

Developments in Property Law

WALTER W. KRIEGER*

I. ADVERSE POSSESSION: THE ELEMENT OF NOTORIETY

In Indiana, the time period required to acquire title by adverse possession is ten years.¹ The possession during this period, in order to meet the requirements of adverse possession, must be: (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous.² In addition, Indiana Code section 32-1-20-1 requires the adverse possessor to pay all taxes and special assessments on the land during the period he claims to have had adverse possession.³

*Associate Professor of Law, Indiana University School of Law—Indianapolis. A.B., Bellarmine College, 1959; J.D., University of Louisville, 1962; L.L.M., George Washington University, 1969. The author wishes to extend his appreciation to Lori F. Kaplan and Timothy S. Durham for their assistance in the preparation of this Article.

¹Indiana Code section 34-1-2-2(6) is a statute of limitations which runs against the title holder. Actions for the recovery of the possession of real estate must be brought within ten years in Indiana, IND. CODE § 34-1-2-2(6) (1983); property will vest in the adverse possessor if other elements of adverse possession are present. *Greene v. Jones*, 490 N.E.2d 776, 777 (Ind. Ct. App. 1986).

²*Worthley v. Burbanks*, 146 Ind. 534, 539, 45 N.E. 779, 781 (1897). The Appellate Court of Indiana expressed the elements of adverse possession in slightly different terms: "such possession must be actual, visible, open, notorious, exclusive, hostile, under claim of ownership, and continuous for the statutory period . . ." *Smith v. Brown*, 126 Ind. App. 545, 552, 134 N.E.2d 823, 826 (1956). However, the Indiana appellate court has also determined that the terms "under a claim of right" and "under claim of ownership" mean nothing more than "hostile" and the use of these terms does not create an additional element of adverse possession. *Poole v. Corwin*, 447 N.E.2d 1150, 1152 n.1 (Ind. Ct. App. 1983); *Kline v. Kramer*, 179 Ind. App. 592, 599, 386 N.E.2d 982, 988 (1979).

³IND. CODE ANN. § 32-1-20-1 (West Supp. 1986). The requirement that the adverse possessor pay taxes on the land was added by the Indiana legislature to put an end to the situation in the northern portion of the state where squatters were obtaining title to large tracts of land while absentee owners were paying taxes. *Echterling v. Kalvaitis*, 235 Ind. 141, 145, 126 N.E.2d 573, 575 (1955). The tax requirement was intended to provide notice to the record owner that an intruder was making a claim to his land. *Id.*; *Kline*, 179 Ind. App. at 600, 386 N.E.2d at 989.

In boundary line disputes, however, the supplementary element of payment of taxes has been held inapplicable by the Indiana courts. The tax duplicates are generally too sketchy to provide notice to the true owner that a claim is being made to a small portion of his land, and as a result both parties believe they are paying taxes on the disputed land. *See, e.g., Echterling*, 235 Ind. at 146, 126 N.E.2d at 675; *Ford v. Eckert*, 406 N.E.2d 1209 (Ind. Ct. App. 1980); *Berrey v. Jean*, 401 N.E.2d 102 (Ind. Ct. App. 1980); *Kline*, 179 Ind. App. at 592, 386 N.E.2d at 982; *Penn Cent. Transp. Co. v. Martin*, 170 Ind. App. 519, 353 N.E.2d 474 (1976). In addition, if any structures have been placed in the disputed area, the taxes on such improvements have undoubtedly been assessed against the adverse possessor.

In *Greene v. Jones*,⁴ the Indiana Court of Appeals examined the element of notorious possession. In 1970, Robert and Janet Jones (Joneses) purchased Lot No. 2 in a residential subdivision in Jefferson County, Indiana. The lot had not been landscaped and four flags were placed at what the Joneses believed were the corners of their lot. In fact, the two flags on the west side of their lot were set approximately seven feet to the west of the true property line. In 1974, the Joneses purchased a portion of Lot No. 10 located behind Lot No. 2. Once again, the Joneses believed the western property line of Lot No. 10 extended seven feet beyond the true property line. In 1981, Richard and Linda Greene (Greenes) purchased Lot No. 1 and the remaining portion of Lot No. 10 immediately to the west of the Jones property. A survey conducted by the Greenes in 1983 revealed that the Greenes' true eastern property line extended seven feet into what the Joneses considered to be their property. They informed the Joneses of this fact, and the Joneses subsequently brought suit to quiet title to the seven foot strip adjacent to their western property line.⁵ The trial court quieted title in the Joneses seven foot strip adjacent to Lot No. 2 and their portion of Lot No. 10.⁶

On appeal, the Greenes raised two issues. The first issue involved the Joneses' claim to title by adverse possession of the seven foot strip adjacent to the western boundary of their portion of Lot No. 10. The Joneses had not purchased their portion of Lot No. 10 until 1974. Since the suit to quiet title was filed in 1983, the Greenes argued that the Joneses had not possessed the property for the ten year period necessary to acquire title by adverse possession and that the trial court's judgment was contrary to law. The appellate court agreed with the Joneses' contention and reversed the trial court's judgment pertaining to Lot No. 10.⁷

The second issue raised by the Greenes was whether the acts of possession by the Joneses were sufficient to meet the requirements for adverse possession as to Lot No. 1.⁸ The court noted that the elements of adverse possession which the Joneses were required to show were that "the possession was actual, visible, notorious, exclusive, under a claim of ownership, hostile to the owner of record title, and continuous

⁴490 N.E.2d 776 (Ind. Ct. App. 1986).

⁵*Id.* at 777.

⁶*Id.*

⁷*Id.* In a footnote, the court noted that prior to 1974, both portions of Lot No. 10 were owned by one person and thus no adverse possession as to a portion of Lot No. 10 could exist before 1974. Had the Joneses' grantor been in adverse possession of the seven foot strip, the Joneses could have tacked on his period of adverse possession to meet the required statutory period. *Id.* at 777 n.1.

⁸*Id.* at 777.

for the full period of the statute.”⁹ The court primarily focused on the element of notorious possession. In explaining this element, the court relied heavily upon the discussion of notorious possession by the Indiana Supreme Court in *McCarty v. Sheets*.¹⁰

Adverse possession was at issue in *McCarty* due to the fact that defendants’ garage encroached upon plaintiff’s land. The defendants mowed the grass, cut thistles, and removed weeds in the area around the garage. The trial court quieted title in defendants to a strip of land four feet and two inches wide along the entire east side of plaintiff’s property, a distance of one hundred and fifty feet.¹¹ In reversing the trial court’s judgment, the supreme court held that “while maintenance activities in a residential area are a factor in a property dispute, standing alone, they are not sufficient to support a divestiture of property based upon adverse possession.”¹² The *McCarty* court did not find such acts to be open and notorious¹³ and cited *Philbin v. Carr*¹⁴ for its explanation of notorious possession:

[P]ossession must be notorious. It must be so conspicuous that it is generally known and talked of by the public—at least by the people in the vicinity of the premises. It must be manifest to the community. In the course of twenty years a visible occupancy naturally ought to become notorious. It ought to be so well known and commonly understood that the people residing in the neighborhood could testify with substantial unanimity concerning its existence. Where the persons who have passed frequently over and along the premises have been unable to see any evidence of occupancy, evidently the possession has not been of the character required by the rule.¹⁵

The *Greene* court, after quoting the same passage from the *Philbin* opinion, noted that “[i]n *McCarty*, the supreme court ruled that yard maintenance activities in a residential area such as mowing grass and weeding are sporadic and periodic acts of ownership and insufficient to constitute adverse possession.”¹⁶ On the other hand, the court held that erecting improvements on a disputed portion of the property is sufficiently conspicuous for purposes of adverse possession.¹⁷

⁹*Id.* at 778.

¹⁰423 N.E.2d 297 (Ind. 1981).

¹¹*Id.* at 300.

¹²*Id.* at 300-01.

¹³*Id.* at 300.

¹⁴75 Ind. App. 560, 129 N.E. 19 (1920).

¹⁵*McCarty*, 423 N.E.2d at 301 (quoting *Philbin v. Carr*, 75 Ind. App. 560, 584, 129 N.E. 19, 27-28 (1920)).

¹⁶*Greene*, 490 N.E.2d at 778.

¹⁷*Id.* The court cites as examples of such activities *Penn Cent. Transp. Co. v. Martin*,

Having thus determined the standard for notorious possession in a residential area,¹⁸ the court next examined the activities of the Joneses in the disputed area. They had plowed, graded, and planted grass up to the mistaken property line and had periodically mowed and fertilized the area. The Joneses had also planted a fruit tree in the disputed area approximately four years before trial.¹⁹ There were two additional activities in the disputed area which the court found irrelevant. A wood fence had been erected along the mistaken property line by a prior owner, but the fence had stood for only seven years (1972 to 1979) at the most.²⁰ The utility company also had placed the Joneses' water meter in the disputed area. The court could find no authority, and none was cited, for the proposition that the placement of equipment by a utility company in a disputed area, whether within or without their easement, could be used as evidence to establish the boundary line of the adverse possessor.²¹ The court noted that the meter was placed in the area by the utility company, not the Joneses, and therefore could not be interpreted as a manifestation of the Joneses' control over the property.²²

The court concluded that "applying these facts to the standard enunciated for notorious possession, we must conclude no activity or conduct by the Joneses was sufficiently conspicuous to give persons who frequently pass the premises the ability to see occupancy other than the periodic and sporadic yard maintenance which was held insufficient by our supreme court in *McCarty*"²³ Thus the court reversed the trial court's judgment as to the disputed area adjacent to Lot No. 2 and held the Greenes' title had not been defeated.²⁴

In a dissenting opinion, Judge Young argued that grading and planting grass and trees in a disputed area are sufficient acts of ownership to establish title by adverse possession "when the owner of record has

170 Ind. App. 519, 353 N.E.2d 474 (1976) (erecting a garage and adding a house in addition to mowing the grass); *Smith v. Brown*, 126 Ind. App. 545, 134 N.E.2d 823 (1956) (erecting concrete curbing, driveway, and hedge fence along with yard maintenance).

¹⁸Throughout the opinion, the court is careful to limit its holding to adverse possession of property in a "residential area." In the *McCarty* decision, which the court indicates is controlling, the Indiana Supreme Court's determination of what constituted open and notorious possession of land in a residential area was greatly influenced by the nature and use of the property being adversely possessed: "Cases of adverse possession must, of necessity, be decided on a case by case basis, for what constitutes possession of a 'wild' land may not constitute possession of a residential lot, just as possession of the latter may not constitute possession of a commercial lot." *McCarty*, 423 N.E.2d at 300.

¹⁹*Greene*, 490 N.E.2d at 778.

²⁰*Id.* at 778-79, 779 n.3.

²¹*Id.* at 779 n.4.

²²*Id.*

²³*Id.* at 779.

²⁴*Id.*

actual notice of the possessor's claim."²⁵ In such a situation, the requirement that the possession be notorious would serve no useful purpose, since the sole purpose of this requirement is to put the record owner on notice of the claim.²⁶ Judge Young cited several Indiana decisions which indicate that the purpose of notorious possession "is to put the record owner on notice of the adverse claim."²⁷ By implication, the cases cited by Judge Young appear to suggest that where the owner has actual notice of the claim, open and notorious possession is not required.²⁸ Judge Young noted that there are no Indiana decisions that have explicitly held that possession must be notorious where the owner has actual notice of the adverse claim.²⁹

Judge Young inferred that there was evidence that the Greenses were aware of the existence of the fence or at least that they were aware the Joneses were making an adverse claim to the mistaken boundary line where the fence once stood: "Here, it was undisputed that the Greenses and their predecessors in title knew the Joneses claimed the property to the line where the fence had once been located."³⁰ If the majority of the court was of the view that the Greenses had actual notice of the Joneses' claim, it was not expressed in the written opinion.³¹ The only reference to actual notice in the majority opinion was the statement that "[t]he discrepancy in the boundary line between Lots Nos. 1 and 2 was discovered by the Greenses in 1983 when they had the land surveyed in order to construct a fence on the west side and a drainage ditch on the east side of their property."³²

A second issue raised in the dissenting opinion relates to the suf-

²⁵*Id.* at 779 (Young J., dissenting).

²⁶*Id.*

²⁷*Id.* (citing *Houston v. United States Gypsum Co.*, 652 F.2d 467, 475 (5th Cir. 1981); *Marengo Cave Co. v. Ross*, 212 Ind. 624, 627, 10 N.E.2d 917, 921 (1937); *Poole v. Corwin*, 447 N.E.2d 1150, 1152 (Ind. Ct. App. 1983); *Philbin v. Carr*, 75 Ind. App. 560, 585, 129 N.E. 19, 28 (1920)).

²⁸In illustration of this observation, Judge Young quoted from *Philbin*: "[W]here there has been no actual notice, the possession must have been so notorious as to warrant the inference that the owner ought to have known that a stranger was asserting dominion over this land." 490 N.E.2d at 780 (Young, J., dissenting) (quoting *Philbin*, 75 Ind. App. at 585, 129 N.E. at 28).

