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TO VEST OR NOT TO VEST? THAT IS THE QUESTION.
THE RULE AGAINST PERPETUITIES AND
PREFERENTIAL RIGHTS TO PURCHASE IN
MISSISSIPPI OIL AND GAS LAW

*Jessica L. Thornhill**

I. INTRODUCTION

Much like any issue concerning the Rule Against Perpetuities, the rule is convoluted at best when discussing its application to oil and gas transactions. Up until 1999, Mississippi's stance on the Rule Against Perpetuities in commercial transactions was unclear; however, the Mississippi Supreme Court's decision in *Murphy Exploration & Production Co. v. Sun Operating Ltd. Partnership*¹ carved out an exception for preferential rights to purchase within oil and gas leases, a "commercial transactions" exception. However, whether this exception clarifies Mississippi's stance on the Rule Against Perpetuities remains debatable.

Although the Rule Against Perpetuities may arise in many areas within Mississippi's oil and gas law, this Comment focuses solely on the rule's application to "preferential rights to purchase" or "rights of first refusal" within oil and gas transactions and agreements. Following a modern approach and in an effort to avoid the harsh consequences of the Rule Against Perpetuities, courts hold, ninety percent of the time, "that the Rule is *not* violated," especially when dealing with purely commercial oil and gas transactions.²

Part II of this Comment provides the background and prior case law concerning Mississippi's Rule Against Perpetuities and preferential rights to purchase in commercial transactions. Part III analyzes Mississippi's prior position as well as Mississippi's current position on applying the Rule Against Perpetuities to preferential rights provisions in oil and gas transactions and discusses the progression from applying a strict mechanical rule to focusing primarily on public policy.

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1. 747 So. 2d 260 (Miss. 1999).

2. J. Hovey Kemp & J. Forbes Newman, *Hidden Rule Against Perpetuities Problems in Oil and Gas Transactions*, 32 ROCKY MTN. MIN. L. INST. § 16.02 (1986).

II. BACKGROUND

A. *An Overview of Mississippi's Rule Against Perpetuities*

In *Pace v. Culpepper*, the Mississippi Supreme Court stated the Rule Against Perpetuities as follows:

The rule against perpetuities prohibits the creation of future interests or estates which by possibility may not become vested within a life or lives in being at the time of the testator's death or the effective date of the instrument creating the future interest, and twenty-one years thereafter.³

However, the rule can be traced back hundreds of years. Originating in 1682 in the well-known English decision, *Duke of Norfolk's Case*,⁴ the Rule Against Perpetuities was designed to prevent tying up ownership of land for long periods of time, thus preventing wealth from being concentrated in the hands of a few.⁵ Generally stated, the Rule Against Perpetuities states that "no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."⁶ In other words, a future interest in property is invalid unless the interest is absolutely certain to vest before the end of a life in existence at the time the interest is created plus twenty-one years. The rule applies not only to surface interests, but also to mineral interests and oil and gas leaseholds.⁷

Also concerned with unreasonable restraints on alienation, the purpose of the Rule Against Perpetuities is to prevent restrictions on alienation that remove property from the stream of commerce for no ascertainable period or duration.⁸ The rule was adopted primarily in response to "donative transactions," such as wills or deeds, where wealthy landowners would pass their estates to their heirs or family members, thus tying up the property for an indefinite period of time.⁹ These wealthy landowners, in order to ensure that their wealth and property stayed within their families, would control the devolution of their property by expressly conditioning the property's disposition in the future.¹⁰ Thus, "[t]he Rule Against Perpetuities was [created] to limit these [types of] donative transfers and prevent [wealthy landowners from alienating property] by tying up . . . title . . . for generations or in perpetuity."¹¹ This is reiterated in the Fifth Circuit's opinion in *Weber v. Texas Co.*:

3. *Pace v. Culpepper*, 347 So. 2d 1313, 1316 (Miss. 1977) (citing *Magee v. Magee's Estate*, 111 So. 2d 394, 402 (Miss. 1959)) (internal quotation marks omitted).

