    - The fourth child is excluded.
- No class members alive at T's death – class stays open.
  - *T wills $100,000 to my friend John's children. John has 0 children. T dies.*
    - The class stays open for any children until John dies.
- Postponed Gift – class closes at fixed time for distribution.
  - *T creates trust to pay $$ to W for life and then pay the principal to John's children. John has two children. Before T dies John has child 3. T dies then W dies, and John has child 4.*
    - Child 4 is excluded by the rule as the class closed at the time W died when it was time to make a distribution.

THE RULE AGAINST PERPETUITIES

- ***The RAP applies to equitable interests in trust just as it does to legal interests.***
- *O conveys to A in trust for the benefit of B so long as the house on the land is standing, then for the benefit of the descendants of B then living.*
  - *The equitable interests of B's descendants is void under the rule.*
- Charitable trusts are entities with an indefinite group of beneficiaries, usually an established charity or group, i.e., the Salvation Army or Survivors of Hurricane Ian. RAP does NOT apply to entirely charitable trusts or trusts transfers between like entities.

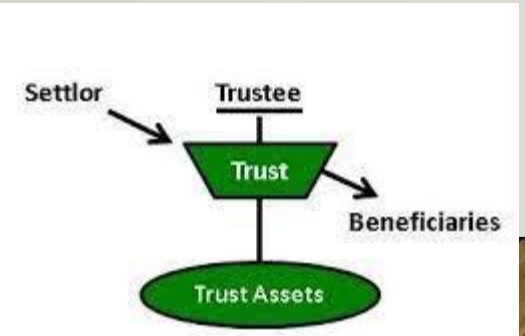
Trusts can be revocable or irrevocable.

- If revocable, the perpetuities period begins to run on the date the trusts becomes irrevocable, a/k/a at the settlor's death.
- If irrevocable, the period begins to run on the date the trusts is created.



THE RULE AGAINST PERPETUITIES

- Powers of Appointment – examples
  - *Jed transfers Oilacre to Jethro, in trust, to pay the income to Ms. Hathaway for life, then to pay over the principal to such of Jethro's children as Ms. Hathaway's grandchildren shall by will appoint. Jethro and Ms. Hathaway are alive with no children.* The power of appointment held by Ms. Hathaway is void under the rule.
  - *Hannah creates a trust for the lives of her two sisters, Mary and Eliza, and the lives of their children, with the survivor granted a power to appoint the corpus.* The power of appointment is invalid because either or both sisters may have children born after the trust was created.
    - Powers of Appointment in wills and trust is a specialty area with various rules and modifications that go beyond standard property doctrine. ***However, for RAP purposes, you are still looking to see if the power given can be exercised beyond the perpetuities period.***

