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A Modern Guide to the Modifications of the Rule Against Perpetuities in New York

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A MODERN GUIDE TO THE MODIFICATIONS OF THE RULE AGAINST PERPETUITIES IN NEW YORK

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I. INTRODUCTION

The common law Rule Against Perpetuities (RAP) stems from the original English common law case, *The Duke of Norfolk's Case*[1] or the Doctrine of Perpetuities.[2] The common law rule, as stated by John Chipman Gray, provides that "[n]o 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."[3] The primary modifications New York has created include the alteration to the fertile octogenarian rule, addition of a savings provision for the reduction of age contingencies, removal of the unborn widow rule, and application of the RAP to commercial option contracts. These modifications to the common law rules have been beneficial to the evolution of RAP from its historic application to its modern necessity.[4]

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[1] 22 Eng. Rep. 931, 931 (Ch. 1681).

[2] JESSE DUKEMINIER ET AL., PROPERTY 308 (Vicki Been et al. eds., 8th ed. 2014).

[3] JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 201 (Roland Gray eds., 4th ed. 1942) (citation omitted). Two modern approaches to the RAP have been codified in American Law. The Uniform Statutory Rule Against Perpetuities (USRAP) applies a "flat 90 years vesting period, [i]f at the end of 90 years following the creation of the interest, the interest is still in existence and unvested, it is invalid." *See* DUKEMINIER ET AL., *supra* note 2, at 330. The wait and see approach is the second modern application which applies the same vesting period as common law RAP; however, unlike under the common law, the period is determined retrospectively. *See id.*

[4] New York's codification has been said to have simply mimicked the common law; however, this statement is misleading. LEWIS M. SIMES, LAW OF FUTURE INTERESTS 310-11 (W. Publ'g Co. 2d ed. 1966).

First, the removal of the fertile octogenarian rule has allowed the state to further secure future interest beneficiaries' rights. At common law, the fertile octogenarian rule provides that a person is considered capable of bearing a child at any age.[5] This rule resulted in the invalidation of future interests because of the distant possibility that a person may bear a child at an advanced age.[6] For the purpose of protecting these future interests that would otherwise be invalidated, New York substituted strict rules of construction by furnishing age ranges within which a person shall be considered capable of bearing a child.[7] The elimination of the fertile octogenarian rule limits invalidation of future interests caused by far-fetched possibilities such as childbearing among the elderly.[8]

Second, the reduction of the age contingency rule properly promotes the testator's intent because, notwithstanding the age contingency in the conveyance or testamentary instrument, the testator's ultimate purpose, for the beneficiary to receive the property at some time, is accomplished. At common law, if a conveyance or testamentary transfer was created with an age contingency which could be satisfied too remotely, the interest would be invalid.[9] New York has alleviated this problem by reducing the age contingency to twenty-one years.[10]

Further, New York's evolution away from the common law has helped to secure a future interest by eliminating the common law unborn widow rule. At common law, if a conveyance or testamentary instrument were made in favor of an unascertainable spouse with a remainder to a third person, the spouse could not operate as a life in being.[11] Abolishing the unborn widow rule is advantageous because it effectuates the testator's intent, under the premise that a testator always intends to create a valid instrument. Allowing the unascertainable spouse to operate as a life in being facilitates the validation

5 Jee v. Audley, 1 Cox. 324, 325-26 (1787).

6 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1966) (practice commentary) (Margaret Valentine Turano subparagraph E).

7 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e) (McKinney 1972).

8 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3 (McKinney 1966) (practice commentary) (Margaret Valentine Turano subparagraph E).

9 *The Duke of Norfolk Case*, 22 Eng. Rep. at 931.

10 N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966).

11 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1966), *construed in* 1960 N.Y. Leg. Doc. No. 65(G), at 18.

of the third party's interest.[12]

Furthermore, New York has taken the proper approach departing from the common law in applying the RAP to commercial option contracts because no persuasive reason exists for the exemption of an entire class of future interests from its application. At common law, a commercial option contract was considered exempt from the RAP remoteness of vesting application.[13] New York has refused to exclude this entire class of future interests from the remoteness of vesting application.[14]

Finally, New York has properly applied the common law by not expanding the RAP to leaseholds and rights of first refusal because these types of contracts do not involve the evils the RAP attempts to prohibit. At common law, leaseholds and rights of first refusal were exempt from the remoteness of vesting application.[15] New York has properly excluded theses interests from the application of the RAP.[16]

This Comment will explore RAP's common law principles as well as the New York modifications of the remoteness of vesting and suspension of alienability applications.[17] Section II of this Comment will delve into the original creation of the RAP as well as its common law application. Section III will explore New York's codification of the common law rule. Section IV will probe into New York's minor modifications of the common law rule in relation to the fertile octo-

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[12] *Id.*

[13] *See* SIMES, *supra* note 4, at 311-12.

[14] Symphony Space v. Pergola Properties, 669 N.E.2d 799, 800 (N.Y. 1966).

[15] Metropolitan Transp. Auth. v. Bruken Corp., 492 N.E.2d 379, 381 (N.Y. 1986).

[16] *Id.*

[17] There are two different applications of the RAP codified in New York Estates, Powers, and Trusts Law (E.P.T.L.) § 9-1.1. N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 (McKinney 1966). Under New York E.P.T.L. § 9-1.1(a), the New York legislature has codified the common law suspension of alienation and remoteness of vesting applications. *Id.*

> The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred. Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years. Lives in being shall include a child conceived before the creation of the estate but born thereafter. In no case shall the lives measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult.

Id.

genarian rule, the reduction of the age contingency savings provision, and the unborn widow rule. Section V will analyze RAP's common law application to non-commercial option contracts as well as New York's major modification applying the RAP to commercial option contracts. Finally, this Comment will conclude that New York's modifications to the RAP have refined the common law RAP by preserving the underlying purpose of the RAP as well as the intent of grantors and testators.

II. THE COMMON LAW RAP

RAP originated under the common law in the patriarchal society of England.[18] Around 1535, King Henry VII put incremental pressure on Parliament to enact additional means to derive wealth,[19] which led to the creation of the Statute of Uses.[20] The Statute of Uses is an "English statute that converted the equitable title held by the cestui que use (i.e., beneficiary) to a legal one in order to make the cestui que use liable for feudal dues, as only a legal owner."[21] The purpose of the statute was to expand future interests by converting springing and shifting uses to executory shifting or springing interests.[22] However, the hidden agenda behind the statute's creation was to provide the crown with additional tax revenue.[23] In addition to allowing for the collection of increased tax revenue, this initiative led to the creation of the Statute of Wills.[24] This statute, which allowed landowners to pass property at death for the first time, led to the RAP's creation.[25] The Statute of Wills established the fundamental principle known as freedom of disposition, which permits decedents to pass property at death in accordance with their wishes.[26] The Statute of Wills enabled property owners to begin to restrict alienation of

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18 *See* DUKEMINIER ET AL., *supra* note 2, at 289.

19 *See id.*

20 *See id.*

21 *The Statute of Uses,* BLACK'S LAW DICTIONARY (10th ed. 2014).

22 *See* DUKEMINIER ET AL., *supra* note 2, at 290.

23 Jonathan M. Vecchi, Comment, *Repulsed by RAP? Renewal Options Are Singing A Different Tune: Bleecker Street Tenants Corp. v. Bleeker Jones, LLC*, 29 TOURO L. REV. 205, 207 (2012).

24 *Id.*

25 *Id.*

26 JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 19 (Vicki Been et al. eds., 9th ed. 2013).

their property for generations.[27]

RAP has two primary purposes: (1) keeping property marketable; and (2) limiting dead hand control.[28] By limiting the alienation restraints on a parcel of property, RAP ensures that the property will become marketable within a reasonable period of time from the transfer.[29] However, this principle is a double-edged sword. Estates laws attempt to promote freedom of disposition, while at the same time restricting that freedom for community benefit.[30] Prior to the creation of the RAP, judges in England would often rule contrary to perpetuities in an attempt to limit dead hand control over real and personal property.[31] In ruling contrary to perpetuities, "[t]he weapon they had at hand to oppose perpetuities in the two centuries prior to *The Duke of Norfolk's Case* was principally destructibility of fee tails by the common recovery and of contingent remainders by merger and failure to vest."[32]

In 1681, *The Duke of Norfolk's Case* established the Doctrine of Perpetuities, which is still followed by a minority of United States jurisdictions today.[33] Under this rule, "[n]o 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."[34] When determining whether an interest is valid under the common law, it must be ascertained prospectively.[35] If there is any possibility, no matter how slight, that the interest may not vest within the perpetuities period, the interest is invalid.[36] The primary goal in the creation of the Doctrine of Perpetuities was to strike down dead hand control by invalidating interests that may vest too remotely.[37] As a general consensus in the legal sys-

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[27] George L. Haskins, *Extending The Grasp of the Dead Hand: Reflections On the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 20 (1977).

[28] *See* DUKEMINIER & SITKOFF, *supra* note 26, at 880.

[29] *See id.*

[30] *See id.*

[31] *See* Haskins, *supra* note 27, at 21.

[32] *See id*. at 35.

[33] The common law application of RAP is still followed in Arizona, Iowa, Ohio, Oklahoma, Pennsylvania, and Texas. ARIZ. REV. STAT. ANN. § 33-261 (1963); IOWA CODE ANN. § 558.68 (West 1983); OHIO REV. CODE ANN. § 2131.08 (West 2012); OKLA. STAT. ANN. tit. 60, § 175.47 (West 1941); Okla. CONST. art. II, § 32; 20 PA. CONS. STAT. ANN. § 6104 (West 1972); TEX. PROP. CODE ANN. § 112.036 (West 1983).

[34] *See* GRAY, *supra* note 3, at § 201 (citation omitted).

[35] *See* SIMES, *supra* note 4, at 263.