4. (1682) 22 Eng. Rep. 931 (Ct. Ch.); 3 Ch. Cas. 1.

5. OLIN L. BROWDER ET AL., *BASIC PROPERTY LAW* 246-47 (5th ed. 1989).

6. *Id.* at 246.

7. Gary B. Conine, *Property Provisions of the Operating Agreement—Interpretation, Validity, and Enforceability*, 19 TEX. TECH L. REV. 1263, 1376 (1988).

8. See *Producers Oil Co. v. Gore*, 610 P.2d 772 (Okla. 1980).

9. Brief of Appellants at 5, *Murphy Exploration & Prod. Co. v. Sun Operating Ltd. P'ship*, 747 So. 2d 260 (Miss. 1999) (No. 98-CA-00429).

10. *Id.* at 5-6.

11. *Id.* at 6.

The rule against perpetuities springs from consideration[s] of *public policy*. The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil.¹²

Essentially, the rule was designed to give present owners full use as well as free alienability of their property.¹³

Specifically, the rule only applies to contingent interests, i.e., interests that do not automatically vest at the time they are created. “[The Rule Against Perpetuities] is a rule of property law which is designed to preclude the creation of a contingent future interest, the vesting of which is postponed for a period of time which is too long.”¹⁴ Unlike a vested interest, which vests at the time of creation and therefore never violates the Rule Against Perpetuities, a contingent interest is uncertain as to when it will vest.¹⁵

This traditional common law approach is currently in effect in only a few states, with the majority of states either abolishing the traditional rule or modifying the rule by adopting alternatives such as the “wait-and-see” doctrine.¹⁶

B. “Wait-and-See” Doctrine

As an alternative to the traditional Rule Against Perpetuities, Mississippi has adopted the “wait-and-see” doctrine.¹⁷ Viewed as a “common sense approach to perpetuities,” the doctrine was first applied in Pennsylvania in 1947 and later expressed in the Second Restatement of Property in 1979.¹⁸ Mississippi formally adopted the doctrine in 1966 in *Phelps v. Shrosphire*.¹⁹ The Mississippi Supreme Court held that under this wait-and-see approach, all contingent future interests are deemed valid so long as they actually vest during the perpetuity period.²⁰ Accordingly, “the validity of an interest is not judged by what might happen, but rather by what

12. 83 F.2d 807, 808 (5th Cir. 1936) (emphasis added), *cert. denied*, 299 U.S. 561 (1936).

13. 2 WILLIAMS & MEYERS OIL AND GAS LAW § 325, at 66 (1997).

14. 2 KUNTZ LAW OF OIL AND GAS § 17.1, at 517 (1987).

15. *See id.*

16. GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, BOGERT’S TRUSTS AND TRUSTEES, § 214, at 216–17 (3d ed. 2011).

17. *Id.*

18. *Id.* at 218–19; *Nantt v. Puckett Energy Co.*, 382 N.W.2d 655, 661 (N.D. 1986) (internal quotation marks omitted).

19. 183 So. 2d 158, 163 (Miss. 1966).

20. *Id.*

does happen, by whether the interest in fact vests or fails [to vest] within the perpetuities period.”²¹

Essentially, under the wait-and-see doctrine, courts are permitted to determine the validity of a contingent interest at the time the interest vests rather than when the interest is created.²² This gives courts much flexibility in validating contingent interests that actually do vest during the required perpetuities period.²³ In other words, courts “wait and see” what actually happens to a contingent interest and whether the interest vests within the required time frame rather than automatically voiding the interest at the outset.²⁴

C. Ascertaining “Measuring Lives”

To determine whether a contingent interest has vested timely according to the Rule Against Perpetuities, the first step is to determine the perpetuities period. This step involves ascertaining the “measuring lives,” i.e., those affecting whether the interest vests, to calculate the applicable perpetuities period.²⁵

Under the common law Rule Against Perpetuities, you look to all persons who can affect vesting and determine whether one allows you to prove timely vesting, i.e., a validating life.²⁶ If a validating life is not found, the wait-and-see doctrine allows us to wait out the lives and see what actually happens.²⁷ However, under the wait-and-see doctrine, during what lives do we wait and see?

