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SECTION 6104(d) OF THE PENNSYLVANIA RULE AGAINST PERPETUITIES: THE VALIDITY AND EFFECT OF THE RETROACTIVE APPLICATION OF PROPERTY AND PROBATE LAW REFORM

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I. INTRODUCTION

In 1947, PENNSYLVANIA PROSPECTIVELY SUBSTITUTED a statutory Rule Against Perpetuities for the common law version.¹ Under the statutory rule, an interest is no longer invalid because of a mere possibility that it might vest beyond the permissible period of a life or lives in being plus twenty-one years.² Instead, a remote executory or contingent interest is only invalid if it actually fails to vest at the termination of the permissible period.³

In 1978, the Pennsylvania legislature added section 6104(d) to the Pennsylvania Probate Code, thereby making the statutory rule applicable to interests “heretofore created.”⁴ Although section 6104(d) purports to apply to all interests “heretofore created” without limitation, it seems likely that the statute can and should reach no

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1. The classic statement of the common law Rule Against Perpetuities was set forth by John Chipman Gray. It provides: “No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.” J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

2. 20 PA. CONS. STAT. ANN. § 6104(b) (Purdon 1976). The amendment provides in pertinent part: “The provisions of this section . . . shall apply to all interests heretofore or hereafter created.” Id.
further back than to those estates which have not yet been completely distributed to the intended beneficiaries because they are still in the course of administration by the Orphans’ Court.\(^5\) The statute should not, however, have any retroactive effect on distributions which have already been made pursuant to a court’s adjudication.\(^6\)

Nevertheless, even when construed with this limitation, the provision still appears to represent a substantial break with traditional doctrine. The property interest which passes to the residuary legatees or intestate heirs as a reversionary right upon the failure of an interest under the Rule Against Perpetuities has been generally assumed to be a vested interest\(^7\) which cannot be constitutionally impaired by the legislature.\(^8\) By making Pennsylvania’s statutory Rule Against Perpetuities retroactive, section 6104(d) affects existing interests. It preserves some interests which would have failed under the common law rule and, thus, prevents the accrual of property rights to the residuary legatees or intestate heirs who would otherwise possess reversionary rights.

The adoption of this new provision, along with the heightened interest in probate and related property law reform stimulated by developments such as the Uniform Probate Code,\(^9\) evinces the need to reevaluate the wisdom and validity of making reform apply to interests already in existence. Part II of this article will examine the doctrines developed by the courts to determine whether a rule may be applied retroactively, and the extent to which these doctrines do or do not establish a working criterion. Based on this reevaluation of such doctrines, Part III will suggest a simplified alternate basis for dealing with the problem of whether probate and related property law reform should be given retroactive effect.

In particular, Part III will explore, in the context of the 1978 amendment to the Rule Against Perpetuities,\(^10\) the seemingly irreconcilable considerations involved in deciding whether to achieve a single regulatory system immediately through the retroactive application of a new statute, or whether to respect preexisting relationships

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\(^5\) Where distribution has not been completed, the adjudication remains subject to modification, and the allocation of the property of the estate may validly be affected by the statute. See In re Estate of DeRoy, 481 Pa. 403, 392 A.2d 1355 (1978) (holding that a ruling of the Orphan’s Court relating to distribution of a portion of a trust is not binding on a later adjudication relating to a different portion of the same trust).

\(^6\) See 20 PA. CONS. STAT. ANN. § 3533 (Purdon 1976); notes 82-84 and accompanying text infra.

\(^7\) See Leach, Perpetuities In A Nutshell, 51 HARV. L. REV. 638, 647 (1938).

\(^8\) See notes 14-19 and accompanying text infra.

\(^9\) UNIFORM PROBATE CODE, reprinted in 8 UNIFORM LAWS ANN. 287 (1972).

by allowing only a prospective application. Obviously there is a strong policy in favor of having a single regulatory system applied to all estates. Exclusion of preexisting rights defers a reform for a generation or longer. Furthermore, in the intervening period, the state probate rules might become more complex by virtue of “time layering,” which means that different sets of principles would be applicable to identical transactions depending upon the effective time selected for choice of law. On the other hand, the recognition of preexisting relationships, and the continuation of prior law with respect thereto, is not simply based on judicial timidity or legislative conservatism. Rather, it represents a reaction to a very real and practical problem. Given a free society in which the institution of private property is accepted, a certain continuity in the law governing rights accruing from property ownership is corollary. The absence of such continuity would deprive the affected property interest of any constitutional protection of substance and would prevent a person from making long-range plans for fear that “the rules of the game” might be materially altered after he has changed his position. Thus, Part III of this article will examine the extent to which it is appropriate to consider the tendency of individuals to rely on maintenance of the legal status quo (the reliance interest).

II. CONVENTIONAL DISTINCTIONS IN APPLYING PROBATE AND PROPERTY LAW REFORM RETROACTIVELY

A. Constitutional Limitations

At the outset, the constitutional boundaries must be established. The United States Supreme Court has never definitively ruled that
changes in the substantive rules of property are per se invalid when applied to an existing interest. While acknowledging that a rule which "takes property from A and gives it to B" might violate due process, the Court has nevertheless suggested that states do retain the power to alter existing property rights where a sufficient public interest exists. Dicta in several decisions of the Pennsylvania Supreme Court, on the other hand, recognize that the preservation of an existing property interest represents a fundamental right protected by the Pennsylvania and the United States constitutions. The Pennsylvania courts have maintained that the legislature may not substantially affect a vested property interest, holding, for example, that the legislature cannot alter the estate of a person who has already died or a trust which has been previously funded.