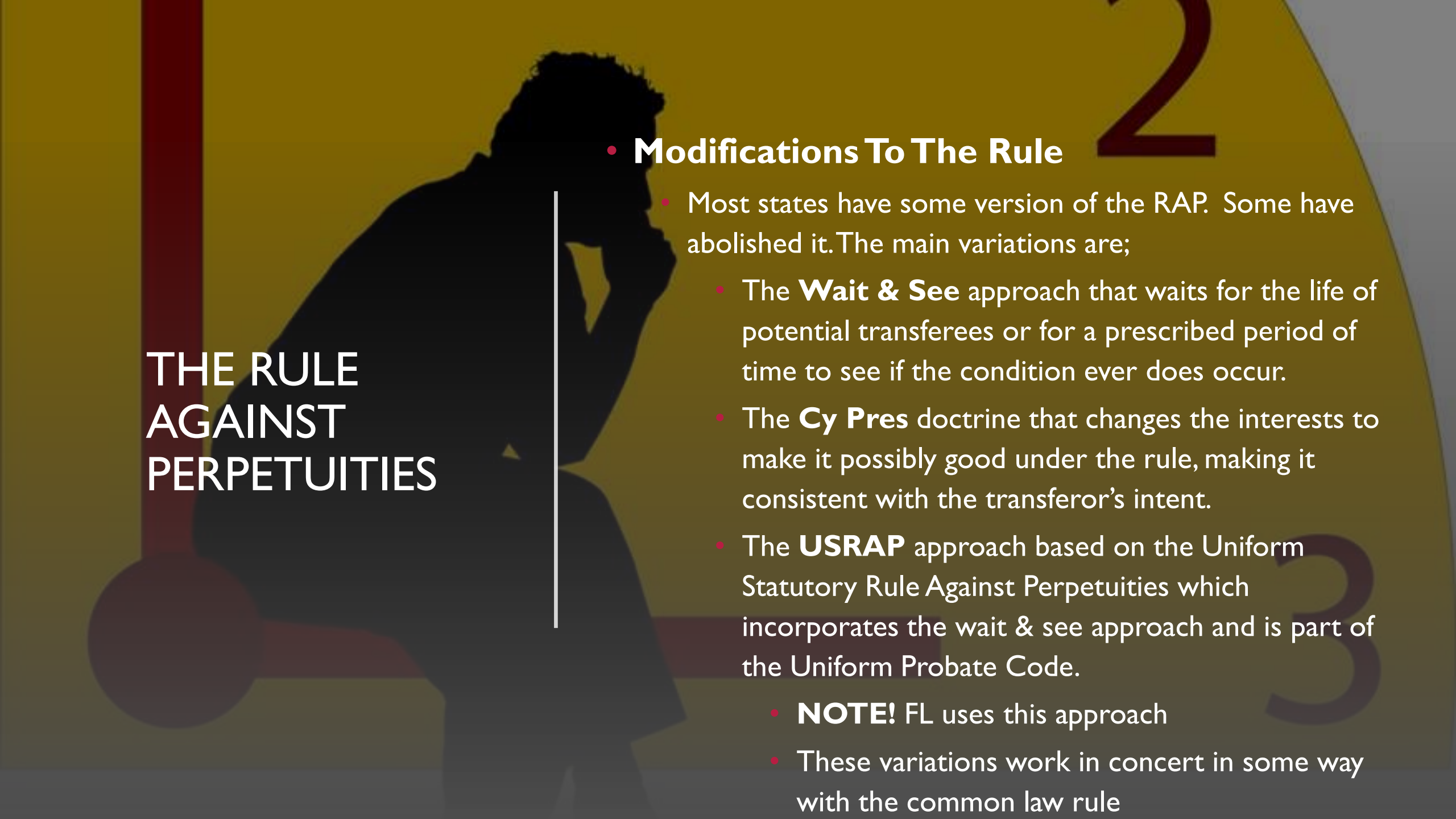


THE RULE AGAINST PERPETUITIES



- **Option to Purchase** – is a chance to purchase residential property on specified terms. Options that can be exercised beyond the perpetuities period are void.
  - *I.e., Developer conveys to Bob Buyer an option to purchase land in PUD city subdivision within 60 days after City approval of the subdivision.*
  - The transfer is void under the rule. No life in being can say, at the time of conveyance, if w/n their life, or at their death, or w/n 21 years of death there will be city approval.
- Does **not** apply if optionees are "lessees".
- Does **not** apply to optionees in "commercial transactions".
- Does not apply to "non-assignable" right of first refusal rights.

THE RULE AGAINST PERPETUITIES



- **Modifications To The Rule**
  - Most states have some version of the RAP. Some have abolished it. The main variations are;
    - The **Wait & See** approach that waits for the life of potential transferees or for a prescribed period of time to see if the condition ever does occur.
    - The **Cy Pres** doctrine that changes the interests to make it possibly good under the rule, making it consistent with the transferor's intent.
    - The **USRAP** approach based on the Uniform Statutory Rule Against Perpetuities which incorporates the wait & see approach and is part of the Uniform Probate Code.
      - **NOTE!** FL uses this approach
      - These variations work in concert in some way with the common law rule

THE RULE AGAINST PERPETUITIES



- ***Modifications To The Rule***
- The **Cy Pres** approach…*O conveys to A for life, then to A's children who reach 25. A dies with one child aged 2.* Under common law the interest to A's children is void.
  - Cy Pres allows the language to be reformed to children who reach 23. Now, coupled with Wait & See, the interest will be good or not w/n 21 years, so it is not struck.
- The **Wait and See** approach w/o Cy Pres…*O conveys to A for life, then to A's children who reach 25. A later dies leaving three children aged 4, 8, and 12.*
  - Instead of declaring the transfer void, wait and see if any child reaches 25 w/n the next 21 yrs.

THE RULE AGAINST PERPETUITIES

- ***Modifications To The Rule***
- The **USRAP/90-year** approach.
- *O conveys to A, but if used as an amusement park, then to B.*
  - USRAP/90 says we'll wait up to 90 years to see if the property is used as an amusement park to determine B's rights.
- *O conveys to A for life, then to A's children who reach 25. A is alive with three children aged 4, 8, and 12.*
  - USRAP/90 says we will wait up to 90 years, to see if any of A's current children, or any born after the conveyance, reach 25 before determining if the interest is void or good under the rule.



THE RULE AGAINST PERPETUITIES



- ***Modifications To The Rule…The Charity-to-Charity Exception***
- *O coveys Blackacre to the YMCA so long as it's used as an athletic center, and if such use ceases then to CASA as a women's retreat.*
  - Under the normal application of the common law rule CASA's executory interest is void as there is no possible validating life. But where a possible Charity-to-Charity transfer exist, the RAP will not apply.
  - If either the present estate or future interest is not a Charity, the normal application of the rule applies.
    - *O coveys Blackacre to the YMCA so long as it's used as an athletic center, and if such use ceases then to O's issue, then living.*
      - *O's issue then living violates the rule and is struck from the conveyance.*
      - *The YMCA has a fee subject to condition subsequent and O has a reversion.*

THE RULE AGAINST PERPETUITIES

- ***Modifications To The Rule…Fixed sum gifts to separate class members***
- For example…*T wills to A for life, then $1000 to each of A's grandchildren that reach 21, whether alive at T's death or born thereafter. T dies leaving A's 2 children and 5 grandkids.*
  - The gift is good as to A's grandkids born of A's children at T's death. We'll know for sure if they reach 21 or not during their lifetime. The same is true of any future or afterborns of A's 2 children.
  - The gift is void as to any children later born to A and their children. No one alive at T's death can be a validating life for those grandchildren.