²⁹*Greene*, 490 N.E.2d at 779 (Young, J., dissenting).

³⁰*Id.* at 780.

³¹Since the fence was removed in 1979, there was no direct evidence that the Greenses were aware that it ever existed when they purchased Lot No. 1 and the remaining portion of Lot. No. 10 in 1981. *Id.* at 779 n.3. This would leave only the maintenance activities to establish notice of the adverse claim.

³²*Id.* at 777. Perhaps Judge Young was inferring such notice from the activities in the disputed area, i.e. how could the owner of a residential area fail to see the grading and planting of grass and trees or the existence of a water meter in the disputed area. However, such implied notice would seem to require the activities to be notorious.

iciency of the activities by the Joneses. Judge Young clearly believed that the activities by the Joneses were sufficient to acquire title by adverse possession.³³ In *McCarty*, however, the supreme court found maintenance activities in residential areas insufficient to establish title by adverse possession, not only because they failed to meet the standard for open and notorious possession, but because they were not continuous.³⁴ The supreme court found such maintenance activities to be periodic or sporadic acts of ownership insufficient to constitute adverse possession.³⁵ Thus, even if the fence or other activities such as the planting of grass and trees gave the owner notice of a claim, the activities must have been continuous for the statutory period.³⁶

One final observation regarding the decision in *Greene* can be made. It can be inferred from the majority opinion that some evidence of a visible marker must exist establishing the boundaries of the area being adversely claimed. Judge Young read the majority opinion as requiring such evidence when he observed that "[t]he majority's view that the entire neighborhood must be able to recognize the property line between the two neighbors' residences would limit adverse possession to situations where the act of possession is evidenced by a visible marker such as a fence, garage, or driveway."³⁷ The *McCarty* decision, relied upon extensively in the majority opinion, appears to suggest even more strongly that some visible evidence of the location of the disputed boundary line is required before the possession can be adverse.³⁸ Clearly the requirement that there be visible evidence of the disputed boundary line is an element of notorious possession. It is also suggested that this requirement can be viewed as part of other elements of adverse possession such as "exclusive" or "under claim of ownership." Without some evidence of the exact area of the encroachment, it is hard to impute actual or constructive notice to the owner that a claim of ownership has been made. This point was made by Judge Hoffman, in a separate dissenting opinion in the court of appeals decision in *McCarty*,³⁹ when he remarked: "No fence or markings of any kind showed where the boundary line

³³*Id.* at 779 (Young, J., dissenting). "Improving the disputed area by grading and planting grass and trees constitutes sufficient acts of ownership to establish adverse possession of a residential property when the owner of record title has actual notice of the possessor's claim." *Id.*

³⁴*McCarty*, 423 N.E.2d at 300.

³⁵*Id.* at 301.

³⁶*Id.* at 297; *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955); *Greene*, 490 N.E.2d at 776; *Philbin v. Carr*, 75 Ind. App. 560, 129 N.E. 19 (1920).

³⁷*Greene*, 490 N.E.2d at 779 (Young, J., dissenting).

³⁸For a discussion of the supreme court's decision in *McCarty*, see Krieger, *Survey of Recent Developments*, 16 IND. L. REV. 283, 287-88 (1983).

³⁹391 N.E.2d 834 (1979), *rev'd*, 423 N.E.2d 297 (Ind. 1981).

existed. It is a sad day in Indiana when the courts take a man's land from him on evidence of mowing grass on the side and behind a garage."⁴⁰

II. EASEMENTS: SCOPE

In *Brock v. B & M Moster Farms, Inc.*,⁴¹ the Indiana Court of Appeals discussed several issues relating to the scope of an express easement. In 1911, John Roemer conveyed a forty acre tract of land in Franklin County, Indiana, to Clarence Schreiber. At that time of the conveyance, the only access from the forty acre tract to a public road was over the land retained by the grantor.⁴² The Roemer/Schreiber deed contained the following express easement: "Also, a right-of-way for wagon, horses and footpassers, and no hauling can be done over said right-of-way when the ground is soft from heavy rains or when thawing out in the spring of the year."⁴³

The court noted that had the deed not contained an express easement, the law would have implied a way of necessity to afford Schreiber access to a public road.⁴⁴ In the case of an implied way of necessity, the easement would have come to an end in 1971, when Roemer Road was extended to provide direct access to the property thereby eliminating the necessity of the easement.⁴⁵ However, because this was an express easement, neither the fact that direct access to a public road was subsequently made available nor the fact that the easement had been used only occasionally caused the easement to terminate.⁴⁶

The defendants, John and Jean Brock, acquired title to the land previously owned by Schreiber from Alice Blair. The deed indicated that there was "a right of way for ingress and egress for horses, wagons, vehicles and persons on foot . . . [as] set forth in deed from John

⁴⁰*Id.* at 838 (Hoffman, J., dissenting).

⁴¹481 N.E.2d 1106 (Ind. Ct. App. 1985).

⁴²*Id.* at 1107.

⁴³*Id.*

⁴⁴*Id.* at 1108. Where land is conveyed in such a manner that the grantee is completely landlocked, the law will imply an easement for a way of necessity over the lands of the grantor not conveyed. *Ritchey v. Welsh*, 149 Ind. 214, 48 N.E. 1031 (1898). Such an easement is favored by the public policy that land should not be rendered unfit for use or occupancy by a grant which provides no means of ingress or egress. *Moore v. Indiana & Mich. Elec. Co.*, 229 Ind. 309, 95 N.E.2d 210 (1950).

⁴⁵*Brock*, 481 N.E.2d at 1107. A way of necessity ends when the necessity no longer exists. *Wilson v. Glascock*, 74 Ind. App. 255, 126 N.E. 231 (1920).

⁴⁶*Brock*, 481 N.E.2d at 1108-09. The rule that an implied easement by necessity terminates with the necessity does not apply to right-of-ways acquired by express grant or by prescription. *See, e.g., Reder v. Radtke*, 132 Ind. App. 412, 177 N.E.2d 669 (1961). The fact that the easement is used intermittently does not terminate an easement created by express grant. *Brock*, 481 N.E.2d at 1108-09. An express easement by grant is generally not lost by mere nonuse. *Jeffers v. Toschlog*, 178 Ind. App. 603, 383 N.E.2d 457 (1978).

Roemer to Clarence W. Schreiber. . . ."⁴⁷ Even without the express reference to the easement in the deed, the easement appurtenant would have passed with the sale of the dominant estate "like a dog's tail goes along with a sale of the dog."⁴⁸ The easement in this case was clearly appurtenant because it benefited the forty acre tract (dominant estate).⁴⁹ Had the intent of the parties been that the easement was to benefit Schreiber personally rather than as owner of the forty acre tract (an easement in gross), there would have been a serious problem raised regarding the assignability of the easement.⁵⁰

In 1978, the portion of the land formerly owned by Roemer, on which the disputed right of way was located (servient estate), was conveyed to B & M Moster Farms, Inc. (Moster). A clause in an addendum to the contract to purchase stated that the conveyance was "subject to a right-of-way for wagons, horses and foot passers on and over [land] . . . described in a warranty deed to Clarence W. Schreiber."⁵¹ Even without this express statement in the contract, however, it seems unlikely Moster could have successfully claimed that it took the land without notice of the easement. Moster would be charged with constructive notice of the easement because the Roemer/Schreiber deed was in its chain of title.⁵² In addition, Moster would be charged with inquiry notice if there were any evidence of the existence of the easement visible by a physical inspection of the premises.⁵³

Moster filed suit in 1983 to prevent the Brocks from constructing a private drive over its land and the Brocks counterclaimed seeking an injunction prohibiting Moster from interfering with their use of the right of way. The trial court held that use of the right of way granted in the deed was exclusively limited to agricultural purposes and enjoined the Brocks from entering upon Moster's land for any other purpose and

⁴⁷*Brock*, 481 N.E.2d at 1107.

⁴⁸R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* § 8.10 (1984) [hereinafter CUNNINGHAM].

⁴⁹The court refers to the Brocks' land as the "dominant estate:" "Nor may Brocks subdivide the dominant estate such that there would be increased traffic . . ." *Brock*, 481 N.E.2d at 1109.

⁵⁰At common law, easements in gross were not transferable but created a personal right only in the grantee. CUNNINGHAM, *supra* note 48, § 8.10, at 461. Under Indiana statute, easements in gross created after July 6, 1961, may be alienated, inherited, and assigned if the instrument that created the easement so states. IND. CODE ANN. § 32-5-2-1 (West Supp. 1986).

⁵¹*Brock*, 481 N.E.2d at 1107.

⁵²A purchaser is charged with constructive notice of all interests recorded within the chain of title. *Willard v. Bringolf*, 103 Ind. App. 16, 30, 5 N.E.2d 315, 321 (1936).

⁵³A purchaser is charged with notice of anything he could have discovered from a physical inspection of the premises. *Mishawaka St. Joseph Loan & Trust Co. v. Neu*, 209 Ind. 433, 196 N.E. 85 (1935).

from constructing a private drive over the right of way. The Brocks appealed the order.⁵⁴

The court of appeals began its analysis by noting that in interpreting the meaning of an instrument creating an easement, the intent of the parties must be ascertained and given effect. The intent of the parties

is determined by a proper construction of the language in the instrument from an examination of all the material parts thereof. Where the provision is ambiguous, the court may consider the situation of the property and the parties, and the surrounding circumstances at the time the instrument was executed to determine intent In the case of doubt or uncertainty, the grant of an easement will ordinarily be construed in favor of the grantee.⁵⁵

The Roemer/Schreiber deed was construed to contain an ambiguity. The 1911 language authorizing the use of the right of way by "wagons, horses and footpassers" became ambiguous by "the mere passage of time and development of society."⁵⁶ The court observed that the function of an easement "should be gleaned by contemplating not the character of the traffic intended to travel the way, but rather the purpose to be served by the traffic."⁵⁷ The court noted that the term "right-of-way" traditionally refers to an easement of access arising out of necessity upon the severance of a tract of land.⁵⁸ The use of the term "wagons, horses and footpassers" was only a statement of the types of transportation existing in 1911.⁵⁹ The court concluded that Roemer intended the easement granted to Schreiber to be a general right of ingress and egress "with no limitation to traffic used for agricultural purposes."⁶⁰

Having established that the easement created a general right of ingress and egress to the Brocks' property, the court addressed the issue of expanded use of or construction on the right of way by the Brocks. The meaning of the term "expanded use" is not fully explained in the decision. The court's discussion indicates, however, that the proposed

⁵⁴*Brock*, 481 N.E.2d at 1107-08.

⁵⁵*Id.* at 1108 (citations omitted).

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.* (citing *Jeffers v. Toschlog*, 178 Ind. App. 603, 383 N.E.2d 457 (1978)). In *Jeffers*, the court construed a 1907 instrument containing a provision authorizing "teams and wagons" as intending to permit present day vehicles to travel the way. *Jeffers*, 178 Ind. App. at 605-07, 383 N.E.2d at 458-59. For further cases discussing this point, see Annotation, *Type of Vehicle or Mode of Travel Permissible on Express Easement of Way Created in Limited Terms*, 156 A.L.R. 1050 (1945); Annotation, *Automobile Traffic as Additional Burden on Right of Way*, 53 A.L.R. 553 (1928)).

⁶⁰*Brock*, 481 N.E.2d at 1108.

construction of the private drive was part of a plan to subdivide the dominant estate and provide each owner with access to the easement.⁶¹ The general rule is that the use of an easement cannot be changed to subject the servient estate to a greater burden than was agreed upon.⁶² In light of this general rule, the court concluded that the Brocks could not "subdivide the dominant estate such that there would be increased traffic over Moster's land, creating an extra burden on the servient estate."⁶³ The court found that when the easement was created, the parties clearly had not intended for the servient estate to be burdened to the extent which would result from the proposed subdivision.⁶⁴ This finding was somewhat unexpected in light of the court's earlier conclusion that the grant of the easement created a general right of ingress and egress not limited to traffic for agricultural purposes.⁶⁵ When a right of way is created by grant in general terms, the right to use the way is not limited to activities conducted on the dominant estate at the time of the grant. A degree of change or growth of the dominant estate is permitted.⁶⁶ This natural development of the dominant estate is presumed to have been contemplated by the parties.⁶⁷ Where the dominant estate is subdivided, the general rule is that those who succeed to the possession of each of the parts into which the dominant estate has been subdivided are entitled to use the easement appurtenant.⁶⁸ Some increased burden to the servient estate will result from the increased number of users, unless forbidden by the terms of the grant or unless the increased burden is material. Nevertheless, the right to use the easement attaches to each of the parts of the dominant estate.⁶⁹ Thus, the court's conclusion that use of the easement by each owner of a subdivided dominant estate would be an "expanded use" of the easement which would create an "extra burden" on the servient estate seems unwarranted on the facts presented.

Selvia v. Reitmeyer,⁷⁰ cited by the *Brock* court as authority for this position, does not in fact support such a broad generalization. The

⁶¹The only expanded use actually discussed by the court relates to the subdivision of the dominant estates. *Id.* at 1109.