14. See Chase Secs. Corp. v. Donaldson, 325 U.S. 304 (1944); Watson v. Mercer, 33 U.S. (8 Pet.) 58 (1834); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). In both Watson and Calder, cases decided prior to the adoption of the fourteenth amendment to the United States Constitution, the Supreme Court upheld the retroactive application of statutes which affected preexisting property rights. The Watson Court stated:

"This court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws generally; but only ex post facto laws.

33 U.S. (8 Pet.) at 110. The enactment of the fourteenth amendment did little to bring about clarification of this issue, for the Supreme Court was even more equivocal in Chase, where it held:

The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin.


17. See, e.g., Wilcox v. Penn Mutual Life Ins. Co., 357 Pa. 581, 55 A.2d 521 (1947); Palairet's Appeal, 67 Pa. 479, 5 A. 450 (1871). The Palairet court expressed this principle well when applying it to the effect of retrospective legislation:

Retrospective legislation is certainly not in itself unconstitutional, unless so far as it has an effect prohibited by the fundamental law. If, however, an Act of Assembly, whether general or special, public or private, operates retrospectively to take what is, by existing law, the property of one man, and without his consent, transfer it to another, with or without compensation, it is in violation of that clause in the Bill of Rights, Const., Art. IX, sect. 9, which declares that no man "can be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

Id. at 485, 5 A. at 452.


B. Retroactive Application of Adjudicative Reform

In dealing with the problem of retroactive change in probate law, the courts have traditionally found it to be easier to apply the reform to a preexisting state of affairs where the reform was the product of a judicial decision rather than a legislative change. The distinction is based on the juridical theory which maintains that when a court changes a rule by its own decree, the court is deemed to be declaring what the law has always been: prior courts simply failed to recognize it. Hence, theoretically, no direct retroactive effect is involved in a judicial change of heart. Yet, the practical result of such a change is that the newly perceived law will be applied in all cases from the date the court "discovered its error" forward, regardless of when the rights involved accrued. It is nevertheless true that many courts see through this theoretical sophistry and, thus, are reluctant to make any change at all because of its possible retroactive effect. This produces judicial paralysis.

The theory which views "the law" as distinct from the court's perception of it, appears to be losing favor with many modern courts because of its practical retroactive effect. These courts are anxious to reform what they regard as a bad decision of law without having to bear the onus of destroying the rights of those who may have relied

Supreme Court stated: "One possessed of testamentary capacity, who makes a will in Pennsylvania, may die with the justifiable conviction that the courts will see to it that his dispositions, legally made, are not departed from ... or improperly defeated ..." Id. at 484, 198 A.2d at 588, quoting Brown Estate, 408 Pa. 214, 228-29, 183 A.2d 307, 314 (1962).

20. See Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 Hastings L.J. 533, 535 (1977) (discussing the myth that judges discover rather than create the law). The traditional view of a change in law by judicial fiat was that the court was merely correcting erroneous prior decisions: the court, "rather than being the creator of the law was but its discoverer." Linkletter v. Walker, 381 U.S. 618, 623 (1965) (citation omitted) (dictum). Therefore, the court would apply the correct new rule in all subsequent cases regardless of whether the factual events being litigated occurred before or after the new rule was instituted. Id. at 625-26. See Annot., 10 A.L.R.3d 1371 (1966).

21. See Traynor, supra note 20, at 534 ("judicial decisions ... operate retroactively as well as prospectively").

22. See Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950). In Fox, the court applied a long standing rule of construction to a will which resulted in frustrating the apparent intent of the testatrix. The majority explained:

Appellants ask this Court to explicitly and expressly overrule the long established law of this State. This we decline to do. Such action would be fraught with great danger in this type of case where titles to property, held by bequests and devises, are involved. A change of the established law by judicial decision is retrospective. It makes the law at the time of prior decisions as it is declared in the last decision, as to all transactions that can be reached by it.

Id. at 14, 76 A.2d at 877-78.

23. See Traynor, supra note 20, at 535.
upon the prior law.\textsuperscript{24} Several courts have indicated that a judicial change can play as much havoc with a vested right as a legislative amendment can.\textsuperscript{25} Thus, more than one decision has been made in which a court let stand what it regarded as a bad rule rather than risk disappointing the expectations of those who had relied upon it.\textsuperscript{26} In addition, spurred by the example of the United States Supreme Court in dealing with issues of criminal procedure,\textsuperscript{27} a few courts have begun to control the effect of their decision so as to protect the rights of those who may have relied upon the prior state of the law.\textsuperscript{28} In other words, it has been recognized that just as the legislature may create a change effective only after a specified date, a similar power exists for judicial rule changes. Consider, for example, the opinion of a lower Pennsylvania court in \textit{Heilig Trust}.\textsuperscript{29} In \textit{Heilig}, the plaintiff's decedent had purchased a remainder interest from an heir whose testator had made charitable bequests within thirty days of his death.\textsuperscript{30} Before the \textit{Heilig} court's decision, but after the purchaser had changed his position, a provision in the probate code prohibiting gifts to charities made within thirty days of death was