[36] *See id.*

[37] *See id.* at 264.

tem, it is desired that wealth flow from the wealthy to the poor, which becomes more probable when the law limits perpetual wealth.[38]

Equally important, the remoteness of vesting rule usually applies when a property owner holds his freehold estate in fee simple absolute[39] and transfers away something less than what he owns.[40] There are many remainders that a property owner can transfer, either through an inter vivos or testamentary disposition, when the first grantee is not given a fee simple absolute.[41] These remainders may be indefeasibly vested,[42] vested subject to open,[43] vested subject to an executory limitation,[44] or contingent.[45] All of these remainders are subject to the RAP except indefeasibly vested remainders and vested remainders subject to an executory limitation.[46] An indefeasibly vested remainder is not subject to the RAP due to its vested characteristics.[47] A remainder can only be indefeasibly vested if it is "certain of becoming possessory in the future and cannot be divested."[48]

Moreover, following traditional English common law principles, a few minor common law doctrines were used to increase the alienability of estates and avoid perpetuities; however, these doctrines have been abrogated in almost every United States jurisdiction today,[49] including the Rule in Shelley's Case,[50] the doctrine of the

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38 *See* DUKEMINIER & SITKOFF, *supra* note 26, at 20.

39 A fee simple absolute is a possessory estate that is capable of continuing indefinitely. *See* DUKEMINIER ET AL., *supra* note 2, at 216.

40 *See* DUKEMINIER ET AL., *supra* note 2, at 309-10.

41 *See id.*

42 An indefeasibly vested remainder is a remainder that is certain to come into possession at the termination of the preceding estate. *See id.* at 281.

43 A remainder that is vested subject to open is a remainder that is not certain to become possessory in a particular person because it is commonly a class gift and the class is not closed at that time. The remainder is subject to partial divestment because as the class expands a portion of the interest divests from one class member to the other. *See id.* at 282.

44 A vested remainder subject to an executory limitation is a remainder that will divest into another transferee upon the occurrence of an event. The remainder is subject to complete divestment because if an event occurs, a condition subsequent, the interest will entirely divest from one interest holder to another. *See id.* at 286.

45 A contingent remainder is a remainder that is either (1) subject to a condition precedent, or (2) is given to an unascertained person. *See* DUKEMINIER ET AL., *supra* note 2, at 281.

46 *See id.* Note that the executory interest is subject to RAP. *Id.*

47 *See id.*

48 *See id.*

49 *See id.* at 304-07.

50 *See* SIMES, *supra* note 4, at 45.

> It has come to be recognized that (a) the rule in Shelley's case affects only the remainder, and that (b) whether the ancestor has a possessory fee

Destructibility of Contingent Remainders,[51] and the Doctrine of Worthier Title.[52]

The common law rule in relation to the remoteness of vesting problem can be reduced to one simple rule: "[n]o 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."[53] Nonetheless, its application is one that has perplexed scholars and commentators since its creation. The common law application was indeed useful at the time

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> simple or fee tail immediately, depends upon the applicability of the doctrine of merger. The rule may, therefore, be stated as follows: If a life estate in land is conveyed or devised to A, and by the same conveyance or device, a remainder in the same land is limited, mediately, or immediately, to the heirs of A, or to the heirs of A's body, and the life estate and remainder are of the same quality, then A has a remainder in fee simple or in fee tail.

See id.

[51] *See id.* at 33.

> According to English common law, a remainder in land must take effect in possession at the termination of the prior estate of freehold. But a contingent remainder could not take effect in possession prior to the happening of the contingency on which it was limited. From these two propositions may be deduced the destructibility rule, which as follows: If the prior estate of freehold terminate before the happening of the contingency on which a contingent remainder is limited, the remainder can never take effect. The rule was so designed because the contingent remainder could be destroyed by a premature determination of prior life estate resulting from a forfeiture or a merger. Executory interests were held to be indestructible. But a limitation of a contingent remainder could not be treated as an executory interest merely because the contingency was not vested at the termination of the prior estate of freehold. If, at the inception of the interest, it appeared that a limitation might take effect as a remainder, it was construed as a contingent remainder rather than an executory interest.

See id.

[52] *See id.* at 59.

> When the rule applies, the limitation to the heirs is void as a conveyance to them and there is a reversionary interest in the grantor. Though the limitation is void as such, it may show that the prior interest is a determinable fee and not a fee simple absolute.
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> After a grant containing a limitation to the grantor's heirs has been made, a question involving the rule may arise: (a) when the grantor conveys or devises his reversionary interest to another; (b) when creditors of heirs apparent seek to reach their property; (c) when the termination of a trust is sought; and (d) when the applicability of the Federal Estate Tax is involved.

See SIMES, *supra* note 4, at 59.

[53] *See* GRAY, *supra* note 3, at § 201 (citation omitted).

of its inception; however, the strict application may yield troubling outcomes in contemporary society. Although New York's rule is analogous to the common law rule, New York has taken many strides towards evolving the rule for modern use.

III. NEW YORK'S CODIFICATION OF THE COMMON LAW RULE

New York's codification of the RAP has been said to have simply mimicked the common law rule.[54] However, this statement is misleading because New York has departed from the common law application.[55] The codification of the common law rule can easily be found under New York E.P.T.L. § 9-1.1;[56] nonetheless, the application of the RAP is not so simple. Under this codification, no conveyance of property is valid unless the interest in the property will vest, if at all, within twenty-one years after the death of some life in being, at the time of the conveyance if it is an irrevocable inter vivos transfer or at the time of death if it is a testamentary transfer.[57] This codification is identical to the common law principle as stated by John C. Gray.[58]

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[54] *See* SIMES, *supra* note 4, at 310-11.

[55] *See id.*

[56] N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 (McKinney 1966).

> No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.

Id.

[57] *Id.*

[58] *See* GRAY, *supra* note 3, at § 201. However, if the conveyance is in the form of a trust that is in favor of a class of persons who are his heirs or next of kin, New York E.P.T.L. § 7-1.9(b), which incorporates a minor application of the Doctrine of Worthier Title, must be applied along with New York E.P.T.L. § 9-1.1(b). N.Y. EST. POWERS & TRUSTS LAW § 7-1.9 (a), (b) (McKinney 1966).

> Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke or amend the whole or any part thereof by an instrument in writing acknowledged or proved in like manner, and thereupon the estate of the trustee ceases with respect to any part of such trust property, the disposition of which has been revoked. If the conveyance or other instrument creating a trust of property was recorded in the office of the clerk or register of any county of this state, the instrument revoking or amending such trust, together with the consents thereto, shall be recorded in the

IV. NEW YORK'S MINOR MODIFICATIONS OF THE COMMON LAW RULE

New York has made several modifications to the common law rule; some of these modifications are minor, while others are considered major.[59] The minor modifications include the removal of the fertile octogenarian rule, the adjustment to age contingencies, and the elimination of the unborn widow rule. First, the fertile octogenarian rule, at common law, stated that a person was considered capable of bearing a child at any age.[60] New York has modified this rule to create a strict rule of construction limiting childbearing capabilities to certain age ranges.[61] Second, New York introduced a mechanism to modify an age contingency which would otherwise validate the remainder to allow the remainder to definitely vest, if at all, within the perpetuities period.[62] Third, at common law, when a conveyance was made to an unascertainable spouse, that spouse was not considered a life in being for purposes of the RAP.[63] New York's modification now operates to allow an unascertainable spouse to be considered a life in being, which can operate to secure a remainder's interest that would have been invalidated at common law.[64]

A. New York's Modification of the Fertile Octogenarian Rule

New York's modification of the common law fertile octogenarian rule is the first modification that helped New York's application evolve to its modern necessity. Under common law principles,

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> same office of every county in which the conveyance or other instrument creating such trust was recorded.
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> For the purposes of this section, a disposition, contained in a trust created on or after September first, nineteen hundred fifty-one, in favor of a class of persons described only as the heirs, next of kin or distributees (or by any term of like import) of the creator of the trust does not create a beneficial interest in such persons.

Id. (citations omitted).

59 Although some modifications are more significant than others, they have all meaningfully contributed to New York RAP's evolution away from the common law.

60 *Jee v. Audley*, 1 Cox. at 325-26.

61 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e)(1) (McKinney 1972).

62 N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966).

63 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1966), *construed in* 1960 N.Y. Leg. Doc. No. 65(G), at 18.

64 *Id.*

for the purposes of the RAP, a person is considered capable of bearing children regardless of age.[65] This concept, known as the fertile octogenarian rule, was continued in New York's original adoption of the common law.[66] The rule primarily became an issue in transfers of life estates that included a living issue contingency. In *Jee v. Audley*,[67] the testator created a testamentary transfer which stated, "I g[ive] £1000 to M and the issue of her body, and in default of such issue he gave the said £1000 to be equally divided between the daughters of *then* living J[ohn] and E[lizabeth] his wife."[68] At the time of T's death, M had no living issue.[69] The words of limitation would have previously been recognized as a fee tail in the wife's bloodline.[70] In addition to the creation of the fee tail, the testator created a contingent gift over.[71] As such, if M were to die without issue, the property was to be disbursed to the then living issue of John and Elizabeth.[72] At the time of the litigation, M was nearly seventy years old, without issue.[73] The issue of John and Elizabeth, who were also nearly seventy years old and held the contingent gift over, filed suit to secure their contingent interest in the estate.[74] The court refused to find that, based upon her age, a person should be considered incapable of bearing a child. The court stated,

> I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case it may in another, and it is a very

[65] *Jee v. Audley*, 1 Cox. at 325-26.

[66] Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent,* 53 U. KAN. L. Rev. 595, 600 (2005).

[67] *Jee v. Audley*, 1 Cox. at 324.

[68] *Id.* (emphasis added).

[69] *Id.* at 324-26.