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.* at 1108.

⁶⁶CUNNINGHAM, *supra* note 48, § 8.9, at 459-60.

⁶⁷RESTATEMENT OF PROPERTY § 484 (1944).

⁶⁸*Id.* § 488 (1944); see also Annotation, *Right of Owners of Parcels into Which Dominant Tenement Is or Will Be Divided to Use Right of Way*, 10 A.L.R.3d 960 (1966).

⁶⁹CUNNINGHAM, *supra* note 48, § 8.9, at 460; RESTATEMENT OF PROPERTY § 488 comment b (1944).

⁷⁰156 Ind. App. 203, 295 N.E.2d 869 (1973).

Selvia defendants were using the easement not only to reach the portion of their property that was part of the dominant estate, but also were using the easement for ingress and egress to lands that were never part of the dominant estate. The court prohibited the use of the easement to reach lands that were not part of the dominant estate, holding that this use amounted to an unreasonable burden on the servient estate.⁷¹ The *Selvia* opinion recognized the general rule that the owners of each portion of the subdivided dominant estate may use the appurtenant easement unless the increased or additional use "materially burdens" the servient estate.⁷² The *Brock* court appears to have assumed that any increase in traffic constituted an "expanded use" and a material burden beyond the scope of the easement.⁷³ However, this conclusion is not unreasonable considering that the *Brock* court determined that apportionability of the appurtenant easement was not intended when the easement was created.⁷⁴

The final issue raised by the *Brock* court involved the right of the Brocks to improve the easement. The court acknowledged the general rule that the owners of an easement have a right to make improvements and repairs that are reasonably necessary to effectuate the grant of an easement.⁷⁵ However, the court did not believe improvements were necessary to the Brocks easement, as the right of way was passable and "mere inconvenience provides no basis for changing its construction."⁷⁶ Once the court determined that there could be no increased traffic over the easement, the issue of the right of the Brocks to make improvements most likely became moot. Had the court found the increased traffic resulted from the natural development of the dominant estate and did not create an undue burden on the servient estate, the court might have determined the paving of the right of way across Moster's pasture was reasonably necessary to the effectual use of the easement.⁷⁷

III. LANDLORD AND TENANT: ASSIGNMENTS

A leasehold interest is freely transferable by a tenant unless there

⁷¹*Id.* at 210, 295 N.E.2d at 874.

⁷²*Id.* at 209-10, 295 N.E.2d at 873-74 (citing Annotation, *Right of Owners of Parcels into Which Dominant Tenement Is or Will Be Divided to Use Right of Way*, 10 A.L.R.3d 960 (1966).

⁷³*Brock*, 481 N.E.2d at 1109. If an increase in traffic is viewed as a change in degree of use rather than as a change in the character of the use, such change should not be viewed as an increased burden on the servient estate. See, e.g., *Burgess v. Sweet*, 662 S.W.2d 916, 919 (Mo. Ct. App. 1983).

⁷⁴*Brock*, 481 N.E.2d at 1109.

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷For cases discussing the right of an owner of a right of way easement to make

is a covenant against such transfer in the lease.⁷⁸ Where the tenant transfers possession of the leasehold to the transferee for the entire remaining term of the lease, the transfer creates an assignment.⁷⁹ Where the tenant transfers his interest in the lease for less than the entire term, i.e. where the tenant retains a reversion in the leasehold, the transfer creates a sublease and not an assignment.⁸⁰ The difference between an assignment and a sublease is very technical and the intent of the parties is often ignored by the courts.⁸¹ The two transfers, however, create entirely distinct legal relations between the parties. In the case of an assignment, the original tenant ceases to have a possessory interest in the leasehold, and the privity of estate between the original tenant and the landlord comes to an end. The assignee-transferee, on the other hand, is now in privity of estate with the landlord and is liable to the landlord for the performance of all covenants that run with the land, including the covenant to pay rent.⁸² Unless the assignee agrees to assume the obligations under the lease for the remainder of the term, however, the assignee remains liable for the performance of the covenants only while the privity of estate continues. If the assignee reassigns the leasehold estate, his liability comes to an end.⁸³ Because the original tenant was a party to the lease agreement, he remains secondarily liable for the performance of obligations in the lease even after an assignment because of this privity of contract unless the landlord releases him from this liability.⁸⁴

In the case of a sublease, the original tenant retains a reversion in the leasehold estate, and therefore the privity of estate between the original tenant and the original landlord continues. The law does not recognize any privity of contract or privity of estate between the sublessee and the original landlord. Instead, the sublease (new lease) creates a new landlord and tenant relationship between the original tenant (new

repairs or improvement, see Annotation, *Right of Owner of Easement of Way to Make Improvements or Repairs Thereon*, 112 A.L.R. 1303 (1938).

⁷⁸W. BURBY, *HANDBOOK OF THE LAW OF REAL PROPERTY* 144 (3d ed. 1965); J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 219 (2d ed. 1975). Covenants prohibiting the tenant from transferring his leasehold estate without the consent of the landlord, however, are standard "boilerplate" in most leases. CUNNINGHAM, *supra* note 48, § 6.69, at 386.

⁷⁹J. CRIBBET, *supra* note 78, at 219; CUNNINGHAM, *supra* note 48, § 6.66, at 381.

⁸⁰See sources cited *supra* note 79.

⁸¹See sources cited *supra* note 79.

⁸²J. CRIBBET, *supra* note 78, at 221; CUNNINGHAM, *supra* note 48, § 6.67, at 382.

⁸³W. BURBY, *supra* note 78, at 141-42; J. CRIBBET, *supra* note 78, at 221-22. If the assignee agrees to assume the obligations under the lease, he would then remain liable for the performance of the obligations under privity of contract. CUNNINGHAM, *supra* note 48, § 6.67, at 382.

⁸⁴J. CRIBBET, *supra* note 78, at 221; CUNNINGHAM, *supra* note 48, § 6.67, at 382.

landlord) and the sublessee (new tenant), and the original landlord must continue to look to the original tenant for the performance of the obligations under the original lease.⁸⁵

In *Shadeland Development Corp. v. Meeks*,⁸⁶ the Indiana Court of Appeals examined some of the common and not so common problems involved in the transfer of leasehold estates. In *Shadeland*, the owner lessors, Mary R. Meek and J. Perry Meek Realty Co., Inc. (the Meeks), brought suit against Shadeland Development Corp. (Shadeland), the tenant assignor, and its parent corporation, Holiday Inns, Inc. (Holiday Inns), for breach of a sixty year commercial lease. Shadeland had transferred the lease to San Antonio Inns, Inc. (San Antonio), who subsequently defaulted on the rental payments.⁸⁷ The trial court denied the motion of Shadeland and Holiday Inns for summary judgment and granted the Meeks' motion for summary judgment on the issue of liability.⁸⁸

Three major issues were addressed by the court on the appeal by Shadeland and Holiday Inns.⁸⁹ The first issue discussed was the right of Shadeland to assign its interest under the lease. The lease was signed by Fred C. Tucker, Jr., as agent for a nominee, an Indiana corporation to be formed by Tucker and others. The lease specifically provided that the lease could be assigned by Tucker at any time to the nominee corporation and that upon the assumption of the lease by such corporation, "it shall be the Lessee hereunder as if it were the original party and solely liable and Fred C. Tucker, Jr. shall have no further liability hereunder."⁹⁰ Tucker subsequently assigned the lease to 1920 North Meridian Corp. (North Meridian), which later merged with Shade-

⁸⁵J. CRIBBET, *supra* note 78, at 221; CUNNINGHAM, *supra* note 48, § 6.68, at 384.

⁸⁶489 N.E.2d 1192 (Ind. Ct. App. 1986).

⁸⁷*Id.* at 1193. There was actually an earlier assignment from Shadeland to Key Host Inn of Indianapolis, Inc. (Key Host) on July 22, 1977. Holiday Inns loaned Key Host the funds to pay the consideration for the transfer from Shadeland. Subsequently, financial difficulties arose and a "resettlement statement" was issued by Shadeland and Robert Weber, President of Key Host, whereby Shadeland assigned the lease to San Antonio with Weber as guarantor for San Antonio. Again, Holiday Inns loaned San Antonio the money to pay the consideration for the assignment from Shadeland. *Id.* at 1194. After briefly mentioning these facts, the opinion never again refers to this assignment or to Key Host. However, clause (8) of the assignment from Shadeland to San Antonio provided that "[t]he parties hereto previously entered into an Assignment of Lease on the premises dated July 22, 1977. Upon execution hereof by both Assignor and Assignee this previous Assignment of Lease shall be deemed null and void." *Id.* at 1198.

⁸⁸*Id.* at 1193.

⁸⁹*Id.* A fourth issue, whether Holiday Inns was liable to the Meeks as Shadeland's parent corporation became moot when the court found that Shadeland had not breached any contractual duty under the lease. *Id.* at 1202.

⁹⁰*Id.* at 1195.

land, which emerged as the surviving corporation.⁹¹ The lease further provided that after the completion of certain improvements on the leased premises called for by the lease, "Lessee shall have the free right to assign this Lease without the consent of the Lessor; and, upon such assignment becoming effective and the assumption by the assignee of all obligations of this Lease, Lessee shall have no further liability hereunder."⁹² The court noted that the construction of a motel building, an improvement on the leased premises called for by the lease, was completed "sometime in the early 1960's."⁹³ Because the assignment by Shadeland to San Antonio did not occur until October 13, 1977, it would appear that the consent of the lessor was not required. The Meeks, however, while conceding that the term "lessee" as used in the lease was meant to include both Tucker and the nominee corporation, argued that North Meridian and not Shadeland, its successor by merger, was the nominee.⁹⁴ Thus, arguably Shadeland did not have a right of assignment.⁹⁵ The court rejected this argument for two reasons. First, the lease contained a specific provision which stated "[t]he covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns."⁹⁶ Thus as a successor corporation, Shadeland would have the right to assign. Second, the court pointed out that under Indiana Code section 23-1-5-5, dealing with the effect of corporate merger or consolidation, a surviving corporation after merger possesses all the rights of each corporation merged.⁹⁷ Thus, Shadeland possessed all the rights of North Meridian including the right to assign.⁹⁸

The second issue discussed by the court was the liability of Shadeland to Meeks after the transfer to San Antonio. The trial court had found Shadeland liable based on the general rule that the original tenant remains liable for the performance of the covenants in the lease under privity of contract even after a valid assignment. The court agreed with Shadeland that the trial court's reliance on the general rule was misplaced due to the express release contained in the lease.⁹⁹ Meeks, however, made several additional arguments concerning the validity of the assignment to San Antonio. The assignment agreement stated that San Antonio took subject to the payment of rent and subject to the observance

⁹¹*Id.* at 1193-94.

⁹²*Id.* at 1195.

⁹³*Id.* at 1193.

⁹⁴*Id.* at 1195.

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.* at 1196 (citing IND. CODE § 23-1-5-5 (1979) (repealed effective August 1, 1987). IND. CODE ANN. § 23-1-5-5 (Burns Supp. 1986)).

⁹⁸*Shadeland*, 489 N.E.2d at 1196.

⁹⁹*Id.* at 1196-97.

and performance of each and every covenant and condition in the lease.¹⁰⁰ Meeks argued that this made the assignment conditional on the performance of the obligation in the lease and that when the assignee failed to pay the rent, the lease reverted to Shadeland.¹⁰¹ The court found this argument unpersuasive and held the "subject to" language was merely a statement of explanation of the rights being assigned.¹⁰² Meeks' argument regarding the "subject to" language appears to have been limited to the question of whether or not the assignment was conditional and does not appear to raise the issue of whether the assignee "assumed" the obligations under the lease. Before the tenant was to be released from liability under the lease in question, the lease required that there be an "assumption by the assignee of all obligations under this Lease."¹⁰³ Although this point does not appear to have been raised, the language of the assignment agreement clearly indicates that the assignee is assuming the performance of the covenants and conditions of the lease for the remainder of the term:

And the Assignee . . . does hereby promise, covenant, and agree to and with the said Assignor and to and with the Lessor above named, that Assignee will, effective as of and from the date of the execution of this instrument and during the remainder of the term of the Lease, pay the rents thereby reserved . . . and will also faithfully observe and perform all of the covenants and conditions contained in the Lease.¹⁰⁴

The second argument made by Meeks regarding the validity of the assignment involved the effect of a right of reentry (power of termination) clause contained in the assignment agreement. Meeks argued that this clause was a retention by the tenant of a reversion in the leasehold making the transfer a sublease and not an assignment.¹⁰⁵ The court noted that there is a split of authority as to whether a right of reentry is a sufficient reversionary interest to make an otherwise valid assignment a sublease.¹⁰⁶ In *Indian Refining Co. v. Roberts*,¹⁰⁷ the court held that a

¹⁰⁰*Id.* at 1197.

¹⁰¹*Id.* at 1198-99.

¹⁰²*Id.* at 1199.

¹⁰³*Id.* at 1195.

¹⁰⁴*Id.* at 1197.

¹⁰⁵*Id.* at 1199.