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\item \textsuperscript{24} See Linkletter v. Walker, 381 U.S. 618 (1965); Annot., 10 A.L.R.3d 1371, 1384 (1966). The Linkletter Court stated that whether an overruling decision will be given retroactive effect "depends upon a consideration of particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality; and of public policy in the light of the nature both of the statute and of its previous application." 381 U.S. at 627, quoting Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940) (citation omitted). The Court concluded that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." \textit{id.} at 628. See also Traynor, \textit{supra} note 20, at 541-42.
\item \textsuperscript{26} See, e.g., Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950) (allowing the language of a will to control and therefore voiding a "gift over," despite the apparent intent of testatrix to create a life estate and remainder); see note 22 \textit{supra}; cf. \textit{Heilig Trust}, 29 Pa. Fiduc. 265 (C.P. Phila. 1979) (allowing only prospective application of a previous decision, which had declared a statute to be unconstitutional, so as not to defeat the interests of one who had relied on the statute).
\item \textsuperscript{28} See, e.g., Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971) (allowing only a prospective application of a new measure of damages rule in survival actions); Molrup Estate, 424 Pa. 161, 225 A.2d 676 (1967) (denying the application of a rule of will construction, changed in an earlier case, to the will of a testator who had died before that case was decided); \textit{Heilig Trust}, 29 Pa. Fiduc. 265 (C.P. Phila. 1979) (previous decision which had declared a statute unconstitutional would not be applied to defeat the interest of one who had relied on the statute). See also note 24 \textit{supra}.
\item \textsuperscript{29} 29 Pa. Fiduc. 265 (C.P. Phila. 1979).
\item \textsuperscript{30} \textit{id.} at 277.
\end{itemize}
found to be unconstitutional. The court held that the holding of unconstitutionality should not be applied to upset the rights of the purchaser of an heir’s reversionary interest upon proof that the purchaser had relied upon the facial invalidity of such a charitable gift.

C. Retroactive Application of Statutory Reform

When the change in probate-related law is legislative, as in the case of section 6104(d), the problem is considerably more complex. In evaluating the applicability of the statute to a preexisting interest, a court faces a dual problem. It will have to determine first, as a matter of statutory construction, whether or not the statute was intended to apply to preexisting interests, and second, whether such application is violative of either the state or federal constitution.

Where the statute specifies an effective date and makes clear what event will trigger its application, little problem exists for judicial application of the act. Thus, it is common for a new probate code to provide that it will apply to the estates of persons dying after the effective date of the act. For an interim period, while a court is in the process of settling both the estates of persons who died before, and the estates of those who died after, the effective date of the statute, the court will necessarily be administering two sets of rules at the same time with the choice of the applicable rule depending upon the date of the decedent’s death.

Where no effective date is set forth in the statute, a court must determine whether or not the statute can and should be applied to particular fact situations. In this instance, courts frequently state that there is a presumption against the retroactive application of a stat-


In Ryan, the court stated: “[w]here a will becomes operational after the effective date of the 1947 Estates Act, the provisions of the will are subject to the application of the act . . . .” 24 Pa. D. & C.2d at 49.
34. See Spain’s Estate, 327 Pa. 226, 193 A. 262 (1937); note 33 supra.
ute, a presumption that occasionally has been given legislative sanction. Furthermore, some states specifically forbid retroactive legislation in their constitutions.

D. Problems of Characterization

In dealing with all of these problems, an initial question of characterization arises, for it is not always immediately apparent whether a statute can be regarded as retroactive. Clearly, when a testator executes his will, he does so with reference to the rules in effect at that time. Nevertheless, it is universally accepted that so long as the will remains ambulatory — i.e., so long as the testator is still alive — there is no inhibition to the alteration of the law which would affect the validity of such a will. Likewise, there is no unfairness in changing the law regarding intestate rights and the right of surviving spouses arising by operation of law when the change is effected during the lifetime of the decedent.

Somewhat more difficult questions are raised when an interest created by a will substitute is involved, or where the change in the law admittedly occurred after the testator's death. In deciding upon the propriety of retroactivity under these circumstances, the question arises whether the appropriate time of reference is the date of the creation of the interest out of which the rights arise, or the date of the "triggering event" by which the beneficiary's affected right ac-

35. See, e.g., Safeway Stores, Inc. v. County of Alameda, 51 Cal. App. 3d 783, 788, 124 Cal. Rptr. 503, 506 (1975) ("Absent contrary indication in a statute, it is presumably intended to operate prospectively and not retroactively").
36. See, e.g., 1 PA. CONS. STAT. ANN. § 1926 (Purdon 1976).
37. COLO. CONST. art. II, § 11; LA. CONST. art. 4, § 15; MO. CONST. art. 1, § 13; N.H. CONST. pt. 1, art. 23; OHIO CONST. art. II, § 28; TENN. CONST. art. 1, § 20; TEX. CONST. art. 1, § 16.
38. See Spain's Estate, 327 Pa. 226, 193 A. 262 (1937) (amendment to the Wills Act, abolishing the requirement of subscribing witnesses in order to make a valid charitable bequest, applied to the will of a person dying after the effective date of the Act, even though the will was executed prior to that date).
39. See Scaife v. McKee, 298 Pa. 33, 148 A. 37 (1929) (holding that the Intestate Act of 1917, Pub. L. No. 192, § 4, 1917 Pa. Laws 429, 434, destroys a husband's right of curtesy only in cases where the wife dies after the effective date of the Act, but not where she dies before such date).
crues. Even within a particular jurisdiction, such as Pennsylvania, there is no one, clear-cut answer to the foregoing question.