[70] *See* DUKEMINIER ET AL., *supra* note 2, at 222-23. A fee tail is an estate that gives the current possessor a life estate in the property and upon the death of the life estate holder the property passes directly to his issue. *Id.* Each fee tail holder only maintains a life estate which is automatically terminated upon his death. *Id.* Fee tails are no longer used due to the ease of manipulation of the estate. *Id.* For instance, often the present interest holders would transfer their fee tail interest to a strawman, who would transfer the property back to the present interest holder in a fee simple absolute, destroying the fee tail. *Id.*

[71] *Jee v. Audley*, 1 Cox. at 325.

[72] *Id.* at 324.

[73] *Id*. at 324-25.

[74] *Id*. at 324-26.

> dangerous experiment and introductive of the greatest inconvenience to give a latitude to such sort of conjecture.[75]

Thus, the court concluded, due to the adverse effects of such a determination, that a court should not decide whether a person is capable of bearing a child.[76] However, New York has taken a converse approach, despite the court's warning.[77]

New York has abrogated the common law fertile octogenarian rule.[78] Under New York E.P.T.L. § 9-1.3(e)(2), a male is only considered capable of having a child from age fourteen until death.[79] Further, for RAP purposes, a female is only considered capable of bearing a child from ages twelve to fifty-five.[80] For example, at common law, if a testator devised property under a will to his daughter for life then to her issue, if any, and if no issue then to his son, the outcome would depend on whether the daughter was capable of bearing children from the date of the testator's death, which period would run indefinitely. Thus, the daughter's age would not make a difference; the gift over would not vest until the death of the daughter, so long as she died with no issue. In contrast, under New York's modification, if the daughter had already surpassed the age of fifty-five, the analysis would depend upon whether the gift over interest will vest, if ever, immediately, based on whether she has issue at that time. If the daughter had already reached the age of fifty-five and did not have issue, the gift over remainder holders may be able to petition to immediately vest their interest in the property. The ability of the contingent future interest holders to immediately vest their future interest would allow the remaindermen to have certain rights over the current possessor, including applicable uses of the doctrine of

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75 *Id.* at 325-26.

76 *Jee v. Audley*, 1 Cox. at 325-26.

77 *Id.*

78 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e) (McKinney 1972).

79 *Id.* § 9-1.3(e)(2).

> Where the validity of a disposition depends upon the ability of a person to have a child at some future time, it shall be presumed, subject to subparagraph (2), that a male can have a child at fourteen years of age or over, but not under that age, and that a female can have a child at twelve years of age or over, but not under that age or over the age of fifty-five years.

Id.

80 *Id.*

waste.[81]

However, despite converse rights available to future interest holders, such as the use of the doctrine of waste, this modification facilitates RAP's evolution for the public benefit. The legislature's intent in the removal of the fertile octogenarian rule was to avoid invalidating dispositions on such "far-fetched" possibilities.[82] For example, "if a husband with an 80-year old wife created a trust to pay income to himself for life, then the income to his wife for life, then the income to his children for their lives, remainder to his grandchildren," the wife's assumed ability to have issue would have invalidated the remainder interest to the testator's grandchildren.[83] The wife would not be able to operate as a validating life because she is the last ascertainable person born at the time of the conveyance. Therefore, there is a possibility that the grandchildren's remainder would vest too remotely because it may vest beyond twenty-one years after her death. To avoid this improbability, the legislature created a presumption that the wife shall not be considered capable of bearing children,[84] thus, securing the children's interest in the trust.

Further, New York's presumption allows for the early closure of a class especially when applying the rule of convenience.[85] Ordinarily, a class gift cannot close until the interests of all members of that class have vested, and the class closes because no new members of the class can be born.[86] The rule of convenience, which applies to class gifts which are vested subject to open, allows the early closure of a class, so long as at least one member of the class is capable of taking possession, which would exclude members of the class who

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[81] Affirmative waste occurs when a person with a life estate takes an action that decreases the value of the property. *Affirmative Waste*, BLACK'S LAW DICTIONARY (10th ed. 2014). Permissive waste is when a person with a life estate does not take a necessary action, which decreases the value of the property. *Permissive Waste*, BLACK'S LAW DICTIONARY (10th ed. 2014). Ameliorative waste is when a person with a life estate makes an unauthorized change to the property, even though it increases the value of the property. *Ameliorative Waste*, BLACK'S LAW DICTIONARY (10th ed. 2014). The concept of ameliorative waste stems from the traditional common law principle that lease holders are not supposed to make any changes, even if it is an investment, to a leasehold. Baker v. Latham Sparrowbush Assocs., 808 F. Supp. 992 (S.D.N.Y. 1992), *aff'd,* 72 F.3d 246 (2d Cir. 1995).

[82] N.Y. EST. POWERS & TRUSTS LAW § 9-1.3 (McKinney 1966) (practice commentary) (Margaret Valentine Turano subparagraph E).

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *See* DUKEMINIER ET AL., *supra* note 2, at 311.

were born after its closure.[87] This modification operates to allow the early closure of a class gift intended for someone's children.[88] For example, if a conveyance was made to A's children who reach the age of 25, at common law, the class would not close until A's death because she was capable of having a child at any time during her life; however, under New York's modification, if A, a female, attained the age of fifty-five and all the conditions precedent have been satisfied, her then living issue would be able to use the rule of convenience to close the class early.[89] The class would be capable of closing early because under New York's rules of construction, the mother is incapable of bearing a child.[90]

Finally, with the increase in artificial reproductive means of childbearing, New York has taken a definitive stance to discount these possibilities for the RAP and other purposes.[91] Under New York E.P.T.L. § 4-1.3(h), "[w]here the validity of a disposition under the rule against perpetuities depends on the ability of a person to have a child at some future time, the possibility that such person may have a genetic child shall be disregarded."[92] Even for purposes of inheritance, New York has stringently limited when a child can claim a testate or intestate share.[93] Under New York E.P.T.L. § 4-1.3(b), in order for a posthumously conceived child to claim a testate or intestate share, the following must be satisfied: 1) during life the parent consented to posthumous conception in a signed writing; and 2) the child was in utero not later than 24 months or is born not later than 33 months after the parent's death.[94]

The abrogation of the common law rule was necessary to allow New York to evolve this historic rule to a modern application. Under the common law, a wholly unlikely possibility, such as childbearing at an elderly age, has the ability to frustrate the grantor's intent.[95] The intent of the grantor should always be given the highest

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87 *See id.*

88 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3 (McKinney 1972) (practice commentary) (Margaret Valentine Turano subparagraph C).

89 *See* DUKEMINIER ET AL., *supra* note 2, at 311.

90 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e) (McKinney 1972).

91 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e)(4) (McKinney 1966).

92 N.Y. EST. POWERS & TRUSTS LAW § 4-1.3(h) (McKinney 2014).

93 *Id.* § 4-1.3(b).

94 *Id.* § 4-1.3(b)(4).

95 N.Y. EST. POWERS & TRUSTS LAW § 9-1.3 (McKinney 1972) (practice commentary) (Margaret Valentine Turano subparagraph C).

regard, and only be limited when it is necessary for community benefit, which is not applicable in situations when parties are capable of having future children.[96] Because a grantor's intent should not be frustrated by a remote possibility that the grantor did not contemplate, New York has taken the proper step in securing beneficiaries' future interests.

B. New York's Modification of the Common Law Age Contingency Rule

New York has also modified the common law principles to ease RAP's stringencies by creating a mechanism that automatically adjusts otherwise problematic age contingencies under the common law RAP.[97] A grantor or testator may place an age contingency on a conveyance or bequest[98] frequently to prevent an immature child from receiving a large amount of capital.[99] Such an age contingency seeks to withhold the bequest or conveyance until the child is of a proper age to manage the asset.[100] New York's modification, by reducing the age contingency, allows the RAP application to further promote the creator's intent while still limiting dead hand control.[101] Under the common law, an age contingency is valid unless, as a result of the contingency, the conveyance is capable of vesting beyond the perpetuities period.[102] Under the savings provision in E.P.T.L. § 9-1.2,[103] New York provides a mechanism that reduces the age contingency to ensure that the remainder would vest within the perpetuities period.[104] Further, under the savings provision, the age contin-

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96 *See* DUKEMINIER & SITKOFF, *supra* note 26, at 880.

97 N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966).

98 *See* DUKEMINIER & SITKOFF, *supra* note 26, at 131-32.

99 *Id.*

100 *Id.*

101 N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966).

102 *The Duke of Norfolk Case*, 22 Eng. Rep. at 934.

103 N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966).

> Where an estate would, except for this section, be invalid because made to depend, for its vesting or its duration, upon any person attaining or failing to attain an age in excess of twenty-one years, the age contingency shall be reduced to twenty-one years as to any or all persons subject to such contingency.

Id.

104 *Id.*

gency will only be reduced if it is needed to secure the conveyance so that the rule does not invalidate the conveyance.[105]

For example, if the testator conveyed Sepacre to his daughter for life, then to her issue who attain the age of thirty and, if none, then to X, at common law the remainder would be invalid. Under the common law, the testator's daughter could die and her children, born after the testator's death, may not satisfy the age contingency of thirty within twenty-one years of their mother's death. Therefore, the gift over to X would immediately vest, which would become possessory at the daughter's death because at that point we would know for certain if the daughter's issue's interest would vest within the perpetuities period.[106] When the testator dies, the vesting of the interest will be analyzed prospectively based upon whether the interest will definitely vest, or will never vest, within the perpetuities period. At common law, at the death of the daughter, a life in being,[107] if any of her issue was younger than nine years old, we could immediately determine that the issue's interest would never vest within the perpetuities period. Therefore, at the testator's death, we would know that it is possible for the issue's interest to vest more than twenty-one years after the death of the testator or his daughter. However, under New York's savings provision, at the testator's death, so long as the daughter had issue, the age contingency of thirty would automatically be reduced to twenty-one so that the issue have the ability of meeting the age contingency within the perpetuities period.[108]

Furthermore, even under New York's savings provision, if all of the issue fail to meet the age contingency within the perpetuities period, their interest would never vest, at which point X's interest in the estate would vest. Consider a testator who transfers Blackacre to X for life, then to X's heirs who attain the age of thirty-one.[109] If, at

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105 Matter of BNY Mellon, N.A. (Doris), 2 N.Y.S.2d 757 (Sur. Ct., Nassau Cty. 2014) (construing N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966)).