¹⁰⁶*Id.* at 1200 (citing *Indian Refining Co. v. Roberts*, 97 Ind. App. 615, 181 N.E. 283 (1932)). The majority of jurisdictions do not consider a right of reentry to be a sufficient interest to make an otherwise valid assignment a sublease. The minority view, the Massachusetts rule, followed in some states, does consider a right of reentry the retention of a reversionary interest by the tenant turning the transfer into a sublease. CUNNINGHAM, *supra* note 48, § 6.66, at 381.

¹⁰⁷97 Ind. App. 615, 181 N.E. 283 (1932).

right of reentry for the nonpayment of rent was not a reservation of a reversion but was instead merely a chose in action.¹⁰⁸ While in *Roberts* the right of reentry was only for the nonpayment of rent, the *Shadeland* court held that the rationale was still applicable even though in the present case, the conditions giving rise to the right of reentry included unauthorized structural modification, an unauthorized sublease, and the lack of premises insurance.¹⁰⁹ The *Shadeland* court also noted that in any event, the right of reentry was intended only to insure the repayment of the loan from Holiday Inns, and thus, it ended when the debt was paid and the assignment was recorded on September 6, 1978.¹¹⁰ The breach by San Antonio did not occur until much later when rent was not paid after March 1980.¹¹¹

The last issue addressed by the court is perhaps the most interesting. The trial court concluded that Shadeland and Holiday Inns owed a duty to the Meeks to use reasonable care in selecting and securing an assignee capable of performing its obligations for the remainder of the lease term, roughly forty-five years.¹¹² In reversing the trial court, the court of appeals found no duty as a matter of law to use reasonable care in selecting an assignee:

[S]uch duty would be a restriction on alienation of land and such restrictions are not favored in law. How and to whom a leasehold may be assigned is a matter for contract law to be decided by the landlord and tenant each bargaining in his own interest. The existence of a duty to find a solvent assignee would unduly inhibit the parties from fashioning an agreement in their own best interests.¹¹³

The court could find nothing in the language of the lease implying a duty in the selection of an assignee. The lessee was given the " 'free right to assign this lease without the consent of the lessor.' " ¹¹⁴

Finally, the court noted that the nature of the transaction made it hesitant to infer any duty in the selection of the assignee.¹¹⁵ The lease

¹⁰⁸*Id.* at 631, 181 N.E. at 289.

¹⁰⁹*Shadeland*, 489 N.E.2d at 1200.

¹¹⁰*Id.* The court apparently agreed with Shadeland's assertion that the right of reentry was merely security for the repayment of the loan made to San Antonio to finance its venture. *Id.* at 1199.

¹¹¹*Id.* at 1200.

¹¹²*Id.*

¹¹³*Id.* at 1200-01 (citations omitted). There is also authority for the position that an assignee does not have any duty to use care to select a solvent assignee in the case of a reassignment. *A.D. Julliard & Co. v. American Woolen Co.*, 69 R.I. 215, 32 A.2d 800 (1943).

¹¹⁴*Shadeland*, 489 N.E.2d at 1201.

¹¹⁵*Id.*

required Shadeland to construct, at its own expense, a building sufficient to operate a motel with all allied services and facilities. Only after this was accomplished could the tenant assign without the consent of the lessor.¹¹⁶ This suggests the lessor was looking to the improvement erected on the leased premises as security for the tenant's future performance of the lease.¹¹⁷ The court quoted from several treatises indicating that it is not uncommon where the lease requires the tenant to erect a building on the leased premises to provide that upon completion of the structure, the tenant may freely assign the lease with no further personal liability under the lease.¹¹⁸ The court also quoted from decisions in other jurisdictions reaching the same conclusion based on similar factual situations.¹¹⁹ Thus, because no duty to use particular care in the selection of an assignee was expressed in the lease and because none could be inferred from the nature of the transaction, the decision of the trial court was reversed and remanded for entry of summary judgment in favor of Shadeland and Holiday Inns.¹²⁰

IV. RECORDING STATUTES, NOTICE, AND BONA FIDE PURCHASER

Without a recording system, the priority among deeds, mortgages, and other interests in property is determined by the effective date of the conveyance.¹²¹ The owner, having once conveyed his interest, has nothing left to convey a second time. Thus the second purchaser of the same interest, even if he has paid value and is without notice of the prior conveyance, takes nothing.¹²² A recording system changes this "first in time, first in priority" rule by requiring the first purchaser to record his conveyance or run the risk of losing it to a subsequent purchaser.¹²³ The vast majority of recording systems, however, give priority to a subsequent purchaser only if he qualifies as a bona fide purchaser, i.e. one who pays value and who acquires the interest without notice of the prior conveyance.¹²⁴ In addition, about half the states, including Indi-

¹¹⁶*Id.*

¹¹⁷"Because of this security it is not unreasonable for the parties to place no duty on Shadeland to choose a particular assignee." *Id.*

¹¹⁸The court quoted from 1 M. FRIEDMAN, FRIEDMAN ON LEASES § 7.1 (1983); 2 R. POWELL, THE LAW OF REAL PROPERTY 242 (1983).

¹¹⁹*Alexander v. Theatre Realty Corp.*, 253 Ky. 674, 70 S.W.2d 380 (1934); *Jenkins v. John Taylor Dry Goods*, 352 Mo. 660, 179 S.W.2d 54 (1944).

¹²⁰*Shadeland*, 489 N.E.2d at 1203.

¹²¹J. CRIBBET, *supra* note 78, at 279.

¹²²*Id.*

¹²³CUNNINGHAM, *supra* note 48, § 11.9, at 775.

¹²⁴*Id.* § 11.10, at 783. Only under a pure race statute could a subsequent purchaser with actual or constructive notice take over a prior unrecorded interest. *Id.* § 11.9, at 776.

ana,¹²⁵ also require that the subsequent bona fide purchaser record his conveyance first, before the prior conveyance is recorded.¹²⁶

Notice is an essential element of the recording system. When a conveyance is properly recorded, it is said to give "constructive notice" to the world of the conveyance.¹²⁷ Thus, a person will be charged with notice of the conveyance because had he checked the public records, he would have discovered it. Thus if the prior conveyance has been properly recorded, the subsequent purchaser cannot qualify as a bona fide purchaser. The converse, however, is not true. The mere fact that a prior conveyance has not been properly recorded does not necessarily mean the subsequent purchaser is without notice. If the subsequent purchaser has actual notice of the prior unrecorded conveyance, he will not be protected by the recording system in most states.¹²⁸ Actual notice can come from a variety of sources.¹²⁹ An interesting situation in which an arguably improper recording of a memorandum of an installment land contract gave actual rather than constructive notice to the subsequent purchaser of the prior interest was presented in *Altman v. Circle City Glass Corp.*¹³⁰

In *Altman*, Bert and Elsie Brown executed a conditional sales contract in 1968, conveying the property in question to the Circle City Glass Corp. (Circle City). Circle City subsequently paid the full consideration pursuant to the contract, but a deed was never received from the Browns.¹³¹ Elsie Brown died in 1972 and her son, Bert, acquired title to the property.¹³² Bert died in 1973, and his widow and sole heir,

¹²⁵Indiana has a typical "race-notice" statute:

Every conveyance or mortgage of lands or of any interest therein, and every lease for more than three (3) years shall be recorded in the recorder's office of the county where such lands shall be situated; and every conveyance, mortgage or lease shall take priority according to the time of the filing thereof, and such conveyance mortgage or lease shall be fraudulent and void as against any subsequent purchaser, lessee or mortgagee in good faith and for a valuable consideration, having his deed, mortgage or lease first recorded.

IND. CODE § 32-1-2-16 (1982).

¹²⁶CUNNINGHAM, *supra* note 48, § 11.9, at 775-76. For a discussion of the various types of recording statutes, see Johnson, *Purpose and Scope of Recording Acts*, 47 IOWA L. REV. 231 (1962).

¹²⁷J. CRIBBET, *supra* note 78, at 282.

¹²⁸See *supra* note 124.

¹²⁹For a discussion of the sources of actual notice, see CUNNINGHAM, *supra* note 48, § 11.10, at 787.

¹³⁰484 N.E.2d 1296 (Ind. Ct. App. 1985).

¹³¹*Id.* at 1297. It appears from the wording the consideration was paid over a period of time, but the date on which the full consideration was eventually paid is not stated.

¹³²*Id.* The facts indicate that Bert and his mother executed the conditional sales contract as sellers, but the exact nature of Bert's interest in the property at the time the contract was executed is not made clear. Because the opinion later indicates that Bert

Gertrude, inherited the property.¹³³ On June 21, 1976, Circle City recorded a memorandum of the conditional sales contract.¹³⁴ On January 26, 1983, Gertrude Brown conveyed the property to Daniel B. Altman by a warranty deed. Several months prior to the conveyance, Altman had received a commitment for title insurance from Lawyers Title Insurance Corp. (Lawyers Title). The written commitment informed Altman that before title insurance could be obtained, "Altman would first have to obtain a quitclaim deed from Circle City 'to terminate its interest in a Conditional Sales contract, a Memorandum thereof having been recorded on June 21, 1976.'"¹³⁵ After purchasing the property, Altman brought suit to quiet title against Circle City, which counterclaimed to quiet title in its name.¹³⁶ The trial court granted summary judgment in favor of Circle City, holding that Altman had constructive notice of Circle City's interest by reason of the recorded memorandum of the conditional sales contract and actual notice of its interest from the written commitment for title insurance.¹³⁷

Altman raised two issues on appeal. The first issue was whether the recording of the memorandum of the conditional sales contract gave Altman constructive notice of Circle City's interest in the property.¹³⁸ The court of appeals' conclusion that Altman had actual notice of Circle City's interest from the commitment for title insurance made it unnecessary for the court of appeals to address this issue.¹³⁹ Nevertheless several observations should be made. Altman did not appear to be arguing that a conditional sales contract could not be recorded.¹⁴⁰ Instead,

"acquired title" to the property at his mother's death, it seems likely that he and his mother held title as joint tenants with right of survivorship.

¹³³*Id.* It is not clear if Circle City had completed the payments under the contract before Elsie and Bert's death. It is irrelevant, however, since the heirs of a record owner have the power to transfer title to a bona fide purchaser whether or not the record owner had any valid interest in the land at the date of his death. See *Earle v. Fisk*, 103 Mass. 491 (1870).

¹³⁴*Altman*, 484 N.E.2d at 1297. It is not clear from the facts why Circle City did not record the conditional sales contract itself rather than a memorandum. One can only speculate, but one possibility is that the instrument might not have been entitled to recordation because it lacked one of the formalities. It is a common practice when executing long term conditional sales contracts to leave out one or more of the requirements necessary to record the document. Thus, in the event of default by the purchaser, the seller will have clear record title and will not have a recorded contract clouding the title. CUNNINGHAM, *supra* note 48, § 11.9, at 782. The requirements for an instrument to be entitled to be received and recorded are contained in IND. CODE § 36-2-11-16 (1982).

¹³⁵*Altman*, 484 N.E.2d at 1297.

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸*Id.*

¹³⁹*Id.* at 1300.

¹⁴⁰It would appear that a conditional contract can be recorded under the Indiana

he appeared to be arguing that there is no statute authorizing the recording of a "memorandum" of the conditional sales contract.¹⁴¹ The fact that the legislature passed a statute authorizing the recording of a memorandum of a lease¹⁴² would appear to support Altman's position. Until this question is resolved by case law or until the legislature enacts specific legislation, it would be unwise to record a memorandum of a conveyance (other than a lease) instead of the instrument itself. Additionally, Altman may have been arguing that even if a memorandum could be recorded, this memorandum did not comply with the statutory requirements for the recording because the memorandum was signed only by Circle City's representative.¹⁴³

The second issue raised by Altman related to the trial court's finding that he had actual notice of Circle City's interest.¹⁴⁴ Altman argued that because the memorandum is not entitled to be recorded, it does not impart either actual or constructive notice of the interest.¹⁴⁵ Further, Altman argued that because he did not actually see the memorandum or the conditional sales contract himself, he did not have actual notice.¹⁴⁶

The court of appeals began with the observation that while an instrument that is not entitled to be recorded, or is improperly recorded, or is recorded outside the chain of title does not operate as constructive notice, it may nevertheless bind persons having actual notice of its existence.¹⁴⁷ While it was true that Altman did not actually see the memorandum in the public records, the information he received from Lawyers Title placed a duty on him to make a reasonable inquiry. Had he inquired with reasonable diligence, he would have discovered the nature of Circle City's interest in the property.¹⁴⁸ The court of appeals noted the general principle of law that where a person becomes aware of facts that are sufficient to place a reasonable and prudent person under a duty to inquire, the person will be charged with the knowledge

recording system. *Case v. Bumstead*, 24 Ind. 429 (1865); IND. CODE ANN. § 32-1-2-32 (West Supp. 1986).

¹⁴¹*Altman*, 484 N.E.2d at 1297.

¹⁴²Indiana Code section 36-2-11-20 provides for the recording of a memorandum of lease.