In the case of a tenancy by the entireties, for example, Pennsylvania courts have held that when the property right vests before the enactment of the statute, the legislature cannot create a right to partition upon divorce, even though the divorce, as the triggering event, occurs after the legislative change.\(^\text{40}\) Similarly, a statute intended to create a system of community property for married persons which would have applied to existing property interests was invalidated in Pennsylvania.\(^\text{41}\) With respect to this decision, it is noteworthy that the attempted merger of the spouses' separately owned property interests into community property was to occur immediately upon the passage of the statute.\(^\text{42}\) The change in ownership was not delayed until the occurrence of a triggering event, such as divorce or the death of either party.\(^\text{43}\) Hence, there is at least an argument for characterizing the statute as an attempt to make an immediate change in the character of preexisting ownership. A different case would be presented by the invalidation of a statute intended to create a right of partition between tenants by the entireties of preexisting estates only when they thereafter obtain a divorce. In such a situation, there would be no change in status at all until the triggering event of divorce. Thus, as long as the divorce occurs after the statute's adoption, it is arguable that the statute would not be operating retroactively at all, but would simply be regulating the effect of a subsequent divorce between tenants by the entireties.

One very early case, \textit{Bambaugh v. Bambaugh},\(^\text{44}\) seems to support such a distinction. In that case, the Pennsylvania Supreme Court held that it was proper to apply a statute eliminating the right of survivorship to a joint estate which had been created before the statute was adopted as long as both joint tenants were alive at the time

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41. Wilcox v. Penn Mutual Life Ins. Co., 357 Pa. 581, 55 A.2d 521 (1947). Parenthetically, it should be noted that when a change in California's community property law was legislated to apply to preexisting interests, the California Supreme Court rejected the reasoning of the Pennsylvania courts and sustained the change under the state's general police power. Bouquet v. Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976). The court upheld the retroactive application of the amended statute, maintaining that "the state's interest in the equitable dissolution of the marital relationship supports this use of the police power to abrogate rights in marital property derived from the patently unfair former law." \textit{Id.} at 594, 546 P.2d at 1378, 128 Cal. Rptr. at 434.
43. \textit{Id.}
44. 11 Serg. & Rawl. 190, 191-92 (Pa. 1824).
of its adoption.\textsuperscript{45} Two of the court's conclusions enabled it to avoid the issue of the validity of legislation whose retroactivity affects vested rights: first, the court's analysis characterized the inchoate right of survivorship as being other than a vested right or interest; and second, by selecting the death of the first joint tenant — the event which would trigger the right of survivorship — rather than the creation of the joint estate as the time for determining retroactivity, the court ensured that the statute would have no retroactive effect.\textsuperscript{46}

Additionally, the Pennsylvania Supreme Court has held, in its more recent decisions, that a change in the rules of apportionment of income and principal between a life tenant and a remainderman may properly be applied to a trust created before the effective date of the change so long as the event triggering apportionment (apportionable event) occurred afterwards.\textsuperscript{47} Under these circumstances, the application of the change could be regarded as only prospective in nature: the theory being that the new rule merely changed the definition and the method of ascertaining income, and therefore, affected only those apportionments which occurred after the change in the rule.

Based upon this rationale, the Pennsylvania Supreme Court has indicated that no one has a vested right or interest in the continued application of a legal principle.\textsuperscript{49} While a literal interpretation of this doctrine might eliminate any bar to retroactive change by either the legislature or the judiciary, it appears that the principle is employed by the courts only where the triggering event is one occurring after the change in the law takes place.\textsuperscript{50} Thus, it is only when the apportionable event occurs after the legislative change in the rules of apportionment that the Pennsylvania courts have applied the changed rules of apportionment to preexisting trusts.\textsuperscript{51} Moreover, in at least

\textsuperscript{45} Id.
\textsuperscript{46} Id. at 191-92.
\textsuperscript{50} See text accompanying notes 40-48 supra.
\textsuperscript{51} See cases cited note 47 supra. Compare Norvell Estate, 415 Pa. 427, 203 A.2d 538 (1964), cert. denied, 380 U.S. 913 (1965) and Catherwood Trust, 405 Pa. 61, 173 A.2d 86 (1961) (applying the Principal and Income Act of 1947, Pub. L. No. 516, 1947 Pa. Laws 1283, to all trusts coming before the court, as long as the apportionable event occurred after the Catherwood decision, whether the trust was created before or after the Act was passed) with Reznor Estate, 419 Pa. 188, 213 A.2d 791 (1965) (denying application of the Principal and Income Act of 1947, Pub. L. No. 516, 1947 Pa. Laws 1283, to distributions which should have been made prior to the passage of the Act).
one decision, the Pennsylvania Supreme Court refused to apply the statutory reform to an apportionment problem when the case arose after the statutory change had taken place, but where the apportionable event had occurred before the statutory change.\textsuperscript{52}