Several jurisdictions, including Mississippi, provide that the “measuring lives” under the wait-and-see approach are those that are causally related to vesting, also called the causal relationship principle.²⁸ This principle includes all persons who can affect vesting and, therefore, easily and accurately ascertains the wait-and-see measuring lives.²⁹ Under the wait-and-see doctrine, “absolute certainty . . . is not required, and hence the measuring lives are those in being at the beginning of the period whose continuance might affect vesting. These are lives which ‘play a part in the ultimate disposition of the property’; these are lives with a causal relationship to vesting.”³⁰

21. *Estate of Anderson v. Deposit Guar. Nat'l Bank*, 541 So. 2d 423, 432 (Miss. 1989) (citing *C & D Inv. Co. v. Gulf Transp. Co.*, 526 So. 2d 526, 530 (Miss. 1988)).

22. See BOGERT, *supra* note 16, at 217–18.

23. See generally *Phelps*, 183 So. 2d 158.

24. BOGERT, *supra* note 16, at 218.

25. *Estate of Anderson*, 541 So. 2d at 430.

26. Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1648 (1985).

27. *Id.*

28. *Id.*; *Estate of Anderson*, 541 So. 2d at 431.

29. See Dukeminier, *supra* note 26, at 1648.

30. Jesse Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 3, 63 (1960).

Accordingly, “[t]he life or lives in being which are selected for testing whether the gift initially complies with the perpetuity rule are . . . the measuring lives under the ‘wait-and-see’ rule.”³¹ However, under the wait-and-see doctrine, it is not fatal if a validating life is not found “among the lives causally related to vesting;” proper procedure under the doctrine dictates that you just wait out all the lives and see if the interest vests before their deaths or within twenty-one years thereafter.³²

However, common law prevents three types of causally related lives from being used as measuring lives.³³ First, redundant lives may not be used as measuring lives, i.e., persons who cannot affect vesting after the death of another measuring life.³⁴ Second, even though ascertainable, if the number of measuring lives is unreasonable, they cannot be used.³⁵ Lastly, if the persons are not reasonably ascertainable within the perpetuities period, they cannot be used as measuring lives.³⁶ These persons are excluded as measuring lives because if included, it would be impossible to say when the perpetuities period ends.³⁷

Moreover, “[t]he lives used as a measure of the period need not be those of persons who take anything under the instrument.”³⁸ However, if the instrument does not designate a life in being to serve as the measuring life, then the period for vesting is limited to twenty-one years.³⁹

D. Preferential Rights to Purchase

Within the area of oil and gas law, Rule Against Perpetuities issues may arise under operating agreements, specifically where two parties who are working on the same endeavor agree, that, in the event that one of the parties wishes to leave the endeavor, the other party has the right to buy his portion or interest before selling to a third party.⁴⁰ This type of agreement or contract provision is commonly known as a “preferential right to purchase,” “right of first refusal,” or “pre-emptive right.”

Although an option to purchase is traditionally subject to the Rule Against Perpetuities, a “preferential right to purchase” is not truly an option. An option to purchase is usually a contract provision that specifies a fixed price, which may be exercised by the holder at some future time, possibly beyond the limit imposed by the Rule Against Perpetuities.⁴¹

31. See Dukeminier, *supra* note 26, at 1657 (quoting C.M. Sappideen & P.J. Butt, *Rendering the Rule Against Perpetuities Less Remote*, 8 SYDNEY L. REV. 620, 633–34 (1979)).

32. *Id.* at 1657.

33. *Id.* at 1661.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. JOHN A. BORRON, JR. & LEWIS M. SIMES, 3 SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 1223 (3d. ed. 2011).

39. *Id.* § 1225.

40. Bruce M. Kramer, *Modern Applications of the Rule Against Perpetuities to Oil and Gas Transactions: What the Duke of Norfolk Didn't Tell You*, 37 NAT. RESOURCES J. 281, 300–01 (1997).