106 A reversion is an interest that is left with the grantor or testator when he transfers less than what he owns. *See* DUKEMINIER ET AL., *supra* note 2, at 277.

107 A life in being is "[u]nder the rule against perpetuities, anyone alive when a future interest is created, whether or not the person has an interest in the estate." *Life in Being*, BLACK'S LAW DICTIONARY (10th ed. 2014).

108 N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966).

109 At common law, the Rule in Shelley's Case would apply and create a remainder in fee simple absolute in X. *See* SIMES, *supra* note 4, at 45. The doctrine of merger would then apply and, In order to promote the alienability of estates, the doctrine of merger would then apply to merge the smaller interest, the life estate, into the larger estate, the remainder in fee simple absolute, giving X a fee simple absolute. *Id.*

the time of her death, X, a life in being, has one child Z, who is two years old, the savings provision would reduce the age contingency to twenty-one so that the interest will vest or fail to vest within the perpetuities period. During that period, which will begin prospectively at the testator's death, until Z reaches the age of twenty-one, the property would revert back to the testator's estate, which would hold the property subject to a springing executory interest[110] in Z. However, if Z dies before she reaches the age of twenty-one, the interest will never vest. In that situation, the executory limitation is eliminated and the testator's estate now holds the estate in fee simple absolute.[111] Thus, this minor modification is advantageous because it furthers the intent of the testator or grantor to create a valid interest, and still limits dead hand control.

New York has codified the savings provision in an attempt to further ease the application of the rule to wills and trusts.[112] The primary purpose of the RAP was to further the intent of the testator, while promoting the societal interest in limiting dead hand control and restraints on alienation.[113] Courts always assume that the testator intended to create a valid transfer and the goal of the courts in application of the rule is to further the intent of the testator.[114] This provision furthers the testator's intent because the testator created the interest with the intention of the beneficiaries eventually receiving the corpus. If, for whatever reason, an interest improperly has a contingency that may prohibit the interest from ever vesting under the common law,[115] the savings provision will remove the error in the

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[110] An executory interest is "[a] future interest held by a third person that either cuts off another's interest or begins after the natural termination of a preceding estate." *Executory Interest*, BLACK'S LAW DICTIONARY (10th ed. 2014). A shifting executory interest is "[a]n executory interest that operates in defeasance of an interest created simultaneously in a third person." *Shifting Executory Interest*, BLACK'S LAW DICTIONARY (10th ed. 2014). A springing executory interest is "[a]n executory interest that operates in defeasance of an interest left in the transferor." *Springing Executory Interest*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[111] *See* DUKEMINIER ET AL., *supra* note 2, at 286.

[112] N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966), *construed in Matter of BNY Mellon, N.A. (Doris)*, 2 N.Y.S.3d 757 (Sur. Ct., Nassau Cty. 2014).

[113] *See* DUKEMINIER & SITKOFF, *supra* note 26, at 880.

[114] *See id.*

[115] The greatest number of errors comes about when people draft their own documents. Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1912 (1986). However, the greatest amount of attorney malpractice arises out of RAP issues and even some highly respected practitioners draft documents that violate RAP. *Id.* Due to the complexity of RAP, it is not clear in certain jurisdictions if a malpractice claim can be filed against an attorney for creating a document that violates the rule. *Id.*

transfer to allow the beneficiaries to enjoy the estate that they would have received absent the contingency.[116] The purpose of this modification is to promote the testator's intent by upholding otherwise invalid provisions under the common law application of the RAP.[117]

This modification furthers the intent of the RAP because it upholds transfers, which would be invalid under the common law, notwithstanding any misjudgment of the testator.[118] If the testator made a disposition in which a contingent interest could vest beyond the perpetuities period, the New York modification allows the testator's disposition to be valid.[119] Therefore, New York has made the proper determination in the creation of the savings provision, allowing RAP to evolve to promote the intent of the testator notwithstanding his error.[120] This modification is necessary because it promotes the testator's freedom of disposition, with some limitations to further community benefit.

C. New York's Modification of the Unborn Widow Rule

New York has made one final minor modification of the common law rule by removing the unborn widow rule, which also promotes the grantor's intent even when he failed to contemplate that his spouse may change over time.[121] At common law, if the grantor were to create a contingent interest in an unascertainable spouse with a contingent gift over, the contingent interest would be invalid.[122] New York's elimination of the unborn widow rule, codified in New York E.P.T.L. § 9-1.3(c), presumes that a surviving spouse was alive at the time of the transfer.[123] For example, if the grantor made a con-

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[116] N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1966).

[122] N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1966), *construed in* 1960 N.Y. Leg. Doc. No. 65(G), at 18.

[123] N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1966).

> Where an estate would, except for this paragraph, be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the estate, and such person is referred to in the instrument creating such estate as the spouse of

veyance "to X for life, then to X's spouse for life, then to such of the grantor's issue as shall survive X's spouse," under the common law the gift over would be invalid.[124] In this example, X's spouse has a contingent remainder for life because she is an unascertainable party.[125] At common law, this conveyance would fail because of the possibility that the grantor would lose his spouse, either through death or divorce, and remarry a person who may not have been born at the time of the conveyance.[126] Because the spouse is an unascertainable party, the last life in being would be X. After all, there is a possibility that the spouse had not been born at the time of the conveyance, and would survive the grantor and X by more than twenty-one years. Therefore, the interest of the grantor's issue may not vest within twenty-one years of X's death. Due to these possibilities, the common law invalidates the remainder to the grantor's issue.[127] Consequently, after the death of X's spouse, the property would revert back to the grantor or the grantor's estate, if he is deceased. This problem is avoided at common law in cases where a grantor identifies a specific spouse who was alive at the time of the transfer.[128] New York, however, has provided a remedy for this problem.

Under New York's codification, it is presumed that the person referred to as a spouse in an instrument is a life in being, regardless of whether the spouse is ascertainable at the time of the transfer.[129] Under New York E.P.T.L. § 9-1.3(b), courts shall presume that the creator intended creating a valid transfer.[130] A grantor, who conveys an interest to his or her spouse, is unlikely to anticipate the possibility that the spouse was not born as of the date of the transfer.[131] Further, when a grantor creates a conveyance, he does not necessarily intend a

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> another without other identification, it shall be presumed that such reference is to a person in being on the effective date of the instrument.

Id.

[124] N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1966), *construed in* 1960 N.Y. Leg. Doc. No. 65(G), at 18.

[125] *See* DUKEMINIER ET AL., *supra* note 2, at 281.

[126] N.Y EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1966), *construed in* 1960 N.Y. Leg. Doc. No. 65(G), at 18.

[127] *Id.*

[128] *Id.*

[129] N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1966).

[130] N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(b) (McKinney 1966).

[131] *Revocation*, NATIONAL PARALEGAL COLLEGE, http://nationalparalegal.edu/willsTrustsEstates_Public/ConstructionofWills/Revocation.asp (last visited Apr. 16, 2016).

substitution of the spouse whom he originally considered in the conveyance.[132] Marital relationships, especially in blended families, can take many forms and it is impracticable to expect a testator to rewrite all of his testamentary documents in the instance of a change of that relationship.[133] The grantor most likely intended the estate to transfer to his current spouse upon his death with a remainder to others – most possibly his issue. New York has properly modified the rule because it operates to secure the remainder's interest. This change is beneficial because it would avoid the spouse's receiving the property outright as a reversion in violation of the testator's intent. If the issue's remainder interest violates RAP under the common law unborn widow rule and the spouse is the residuary beneficiary, the spouse would obtain a fee interest in the property. There are many reasons that a grantor may not want his spouse to hold his estate in fee simple absolute after his death, especially if the spouse has children from a different marriage. The testator might be attempting to protect his own issue's interest by ensuring that his spouse's issue from a prior marriage do not receive a portion of his estate. The testator may also be attempting to prevent his new spouse from being able to claim any right to his estate.[134] While the testator had the option to re-write his testamentary documents in the instance of a divorce, the testator may assume that the divorce would operate by law to remove the divorced spouse from the document because revocation by operation of law does not apply in all situations.[135]

This modification supports the policy that a grantor's intentions in the creation of a conveyance should be followed whenever it is possible and just to do so.[136] New York has taken a proper approach in promoting the testator's intent, notwithstanding an error in

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[132] *Id.*

[133] Gretchen Livingston, *It's no longer a 'Leave It to Beaver' world for American Families – but it wasn't, back then, either*, PEWRESEARCHCENTER (Dec. 30, 2015), http://www.pewresearch.org/fact-tank/2015/12/30/its-no-longer-a-leave-it-to-beaver-world-for-american-families-but-it-wasnt-back-then-either/.

[134] This premise can be found in multiple areas of codified law. Under New York Domestic Relations Law § 248, a court retains the ability to suspend or modify a spousal support order, upon that spouse's either cohabitating with another person, holding himself or herself out as the spouse of another, or remarrying. N.Y. DOM. REL. LAW § 248 (McKinney 2016).