Once it has been determined that a rule was intended to operate retroactively, it has traditionally been said, although not without some disagreement,\textsuperscript{53} that it cannot interfere with or divest any vested property right.\textsuperscript{54} In actual practice, however, this prohibition has not been helpful either to provide, or to predict, the solution to retroactivity problems. Rather, it appears that many courts assume the answer first and then apply the principle in a manner consistent with that answer. For example, it has always been said that even when constitutional protections apply with respect to retroactive legislation,\textsuperscript{55} these safeguards are applicable to substantive rights only.\textsuperscript{56} Hence, if the rule in question can be categorized as merely procedural, it may be altered by the legislature at will, subject to the requirements of due process.\textsuperscript{57} This conclusion is based on the premise that no person can have a vested right in a given manner of proceeding.\textsuperscript{58} Thus, generally speaking, a statute of limitations for an existing cause of action can be altered as long as a reasonable period of time remains after the change has been made to permit the

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  \item \textsuperscript{52} Reznor Estate, 419 Pa. 188, 213 A.2d 791 (1965). See note 51 supra.
  \item \textsuperscript{53} Bouquet v. Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976). The Bouquet court noted: "The vesting of property rights, consequently, does not render them immutable. 'Vested rights, of course, may be impaired 'with due process of law' under many circumstances.' Id. at 592, 546 P.2d at 1376, 128 Cal. Rptr. at 432 (footnote omitted), quoting Addison v. Addison, 62 Cal. 2d 558, 566, 399 P.2d 897, 902, 43 Cal. Rptr. 97, 102, quoting Armstrong, "Prospective" Application of Changes in Community Property Control — Rule of Property or Constitutional Necessity?, 33 CALIF. L. REV. 476, 495 (1945) (footnote omitted).
  \item \textsuperscript{54} Willcox v. Penn Mutual Life Ins. Co., 357 Pa. 581, 55 A.2d 521 (1947). See notes 41-43 and accompanying text supra. See also Schmitt v. Jenkins Truck Lines, Inc., 260 Iowa 556, 149 N.W.2d 789 (1967) (allowing retroactive application of a statute which altered the measure of damages in wrongful death actions, by distinguishing between a substantive law which creates, defines, and regulates rights, versus a remedial law which prescribes the method of enforcing the right or obtaining redress for its inversion).
  \item \textsuperscript{55} See notes 14-19 and accompanying text supra.
  \item \textsuperscript{56} Schultz v. Gosselink, 260 Iowa 115, 148 N.W.2d 434 (1967). The Schultz court stated: [I]t is a general rule all statutes are to be construed as having a prospective operation only unless the purpose and intent of the legislature to give it retroactive effect is clearly expressed in the act or necessarily implied therefrom. The rule is subject to an exception where the statute relates to remedies and modes of procedure. If a statute relates to a substantive right, it ordinarily applies prospectively only. If it relates to remedy or procedure, it ordinarily applies both prospectively and retrospectively.
  \item \textsuperscript{57} Id. at 117-18, 148 N.W.2d at 435-36 (citations omitted).
\end{itemize}
action to be brought. The principle, however, easily becomes a tautology since labeling the rule as procedural or substantive determines the outcome.

Moreover, courts have experienced difficulty in attempting to distinguish between substantive and procedural changes. For example, several states, in an effort to clear land titles, have adopted statutes which purport to limit the time within which a possibility of reverter can be enforced. Such a statute cannot have the desired effect unless it can be made applicable to a preexisting possibility of reverter. Is such a change merely procedural since the possibility of reverter is not instantly extinguished but becomes void only after it fails to ripen within the prescribed period of time? Or, is the change substantive because the right of enforcement will never arise if the condition fails to occur within the prescribed period? As may be expected, courts do not agree on this issue.

Nevertheless, even if a rule is substantive, traditional concepts do not preclude the legislature from amending it retroactively unless the property right being affected can be properly characterized as "vested." Again, attempts to define a vested right or interest have found the meaning to be extremely elusive. In one sense, the problem may be viewed as simply another manner of stating the question previously discussed: that of determining whether or not the rule does, in fact, operate retroactively. Although it would seem clear


61. Compare Presbyterian Southwest Iowa v. Harris, 226 N.W.2d 232 (Iowa), cert. denied, 423 U.S. 830 (1975) (requirement of filing notice of reversionary interest in order to extend enforceability of claim merely modifies the procedure for effecting a remedy and does not unconstitutionally destroy any vested rights) with Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954) (statute which required holder of a possibility of reverter to institute suit to establish or enforce such right within one year of the date of enactment is unconstitutional because it impairs obligations of contracts).

62. For an illustration of this uncertainty, consider the following definition of "vested":

In one sense the word "vested" is defined as meaning accrued; fixed, settled, absolute, having the character or giving the rights of absolute ownership not contingent, not subject to be defeated by a condition precedent; not subject to a condition precedent. However, the word is often used in a different sense from its technical or strictly legal meaning. "Thus vested" has been construed to mean not subject to be divested or indefeasible. When the word "vested" is used as descriptive of recognized legal rights, it does not exclude divestible rights or interests, and it is employed to denote the quality of a present right or interest, even though divestible, as distinguished from the very existence of which is contingent.

