Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we're doing another in our "Listen and Learn" series – this one is on the rule against perpetuities. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series. Today we are going to be talking about the rule against perpetuities. This is a topic of lore in law school and it seldom appears on the bar exam, but it showed up in two different ways on the July 2022 UBE exam, so let's discuss it. On this episode we're going to focus broadly on the definition and work through some hypotheticals to start breaking it down in a way that makes sense.

Lee Burgess: Let's start by going over the rule. For an interest to be valid under the rule against perpetuities, it must vest within a life in being at the time of the grant plus 21 years. Any interest that will not vest during the time period, and those that hypothetically might not vest during that period, is invalidated.

Lee Burgess: This is the common law rule. Some states have modified the rule and will wait to see if an interest will not vest. Other states require the court to reframe the trust to allow the interest to vest within the prescribed time, rather than automatically invalidating the interest. The rule exists to prevent people from drafting transfers that can tie up land or other property for lifetimes. This ostensibly helps prevent dynasties that lock up control in land by someone who has been dead for a century.

Lee Burgess: We're going to break each part of the rule down, but let's simplify things first. Your challenge on the exam will be to create a hypothetical in which an interest in property might vest more than 21 years after all the measuring lives have died.

Lee Burgess: The rule against perpetuities is a rule that requires some foundational knowledge from your Property class. First, what does "interest" mean here? It is just a property interest – specifically, a future interest. Present interests are not implicated by this rule because they vest immediately.

Lee Burgess: So let's do a quick review of some future interests. Remember that a remainder is merely what is left over from a life estate. Here's a short example of a remainder:

Lee Burgess: Alice conveys her nail salon to Joe for life, then to Mary. Here, Mary has a remainder interest in the nail salon. If Alice changes the conveyance just a bit, it becomes contingent: Alice conveys her nail salon to Joe for life, then to Mary, should Mary rescue five corgis.

Lee Burgess: These are outlandish examples, but you can see how the second one is triggered only if Mary takes a specific action. That's what makes it contingent. A remainder interest is also contingent if it is given to a class such as "heirs". No one knows who heirs are until after someone dies. If something is left to "heirs", the remainder interest is contingent on there being heirs at the time of the death.

Lee Burgess: We need to dig just a bit deeper before moving on with the rule against perpetuities. Executory interests can be shifting or springing. A shifting executory interest cuts off another grantee's interest upon the occurrence of a specific event, and a springing executory interest cuts off the grantor's own interest upon the occurrence of a specific event.

Lee Burgess: Now back to the rule. What does "vesting" mean in the context of "must vest"? The property interest must land into the control of an ascertained person who is entitled to possession of that gift within the time limits. Put simply, the property must be given to a living person and it must not be subject to a condition precedent. This matters because the rule requires future interests to vest within a certain period of time.

Lee Burgess: A class gift becomes vested when the class closes and all conditions for every member of the class are satisfied. Class gifts are frequently seen in different contexts on the bar exam. This is simply a gift to a group of persons. When you see words like children, siblings, or issue, you're generally looking at a class gift. These gifts often close at the death of the testator or settlor when there is an outright distribution. However, when the gift is delayed and meant to be distributed after a life estate or some other passage of time, the class closes when any member of the class is entitled to possession of the gift. This is known as the rule of convenience.

Lee Burgess: We're talking about time limits. These gifts must vest within a life in being at the time of the grant plus 21 years. The grantor must have a grantee that is identifiable at the time of the creation of the interest. The creation of the interest occurs when grantor dies, if the property transfer is devised in a will. If

the property interest is transferred through a conveyance, the creation takes effect immediately.

Lee Burgess: When you are working through a rule against perpetuities issue, you must pay attention to when the interest is created, so that you can measure the lives in being, and then add 21 years. The life in being can be a class or a single person, but the class must be closed, as we discussed above. The measuring life is often named in the will or trust, and tends to have an interest in the property, such as a life estate. If the interest will not vest until after the death of the life or lives in being plus 21 years, or if there is even a possibility that the interest will not vest, the transfer will fail.