[135] UNIF. PROBATE CODE § 2-804 (amended 1997), 2 U.L.A. 7 (Supp. 1995); N.Y. EST. POWERS & TRUSTS LAW § 5-1.4(a) (McKinney 2008). When a spouse makes a bequest to his or her spouse, divorces that spouse and does not revoke his bequest to that spouse, the bequest is revoked by operation of law, unless the intent of the testator is to the contrary. *Id.*

[136] *See* DUKEMINIER & SITKOFF, *supra* note 26, at 19.

his creation of an interest. This modification allows New York's application to evolve to a modern application, particularly as it has become more common for individuals to remarry, and thereby intend to substitute a new spouse in place of a former spouse in their testamentary documents.[137] Therefore, this modification is advantageous because it promotes the testator's intent, which may become more difficult to determine with the ever-increasing divorce rate, by presuming that the testator or grantor intended to make a valid transfer.[138]

V. NEW YORK'S MAJOR MODIFICATIONS OF THE COMMON LAW RULE

A. Option Contract Application

New York first adopted the RAP's suspension of the power of alienation prong in 1830, which eventually led to the New York Court of Appeals applying this rule to option contracts.[139] However, the original landscape was different from what is codified in the E.P.T.L. today.[140] Under the original codification, the perpetuities period was two lives in being plus the actual periods of minority.[141] In 1958, the New York legislature modified the codification to the rule that is applied today.[142] This modification restored the common law rule that the measuring period for remoteness of vesting is a life in being at the creation of the interest plus twenty-one years.[143] Traditionally, New York's approach was never as broad as the common law approach.[144] Instead, New York's statute only applied to certain estates and excluded others; for example, New York's RAP did not apply to non-commercial option contracts.[145] However, a further amendment in 1965 expressed the legislature's intent to eliminate remoteness of vesting issues, when parties would suspend vesting of

[137] *See* Livingston, *supra* note 133; Ami Sedghi & Simon Rogers, *Divorce rates data, 1858 to now: how has it changed?*, THEGUARDIAN, (Feb. 6, 2014, 9:01 AM), http://www.theguardian.com/news/datablog/2010/jan/28/divorce-rates-marriage-ons.

[138] *Id.*; N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(b) (McKinney 1966).

[139] Symphony Space v. Pergola Properties, 669 N.E.2d 799, 803 (N.Y. 1996).

[140] *See* SIMES, *supra* note 4, at 310-11.

[141] *Symphony Space v. Pergola Properties*, 669 N.E.2d at 803.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

estates for excessive periods. [146] The legislature made it clear that New York's re-codification was to encompass the aspects of the traditional common law application.[147]

Prior to 1965, the Court of Appeals of New York held that an option contract[148] with an indefinite use period did not violate the codified RAP in New York.[149] However, the decision in *Water Front on Upper N.Y. Bay, in Borough of Richmond, City of N.Y.*[150] only contemplated the issue of suspension of alienation; it did not address remoteness of vesting.[151] Nonetheless, this decision predated the legislative modification of E.P.T.L. § 9-1.1 in 1965.[152]

At common law, the RAP may be applied to non-commercial option contracts.[153] However, New York was originally reluctant to apply the rule that it has so broadly expanded.[154] It was not until 1982, in the case of *Buffalo Seminary v. McCarthy*,[155] that the New York Court of Appeals first expanded the RAP remoteness of vesting application to non-commercial option contracts.[156] In this case, the defendant had an irrevocable option that allowed him to purchase all or any part of a twenty-foot strip of land that ran along the southern border of his property.[157] The defendant had the right to exercise this option at any time upon thirty days' notice given to the plaintiff.[158] This option was to run indefinitely and transfer to any "heirs, executors, administrators, and assigns of the parties hereto."[159]

In *Buffalo Seminary*, the court held that an option to purchase a parcel of property in the non-commercial setting must only be ca-

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[146] *Symphony Space v. Pergola Properties*, 669 N.E.2d at 803.

[147] *Id.*

[148] An option contract is either an implied or express contract that requires the parties to keep an offer open for a period of time. During that time the offer cannot be revoked or rescinded. *Option Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[149] In re Water Front on Upper N.Y. Bay, In Borough of Richmond, City of N.Y., 157 N.E. 911, 920 (N.Y. 1927).

[150] 157 N.E. 911 (N.Y. 1927).

[151] Buffalo Seminary v. McCarthy, 451 N.Y.S.2d 457, 463 (App. Div. 4th Dep't 1982), *aff'd,* 447 N.E.2d 76 (N.Y. 1983).

[152] *In re Water Front on Upper N.Y. Bay, In Borough of Richmond, City of N.Y.*, 157 N.E. 911.

[153] *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d at 461.

[154] *Id.*

[155] 451 N.Y.S.2d 457 (App. Div. 4th Dep't 1982), *aff'd*, 447 N.E.2d 76 (N.Y. 1983).

[156] *Id.* at 465.

[157] *Id.* at 459.

[158] *Id.*

[159] *Id.*

pable of being exercised within twenty-one years of its creation.[160] The court reasoned that an option that has the ability to run for an indefinite period constitutes a remoteness of vesting issue but not a suspension problem.[161]

Under the New York E.P.T.L., the RAP has two different applications: one for remoteness of vesting problems and the other for suspension of alienation problems.[162] A remoteness of vesting problem relates to the interest's inability to vest in either possession or interest within the perpetuities period, which at the common law was life plus twenty-one years.[163] The suspension of alienation issue relates to the grantor's suspending the estate holder's ability to freely transfer the property in fee simple for longer than the perpetuities period–life in being plus twenty-one years.[164] Both of these applications, although different, were created in an attempt to promote the same public policy and to stimulate the alienation of estates.[165]

In the codification of the New York RAP, the legislature intended to implement the common law rule as written by Gray.[166] Under the common law, the remoteness of vesting application was used for non-commercial option contracts.[167] In *Buffalo Seminary*, the court relied on *Railway v. Gomm*,[168] in which the court stated, "since an unlimited option to purchase is substantially the same as a conditional limitation, which is within the rule, it should therefore be subject to the rule against remoteness of vesting," even though the court in *Buffalo Seminary* relied on the remoteness of vesting application rather than the suspension of alienability application.[169] The court reasoned that it would be an improper application of common law future interest law to exclude an entire class of future interests from the RAP.[170] Thus, the court determined that the New York legislature intended to align the New York rule with common law prin-

[160] *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d at 465.

[161] *Id.* at 459. This was an unusual application of RAP because commonly an option which had the *ability* to run for an indefinite period constituted a suspension of the power of alienation violation and not a remoteness of vesting violation.

[162] N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 (McKinney 1966).

[163] *Id.* at § 9-1.1(b).

[164] *Id.* at § 9-1.1(a)(2). *See supra* notes 26- 30 and accompanying text.

[165] *See* Gray, *supra* note 3, at § 2.1.

[166] *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d at 462.

[167] London and Southwestern Ry. Co. v. Gomm, 20 Ch. D. 562 (1882).

[168] *Id.*

[169] *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d at 462.

[170] *Id.*

ciples, subject to a few carved out exceptions that New York has created.[171]

The decision in *Buffalo Seminary* was not surprising because RAP traditionally applied to non-commercial option contracts.[172] However, fourteen years later, the New York Court of Appeals took a large leap in furthering the application of the rule in *Symphony Space v. Pergola Properties.*[173] In 1996, the court in *Symphony Space* held that New York's codification of RAP in relation to remoteness of vesting applies to both non-commercial and commercial option contracts.[174]

In this case, Symphony Space purchased a large property in New York City from Broadwest at a depreciated value.[175] The property, then held by Symphony, was leased back to Broadwest except for the theater portion that Symphony retained.[176] The property was transferred to Symphony, a non-profit organization, in order to take advantage of its tax-exempt status.[177] As part of the sales agreement, Broadwest maintained the option to buy back the property for the purchase price, which could only be exercised in 1987, 1993, 1998, or 2003.[178] Pergola, Broadwest's successor, notified Symphony of its intent to exercise the option in 1985; however, Symphony sought a

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171 *Id.*

172 *Id.* at 461.

173 669 N.E.2d 799 (N.Y. 1966).

174 *Id.* at 800; *see id.* at 805 (stating that an indefinite use period in an option contract shall be treated similarly to a class gift, an all or nothing approach, if one of the options is invalid, they all must be invalid).

175 *Id.* at 800.

176 *Id.* at 800-01.

177 *Id.* at 801.

178 *Symphony Space v. Pergola Properties*, 669 N.E.2d at 801. Further, this option constituted a covenant that was to run with the land and transfer to any of Broadwest's heirs, successors, or assignees. *Id.* Subsequently, Broadwest sold its interests in the property as well as the option contract to Pergola Properties. *Id.* at 802. A covenant is an agreement recorded on the deed of a parcel of property that requires the deed holders to either perform or refrain from performing some action. *Id.* Although a covenant is a recordable interest, it may still be valid if it is not recorded. *Id.* The requirements for a valid covenant change, depending on whether the benefit or the burden is running against the party. *Symphony Space v. Pergola Properties*, 669 N.E.2d at 802. If the burden is running against the party, the following requirements must be satisfied: intent, horizontal privity of estate between the covenantor and covenantee, vertical privity of estate between the original covenantor and his or her successors, it must touch and concern the land, and notice. *Id.* If the benefit is running against the party, only the following requirements must be satisfied: intent, some vertical privity of estate between the covenantee and successors, and it must touch and concern the land. *See* DUKEMINIER ET AL., *supra* note 2, at 894-95.

declaratory judgment action to enjoin Pergola from exercising its option under the contract, under the theory that the option contract violated the RAP's remoteness of vesting principle.[179]

Prior to *Symphony Space*, it had already been established that New York accepted the common law rule applying the RAP to noncommercial options.[180] According to the court, it was clear from the legislature's intent to adopt the common law application that the RAP was to apply to commercial option contracts.[181] The court stated that the legislature feared that failing to apply remoteness of vesting to commercial option contracts would remove an entire class of contingent future interests from the rule's application.[182] The primary goal through this legislative action was to align New York's rule with that of the common law and to promote alienability of all estates, no matter if they were commercial or personal.[183] Restricting the alienability of a commercial property may have a severe detrimental effect on the property owner's decision on upkeep.[184] If a commercial option contract were allowed to run indefinitely, or for a long period of time, the property owner would be less incentivized to invest any capital into the property due to the possibility of forfeiture.[185] Applying the RAP to commercial options reduces the period of time in which a property may be forfeited, at least in part, reducing the disincentive of the property owner to invest capital into the property.[186] Thus, New York has taken the proper step in the creation of this modification from the common law because it further promotes the common law principles by eliminating contingencies that may vest too remotely.