¹⁴³The court noted that the memorandum was signed only by Circle City's representative. *Altman*, 484 N.E.2d at 1297. Assuming arguendo that a memorandum of the contract could be recorded, it does not appear that the memorandum meets the other requirements for recordation. However, because it was accepted for recordation by the recorder's office and was in fact recorded, there may be a conclusive presumption that it complied with the requirements. See IND. CODE ANN. § 36-2-11-16(e) (West Supp. 1986).

¹⁴⁴*Altman*, 484 N.E.2d at 1297.

¹⁴⁵*Id.*

¹⁴⁶*Id.* at 1299.

¹⁴⁷*Id.* at 1298. The court of appeals cited *Rogers v. City of Evansville*, 437 N.E.2d 1019 (Ind. Ct. App. 1982).

¹⁴⁸*Altman*, 484 N.E.2d at 1299.

that such inquiry would impart if reasonably prosecuted.¹⁴⁹ Some courts refer to inquiry notice as constructive notice;¹⁵⁰ however, the Indiana Supreme Court defined inquiry as implied actual notice in *Mishawaka, St. Joseph Loan & Trust Co. v. Neu*:

[A]ctual notice has been divided into two classes, (1) express and (2) implied, which is inferred from the fact that the person charged had means of knowledge which he did not use. "Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained."¹⁵¹

The *Altman* court observed that "[t]he *Mishawaka* decision stands for the equitable principle that the means of knowledge combined with the duty to utilize that means equate with knowledge itself."¹⁵² The court concluded that the information which Altman had received imparted a duty to inquire, which if pursued with reasonable diligence would have led to the discovery of Circle City's interest in the property. Thus Altman had implied actual knowledge of the prior conveyance and could not be considered a subsequent bona fide purchaser.¹⁵³

It may at first appear strange that the discovery of an instrument not entitled to be recorded in the public records can give actual or inquiry notice to the person making the discovery, while it would not give constructive notice to a person who failed to search the public records. In theory, such a rule appears to punish the party who conducts a diligent search of the public records and discovers an instrument not entitled to be recorded. At the same time, this rule appears to reward the lazy individual who did not bother to search the records and therefore is not charged with actual or inquiry notice of the interest. In practice, however, it would be extremely foolish not to search the public records because of the extremely remote possibility of discovering an instrument not entitled to be recorded and thereby run the risk of not discovering numerous recorded interests.

V. THE RULE AGAINST PERPETUITIES: A POTPOURRI

The rule against perpetuities is without doubt one of the most complex and misunderstood concepts in the whole of law.¹⁵⁴ In Indiana, the common law rule has been codified in Indiana Code section 32-1-4-1:

¹⁴⁹*Id.* at 1298-99.

¹⁵⁰CUNNINGHAM, *supra* note 48, § 11.10, at 787.

¹⁵¹209 Ind. 433, 442-43, 196 N.E. 85, 89 (1935).

¹⁵²*Altman*, 484 N.E.2d at 1298.

¹⁵³*Id.* at 1300.

¹⁵⁴The rule against perpetuities has been described by the late Professor W. Barton

An interest in property shall not be valid unless it must vest, if at all, not later than twenty-one (21) years after a life or lives in being at the creation of the interest. It is the intention by the adoption of this chapter to make effective in Indiana what is generally known as the common law rule against perpetuities¹⁵⁵

In dealing with the rule against perpetuities it is important to keep in mind that it is a rule against the remoteness of vesting of interests—it invalidates interests that vest too remotely.¹⁵⁶ The rule has nothing to do with how long an interest may last or when an interest becomes possessory.¹⁵⁷ An interest may become vested long before it becomes possessory.¹⁵⁸ Likewise, the rule has nothing to do with the duration of trusts.¹⁵⁹

The term “vested interest” refers to an interest that does not contain a condition precedent to its becoming possessory at the natural termination of all preceding estates.¹⁶⁰ A condition precedent is a condition that must occur or happen before a future interest can become vested.¹⁶¹ Where there is a condition precedent, the future interest is contingent

Leach as “a technicality-ridden legal nightmare . . . a dangerous instrumentality in the hands of most members of the bar.” Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954). The Supreme Court of California went so far as to hold that an attorney who drafted an instrument that violated the rule was not guilty of malpractice because he had not “failed to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly exercise.” *Lucas v. Hamm*, 56 Cal. 2d 583, 592, 15 Cal. Rptr. 821, 826, 364 P.2d 685, 690 (1961), *cert. denied*, 368 U.S. 987 (1962). It is unclear whether these and similar remarks are intended as an indictment of the bar or the rule.

¹⁵⁵John Chipman Gray’s classic definition of the common law rule against perpetuities, adopted by the courts in both the United States and England, states: “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).

¹⁵⁶Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 639-40 (1938).

¹⁵⁷*Id.*; T. BERGIN & P. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS*, 180 (2nd ed. 1984).

¹⁵⁸L. SIMES & A. SMITH, *THE LAW OF FUTURE INTEREST* § 1233, at 137 (2d ed. 1956). Professor Leach gives as an example a device “[T]o A for life, remainder to A’s children for their lives, remainder to B.” B’s interest is valid because it is vested. Yet it may not become possessory until after the death of a child of A yet unborn who might live more than twenty-one years after the death of the measuring lives in being at the creation of B’s interest. Leach, *supra* note 156, at 647.

¹⁵⁹As long as the equitable interests are vested in the beneficiaries, the duration of the trust can exceed the period in the rule against perpetuities. T. BERGIN & P. HASKELL, *supra* note 157, at 184, 224-25.

¹⁶⁰L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* § 90, at 186 (2d ed. 1966).

¹⁶¹T. BERGIN & P. HASKELL, *supra* note 157, at 72-73.

and is subject to the rule against perpetuities.¹⁶² One of the more common types of conditions precedent is the age contingency. Often a donative transfer will state that the beneficiary is not to receive the property until he or she attains a named age. Traditionally the courts have treated the age contingency as a condition of survivorship, i.e. that the beneficiary must survive to the designated age to take the property.¹⁶³ For example, if a testator devised property "to *A* if *A* should attain the age of twenty-five (25)," a court would most likely view the age contingency as a condition precedent requiring *A* to reach the age twenty-five to take the property. If *A* should die before reaching twenty-five, the devise to *A* would fail.¹⁶⁴ In this example, the age contingency would not cause a violation of the rule against perpetuities because *A* is a life in being. *A* will either reach the designated age or fail to do so within his own lifetime.¹⁶⁵ However, where the gift is to a class of beneficiaries and there is a possibility of additional members being added to the class after the creation of the interest, an age contingency in excess of twenty-one years can create serious problems.¹⁶⁶

The concept of "lives in being" can also create major problems for the drafters of future interests and those attempting to ascertain their validity. The term refers to a person or persons alive at the creation of the interest, which the court can use as measuring lives to determine whether the interest vested within the rule.¹⁶⁷ The measuring lives are usually named in the instrument creating the interest and these persons are often donees under the instrument, but neither of these conditions is required.¹⁶⁸ For example, a devise by the testator "to my grandchildren

¹⁶²L. SIMES & A. SMITH, *supra* note 158, § 1235, at 139.

¹⁶³L. SIMES, *supra* note 160, § 93, at 193. Words such as "if" or "provided" the beneficiary reaches a certain age are generally held to create a condition precedent. *Id.* However, words such as "to be paid at" a certain age or "to be paid when" the beneficiary reaches a certain age are viewed by the courts as merely postponing the time of enjoyment and not as creating a condition precedent to vesting. *Id.*; T. BERGIN & P. HASKELL, *supra* note 157, at 132-34. If the wording does not create a condition precedent but only delays the time of enjoyment (possession), and the beneficiary dies before the time for distribution, the property passes to his estate. *Id.* at 127; L. SIMES & A. SMITH, *supra* note 158, § 586, at 32.

¹⁶⁴T. BERGIN & P. HASKELL, *supra* note 157, at 133; L. SIMES & A. SMITH, *supra* note 158, § 575, at 8.

¹⁶⁵L. SIMES, *supra* note 160, § 127, at 268; L. WAGGONER, FUTURE INTERESTS IN A NUTSHELL § 12.7, at 181 (1981).

¹⁶⁶See *infra* notes 176-81 and accompanying text.

¹⁶⁷L. SIMES, *supra* note 160, § 127, at 265-67. The lives must be human lives and not lower animals or a corporation. *Id.* § 127, at 265. These measuring lives must not be so numerous as to make it unreasonably difficult for the court to determine the last survivor of the group. T. BERGIN & P. HASKELL, *supra* note 157, at 183-84.

¹⁶⁸T. BERGIN & P. HASKELL, *supra* note 157, at 182-83.

who reach twenty-one (21)" is valid because the testator's children are implied as lives in being, even though they were not named in the instrument nor given any interest under it.¹⁶⁹

A gift to a class¹⁷⁰ such as children or grandchildren can create special problems both with regard to the time of vesting and the determination of the lives in being. Unlike a gift to an individual, the membership in a class can increase or decrease after the interest has been created because of new births or deaths.¹⁷¹ Where the class is closed, i.e. where no additional members can be added at the time the interest is created, the members of the class can be used as the measuring lives.¹⁷² For example, if the testator devised property "to my children who shall attain the age of twenty-five (25)," there would be no violation of the rule against perpetuities. The age contingency would create a condition precedent to vesting, but the interest of the testator's children will vest, if at all, within the lives of the children,¹⁷³ who were all alive at the testator's death¹⁷⁴—the time when the interest was created.¹⁷⁵ Where the class is not closed at the time the interest is created, special problems are created. For example, if the testator devised property "to my children for life, remainder to my grandchildren who attain the age of twenty-five (25)" and the testator left children surviving him, the gift to the grandchildren violates the rule against perpetuities. It would be possible for a surviving child of the testator to have a child (testator's grandchild) after the testator's death and for this grandchild's interest to vest more than twenty-one years after the death of all the measuring lives in being at the time the interest was created. The testator's children and all the grandchildren alive at the testator's death could all die before the afterborn grandchild reached the age of four, and because the interest must vest within twenty-one years of the last death of a measuring life

¹⁶⁹L. SIMES, *supra* note 160, § 127, at 265-66; L. WAGGONER, *supra* note 165, § 12.7, at 180.

¹⁷⁰A class gift is a gift to a group of persons having some common characteristic. The share of each person in the class will be determined by the number of members. L. SIMES, *supra* note 160, § 101, at 204-05.

¹⁷¹*Id.*

¹⁷²L. SIMES & A. SMITH, *supra* note 158, § 1226, at 115; L. WAGGONER, *supra* note 165, § 12.7, at 179-80.

¹⁷³T. BERGIN & P. HASKELL, *supra* note 157, at 191, L. WAGGONER, *supra* note 165, § 12.7, at 181.

¹⁷⁴It is possible that if the testator's last surviving child is a male, a grandchild *en ventre sa mere* could be born after the last child's death and thus reach twenty-one more than twenty-one years after the death of lives in being. However, the rule against perpetuities includes periods of gestation within the period of the rule. T. BERGIN & P. HASKELL, *supra* note 157, at 187; L. SIMES, *supra* note 160, § 12.7, at 266; L. WAGGONER, *supra* note 165, § 12.7, at 178-79.

¹⁷⁵An interest created by will becomes effective at the testator's death. L. SIMES, *supra* note 160, § 12.7, at 267; L. WAGGONER, *supra* note 165, § 12.5, at 174.

in being, the twenty-five year limitation on the vesting of the afterborn grandchild's interest could be outside the twenty-one year limit. For example, under the above provision, suppose the testator had two children, *A* and *B*, and grandchild *C*, who were alive upon the testator's death. Suppose further that *A* had a child, *D*, after the testator had died. Then upon *D*'s first birthday, *A*, *B*, and *C* all die suddenly. Thus, *D*'s interest must vest within twenty-one years of *A*'s, *B*'s, and *C*'s deaths or be void under the rule against perpetuities. However, according to the devising language, *D*'s interest may not vest until he attains the age of twenty-five, which is twenty-four years from the date of the measuring lives in being's (*A*, *B*, & *C*) deaths. Therefore, this provision is void under the rule.¹⁷⁶ The fact that this is unlikely to occur does not prevent the rule from operating. The rule against perpetuities is based on possibilities and not probabilities.¹⁷⁷

In addition, class gifts under the rule against perpetuities are treated as a unit, and under the "all or nothing" rule, unless the interest of each and every member of the class vests within the rule, the gift to the entire class fails.¹⁷⁸ Thus the gift to all the grandchildren will fail even though the interests of the grandchildren alive at the testator's death will vest, if at all, within their own lifetimes, and even though some of the grandchildren are already twenty-five years old at the testator's death.¹⁷⁹ It should be noted that if there had been no age contingency in the example but simply a remainder to the testator's grandchildren,¹⁸⁰ or if the age contingency had been twenty-one instead of twenty-five,¹⁸¹ the interests of the grandchildren would not have violated the rule against perpetuities.