Lee Burgess: And remember, there are always exceptions. The rule against perpetuities does not apply to charitable trusts. Those can keep enduring through time.

Lee Burgess: The rule against perpetuities is notoriously complex, so let's work through some hypotheticals to make it come together.

Lee Burgess: Back to our nail salon. Let's say Alice conveys her nail salon to Joe, so long as haircuts are not offered as a service, and then to Mary. Joe has a fee simple subject to executory limitation, and Mary has an executory interest. We need to stretch to come up with a situation under which a vesting will occur more than 21 years after one of the measuring lives. Here, the measuring lives are Alice, Joe, and Mary. If all three of them die, and then 22 years later, Joe's heirs violate the rule and start cutting hair in the nail salon, the property would vest in Mary's heirs.

Lee Burgess: But wait. That's more than the 21 years after the death of any of the measuring lives, so this executory interest in Mary violates the rule against perpetuities, and the grant should become a fee simple determinable. It will revert back to Alice or her heirs.

Lee Burgess: Here's another scenario:

Lee Burgess: Alice grants the nail salon to Joe for life, and then to Joe's children for life, and then to Joe's grandchildren. Is there any possibility that a granted interest might vest 21 years after a measuring life? If Joe already has a child and a grandchild at the time of the grant, but they die before Joe, things could get a little tricky. If Alice and Joe's child and grandchild die, but then Joe has another child, a daughter, (think fertile octogenarian – the law presumes that people are fertile until their deaths), then that daughter cannot be a measuring life, because she was not alive at the time of Alice's grant.

Lee Burgess: After Joe dies, his late-in-life daughter gets the property, and then has a son 22 years later, before sadly dying the next day. That son should get the property, but because all of the measuring lives have been dead for more than 21 years, the rule against perpetuities has been violated.

Lee Burgess: Think about this broadly. One of the bigger picture goals of property law is for land to be settled and productive. If no one knows who will inherit land and when, there is little incentive to improve land.

Lee Burgess: Now let's walk through a lengthier hypothetical so you can practice:

Lee Burgess: Twenty years ago, in State A, Frank validly created an inter vivos trust and named his brother Matt as trustee. The trust provided that Frank would receive all of the trust income during his lifetime, and that when he dies, the trust income shall be paid to his children in equal shares for their lives. When his last child dies, the trust income shall be paid in equal shares to his grandchildren for their lives. Upon the death of his last grandchild, the corpus of the trust shall be distributed in equal shares to Frank's then born great-grandchildren. The trust is revocable. Frank died recently and was survived by no children, two grandsons, and no great-grandchildren. Does this trust violate the rule against perpetuities?

Lee Burgess: There are quite a few issues here. If you flagged the successive interests and the revocable nature of the trust, you are off to a strong start! When you are approaching a rule against perpetuities question, the first thing you need to do is look at who holds the remainder interest. If there is no future interest, you are not looking at a rule against perpetuities question. Here, Frank established life estates for both his children and his grandchildren, with a remainder interest in the trust corpus in his great-grandchildren.

Lee Burgess: Next we need to figure out when the clock started ticking. When you are working with a will, the clock starts ticking upon the death of the testator, but when you are working with a trust, you need to see whether it is revocable or not. Frank chose to make the trust revocable, so the countdown begins once he can no longer revoke the trust, which happens upon his death. Because he can undo the trust at any point before his death, the measuring lives are not ascertained until he can no longer revoke. If the trust were irrevocable, the countdown would begin on the day of creation.

Lee Burgess: When Frank died, he had only two grandsons and no children. The grandsons are thus the only income beneficiaries of the trust. The grandsons are the only ones who can give Frank great-grandchildren. Any great-grandchildren will be born during one of the lives in being at the time of Frank's death, so the great-grandchildren's non-vested interest is valid.

Lee Burgess: That's all we have for you today! Hopefully you found these hypos to be helpful examples of how to work through the rule against perpetuities on an exam. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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