41. *Id.* at 301.

However, a preferential right to purchase is a contract provision that gives parties to a contract the right to purchase another party's interest in property in the event they want to sell or convey their interest to a third party.⁴²

The difference is that a preferential right to purchase does not restrain free alienation because it does not specify a price at the outset, but rather "amounts to no more than a continuing and preferred right to buy at the market price whenever the lessor desires to sell."⁴³ In other words, this right only arises if the owner wants to sell or convey his interest to a third party; therefore, the right merely gives the holder the ability to acquire the interest for the same price as the third party or at the current market price.⁴⁴

Although preferential right to purchase provisions have been controversial, they do serve important purposes in the development of mineral property, e.g., oil and gas leases or operating agreements.⁴⁵ Given that oil and gas agreements generally "involve (1) risk and uncertainty inherent in unknown mineral potential and (2) multiple parties," preferential rights provisions within these agreements serve two important purposes.⁴⁶ First, preferential rights provisions assure "an opportunity to acquire further interests in the contract area."⁴⁷ Additionally, the holder of the right can decide whether to let outside parties into a joint venture by either purchasing the interest or letting a third party acquire the interest. In other words, preferential rights allow the original contracting parties the ability to acquire a larger share in the endeavor for which they "have been at risk in exploratory efforts which may have contributed to the development of the

42. *Id.* at 300–01; The most common form of a preferential right to purchase is provided by the American Association of Professional Landmen Form 610 which provides:

Should any party desire to sell all or any part of its interests under this agreement, or its rights and interests in the Contract Area, it shall promptly give written notice to the other parties, with full information concerning its proposed disposition, which shall include the name and address of the prospective transferee (who must be ready, willing and able to purchase), the purchase price, a legal description sufficient to identify the property, and all other terms of the offer. The other parties shall then have an optional right, for a period often (10) days after the notice is delivered, to purchase for the stated consideration on the same terms and conditions the interest which the other party proposes to sell; and, if this optional right is exercised, the purchasing parties shall share the purchased interest in the proportions that the interest of each bears to the total interest of all purchasing parties. However, there shall be no preferential right to purchase in those cases where any party wishes to mortgage its interests, or to transfer title to its interest to its mortgagee in lieu of or pursuant to foreclosure of a mortgage of its interests, or to dispose of its interest by merger, reorganization, consolidation, or by sale of all or substantially all of its Oil and Gas assets to any party, or by transfer of its interest to a subsidiary or parent company or to a subsidiary of a parent company, or to any company in which such party owns a majority of the stock.

Timothy C. Dowd, *Preferential Rights to Purchase in Oil and Gas Transactions*, 49 ROCKY MTN. MIN. L. INST. §5.02 (2003).

43. Kramer, *supra* note 40, at 301.

44. *Id.* at 300–01.

45. See Conine, *supra* note 7, at 1315.

46. J.R. Cooney & L.P. Ausherman, *Preferential Purchase Rights in Mineral Agreements*, 37 ROCKY MTN. MIN. L. INST. § 9.01 (1991).

47. Conine, *supra* note 7, at 1317.

property” before allowing a third party to benefit from their investment in the endeavor.⁴⁸

Secondly, preferential rights ensure that original parties to an agreement maintain some sort of control over “excluding undesirable participants who may not have the necessary financial ability to bear their share of expenditures or who might frustrate development with management and engineering philosophies which current participants oppose.”⁴⁹ In other words, if an original party decides to sell their interest in a joint venture, the other parties to the venture should be able to decide whether they want to include a third party based on concerns of the third party’s financial stability and whether the original parties believe they can continue to operate amicably with the third party.