Further, the court in *Symphony Space* refused to invoke the savings provisions codified under New York E.P.T.L. § 9-1.3 to rectify an option contract that may vest beyond twenty-one years.[187] The

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179 *Symphony Space v. Pergola Properties*, 669 N.E.2d at 802.

180 *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d at 462-63. Under the Restatement (First) of Property § 401, RAP was not applied to contractual obligations because RAP "has as its sole objective the prevention of 'inconvenient fetterings of property'. . . [w]hen a transaction is 'exclusively contractual' . . . it involves no fettering of any property . . . ." RESTATEMENT (FIRST) OF PROPERTY § 401 cmt. a (1944).

181 *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d at 462.

182 *Symphony Space v. Pergola Properties*, 669 N.E.2d at 804-05.

183 *Id.* at 804.

184 *Id.*

185 *Id.*

186 *Id.*

187 *Symphony Space v. Pergola Properties*, 669 N.E.2d at 806-07.

rules of construction in New York E.P.T.L. § 9-1.3 govern all applications of the RAP unless the creator's intentions were contrary to that statutory section.[188] Under New York E.P.T.L. § 9-1.3(b), "[i]t shall be presumed that the creator intended the estate to be valid."[189] Further, under New York E.P.T.L. § 9-1.3(d), "it shall be presumed that the creator of such estate intended such contingency [if any] to occur, if at all, within twenty-one years from the effective date of the instrument creating such estate."[190] New York E.P.T.L. § 9-1.2, which reduces the age contingency, when necessary, could be used to validate the option contracts;[191] however, in *Symphony Space*, the court chose not to apply this mechanism.[192] This statute is commonly invoked for age restrictions but it is not limited to a person's age.[193] These provisions are merely rules of construction that require courts reviewing deeds, wills and trusts "to avoid constructions that frustrate the parties' intended purpose."[194]

The savings provisions do not permit courts to rewrite agreements; they only permit courts to enforce agreements when it appears as though the parties' intent in the creation of the agreement was to comply with the RAP.[195] In order for the court to apply the savings provision, in an attempt to validate the interest, the parties' intent that the option should last no more than twenty-one years must be clear.[196] The savings provision operates to reduce an age contingency, to promote the intent of the testator or grantor, notwithstanding his error in the document.[197] In order to apply the provision, it must be clear that the grantor intended to create an interest that was exercisable within the perpetuities period.[198] However, when the parties' agreement does not include a limitation on the duration or an extended option period, it is assumed that they intended the option to be exercisable

[188] N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(a) (McKinney 1966).
[189] N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(b) (McKinney 1966).
[190] N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(d) (McKinney 1966).
[191] *Symphony Space v. Pergola Properties*, 669 N.E.2d at 807.
[192] *Id.*
[193] N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966).
[194] *Symphony Space v. Pergola Properties*, 669 N.E.2d at 807; *see supra* section IV, subsection B.
[195] *Id.*
[196] *Id.*
[197] N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1966).
[198] *Id.*

either indefinitely or for an extended period.[199] The absence of such a term suggests the parties purposely created an ambiguous exercisable term that could be exercised at any time.[200] Furthermore, when the parties create an agreement whereby the option can be exercised beyond twenty-one years, it is also clear they intended allowing the option to be exercised beyond twenty-one years.[201] Thus, since it is clear that the parties intended the exercisable period to be indefinite from their open ended term, the savings provision cannot be applied to validate the option contract with an indefinite exercise period.[202]

New York is among a small minority of jurisdictions that applies the RAP to commercial options.[203] Although New York's approach has been widely criticized, this criticism lacks merit.[204] Some jurisdictions,[205] taking a different approach to the RAP by enacting the Uniform Statutory Rule Against Perpetuities (USRAP), do not apply the RAP to commercial options.[206] Subjecting options to the RAP gives the optionors the ability to escape bad deals, commonly when market fluctuations change the value of the property, claiming that the option violates the RAP.[207] As stated by Jesse Dukeminier,

> Options reasonably limited in time pose no threat to the public welfare; in fact, they are useful in facilitating the development of land. No good reason appears why a court should save an unlimited option to purchase by holding that the parties intended the option to be exercised within a reasonable time, which is neces-

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199 *Symphony Space v. Pergola Properties*, 669 N.E.2d at 807.

200 *Id.*

201 *Id.*

202 *See supra* note 174 (comparing an indefinite option agreement to a class gift, applying the same class gift principles).

203 *See* Dukeminier, *supra* note 115, at 1908-09; *Symphony Space v. Pergola Properties*, 669 N.E.2d at 801.

204 *See id.*

205 The minority of jurisdictions that apply USRAP are: Arizona, Arkansas, California, Connecticut, Florida, Georgia, Massachusetts, Michigan, North Carolina, Oregon, and Utah. *See* DUKEMINIER ET AL., *supra* note 2, at 331.

206 "Under USRAP, all interests are valid for 90 years after creation . . . . At the end of 90 years, any interest that has not vested is reformed by the court as to best carry out the intention of the long-dead settlor." *See* DUKEMINIER & SITKOFF, *supra* note 26, at 894; *See also* RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 27.3 (stating that commercial options are not subject to USRAP); *See also supra* note 3 (elaborating on other approaches).

207 *See* Dukeminier, *supra* note 115, at 1909.

> sarily less than twenty-one years.[208]

For example, if X purchased a commercial office building from Z, which included an option agreement whereby Z had the ability to purchase back the property from X at any time within 90 years of the purchase, for the purchase price, so long as 90 days' notice is given, an issue may arise. If Z attempted to exercise his option X can claim that this contract violates the RAP, if it benefits him. If, after the purchase, property values in the area rose resulting in a 30% increase in the value of the property subject to the option, Z would more than likely exercise his option to claim a financial gain if he were to then re-sell the property. The RAP would invalidate this option agreement because enforcement of this contract would substantially harm and frustrate X's purchase of the property. If the option was limited to only twenty-one years, X's purchase of the property may still be frustrated by Z's election of his option; however, at least in that situation, frustration of his purchase would only last for a limited time. During the time that his purchase may be frustrated, X could limit the amount of capital invested into the property because of the possibility of forfeiture.

New York slowly came into compliance with the common law rule in 1982 in the case of *Buffalo Seminary*.[209] However, New York took the remoteness of vesting provision one step further, applying it not only to personal option contracts but also to commercial option contracts.[210] The Restatement (First) of Property § 393 states:

> [T]he limitation of an option in favor of a class of a person other than the conveyor is invalid because of the rule against perpetuities. . . [if] such option (a) may continue for a longer period than the one described in § 374; and (b) would create an interest in land, or in some unique thing other than land, but for the rule against perpetuities.[211]

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208 *See* Dukeminier, *supra* note 115, at 1909 (citation omitted).

209 *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d at 462.

210 *Symphony Space v. Pergola Properties*, 669 N.E.2d at 800.

211 RESTATEMENT (FIRST) OF PROPERTY § 393 (1944). According to the Restatement (First) of Property § 374,

> the maximum period allowed under the [RAP] is (a) lives of a person who are (i) in being at the commencement of such period, and (ii) neither so numerous nor so situated that evidence of their deaths is likely to be

However, this section, which was drafted by the ALI, even under the common law, was not construed to include commercial options in the RAP's application.[212]

Applying RAP to option contracts operates as an advantage over the common law rule, which does not apply the RAP to commercial options, because, as Jesse Dukeminier stated, "[n]o good reason appears why a court should save an unlimited option. . . ."[213] At common law, optionees would not be protected;[214] however, no persuasive reason supports an exception for the commercial setting.[215] Therefore, New York has properly expanded the common law rule by applying the RAP to commercial option contracts. States that continue to follow the common law rule should contemplate adopting New York's approach to option contracts.

B. Leaseholds and Rights of First Refusal

New York has not applied RAP to all types of option contracts and related interests.[216] The legislature did not intend by codifying the common law application to encompass all option contracts regarding estates.[217] In 1986, the Court of Appeals in *Metropolitan Transp. Auth. v. Bruken Corp.*[218] held that this expansion of New York's RAP in relation to commercial options does not apply to right of first refusal contracts.[219] The court determined that the different attributes of an option contract and a right of first refusal are so apparent that the rule does not apply to the latter.[220] An option contract, in effect, forces the current owner to sell the property to the party with the option at that party's discretion, while a right of first refusal

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> unreasonably difficult to obtain; and (b) twenty-one years; and (c) any period or periods of gestation involved in the situation to which the limitation applies.

Id. at § 374.

[212] *See supra* note 180 (stating the Restatement (First) of Property's rationale for not applying RAP to commercial options).

[213] *See* Dukeminier, *supra* note 115, at 1909.

[214] *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d at 461.

[215] *See* Dukeminier, *supra* note 115, at 1909.

[216] *See generally Baker v. Latham Sparrowbush Assocs*, 808 F. Supp. at 1012; Bleecker Street Tenants Corp. v. Bleeker Jones, LLC, 945 N.E.2d 484 (N.Y. 2011).

[217] *Symphony Space v. Pergola Properties*, 669 N.E.2d at 803.

[218] 492 N.E.2d 379 (N.Y. 1986).

[219] *Id.* at 385.