92 C.J.S. Vest at 1003-04 (1955) (footnotes omitted).
that the right of a prospective heir or distributee to share in the estate of a person still alive is not a vested one, attempts to define "vested" in other contexts are fraught with uncertainty.

Should the historical distinctions between a vested interest on the one hand, and a contingent or executory interest on the other, be maintained for the purpose of deciding whether a change in law applies retroactively? It has been stated that where an interest following a life estate must fulfill a condition precedent to take effect (as distinguished from its divestiture by a condition subsequent), it should be treated as a contingent remainder in contradistinction to a vested remainder. So, too, where a future interest is subject to a condition precedent but does not directly follow a life estate, it has been historically denominated an executory interest rather than a vested one. The distinction between the vested right and the contingent or executory one has served many useful purposes. For example, it has been used to determine how to distribute income which accrues before the time fixed for the interest's enjoyment in the absence of controlling directions in the instrument. Likewise, the determination of whether a future interest is vested or contingent may be conclusive of the property's disposition where the condition which would trigger enjoyment fails by reason of impossibility or illegality. This determination is also the criterion for deciding whether an interest is subject to, and in fact violates, the Rule Against Perpetuities.

It is questionable, however, whether this distinction should be employed in determining the degree of protection that a property interest should receive against a legislative or judicial change of rule. While most American courts treat the reverter as a reversionary interest and, therefore, as vested for purposes of the Rule Against Per-

63. See Spain's Estate, 327 Pa. 226, 233, 193 A. 262, 265 (1937); notes 33 & 38 and accompanying text supra. For a collection of cases applying the rule of law in effect at the time the will was executed, and others applying the rule of law in effect at the death of the testator, see Annot., 111 A.L.R. 910 (1937).


65. Id. at 11.

66. See Edwards v. Hammond, [1936] 1 A.C. 290 (devises to son, conditional upon his reaching age 21, which was distributed to son at age 17, subject to defeasance if he died before reaching 21).

67. See Ross v. Drake, 37 Pa. 373 (1860). In Ross, the testator had made a bequest to his son for life, remainder to the son's surviving children and their heirs. Id. at 373-74. The court held that the remainder had vested at the testator's death so that the death of the son's daughter after testator's death, but prior to the son's death, did not result in the disinheritance of the daughter's child. Id. at 376.

68. See Komitz's Estate (No. 1), 213 Pa. 390, 62 A. 1103 (1906) (remainder to a class subject to two conditions precedent is contingent and the period fixed by the will for the remainder to vest is too remote; consequently, the remainder violates the Rule Against Perpetuities). By definition, the Rule Against Perpetuities does not affect vested interests. See note 1 supra.
petuities, it does not necessarily follow that a reversionary interest, which may not evolve into a possessory interest, is somehow entitled to greater constitutional protection than an executory interest, which is subject to the Rule Against Perpetuities. As previously noted, courts are not in agreement on whether or not such interests can be changed legislatively after they arise.

Although some authorities have rejected the assumption that the legislature never has the constitutional power to alter a vested right—an issue which the United States Supreme Court has never clearly resolved—there has been little analysis as to the utility of the distinction between a vested and an executory or contingent interest for the purpose of deciding whether a change in law applies retroactively. This author's conclusion that there is no rational basis for the distinction raises the question of alternative criteria for limiting the power of the states to deal retroactively with existing interests.

III. A Suggested Criterion for Determining the Validity of Probate and Property Law Reform

If, in fact, the distinction between legislative and judicial action is a distinction without a difference—serving only to create judicial paralysis—and if the practical difference between substantive and procedural rules, or between vested and non-vested rights, proves illusory, what should be the appropriate criterion for determining the constitutionally permissible mutability of a property interest? Cer-

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70. The history of the Rule Against Perpetuities makes this distinction even more untenable. The Restatement of Property relates that [the exclusion of all interests of the conveyor and of his successors in interest (other than remainders or executory interests) from the destructive effect of the rule against perpetuities is a product of history. Such interests existed long prior to the development of the rule against perpetuities; they had caused no inconveniences which aroused the ire of either the public or the judiciary. Hence when the rule against perpetuities received its judicial moulding, it was so moulded as not to impinge on these traditionally accepted types of interests. Restatement of Property § 372, Comment a (1944).

71. See note 61 and accompanying text supra.

72. See, e.g., Bouquet v. Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976); note 41 supra.

73. See note 14 and accompanying text supra.

74. See Commerce Trust Co. v. Weed, 318 S.W.2d 289, 299 (Mo. 1958) (members of class who are to share contingent remainder of trust may be determined by statutory provisions adopted after the death of the testator, but during the lifetime of the life tenant, because "none of the persons who hoped to share these trust assets . . . had any vested right thereto until the trust terminated, [and thus] their contingent remainder did not come within the protection of . . . constitutional prohibitions").

75. See notes 69-71 and accompanying text supra.
tainly, as noted at the outset, a strong argument can be made that rules should apply retroactively in order to permit uniform and widespread reform. The only countervailing consideration is the reliance of individuals upon the continued existence of the governing principles. If the only limit on broad-reaching reforms is a recognition of this reliance interest, the problem becomes one of defining whose reliance should be legitimately recognized.