Typically, preferential rights are triggered by the proposed ‘sale’ of property by its current owner⁵⁰ Most courts, although not universally accepted, require an actual transfer of property between willing parties for cash consideration before the preferential right is triggered.⁵¹ Involuntary sales such as foreclosure sales, judicial sales, condemnations, transfers by descent, or public sales do not generally initiate preferential rights provisions.⁵² Also failing to trigger preferential rights are mortgages, dispositions by merger, reorganization or consolidations, or sale of all or substantially all of the assets of a related company.⁵³ Generally, the test courts employ “to determine whether [a] ‘sale’ has occurred has been the presence of an arms-length transaction or the transfer of title beyond the reach of the holder of the [preferential] right.”⁵⁴

In instances where preferential rights are triggered by the owner’s desire to sell, the parties’ obligations are simple but must be strictly observed.⁵⁵ First, the party who desires to sell must give the holder of the preferential right notice of the proposed sale and offer the holder the opportunity to exercise his right.⁵⁶ The holder must be given the opportunity to purchase the interest on identical terms available to the third party with no increase in price or different terms.⁵⁷ After notice is given, the preferential right becomes an option to purchase for which the holder may exercise his right by accepting the offer on identical terms, but if the holder attempts to modify the terms, his actions constitute a rejection of the offer.⁵⁸ Failure to respond to the offer or exercise the option within the specified time frame results in a waiver of the preferential right.⁵⁹ Depending

48. *Id.*

49. *Id.*

50. *Id.* at 1318.

51. *Id.*

52. *Id.* 1318–19.

53. *Id.* at 1320.

54. *Id.*

55. *Id.* at 1323.

56. *Id.*

57. *Id.*

58. *Id.* at 1323–24.

59. *Id.* at 1324.

on the jurisdiction, remedies for breach of preferential rights provisions generally include specific performance or damages.⁶⁰

These preferential rights provisions are common in numerous types of oil and gas agreements including mining joint venture agreements, joint operating agreements, unit operating agreements, lease agreements, farm out agreements, and gas purchase agreements.⁶¹ These types of provisions are important and routinely used in various types of oil and gas transactions in Mississippi.

III. ANALYSIS

After going through the rule and its idiosyncrasies, simply put, Mississippi no longer applies the rule to preferential rights to purchase in oil and gas transactions. Now let me tell you why. Although the validity of preferential rights provisions are often challenged on the basis of the Rule Against Perpetuities, the Mississippi Supreme Court, in *Murphy Exploration & Production Co. v. Sun Operating Ltd. Partnership*,⁶² overturned the bright-line rule that applied the Rule Against Perpetuities to preferential rights as contingent interests and instead carved out a “commercial transaction” exception for preferential rights within oil and gas transactions.

A. Mississippi's Rule Prior to 1999

In Mississippi prior to 1999, the Rule Against Perpetuities was applied strictly and mechanically, striking down preferential rights due to their unlimited time frame for exercise, or due to their exercise outside the timeframe required under the rule.⁶³ In other words, preferential rights were strictly construed as contingent interests and therefore subject to the rule regardless of the public policy behind the rule's adoption. Mississippi abided by the rule's strict time limit on contingent future interests and voided all interests failing to meet the restriction.

Prior to the Supreme Court taking a stance on the issue, there were two conflicting theories regarding the application of the Rule Against Perpetuities to preferential rights.⁶⁴ The first theory is that the rule firmly forbids remote vesting “and should be applied [in] all situations where vesting [occurs] remotely.”⁶⁵ Under this theory, the argument is that preferential rights within oil and gas transactions are invalid under the rule because “it gives the holder [of the right] a conditional right to specific performance, which creates the possibility of a future vesting of an estate, which could vest beyond the period permitted by the Rule.”⁶⁶

60. *Id.* at 1324–25.

61. Cooney, *supra* note 46, at § 9.02.

62. 747 So. 2d 260 (Miss. 1999).

63. Kemp & Newman, *supra* note 2, at § 16.05[8].

64. Timothy C. Dowd, *Preferential Rights to Purchase in Oil and Gas Transactions*, 49 ROCKY MTN. MIN. L. INST. § 5.03 (2003).