[220] *Id.* at 383.

does not give the holder of the preemptive right the ability to force a property owner to sell his or her property.[221] The preemptive right merely requires the property owner, when selling the property, to offer the property to the party with the preemptive right, prior to opening the property to the market.[222] However, this preemptive right may never be exercised if the current owner decides not to sell the property. *Bruken* further discussed the legislature's intent in the codification of New York E.P.T.L. § 9-1.1.[223] The legislature intended to invalidate interests that would operate as a disincentive on the part of property owners to invest capital in their property.[224] The right of first refusal, unlike an option contract, does not create a disincentive for property owners to invest capital into their estates.[225] In addition, the court in *Symphony Space* noted the differences between an option contract and a right of first refusal contract.[226]

Further, the United States District Court for the Southern District of New York, in *Baker v. Latham Sparrowbush Assocs.*,[227] held that an indefinite option in a lease agreement that allows a landlord to reclaim property is not subject to New York's RAP.[228] In 1968, Latham Sparrowbush Associates (Latham), under a blanket lease, leased a garden complex to Shaker Estates, Inc.[229] The lease was for a term of twenty-one years plus three days with a further option to extend the lease for two consecutive periods of twenty-one years upon expiration.[230] In 1973, Shaker Estates, Inc. sold its interest in the lease to Cohoes Industrial Terminal.[231] As part of this purchase, Leon Baker acquired the equitable right to the property.[232] Under the original lease terms, Latham retained an option to terminate the lease agreement at any time on sixty days' notice and a payment to the lessee in the amount of $350,000.[233] In 1984, Latham notified Baker of its in-

[221] *Id.*
[222] *Id.*
[223] N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 (McKinney 1966).
[224] *Metropolitan Transp. Auth. v. Bruken Corp.*, 492 N.E.2d at 382.
[225] *Baker v. Latham Sparrowbush Assocs*, 808 F. Supp. at 1012.
[226] *Symphony Space v. Pergola Properties*, 669 N.E.2d at 805.
[227] *Baker v. Latham Sparrowbush Assocs*, 808 F. Supp. at 992.
[228] *Id.* at 1012.
[229] *Id.* at 995-96.
[230] *Id.*
[231] *Id.* at 996.
[232] *Baker v. Latham Sparrowbush Assocs.*, 808 F. Supp. at 996.
[233] *Id.*

tent to exercise the option to terminate the lease.[234] At that time, Baker filed suit to enjoin Latham from exercising its option, claiming that the option was invalid under New York's RAP.[235]

In this case of first impression in New York, Baker claimed that this suspension of alienation problem was similar to the issue in *Buffalo Seminary*, implying that the Courts holding in that case should govern the court's decision.[236] To determine whether the RAP invalidated the exercise of the option to terminate the lease, the court needed to identify the type of interest each party held in the property.[237] The option holder in *Buffalo Seminary* held an unlimited option to purchase the parcel of land in fee simple.[238] The effect of a restraint on the alienation of property is quite different when the landlord has an option to re-claim his property rather than when the option holder has the right to purchase property in fee simple.[239] When a lessor exercises his right to terminate the leasehold, the lessee is losing property in which he never held a fee interest. However, when an optionee exercises his right under an option contract, this election may frustrate the optionee's use and purchase of the property, because the optionee more than likely intended eventually having the property in fee simple. A lessee would have been aware that he never could have received the property in fee simple from that transaction.

Latham claimed that it had a reversionary interest in the property, while Bush claimed that Latham's interest was executory.[240] The classification of the interest would determine whether the rule applied. If the court determined that Latham's interest was reversionary, then the RAP would not apply to the interest.[241] A reversion, an interest a grantor retains in his property, is a vested interest and would not be subject to RAP. [242] However, if the court determined that the interest was executory, the rule would apply and a different analysis would occur.[243]

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[234] *Id.*
[235] *Id.*
[236] *Id.* at 1006.
[237] *Baker v. Latham Sparrowbush Assocs.*, 808 F. Supp. at 1006-07.
[238] *Id.* at 1006.
[239] *Id.*
[240] *Id.* at 1007.
[241] *Id.*
[242] *Baker v. Latham Sparrowbush Assocs.*, 808 F. Supp. at 1007; *See* DUKEMINIER ET AL., *supra* note 2, at 281 (stating the characteristics of an indefeasibly vested remainder).
[243] *Baker v. Latham Sparrowbush Assocs*., 808 F. Supp. at 1007.

The court concluded that classifying Latham's interest as executory would be an improper application of common law future interests.[244] An executory interest is an interest that can only be held by a transferee, not a transferor.[245] The proper classification of the transferor's interest would be a reversion.[246] Latham created the lease in which he transferred an estate, less than what he held, for a term of years, subject to an elective right.[247] Latham, holding the property in fee simple absolute, transferred a term of years that was subject to a conditional limitation, the early election.[248] Upon the election of this option, the term of years would terminate early and the transferor would reclaim the property.[249] Thus, Latham held a reversionary interest that, under the common law, was not subject to the RAP due to its vested characteristics.[250]

However, the court did not conclude that by classifying the interests as reversionary, the lease options are not subject to the RAP as the Restatement (Second) states.[251] Nonetheless, section 394 of the Restatement (First) may apply RAP to lease options:[252]

> Subject to the exceptions stated in §§ 373 (destructible interest), 397 (charity) and 400 (unissued shares of a corporation), the reservation of an option to repurchase the whole or any part of the interest conveyed, made in favor of the conveyor, is invalid, because of the rule against perpetuities, when, under the language and circumstances of the reservation, such option (a) may continue for a period longer than the maximum period described in § 374; and (b) would create an interest in land or in some unique thing other than land, but for the rule against perpetuities.[253]

Comment a to section 394 states,

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[244] *Id.* at 1008.

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *Baker v. Latham Sparrowbush Assocs.*, 808 F. Supp. at 1008.

[249] *Id.* at 1008-09.

[250] *See* DUKEMINIER ET AL., *supra* note 2, at 276-77.

[251] *Baker v. Latham Sparrowbush Assocs.*, 808 F. Supp. at 1009.

[252] *Id.* The Restatement (Second) of Property states that "[a] landlord-tenant relationship may be created to endure for any fixed or computable period of time." RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 1.4 (1977).

[253] *Baker v. Latham Sparrowbush Assocs.*, 808 F. Supp. at 1009.

> When such an option to repurchase is reserved by the conveyor of an estate for years in excess of twenty-one years an additional reason for the rule here stated exists. The permitting of such an option would decrease the likelihood of the lessee making the investments in structures on the leased premises normally contemplated by the parties to a long term lease.[254]

These portions of the Restatement suggest that RAP should apply to leaseholds. Nonetheless, the court could not make a dispositive determination that lease options were subject to the RAP based on the reiteration of the Restatement.[255] In these two excerpts, the American Law Institute attempted to persuade practitioners, scholars, and courts that lease options, when the lessor holds an elective right, should be subject to the RAP.[256] The Restatement provides that a lease option with an elective right, similar to an option contract, creates a disincentive on the lessee to invest capital into the leased property.[257] However, these views are persuasive in nature, and apparently no court has understood these characterizations of the common law rule to render the RAP applicable to lease options.[258]

Further, the court concluded that applying the RAP to lease options would be inconsistent with the overall purpose of the common law rule.[259] The primary purpose of this doctrine was to terminate dead hand control over estates to promote the marketability of property.[260] By preventing this control, the RAP protects the public's interest in land by attempting to limit perpetual wealth of upper class families.[261] A landlord's option to terminate a lease upon a given consideration does not share in the traditional evils that the rule attempted to prevent.[262] It is true, as with any option, the party that is in current possession of the property would be less incentivized to invest capital into the property due to the risk of forfeiture. Nevertheless, this concern is not as relevant in leaseholds because, under the

254 *Id.* at 1010.
255 *Id.*
256 RESTATEMENT (FIRST) OF PROPERTY § 394 (1944).
257 *Id.*
258 *Baker v. Latham Sparrowbush Assocs.*, 808 F. Supp. at 1010.
259 *Id.* at 1011.
260 *Id.*
261 *See* DUKEMINIER & SITKOFF, *supra* note 26, at 880.
262 *Baker v. Latham Sparrowbush Assocs.*, 808 F. Supp. at 1012.

common law theory of ameliorative waste, a tenant was prohibited from altering the premises.[263] This common law principle is still encouraged under New York law.[264] Therefore, the court concluded that a landlord's option to terminate a lease at will is a reversionary interest that is not subject to the RAP.[265]

Furthermore, the Court of Appeals in *Bleecker Street Tenants Corp. v. Bleeker Jones, LLC*[266] held that a commercial option to renew a lease that runs appurtenant to the lease is not subject to the remoteness of vesting application of the RAP.[267] In this case, the plaintiff owned Bleecker Street Tenants Corp., a six-story walkup building on Bleecker Street in Manhattan.[268] The defendant, Bleeker Jones, LLC, leased a first-floor commercial space from the plaintiff, with an initial lease term of fourteen years.[269] As part of this lease, the tenant had nine consecutive renewal options to renew the lease for a ten-year period.[270] Each renewal option was to "commence on the first day of the calendar month immediately following the expiration of the immediate preceding term of this lease."[271] The lessee could exercise the renewal option six months prior to the expiration of the previous lease term. Each renewal was to remain in effect until the lessee notified the lessor within six months of the intent to vacate.[272] Furthermore, if the lessee failed to renew the lease, the lessee maintained the right to retain the leased property as a month-to-month tenant.[273]

In August 1997, the initial fourteen-year lease term expired and Bleeker Jones, LLC, did not exercise its right to renew the lease; instead, it continued as a month-to-month tenant.[274] Shortly thereafter, Bleecker Street Tenants Corp. filed suit seeking to void the lease renewal options under N.Y. E.P.T.L. § 9-1.1(b), claiming that the re-

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[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] 945 N.E.2d 484 (N.Y. 2011).
[267] *Id.* at 487.
[268] *Id.* at 484.
[269] *Id.*
[270] *Id.*
[271] *Bleecker Street Tenants Corp. v. Bleeker Jones, LLC*, 945 N.E.2d at 485.
[272] *Id.*
[273] *Id.*
[274] *Id.*

newal option violated the RAP's remoteness of vesting application.[275] Bleeker Jones, LLC contended that the renewal option was appurtenant to the lease, which would not make the option subject to the RAP under the common law or *Symphony Space*.[276]

The court stated that the decision in *Symphony Space* made it clear that options appurtenant or appendant to a lease are not subject to the remoteness of vesting application of the RAP.[277] The court reasoned that if the option "originate[s] in one of the lease provisions, is not exercisable after [the] lease expiration, and is incapable of separation from the lease" it is not subject to RAP.[278] If the option to renew the lease is interwoven within the lease, the option is not subject to the remoteness of vesting application of RAP.[279]

Such options appurtenant to the lease do not implicate the evils that the RAP attempted to limit.[280] Since option holders have the ability to maintain the property for a significant period of time, they would not have the incentive to invest capital into the property.[281] An option that runs appurtenant to a lease "lacks the power to divest title of that property to the option holder."[282]

Thus, the court concluded that since appurtenant lease options do not produce the traditional evils that the RAP intended to prevent, commercial lease renewal options are not subject to the RAP.[283] Further, the court made clear that this result is consistent with the common law.[284] Because these appurtenant options do not create a disincentive for the option holder to invest capital into the property[285] and do not restrain its alienation, New York has properly refused to apply RAP to appurtenant option agreements.[286] New York has taken the proper approach by refusing to apply the expanded principles from *Symphony Space* to leaseholds and rights of first refusal.[287] The evils

275 *Id.*

276 *Bleecker Street Tenants Corp. v. Bleeker Jones, LLC*, 945 N.E.2d at 486.