The reliance of the legatee or distributee does not appear to merit consideration until such time as control of the property has actually passed to him. Prior to the transfer of control, he is merely a gratuitous beneficiary, receiving at best a windfall from the largesse of another, and does not seem to have much basis to argue that he has a reliance interest. If the only limit on broad-reaching reforms is a recognition of this reliance interest, the problem becomes one of defining whose reliance should be legitimately recognized.

At first blush, it would seem that an assignee or purchaser for value of the distributee's interest, who has actually changed his position on the basis of the apparent rights of the distributee, stands on better footing, in fact, the Heilig Trust decision, previously discussed, appears to be based on this consideration. Nevertheless, courts have repeatedly held that those engaged in advancing present funds to distributees entitled to a future right are, of necessity, speculators. While most of the decisions involve expectancies rather than future rights, a strong argument can be made to require purchasers of future rights to assume the same risk of change in the governing rules; for unlike commercial transactions, dealings of this

76. See text accompanying notes 11-13 supra.
77. See Norris's Estate, 329 Pa. 483, 198 A. 142 (1938). The Supreme Court of Pennsylvania has stated:
At law a valid transfer can be made of anything in actual existence. What the assignor has he may dispose of. What he has not, although he may hope or expect to acquire it, he can make no title to because he has no title himself. But such sales and assignments have been sustained in courts of equity whenever good conscience seemed to require it, and not otherwise . . . . Id. at 493, 198 A. at 147, quoting Kuhn’s Estate, 163 Pa. 438, 440, 30 A. 215, 215-16 (1894) (emphasis added) (citation omitted).
78. Heilig Trust, 29 Pa. Fiduc. 265 (C.P. Phila. 1979) (denying retroactive application of statute which would have defeated the interest of an assignee because “fundamental principles of equity require this court to protect [the assignee’s] interests as against the charities who have not changed their positions at all”). See notes 28-32 and accompanying text supra.
79. See Norris’s Estate, 329 Pa. 483, 198 A. 142 (1938). The Norris court stated that when a mere expectancy or hope of receiving an interest or estate is the subject of a contract of assignment, no property passes; if and when the res comes into existence the assignee invokes the aid of a court of equity to obtain the subject of the assignment, he must disclose a transaction that is not unconscionable or inequitable. The right to a decree of specific performance depends on equitable considerations . . . . Id. at 494, 198 A. at 148 (emphasis added).
sort are not favored by a strong public policy. In fact, it is frequently urged that such transactions, in view of the potential for abuse, ought to be curbed.\textsuperscript{80}

Antithetically, once the distributee actually receives control over the property, whatever the source of his ownership, he should have the same right to rely upon such ownership as any other owner. At some point all rights must become indefeasible. Thus, regardless of whether the distributee relies on the assets in his control to borrow money, to make a purchase, or to otherwise extend himself, his rights in the property should no longer be capable of being disturbed. It is imperative that the reliance interest of the original donor or property owner also be considered. As owner, he ought to be able to assume a continuity of rules which will assure him that his gift or estate plan will not be invalidated or substantially altered by adverse changes in the rules of distribution after he makes his gift. Of course, as long as the donor remains alive, any will that he has executed remains ambulatory; thus, if there is a change in the law of wills, he may revoke or change his will as he sees fit. As a practical matter, a similar right continues to exist even with a gift inter vivos as long as the donor has retained a right during his lifetime to alter, revoke, or amend it. Although, theoretically, the retention of such power does not make the gift ambulatory, during the period in which the donor retains these rights, he should not have any basis for complaint about a change in the rules regarding disposition, since he has retained the same power as any other property owner and may adjust his gift to meet the changes.\textsuperscript{81} On the other hand, where the donor has retained no such power, or where a testator has already died so that any such power has died with him, a very legitimate concern exists that his donative intention should not be thwarted by a subsequent rule change which he neither knew of nor could have anticipated; this concern arises regardless of whether the change is by legislative or by judicial action.

On the other hand, not all changes in probate or property law necessarily distort the testator's or donor's plan. Many changes which are regarded as "procedural" have no material effect on the plan. For example, no testator need be disturbed by the fact that an administrator is no longer required to file a bond when the value of an estate

\textsuperscript{80} See \textit{id.}; \textit{Restatement of Contracts} § 154, Comment \textit{b} (1932).

\textsuperscript{81} Cf. Warren's Estate, 320 Pa. 112, 182 A. 396 (1936) (under valid power of appointment, the remoteness of the interest created by the appointment is measured by actual events — occurring between the creation and the exercise of the power for the purpose of determining the validity of such interest under the Rule Against Perpetuities).
is less than $5,000. Moreover, a change which traditionally would not be viewed as "procedural" may similarly have no effect on the testator's or donor's plan. Thus, section 6104(d), the 1978 Pennsylvania legislative change in the Rule Against Perpetuities, cannot and should not be invalidated because it operates retroactively as long as no attempt is made to apply it to an estate which has already been distributed. Absent such an application, no possible distortion or thwarting of the donor's or testator's plan is involved since section 6104(d) is designed to validate and preserve interests which would have been invalid at common law. Indeed, the practical purpose of the rule change was to remove possible legal frustration of the intention of the donor or testator. Certainly, no one can argue that the donor or testator would have relied upon a rule which would have frustrated his intention. A similar argument might be made with regard to a recent judicially adopted change. In the case of Cavill Estate, the Supreme Court of Pennsylvania held unconstitutional a provision of the Pennsylvania Probate Code which had invalidated gifts to charities when the operative document had been executed within thirty days of death. From the testator's standpoint, no objection could be raised to making the judicial rule apply retroactively since its effect is to foster, not to thwart, his testamentary intention.