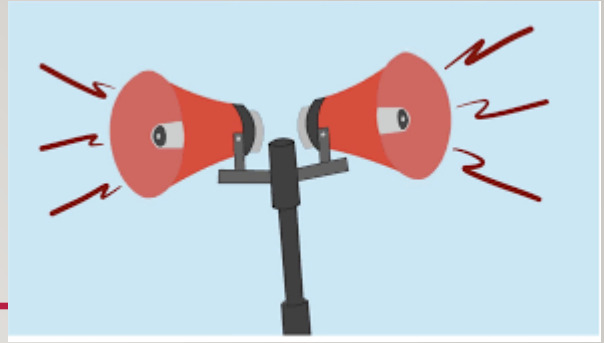
THE RULE AGAINST PERPETUITIES



- ***Warning! RAP is probably being violated here;***
  - Executory interests following defeasible fees having no time limits.
  - Class gifts to members based on ages beyond 21.
  - Gifts based on admin contingencies w/o any time limits (i.e., the slothful executor).
  - Fertile Octogenarians…women presumed to be able to give birth regardless of age.
    - *O coveys to A, aged 82 for life, then to A's children that reach 65.* A has two children aged 50 and 53. The interest is void because it's presumed that, A being alive, can have more children and those children's interests, as well as the current children, may vest outside the perpetuities period.



THE RULE AGAINST PERPETUITIES



- ***Warning! RAP is probably being violated here;***
  - Transfers to third generations and beyond with contingencies on those parties.
    - i.e.,…to grandchildren then living for life, then to their children.
  - Options to purchase (vs. lease) involving residential property.
  - Gifts to classes or subclasses of an individual person or group.
  - Unborn widow or widower situations.
    - *O conveys to A for life, then on the death of A's widow, to A's issue then living. A is presently alive and married.*
    - The interest in A's issue is void. A's issue then living may be from a subsequent marriage to someone not alive yet. There can be no validating life here.

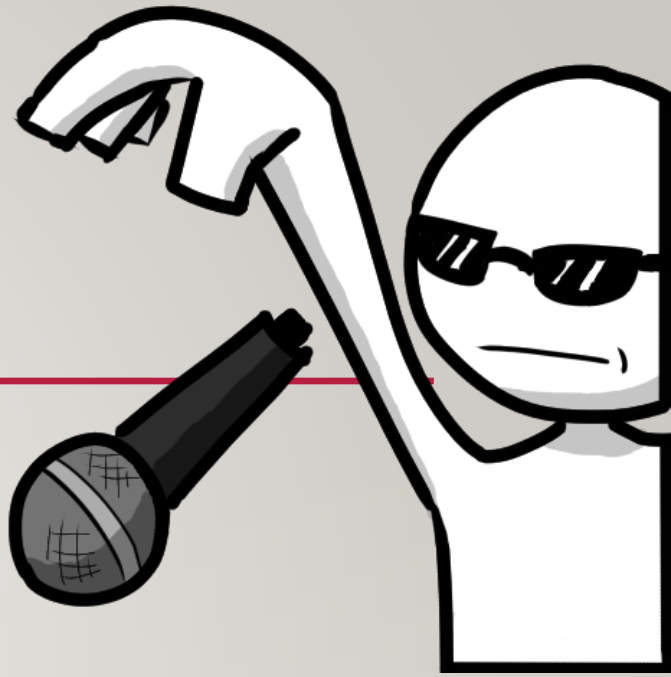


THE RULE AGAINST PERPETUITIES



- ***Other notes and quirks for the bar***
  - Presume RAP applies to all estate and future interest situations unless told otherwise.
  - Do not be surprised to see a RAP option in MC questions dealing with any type of property interest fragmentation.
  - Do not presume a common law class gift situation unless the question expressly mentions it.
  - Pay special attention to RAP timing; Deed v. Will….Revocable v. Irrevocable Trust
  - A remainder to a will residuary is **not** the same as a grantee future interest remainder.
  - Generally, a reference to a residuary applies to real and personal property together, (unless specifically stated to the contrary).

THE RULE AGAINST PERPETUITIES



- ***Other notes and quirks for the bar***
  - Compile your own handy list of exceptions to the rule. Bar examiners like testing the exceptions.
  - Options to Purchase are more likely voided by the RAP than Rights of First Refusal since the latter are presumed personal vs. assignable.
  - Rights of First Refusal are generally not covered by the RAP in FL.
  - In applying RAP, it is usually most effective to analyze step by step;
    - RECOGNIZE
    - ASSEMBLE
    - PROVE