277 *Id.* at 486; *see* Wildenstein & Co., Inc. v. Wallis, 595 N.E.2d 828, 834-35 (N.Y. 1992) (holding that a right of first refusal to purchase chattels is not subject to RAP).

278 *Id.* (citation omitted).

279 *Id.* at 487.

280 *Id.* at 487.

281 *Bleecker Street Tenants Corp. v. Bleeker Jones, LLC*, 945 N.E.2d at 487.

282 *Id.*

283 *Id.*

284 *Id.* at 486-87.

285 *Id.* at 487.

286 *Bleecker Street Tenants Corp. v. Bleeker Jones, LLC*, 945 N.E.2d at 487.

287 The court in *Symphony Space* made it clear that because an option contract and a right

that the common law rule attempted to prohibit are not present in these types of provisions.[288] Therefore, the court's refusal to expand the *Symphony Space* holding has furthered the common law principles of the RAP, which has allowed for the proper evolution of the application in New York.

C. New York's Codification of Option Contract Application: Proposed Enactment of New York Estate Powers and Trusts Law § 9-1.9 – The Rule's Applicability to Option Contracts

New York has codified nearly all of its RAP applications; however, the legislature has yet to codify its application to commercial options, non-commercial options, leaseholds, and rights of first refusal.[289] The legislature has left the court's jurisprudence in place for future application to new issues. In order to promote predictability and provide guidance, the legislature should codify these rulings of the New York Court of Appeals. Due to the complexities of this rule, the legislature should provide commentary for its codification.

i. Proposed Enactment of New York Estates, Powers, and Trusts Law § 9-1.9(a) – The Applicability to Non-Commercial Option Contracts

The New York legislature should codify the Court of Appeals' holding in *Buffalo Seminary* that an indefinite use period of a non-commercial option violates the RAP remoteness of vesting application.[290]

The legislation should state: the remoteness of vesting principle that is defined under New York E.P.T.L. § 9-1.1(b) is applicable to a non-commercial option contract to purchase land. For the purposes of determining a life in being, the calculation of twenty-one years will begin from the date the option is created. Because the option does not relate to a life in being, the interest should be required

of first refusal have different attributes, RAP should not apply to the latter. *Symphony Space v. Pergola Properties*, 669 N.E.2d at 803.

288 *Bleecker Street Tenants Corp. v. Bleeker Jones, LLC*, 945 N.E.2d at 487.

289 *See generally* N.Y. EST. POWERS & TRUSTS §§ 9-1.1 – 9-1.8 (McKinney 1966) (showing the different RAP codifications in New York).

290 *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d at 462.

to be exercised within twenty-one years of its creation. If the optionor creates multiple dates in which the option can be exercised, it shall be treated similarly to a class gift, requiring all dates to be valid or the entire option will be invalid.

In order to promote the alienability of the estate, the legislature in its codification should not extend the lives in being application beyond twenty-one years from the creation of the option. Allowing an option contract to run beyond twenty-one years would operate as a disincentive for the property holder to invest capital into the property due to the risk of forfeiture.[291] The court in *Buffalo Seminary* applied the remoteness of vesting application due to these risks, and the legislature should codify this holding cognizant of the same risks.[292]

ii. Proposed Enactment of New York Estates, Powers, and Trusts Law § 9-1.9(b) – The Applicability to Commercial Option Contracts

The New York legislature should codify the Court of Appeals' holding in *Symphony Space* which applied the RAP remoteness of vesting application to commercial option contracts.[293]

The legislation should state: the remoteness of vesting principle that is defined under New York E.P.T.L. § 9-1.1(b) is applicable to not only personal but also commercial options to purchase land. Following the same premise as non-commercial option contracts, the calculation of lives in being should begin to run from the date of the creation of the option and should terminate after twenty-one years. If the optionor creates multiple dates in which the option can be exercised, it shall be treated similarly to a class gift, requiring all dates to be valid or the entire option will be invalid. Any exercisable option contract, commercial or personal, that has the possibility to vest more than twenty-one years from its creation, should be invalid.

For the codification of both commercial and option contracts, the legislature should make it clear that the reduction of age contingency savings provision cannot operate to validate an option contract that has an exercisable period beyond twenty-one years. The savings provision can only be exercised consistently with the parties' intent

[291] *See* Dukeminier, *supra* note 115, at 1909.
[292] *Buffalo Seminary v. McCarthy*, 451 N.Y.S.2d at 462.
[293] *Symphony Space v. Pergola Properties*, 669 N.E.2d at 800.

and does not give the courts the ability to re-write agreements.[294] When parties create an indefinite option contract, their intent is clear, that it should be exercisable indefinitely.

iii. Proposed Enactment of New York Estates, Powers, and Trusts Law § 9-1.9(c) – Exceptions to the Rule's Applicability

Through this codification, the legislature should clearly indicate what types of contracts are subject to RAP and what types are exempted. The court should combine the holdings from *Bruken*, *Baker*, and *Bleecker Street* into one coherent rule.[295]

The legislature should state: the remoteness of vesting principle that is defined under New York E.P.T.L. § 9-1.1(b) is not applicable to rights of first refusal, options to renew a lease appurtenant, and options to terminate a lease. The legislature should make it clear that the problems the rule attempted to prohibit are not present in these types of option agreements.[296]

The right of first refusal, unlike the purchase option, should be exempted from RAP. The evils posed by options to purchase are not present in the right of first refusal context because a right of first refusal contract does not create a disincentive to invest capital into property.[297] In an option contract, the optionee has the ability to force the current possessor of the property to sell the property at his election.[298] In contrast, under a right of first refusal, the holder of the preemptive right does not have the ability to force the current possessor to sell the property.[299] A right of first refusal can only be exer-

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[294] *Id.* at 807.

[295] The legislature should also codify the holding of *Wildenstein*, where the court held that a right of first refusal to purchase chattels is not subject to the remoteness of vesting application of RAP. *Wildenstein & Co., Inc. v. Wallis*, 595 N.E.2d at 834-35. The legislature should state: the remoteness of vesting principle that is defined under New York E.P.T.L. § 9-1.1(b) is not applicable to a right of first refusal to purchase chattels or other types of personal property. RAP is not applicable to such rights because the evils that the rule attempted to prohibit are not present. *Id.* at 833-34. There is no disincentive on the part of the chattel owner to invest in the chattel. *Id.* at 833.

[296] There are two primary purposes for the RAP: 1) to strike down dead hand control; and 2) to limit the restraints on alienation of the estate. *See* DUKEMINIER & SITKOFF, *supra* note 26, at 880.

[297] *Bleecker Street Tenants Corp. v. Bleeker Jones, LLC*, 945 N.E.2d at 487.

[298] *Metropolitan Transp. Auth. v. Bruken Corp.*, 492 N.E.2d at 385.

[299] *Id.*

cised if the property owner decides to sell the property.[300] The current possessor has no disincentive to improve the property because there is less of a risk of forfeiture and his purchase of the property generally will not be frustrated.

The evils that the rule attempted to prohibit are also not present in the leasehold context when the lessor holds the option.[301] Under the common law theory of ameliorative waste, a lessee is not supposed to make alterations to or invest capital into the leased property.[302] Consequently, the lessee only risks the loss of his leasehold interest in the property.[303] While this may indirectly frustrate his lease of the property, the lessee would not lose an investment, but merely lose his leasehold that is not subject to RAP.

Because leasehold options and rights of first refusal do not fall within the purview of the RAP, the legislature should carve out clear exceptions for these future interests in the manner presented above.

VI. Conclusion

The common law application of the RAP can easily be reduced to one simple phrase: "[n]o 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 interests."[304] However, its application is not so simple. While New York has adopted the common law rule in many respects,[305] the New York legislature has made several modifications to the common law application of the rule[306] that have resulted in New York's evolution to a modern application of the RAP.

These modifications have been beneficial to the evolution of the RAP by saving many future interests from invalidation under the common law rule. New York should serve as a model for other common law jurisdictions, as it has effectively eased the application of the RAP. In addition, New York should codify its application relating to options, as this is the only application yet to be codified, to

300 *Id.*

301 *Bleecker Street Tenants Corp. v. Bleeker Jones, LLC*, 945 N.E.2d at 484.

302 *Baker v. Latham Sparrowbush Assocs.*, 808 F. Supp. at 1012.

303 *Bleecker Street Tenants Corp. v. Bleeker Jones, LLC*, 945 N.E.2d at 487.

304 *See* GRAY, *supra* note 3, at § 201 (citation omitted).

305 N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(b) (McKinney 1966).

306 *Id.*

promote greater alienability and decrease dead hand control. Doing so will further support the evolution of the New York RAP to a modern, more practical application of the common law rule.