This is not to suggest that all problems of retroactivity will necessarily be easily solved. The problem relating to what is the proper

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82. 20 PA. CONS. STAT. ANN. § 3174(d) (Purdon Supp. 1979).
83. See In re Frank, 480 Pa. 116, 389 A.2d 536 (1978); Pruner Estate, 400 Pa. 629, 162 A.2d 626 (1960); Kountz's Estate (No. 1), 213 Pa. 390, 62 A. 1103 (1906); notes 1-3 and accompanying text supra; note 84 infra.
84. See RESTATEMENT (SECOND) OF PROPERTY Donative Transfers, Introduction to Part I, Chapter 1 (Tent. Draft No. 2, 1979). In support of their adoption of the "wait-and-see" approach, the American Law Institute explained:

Most non-vested interests that conceivably might vest too remotely, so far as the rule against perpetuities is concerned, will not in fact vest too remotely, if given an opportunity to vest. Every non-vested interest that conceivably might vest too remotely could be made valid by simply providing that such non-vested interest will take effect if, and only if, it vests within 21 years after the death of the survivor of named lives in being on the date the period of the rule against perpetuities begins to run. In all jurisdictions, such non-vested interest would be valid and it would be necessary to wait and see whether the interest in fact vests in time. In other words, the what-might-happen approach is nothing more than a trap that is easily avoided by appropriate drafting. The adoption of the wait-and-see approach in this Restatement is largely motivated by the equality of treatment that is produced by placing the validity of all non-vested interests on the same plane, whether the interest is created by a skilled draftsman or one not so skilled.

Id. at 17. For further discussion of the "wait-and-see" approach, see notes 1-3 and accompanying text supra.
86. Id. at 417, 329 A.2d at 506. See 20 PA. CONS. STAT. ANN. § 2507(1) (Purdon 1976) (repealed July 9, 1976).
time of reference for determining the applicability of the change still remains. Is the appropriate time of reference for a will substitute, such as a joint bank account, when the account is opened (the time at which rights are created in the donee), or when the donor dies (the time at which it is contemplated that the donee will enjoy his rights)? In this regard, is there a distinction between a right exercisable immediately (such as partition in the event of divorce), 87 and a right accruing on the death of a co-owner (such as survivorship)? 88

Furthermore, when a rule announces a presumed intent for those instances where none was clearly spelled out, it will not be entirely apparent whether the rule’s cognition defeats the donor’s expectations. The question of whether an adopted child or an illegitimate child is within the class of intended donees would seem to fall within this category. 89 So, too, it would appear that questions regarding the permissive character of trust investments, 90 the power of the court to terminate a trust on the basis of unforeseen circumstances, 91 or the alteration of the rules of ademption by extinction or accession, 92 might continue to trouble the courts even if the simplified criterion of donative reliance were adopted.

Despite the above-described problems, the theory of most legislative reform has been to adopt a rule more closely approximating a testator’s or donor’s probable intent. 93 Therefore, if donative reliance were adopted as the criterion for the appropriateness of retroactive application, the test for retroactivity would coincide with the theory of reform. 94 In this situation, no great problem should arise in making such a reform applicable to estates which have not yet been distributed, even though the testator may have died or the gift may have been made before the change became operative. Certainly this is preferable to attempting to find whether the rule is retroactive

87. See Christner v. Christner, 366 Pa. 41, 76 A.2d 361 (1950) (property held as tenancy by entitities could be partitioned, as provided by statute, if the property was acquired after the effective date of the statute).
88. See Bambaugh v. Bambaugh, 11 Serg. & Rawl. 190 (Pa. 1824) (statute, which provided that all joint tenancies not partitioned during the lives of the joint tenants would descend as tenancies in common, held to apply to joint tenancies created before the enactment of the statute because the right of survivorship was contingent upon who died first); notes 40-46 and accompanying text supra.
89. See In re Estate of DeRoy, 481 Pa. 403, 392 A.2d 1355 (1978); Tafel Estate, 449 Pa. 442, 296 A.2d 797 (1972); note 13 supra.
90. See 20 PA. CONS. STAT. ANN. §§ 7301, 7302 (Purdon 1976).
91. See id. § 6102.
92. See id. § 2514(16).
93. See Tafel Estate, 449 Pa. 442, 453, 296 A.2d 797, 801 (1972) (statute requiring that adopted children be treated equally with natural children, unless a contrary intention is apparent, reflects the expectations and wishes of the reasonable man).
94. See id.
and, if it is, whether it is “substantive or procedural” and, if “substan-
tive,” whether it interferes with “vested rights.” 95

Accordingly, this author concludes that a direct inquiry into
whether or not a legitimate reliance interest is being interfered with
(whether such interest is that of the donor, testator, or the donee/
distributee), would be a more realistic way of determining the wis-
dom and essential validity of a change in the law applicable to
preexisting rights. Section 6104(d) of the Pennsylvania Rule Against
Perpetuities is a perfect example of the type of reform to which this
reliance interest test should definitely apply.

95. For a discussion of these problems of characterization, see notes 38-75 and accompan-

ying text supra.