In *Merrill v. Wimmer*,¹⁸² the Supreme Court of Indiana found the provisions for the distribution of the corpus of a testamentary trust violated the rule against perpetuities, and as a result, the testator died intestate. The *Merrill* decision raises a number of interesting issues: (1) why did the interests in the testamentary trust violate the rule against

¹⁷⁶L. WAGGONER, *supra* note 165, § 12.7, at 186 example 12-8; Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1746 (1983) [hereinafter *Perpetuity Reform*].

¹⁷⁷L. SIMES, *supra* note 160, § 133, at 285-89.

¹⁷⁸*Id.* § 134, at 289-92.

¹⁷⁹L. SIMES & A. SMITH, *supra* note 158, § 1265, at 197-98; L. WAGGONER, *supra* note 165, § 12.7, at 186 example 12-8.

¹⁸⁰With no age contingency, the interest will vest in the class of grandchildren when all of them are born, which will occur within the lifetime of the testator's children, who are the lives in being. Leach, *supra* note 156, at 641.

¹⁸¹L. SIMES, *supra* note 160, § 127, at 265. Because the children of the testator are the measuring lives, all the grandchildren will reach twenty-one no later than twenty-one years after the death of the testator's last surviving child. L. WAGGONER, *supra* note 165, § 12.7, at 180.

¹⁸²481 N.E.2d 1294 (Ind. 1985).

perpetuities; (2) what could the drafter have done to avoid a rule violation; and (3) is there a need for legislative reform to mitigate the harshness and inequities resulting from a violation of the rule.

In *Merrill*, the will of Newell M. Merrill left a life estate to his wife and the residue of the estate in trust. The life estate to Merrill's wife became irrelevant when his wife predeceased him.¹⁸³ The income from the trust was left to the Merrill's three children, Judith, Dennis, and Walter, and to the wife of any son who might die before the termination of the trust.¹⁸⁴ The distribution of the corpus of the trust was provided for in Item 3(E) of the will:

That when my youngest grandchild reaches the age of twenty-five (25) years, said Trust shall terminate as to two-thirds (2/3) of the corpus of said Trust, and that said two-thirds (2/3), together with the accumulated income to be credited to said two-thirds (2/3) interest, shall be divided as follows, to wit: One-Third (1/3) shall be divided one-half (1/2) to my daughter, Judith I. Yarling, and one-half (1/2) to her children, share and share alike; One-Third (1/3) shall be divided one-half (1/2) to my son, Dennis A. Merrill, and one-half (1/2) to his children, share and share alike; One-Third (1/3) of the corpus of said Trust, together with any accumulated income, to be credited to said one-third (1/3) interest, shall be continued in Trust for my son, Walter O. Merrill, and he shall have the income from this Trust for and during his natural life and upon his death, if he has bodily issue, then one-half (1/2) of his one-third (1/3), in Trust, shall go to his bodily issue and the other one-half (1/2) of the one-third (1/3), in Trust, or all of said one-third (1/3), in Trust, in the event he has no bodily issue, shall go to my grandchildren, living at the time of the termination of said Trust, share and share alike.¹⁸⁵

The trial court, adopting the findings of the probate commissioner, held that the trust provisions distributing two-thirds of the corpus to Judith, Dennis, and their children violated the rule against perpetuities and awarded Judith and Dennis each one-third of the corpus outright.¹⁸⁶ The trial court also upheld the entire provision regarding the one-third

¹⁸³*Id.* at 1297. The entire will is reproduced in the opinion. *Id.* at 1296-97.

¹⁸⁴*Id.* at 1296. The court does not appear to question the validity of the income provisions of the trust. However, the court finds the entire trust void, apparently under the doctrine of "infectious invalidity." *Id.* at 1300. See *infra* note 190. The income provisions may create an accumulations problem, but the issue was not addressed by the court and will not be discussed in this survey.

¹⁸⁵*Merrill*, 481 N.E.2d at 1297.

¹⁸⁶*Id.*

share of the corpus relating to Walter.¹⁸⁷ The court of appeals agreed with the trial court that the provisions for the distribution of the two-thirds corpus violated the rule against perpetuities, but the court of appeals was critical of the trial court's decision to distribute the two-thirds interest directly to Judith and Dennis, thereby extinguishing the interests of their children in the trust.¹⁸⁸ The court of appeals also found the trial court had erred in upholding the provisions of the trust regarding Walter.¹⁸⁹ While the court of appeals agreed that the provision regarding Walter did not violate the rule against perpetuities, the court of appeals concluded that the provision could not stand alone because it was an integral part of an interrelated testamentary distributional scheme.¹⁹⁰ Instead of declaring the entire trust void, however, the court of appeals saved the trust by applying "the equitable doctrine of approximation."¹⁹¹ In order to avoid the harshness of the rule against perpetuities and to give effect to the testator's intent, the court of appeals held the word "grandchild" appearing in the first line of Item 3(E) of Newell's will should be construed to mean grandchild alive at the testator's death.¹⁹² Under this construction, the provisions in Item 3(E) of the will would not violate the rule against perpetuities.¹⁹³ On transfer, the Indiana Supreme Court was highly critical of the court of appeals' attempt to rewrite the will under the guise of merely construing the will. Resort to rules of construction to ascertain the testator's intent can be made only in cases where there is an actual or latent ambiguity, and here the supreme court found "there is no ambiguity whatsoever in the will, with regard to either the identity of the beneficiaries or the time of termination of the trust."¹⁹⁴ While the court expressed remorse over the fact that

¹⁸⁷*Id.*

¹⁸⁸*Merrill*, 453 N.E.2d 356, 360 (Ind. Ct. App. 1983), *vacated*, 481 N.E.2d 1294 (Ind. 1985).

¹⁸⁹*Id.*

¹⁹⁰*Merrill*, 453 N.E.2d at 360. The rule against perpetuities destroys only those interests in the instrument that violate the rule. The other interests in the instrument take effect as if the void interest had never been created. T. BERGIN & P. HASKELL, *supra* note 157, at 208-10. On occasion, however, the courts will strike the other portions of a will or trust if the court finds they are not severable. *Id.* at 210; G.G. BOGERT & G.T. BOGERT, *LAW OF TRUSTS* 185-86 (5th ed. 1973). This is known as the doctrine of "infectious invalidity." L. SIMES, *supra* note 160, § 133, at 284.

¹⁹¹*Merrill*, 453 N.E.2d at 361. For a detailed discussion of the court of appeals application of the doctrine of equitable approximation, see Falender & Fruehwald, *Trusts & Decedents' Estates, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 435, 450-57 (1985).

¹⁹²*Merrill*, 453 N.E.2d at 362.

¹⁹³If the interest vests (trust terminates) when the youngest grandchild alive at the testator's death reaches twenty-five, the rule against perpetuities is not violated because the grandchild would be a life in being at the creation of the interest. See T. BERGIN & P. HASKELL, *supra* note 157, at 211.

¹⁹⁴*Merrill*, 481 N.E.2d at 1298.

the testator's intent had been frustrated, it noted that it was the rule against perpetuities and not the court that had subverted his intent.¹⁹⁵ The supreme court appeared unwilling to use the doctrine of equitable approximation to save the trust. While noting that "[i]n some jurisdictions, where the rule exists only by virtue of the common law, courts have taken certain liberties [with the rule]," the supreme court felt restrained from making any attempt to prevent its mischief because the rule exists by statute in Indiana.¹⁹⁶ Having found that the provisions for the distribution of the corpus of the trust, including the provision regarding Walter,¹⁹⁷ violated the rule against perpetuities, the court concluded that Newell Merrill died intestate.¹⁹⁸

A logical place to begin any discussion of the *Merrill* decision is with the finding by the court that the trust provisions in Item 3(E) of the will violated the rule against perpetuities. The probate commissioner, the trial court, and the court of appeals were all in agreement that the proposed distribution of two-thirds of the corpus to Judith, Dennis, and their children violated the rule. In fact, the appellants conceded that the proposed distribution violated the rule.¹⁹⁹

Before discussing the supreme court decision, however, it might be useful first to examine the court of appeals opinion to ascertain the rationale for that court's determination that the proposed distribution of two-thirds of the corpus to Judith, Dennis, and their children violated the rule against perpetuities. The most explicit passage in the opinion discussing this issue states:

Here, it is possible the youngest grandchild may reach the age of 25 years more than 21 years after the death of the lives in being, Newell's children, at the creation of the interests. . . .

Such class must close within the period of the rule. . . . Here it may not close until after the period prescribed in the rule. . . . Therefore, the possibility exists that grandchild's interest would not vest within the time required by the rule. For that reason, the entire gift fails.²⁰⁰

¹⁹⁵*Id.* at 1299.

¹⁹⁶*Id.* at 1298-99 n.2.

¹⁹⁷*Id.* at 1299-1300.

¹⁹⁸*Id.* at 1300. From a literal reading of the decision, the supreme court has declared the entire trust, including the income provisions, void. The supreme court apparently applied the doctrine of infectious invalidity to destroy the income provision of the trust.

¹⁹⁹*Merrill*, 453 N.E.2d at 359. The authors of *Trusts and Decedents' Estates, 1984 Survey of Recent Developments in Indiana Law*, berate the attorneys in *Merrill* for conceding a rule violation that arguably did not exist. Falender & Fruehwald, *supra* note 191, at 457.

²⁰⁰*Merrill*, 453 N.E.2d at 359 (citations omitted).

There can be little doubt from the wording of this passage that the court of appeals viewed the gift to the children of Judith and Dennis as a class gift.²⁰¹ Because the class members were all grandchildren of the testator, the court viewed the age contingency “when my youngest grandchild reaches the age of twenty-five (25) years” as applying to the members of the class. It is also clear from the wording that the court of appeals viewed the contingency as a condition of survivorship, creating a condition precedent to the vesting of the class gift.²⁰² Here the youngest grandchild, or for that matter any afterborn grandchild, might reach the age of twenty-five more than twenty-one years after the death of the lives in being (testator’s children) at the creation of the interest. Because a class gift, under the all or nothing rule, must vest in each and every member of the class within the period of the rule against perpetuities, the entire gift failed.²⁰³

Returning to the supreme court decision, it is equally clear that the supreme court viewed the trust instrument as creating class gifts: “The beneficiaries were the Testator’s children and grandchildren, all of them, and the trust was to terminate, as to two-thirds (2/3), when the youngest grandchild attained the age of twenty-five (25) years.”²⁰⁴ While the supreme court likewise viewed the age contingency as creating a condition of survivorship, the decision reads as if the court considered the age contingency as a condition precedent to the vesting of all the interests in the corpus of the trust, not just the interests of the children of Judith and Dennis. In discussing the interests of Judith and Dennis, the court remarked that “[s]ince the identity of the youngest grandchild cannot be determined until all of the Testator’s children have died, the intended gift to these two children fails. . . .”²⁰⁵ Further, in discussing the one-

²⁰¹It is not clear whether the court of appeals also viewed Judith and Dennis as members of the class. It is suggested that they should not be viewed as class members because their shares are fixed. Each is to receive one-half (1/2) of a one-third (1/3) share of the corpus. Only their children’s shares are dependent on the number of class members. If, however, Judith and Dennis are not viewed as members of the class, then technically their interests do not violate the rule against perpetuities. Nevertheless, had the court of appeals not saved the trust by applying the doctrine of equitable approximation, it seems certain the court would not have allowed the interests of Judith and Dennis to survive the destruction of their children’s interests for the same reason the court would not have allowed the one-third share regarding Walter to stand alone. The distribution provisions of the trust were all part of an interrelated testamentary scheme. *Merrill*, 453 N.E.2d at 360.

²⁰²It is not clear from the opinion whether, in addition to each grandchild reaching the age of twenty-five, each grandchild must also survive to the time of distribution when the youngest grandchild reaches twenty-five to take a share of the corpus. See L. SIMES & A. SMITH, *supra* note 158, § 656, at 120.

²⁰³See *supra* notes 178-81.

²⁰⁴*Merrill*, 481 N.E.2d at 1298.

²⁰⁵*Id.* at 1298 n.1.

third share to be distributed at the death of Walter, the supreme court concluded that since this one-third share of the corpus was to "continue" to be held in trust after the youngest grandchild reached the age of twenty-five, "if the corpus of two-thirds cannot vest within the time allowed, . . . the gift of the one-third interest fails for the same reason as does the gift of the two-thirds interest."²⁰⁶

It should be noted that if the language "that when my youngest grandchild reaches the age of twenty-five (25) years" is viewed as creating a condition of survivorship requiring the beneficiaries to survive to the time of distribution, the supreme court correctly concluded that the provisions for distribution of the corpus of the trust violate the rule.²⁰⁷ It is suggested, however, the supreme court could have reached the conclusion that the language did not create a condition precedent of survivorship. In such case, the trust, except for one provision,²⁰⁸ would not have violated the rule against perpetuities.²⁰⁹ Traditionally, when an interest is given to a beneficiary "if," "at," "when," or "provided" the beneficiary attains a stated age, the courts have viewed the language as creating a condition of survivorship requiring the beneficiary to reach the stated age in order to take the interest.²¹⁰ Nevertheless there are numerous age-postponement cases finding no condition of survivorship

²⁰⁶*Id.* at 1300.

²⁰⁷Even though all the grandchildren will be born within the rule against perpetuities, i.e. no additional grandchildren can be born after all the testator's children have died, if the grandchildren must survive until the youngest grandchild reaches twenty-five to take a share of the corpus, then the size of the class cannot be determined within the period of the rule. In the case of a class gift the entire gift will fail where the class can increase or decrease beyond the period of the rule. L. SIMES & A. SMITH, *supra* note 158, § 1265, at 196; L. WAGGONER, *supra* note 165, § 13.2, at 238.

²⁰⁸The provision for the distribution of one-half (1/2) of one-third (1/3) of the corpus "to my grandchildren living at the time of termination of the trust" does violate the rule against perpetuities because the trust cannot be terminated until the youngest grandchild reaches twenty-five, beyond the period of the rule. Even if the court had not found an implied condition of survivorship requiring all the beneficiaries to survive until the time of distribution, the court might have declared the entire trust void under the doctrine of infectious invalidity. *See supra* note 190.

²⁰⁹If the phrase "that when my youngest grandchild reaches the age of twenty-five (25) years" is viewed as referring solely to the time of distribution of the corpus and not as a condition of survivorship, the interests of the grandchildren would have vested at the time of their births. T. BERGIN & P. HASKELL, *supra* note 157, at 193-94.

²¹⁰*Id.* at 132-34; L. SIMES & A. SMITH, *supra* note 158, § 586, at 31-37. It has been suggested that words such as "if" or "provided" the beneficiary attains the stated age clearly indicate a condition of survivorship, whereas words such as "at" or "when" are often used in situations where the drafter intended an absolute gift to the beneficiary with only the time of enjoyment postponed until the stated age. *Colt v. Hubbard*, 33 Conn. 281 (1866); *Fuller v. Fuller*, 58 N.C. 223 (1859), both cited in L. SIMES & A. SMITH, *supra* note 158, § 586, at 33-36; *see also* Halbach, *Future Interests: Express and Implied Condition of Survival*, 49 CAL. L. REV. 297, 301-04 (1961).

and holding that the interest of the beneficiary vests before reaching the named age.²¹¹ A close reading of these age contingency cases suggests that the courts will look to see if there are other factors suggesting the transferor intended to create an immediate interest in the beneficiary with only the time of enjoyment postponed.²¹² It is suggested that there are other factors in the *Merrill* case from which the court could have concluded that the interests in the children of Dennis and Judith were vested and not contingent.²¹³

One factor which suggests that the interests of Judith, Dennis, and their children were vested and not contingent is that the words postponing the distribution of the corpus of the trust to the time that the youngest grandchild reaches the age of twenty-five are separated from the words creating the interests and appear to relate solely to the time of distribution.²¹⁴ Item 3(E) of the will states that when the youngest grandchild

²¹¹See, e.g., *In re Welch's Estate*, 83 Cal. App. 2d 391, 188 P.2d 797 (1948) (despite language that beneficiary "shall have no vested right" until age twenty-five, court found beneficiary did not have to survive to age twenty-five to have a transferrable interest); *Stinson v. Palmer*, 146 Conn. 335, 150 A.2d 600 (1959) (trust estate to pass to children of testator's son alive at widow's death when "each one shall reach the age of thirty (30) years" vested at widow's death); *Carter v. Berry*, 243 Miss. 321, 140 So. 2d 843 (1962) (where trust for benefit of testator's grandchildren was to terminate "when the youngest should become twenty-five years of age," interests of grandchildren vested at testator's death); *Wachovia Bank & Trust Co. v. Taylor*, 255 N.C. 122, 120 S.E.2d 588 (1961) (held will provision providing that legacy was to be divided among children of testator's daughters "when they reached age of twenty-five (25) years" created a vested interest and did not violate the rule against perpetuities); *Wurst v. Savings Deposit Bank & Trust Co.*, 47 N.E.2d 676 (Ohio Ct. App. 1940) (trust for children of testator's son to be distributed when the youngest child attained the age of thirty (30) valid because children's interest vested at birth); *South Carolina Nat'l Bank of Charleston v. Johnson*, 260 S.C. 585, 197 S.E.2d 668 (1973) (trust proceeds to be distributed among grandchildren "when my youngest grandchild shall reach the age of twenty-one (21)" vested at the death of the testator subject to opening to let in after-born grandchildren).

²¹²L. SIMES & A. SMITH, *supra* note 158, § 586, at 33-35.

²¹³These factors negating a requirement of survival are set forth in *Falender & Fruehwald*, *supra* note 191, in the discussion of the court of appeals opinion in *Merrill*:

Under the *Merrill* facts, several factors existed negating the implication of a survivorship condition: the absence of an alternative or a supplanting limitation, the gift of income to the future interest owners during the time preceding termination of the trust, and the lack of a word or phrase describing the beneficiaries as ones who must survive to a later date, such as "if living." The existence of these negative factors, coupled with the commitment of Indiana courts to the earliest possible vesting of interests, makes it unlikely that a condition precedent of survivorship should have been implied in the *Merrill* trust provision.

Id. at 459.

²¹⁴Where the condition is attached to the interest itself, the vesting is postponed to the time stated, but where the condition is annexed to the time of payment, only the gift vests immediately. 2A R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 331, at 786 (P. Rohan rev. ed. 1986); L. SIMES & A. SMITH, *supra* note 158, § 576, at 11.

shall reach twenty-five, the "Trust shall terminate as to two-thirds (2/3) of the corpus of said Trust, and . . . shall be divided as follows. . . ." ²¹⁵ Item 3(E) then provides that one-third (1/3) of the corpus shall be divided one-half (1/2) to Judith and one-half (1/2) to her children and that one-third (1/3) of the corpus shall be divided one-half (1/2) to Dennis and one-half (1/2) to his children. ²¹⁶ There are no express words of survivorship contained in the language creating these interests. In addition, a gift to the children of Judith and Dennis is not the same as a class gift to the testator's grandchildren. The share that each child of Judith shall receive will be determined by the number of children born to Judith, not by the number of children born to Dennis or the total number of testator's grandchildren. Likewise, the share received by each child of Dennis will be determined solely by the number of children born to Dennis. In fact, the youngest grandchild might turn out to be a child of Walter, and there is no gift to the children of Walter, although the children of Walter who survive him would be included in the class gift to his "bodily issue." ²¹⁷ Thus it is hard to see how the youngest grandchild reaching the age of twenty-five is directly related to the vesting of the interests of Judith, Dennis, and their children.

Two additional factors strengthen the argument that the interests were vested. First, the trust provides that the income from the trust is to be paid to the testator's children, Judith, Dennis, and Walter for and during the duration of the trust. ²¹⁸ When an intermediate gift of income is given to a beneficiary who is to receive a share of the corpus at a stated age, the presumption is raised that the beneficiary's interest is vested and not contingent. ²¹⁹ Thus the interests of Judith and Dennis would be presumed to be vested. Second, the provision for the distribution of the one-third of the corpus regarding Walter contains an express condition of survivorship. One-half (1/2) of the one-third (1/3) share, or all of the one-third (1/3) share if Walter should have no bodily issue, is to be distributed "to my grandchildren, living at the time of the termination of the trust." ²²⁰ The use of this express condition of sur-

²¹⁵*Merrill*, 481 N.E.2d at 1297.

²¹⁶*Id.*

²¹⁷A child of Walter would not be considered a "bodily issue" unless he survived Walter. The term "bodily issue" creates a condition of survivorship. R. POWELL, *supra* note 214, ¶ 327, at 761-62. In addition the word "issue" would include more remote descendants than children. L. SIMES & A. SMITH *supra* note 158, § 738, at 215.

²¹⁸*Merrill*, 481 N.E.2d at 1296.

²¹⁹R. POWELL, *supra* note 214, ¶ 332, at 786-91, L. SIMES & A. SMITH, *supra* note 158, § 588, at 37-38. While the children of Judith and Dennis were not given an intermediate gift of the income, the fact that their parents' share would be presumed to be vested would appear to lend some support to the argument that their interests should likewise be considered vested.

²²⁰*Merrill*, 481 N.E.2d at 1297. This provision clearly violates the rule against perpetuities since it requires the grandchildren to survive to the time of distribution—when

vivorship with regard to the distribution of the one-third share of the corpus suggests the testator had no intent to create such a condition with regard to the distribution of the two-thirds share to Judith, Dennis, and their children. Had there been an implied condition of survivorship requiring the beneficiaries to survive to the time of distribution, there would have been no need for the testator to have expressly created one with regard to distribution of the one-third share. The fact that the testator created an express condition of survivorship with regard to the distribution of the one-third share strongly suggests he did not intend to create one with regard to the distribution of the two-thirds share.²²¹ If any doubt then remained as to whether the interests were vested or contingent, the court could have applied the general rule favoring vesting of interests at the earliest possible time.²²²

Within the opinion there is some language which suggests the supreme court may have found a violation of the rule against perpetuities because the duration of the trust exceeded the period of the rule:

Here, there is no ambiguity whatsoever in the will, with regard to either the identity of the beneficiaries or the *time of termination* of the trust. The beneficiaries were the Testator's children and grandchildren, all of them, and the trust was to *terminate*, as to two-thirds (2/3), when the youngest grandchild attained the age of twenty-five (25) years. What could be more clear? The problem is not one of ascertaining the Testator's intentions, as to *time for vesting*, but simply that our statute will not permit such intention to be carried out.²²³

It is not clear from this passage whether the court believed the phrase "when my youngest grandchild reaches the age of twenty-five (25) years" created a condition of survivorship requiring the beneficiaries of the trust to survive until such time or whether the court found a rule violation to exist because the time of termination was when the youngest grandchild reached the age of twenty-five—a time beyond the period of the rule. The latter viewpoint is suggested by the court's

the youngest grandchild reaches the age of twenty-five—a time beyond the period of the rule. It is somewhat shocking therefore that both the trial court and the court of appeals reached the conclusion that the provisions of the trust regarding Walter did not violate the rule against perpetuities. *Merrill*, 453 N.E.2d at 360.

²²¹See, e.g., *Pyne v. Pyne*, 154 F.2d 297, 300 (D.C. Cir. 1946); *In re Stanford's Estate*, 49 Cal. 2d 120, 133-35, 315 P.2d 681, 689 (1957); *Pechin v. Medd*, 476 N.E.2d 526, 530 (Ind. Ct. App. 1985); see also Falender & Fruewald, *supra* note 191, at 459 n.160.

²²²See, e.g., *Alsman v. Walters*, 184 Ind. 565, 111 N.E. 921 (1916); *Aldred v. Sylvester*, 184 Ind. 542, 111 N.E. 914 (1916); *Moorman v. Moorman*, 156 Ind. App. 606, 297 N.E.2d 836 (1973).

²²³*Merrill*, 481 N.E.2d at 1298 (emphasis added).

discussion of the validity of the provision for the distribution of the one-third share of the corpus regarding Walter. The supreme court noted that two-thirds of the trust was to terminate when the youngest grandchild reached the age of twenty-five, but that the remaining one-third of the corpus was to be "continued" in trust until Walter's death.²²⁴ From this fact the court reasoned:

The use of the word "continued" as to the one-third share following the provisions for termination as to the two-thirds share permits no conclusion other than that the one-third share will not vest until some time *subsequent to the vesting of the two-thirds share*. Obviously, if the corpus of two-thirds cannot vest within the time allowed, and the vesting of the remaining one-third may be *deferred until an even later date*, the gift of the one-third interest fails for the same reason as does the gift of the two-thirds interest.²²⁵

Because it was the time of termination that was being deferred, it would appear that the court viewed the time of termination as the time of vesting. If, as one suspects, the court was concerned with allowing the duration of a private irrevocable trust to exceed the period of the rule because of its effect upon the free alienability of property, the court could have approached the problem differently. While the rule against perpetuities does not prevent the duration of a trust from exceeding the period of the rule,²²⁶ there is a small body of caselaw²²⁷ as well as the comments of numerous legal scholars suggesting that a private trust cannot remain indestructible beyond the rule against perpetuities.²²⁸ The trust, according to these authorities, should not be declared void, but merely terminable by the beneficiaries. There seems to be some disagreement between these authorities as to whether the trust is terminable by the beneficiaries from its inception or only after the end of lives in being plus twenty-one years.²²⁹ Under this approach, the trust

²²⁴This remark by the court is most interesting because the court had earlier concluded that the identity of the youngest grandchild could not be determined until all the testator's children had died. *Id.* at 1298 n.1.

²²⁵*Id.* at 1300 (emphasis added).

²²⁶The equitable interests in a trust can vest long before the trust terminates, and if the interests are certain to vest, if at all, within the rule against perpetuities the rule is satisfied. T. BERGIN & P. HASKELL, *supra* note 157, 184, 224-25; L. SIMES, *supra* note 160, § 144, at 314-15.

²²⁷See cases cited in L. SIMES, *supra* note 160, § 145.

²²⁸See, e.g., *id.*; T. BERGIN & P. HASKELL, *supra* note 157, at 225-26; RESTATEMENT (SECOND) OF TRUSTS § 62 comment o (1959); RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFER) § 2.1 (1983); A. SCOTT, THE LAW OF TRUSTS § 62.10(2) (3d ed. 1967); L. SIMES & A. SMITH, *supra* note 158, § 1393, at 245-46.

²²⁹Simes and Smith argue for the position that it would be more in accord with the analogy to the period of the rule to strike down the provision for indestructibility as of

would not be destroyed, but its indestructibility would be limited to the period of the rule, or if the court preferred, from the inception of the trust, thus allowing the beneficiaries to terminate the trust.

The testamentary trust in *Merrill* is less than a paragon of legal draftsmanship. There were a number of mistakes made by the drafter leading to the apparent rule violation. The first was the use of an age contingency in excess of twenty-one years.²³⁰ Where an interest is given to an individual or to a class that is closed at the time the interest is created, a requirement that the individual or members of the class attain a certain age in excess of twenty-one in order to take the interest presents no problem because they are measuring lives in being at the creation of the interest and they will attain the stated age, if at all, within their own lifetimes.²³¹ However, where an interest is given to a class (testator's grandchildren) that is not closed at the time the interest is created, an age contingency in excess of twenty-one years may cause the gift to fail because the interest might vest more than twenty-one years after the death of the last measuring life in being at the creation of the interests.²³² For example, a gift to the testator's grandchildren or to the testator's grandchildren who reach the age of twenty-one is valid, since the testator's children can be used as the measuring lives in being and the grandchildren will all be born and reach the age of twenty-one no later than twenty-one years after the death of the testator's last child. If, however, the age contingency for vesting is in excess of twenty-one, the gift to the grandchildren may fail. In *Merrill*, the interests would not have failed had the drafter reduced the time of distribution to "when the youngest grandchild reaches the age of twenty-one (21)." It is very possible, however, as the court of appeals suggested, that the testator did not want the corpus of the trust distributed until the grandchildren were mature enough to handle their inheritance wisely—apparently at the age of twenty-five.²³³ Faced with this dilemma, the drafter should have done two things. First, he should have attempted to word the trust in such a manner as to be absolutely clear that the interests of the grandchildren

the time of creation. L. SIMES, *supra* note 160, § 145, at 317; L. SIMES & A. SMITH *supra* note 158, § 1393, at 246. The other authorities cited *supra*, note 228, suggest the trust is terminable by the beneficiaries only at the end of the period of the rule.

²³⁰"Regard with particular suspicion any gift which is contingent upon the taker attaining an age in excess of 21. Such gifts constitute the largest single group of invalid limitations." Leach, *supra* note 156, at 670.

²³¹See *supra* notes 172-75 and accompanying text.

²³²See *supra* note 176 and accompanying text.

²³³*Merrill*, 453 N.E.2d at 360. To prevent a rule violation, the court of appeals excluded grandchildren born after the testator's death from the term "grandchild" in 3(E) of the will, thus closing the class at the testator's death. *Id.* at 362. The supreme court found no indication of an intent to exclude after-born grandchildren from the wording of the trust and as a result it violated the rule. *Merrill*, 481 N.E.2d at 1298.

were to vest at their birth and not when they reached the age of twenty-five, and that the distribution of the corpus to the grandchildren when they reached the age of twenty-five was related solely to the time of the enjoyment and not to the time of vesting. One proposed solution is to give the income from one-third of the corpus to each of the testator's children for so long as they shall live. This would not change the time of distribution of the trust as written in *Merrill* because, as the supreme court pointed out, the youngest grandchild cannot be determined until all the testator's children are dead.²³⁴ Thus the testator's children in *Merrill* would never have been able to enjoy any of the corpus. Following the income provisions for Dennis and Judith, another provision would provide for the distribution of the corpus to their children. For example, following the income provision to Judith, the clause might read:

Upon the death of my daughter, Judith, the trustee shall divide the one-third (1/3) of the corpus from which Judith was receiving the income into as many shares as there are children of Judith then living, and the trustee shall set aside and designate one such share as a separate trust fund for the benefit of each living child of Judith. The trustee shall thereafter pay the income from each share to the child for whose benefit the share was set off until the termination of the trust with respect to such share. When such child shall attain the age of twenty-five (25) years, or shall have attained the age of twenty-five (25) years at the death of Judith, or when such child, having survived Judith, shall die under the age of twenty-five (25), the trust shall terminate as to such share and the trustee shall distribute such share, together with any accrued income, to such child or, if he be dead, to his executor or administrator.²³⁵

This provision would not require the grandchildren to survive to the time of distribution, and the income provision to each of the grandchildren, as well as the payment of the share of the corpus to the estate of any grandchild who should die before reaching the age of twenty-five, clearly indicate the interests are "vested" at the death of Judith and Dennis. Because Walter did not have any children at the time the instrument was drafted, it might be prudent to include a gift over in the event Walter should die without children.

²³⁴*Id.* at n.1. By providing that one-half (1/2) of the two-thirds (2/3) of the corpus was to go to Judith and Dennis and that the trust of the other one-third (1/3) of the corpus might "continue" after the time of distribution until Walter's death, the drafter did not appear to have been aware of the legal effect of the words employed.

²³⁵This provision is a modified version of the clause contained in L. SIMES & A. SMITH, *supra* note 158, § 1294, at 236.

Second, to avoid any question of a rule violation, the drafter should include a saving clause.²³⁶ A blanket saving clause in the *Merrill* trust would have prevented a rule violation.²³⁷ Such a clause might have read:

This trust shall terminate in any event not later than twenty-one years after the death of the last survivor of all beneficiaries of this trust who are in being at the time of my death, and, unless sooner terminated by the terms of this trust, the trustee shall, at the termination of such period make distribution to my then living descendants per stirpes.²³⁸

The harshness that can result from a rule violation is clearly reflected in the *Merrill* decision. The testator wanted a substantial portion of his estate to pass to his grandchildren, and one of his children, Walter, to receive only the income for life from one-third of the corpus of the trust. Instead, because of the rule violation, the entire trust was destroyed and the testator's estate passed intestate to his second, childless wife and his three children.²³⁹ The testator's grandchildren received nothing and his children, including Walter, received their shares of the estate outright. The testator's intent was totally frustrated. One might argue that the frustration was caused by the ineptness of the testator's attorney. To some degree this is true, but the rule is so technical and full of pitfalls for even the most experienced drafters that Professor Gray was led to remark: "[T]here are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it."²⁴⁰

The ease with which a technical violation of the rule can occur and the harshness of the consequences of a violation have led most legal scholars and experts in the field to conclude that some type of perpetuities reform is needed.²⁴¹ The court of appeals in *Merrill* attempted to reform the instrument to make it comply with the rule by applying the doctrine

²³⁶*Id.* § 1295, at 236; T. SCHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 143 (2d ed. 1979); L. WAGGONER, *supra* note 165, § 12.7(c), at 188; Leach & Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule*, 74 HARV. L. REV. 1141 (1961).

²³⁷*Merrill*, 481 N.E.2d at 1298-99 n.2.

²³⁸This provision is a modified version of the saving clause contained in L. SIMES & A. SMITH, *supra* note 158, § 1295, at 236.

²³⁹The facts indicate that the testator is survived by a second, childless wife and three children by a prior marriage. *Merrill*, 481 N.E.2d at 1297. Under IND. CODE § 29-1-2-1 (1982), the decedent's estate would be distributed to his wife and his three children from the first marriage.

²⁴⁰J. GRAY, *THE RULE AGAINST PERPETUITIES* xi (4th ed. 1942).

²⁴¹Unfortunately there is no general agreement as to the method of reform to be used. *Perpetuity Reform*, *supra* note 176, at 1718.

of equitable approximation.²⁴² The supreme court rejected the court of appeals' attempt to save the instrument, finding the court had no authority to rewrite the will.²⁴³ Courts in only four states, Hawaii, Mississippi, New Hampshire, and West Virginia, have presumed to reform an instrument without legislative authority in order to avoid a violation of the common law rule.²⁴⁴ In light of the *Merrill* decision, it appears that modification of the rule in Indiana must come, if at all, from the legislature.

At the present time, legislation that to some degree or another modifies the common law rule against perpetuities exists in twenty-three states. In a few states, this legislation is directed towards the correction of specific drafting errors resulting in rule violations of a technical nature such as age contingencies in excess of twenty-one years, the presumption of lifetime fertility, and the unborn widow problem.²⁴⁵ In most states, however, the reform has been more extensive and has attempted to address all potential rule violations. Sixteen states have adopted variations of the wait-and-see rule.²⁴⁶ In these jurisdictions, the courts wait to see if in fact the interest vests or fails to do so within the rule. Only if the interest remains contingent after the period of the rule does a violation occur.²⁴⁷ The wait-and-see doctrine will eliminate those violations based on remote possibilities which in fact never occur and in many cases will permit the instrument to operate as written without any modification.²⁴⁸ The main objection to the doctrine is that title to property could be tied up for the period of the rule.²⁴⁹ It should be observed that the drafter can easily create his own wait-and-see provision in an instrument by use of the blanket saving clause.²⁵⁰

²⁴²See *supra* notes 191-92 and accompanying text.

²⁴³See *supra* notes 194-96 and accompanying text.

²⁴⁴*Perpetuity Reform, supra* note 176, at 1757; see cases cited in *Merrill*, 481 N.E.2d at 1298-99 n.2.

²⁴⁵*Perpetuity Reform, supra* note 176, at 1726-50. Professor Leach in his quest for reform of the rule went so far as to give names to certain categories of rule violations, such as "the fertile octogenarian," "the unborn widow," "the precocious toddler" and "the magic gravel pit." Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); Leach, *Perpetuities, Staying the Slaughter of the Innocents*, 68 L.Q. REV. 35 (1952).

²⁴⁶For specific statutes, see T. BERGIN & P. HASKELL, *supra* note 157, at 213-14 n.6 and 7.

²⁴⁷For specific statutes, see T. BERGIN & P. HASKELL, *supra* note 157, at 213-14 nn.6-7. *supra* note 176, at 1759-84.

²⁴⁸L. WAGGONER, *supra* note 165, § 15.3, at 298-99.

²⁴⁹*Id.* at 300. T. BERGIN & P. HASKELL, *supra* note 157, at 218. Another problem created by the wait-and-see doctrine is that of deciding who are to be used as the measuring lives in determining the waiting period. This problem is discussed in some detail in *Perpetuity Reform, supra* note 176, at 1762-82.

²⁵⁰*Perpetuity Reform, supra* note 176, at 1776, 1778 n.155.

Fifteen states have enacted reformation type statutes which employ the doctrine of cy pres or equitable approximation to reform instruments that violate the rule.²⁵¹ In some of these states, the statutes allow the court to reform the instrument immediately where there is a rule violation, but in other states, the reformation statutes are combined with wait-and-see statutes so that the court must wait to see if a violation in fact occurs; only if the interest remains contingent at the end of the waiting period is the court permitted to modify the instrument in order to comply with the rule.²⁵²

It is beyond the scope of this survey to discuss in any detail the pros and cons of legislative reform of the rule, nor is this limited discussion intended as an endorsement of such reform. Instead this discussion is intended merely to alert the reader that there is some momentum for perpetuities reform. The American Law Institute (ALI) recently adopted both a wait-and-see provision²⁵³ and a reformation (cy pres) provision²⁵⁴ in the Restatement (Second) of Property, Donative Transfers. Similarly at the August 1986 meeting of the National Conference of Commissioners on Uniform State Laws, a massive eighty page "Draft for Approval" Statutory Rule Against Perpetuities was introduced by the Drafting Committee on Rule Against Perpetuities Act, Professor Lawrence Waggoner of the University of Michigan Law School, Reporter. It is unclear at this time if these recent legislative activities or the *Merrill* decision will spark any interest in perpetuity reform in the Indiana legislature.

The *Merrill* decision should stand as a warning to those members of the bar who draft wills, trusts, and other documents involving future interests. The drafter must be ever mindful of the rule against perpetuities and each provision should be tested to insure no violation exists. Where possible, beneficiaries should be described by name rather than class,

²⁵¹T. BERGIN & P. HASKELL, *supra* note 157, at 218 n.14.

²⁵²L. WAGGONER, *supra* note 165, § 15.2, at 291-92; *Perpetuity Reform*, *supra* note 176, at 1755 n.97.

²⁵³The wait-and-see provision provides the vesting requirement with respect to donative transfers: "[E]xcept as provided in § 1.6 [which applies to charitable gifts], a donative transfer of an interest in property fails, if the interest does not vest within the period of the rule against perpetuities." RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 (1983).

²⁵⁴The reformation provision states the consequences of the failure of an interest under the rule against perpetuities in a donative transfer:

If under a donative transfer an interest in property fails because it does not vest or cannot vest within the period of the rule against perpetuities, the transferred property shall be disposed of in the manner which most closely effectuates the transferor's manifested plan of distribution and which is within the limits of the rule against perpetuities.

Id. § 1.5.

and age contingencies in excess of twenty-one years should be avoided. Where any doubt exists, a saving clause should be included in the instrument.