65. *Id.*

66. *Id.*

The second theory is that the Rule Against Perpetuities is more policy driven and “that the Rule is another aspect of the policy against restraints on alienation and should not be applied where the practical alienability and use of the land is not impaired.”⁶⁷ Courts following this theory hold that the rule is designed to prevent “unreasonable restraints on alienation” and if the preferential rights do not impinge on alienation, “but only [direct] who shall have the first right to [purchase] property,” if and when the owner decides to sell, then the provision does not fall within the protections of the rule.⁶⁸ Mississippi recently chose to follow the second theory, or the modern approach discussed *infra*.

Before moving to Mississippi’s new stance, it is important to discuss the law prior to the Supreme Court’s decision in *Murphy*. Prior to *Murphy*, the rule was applied strictly and invalidated all interests that vested too remotely, no matter what context, i.e., donative or commercial, and was not concerned with the duration of vested interests.⁶⁹ Before *Murphy*, Mississippi failed to distinguish between donative and commercial transactions and viewed preferential rights as non-vested interests subject to the rule because these provisions, in their very nature, are meant to vest in the future. Mississippi chose to focus solely on remoteness of vesting, and thus disregarded the public policy behind the rule, e.g., whether the contingent future interest actually restrained alienation.⁷⁰ Instead, the court was blind to the rule’s purpose and merely focused on the time limits for vesting.⁷¹

However, Mississippi did adopt an alternate version of the traditional Rule Against Perpetuities. In 1966, Mississippi adopted the “wait-and-see” doctrine in *Phelps v. Shropshire* and, therefore, chose to alter the classic common law application of the rule.⁷² Under the wait-and-see doctrine, a contingent future interest is not automatically void so long as it actually vests during the perpetuity period.⁷³

Consequently, under Mississippi’s old approach, the Rule Against Perpetuities did apply to preferential rights to purchase since they were classified as contingent future interests.⁷⁴ Even under the wait-and-see exception, preferential rights were still viewed as contingent interests and, therefore, subjected to the rule. The Mississippi Supreme Court stated this stance in *Pace v. Culpepper*:

A [preferential] right to purchase real estate . . . is held to be subject to the rule against perpetuities. Thus, it has been ruled that a contractual right, granted to A and his heirs and

67. *Id.*

68. *Id.*

69. See *Carter v. Berry*, 140 So. 2d 843 (Miss. 1962); *May v. Hunt*, 404 So. 2d 1373, 1376 (Miss. 1981).

70. *May*, 404 So. 2d at 1376.

71. *Carter*, 140 So. 2d at 846.

72. *Phelps v. Shropshire*, 183 So. 2d 158, 162 (Miss. 1966).

73. *Id.*

74. See *Estate of Anderson v. Deposit Guar. Nat’l Bank*, 541 So. 2d 423, 423 (Miss. 1989).

assigns, unlimited as to time, to purchase real estate upon the same terms as the owner could and would sell to a third person, is void.⁷⁵

Consequently, prior to 1999, Mississippi viewed preferential rights as contingent future interests and not vested interests, which made them susceptible to the rule's time restraints. In doing so, Mississippi disregarded the public policy concerns behind the rule and strictly applied the rule's time restrictions.

B. Changing the Rule in Mississippi—Murphy Exploration & Production Company v. Sun Operating Limited Partnership

In 1999, the Mississippi Supreme Court held that an operating agreement's preferential right to purchase did not violate the Rule Against Perpetuities.⁷⁶ In *Murphy Exploration & Production Co. v. Sun Operating Ltd. Partnership*, Sun, Murphy, and Como were all co-tenants holding interests in certain oil and gas leases.⁷⁷ The Joint Operating Agreement, to which all three were parties, provided for preferential rights to purchase, meaning that a co-tenant must provide prior notice to the other co-tenants in the event one decided to sell his interest so that the other co-tenants could, if they desired, meet the anticipated purchase price.⁷⁸

Although Murphy and Sun were not original parties to the Joint Operating Agreement, both were subsequently assigned interests under the agreement.⁷⁹ Issues arose when Sun, without giving notice to Murphy or Como, sold its interest to Mississippi Oil Acquisitions, a third party.⁸⁰ Murphy and Como subsequently filed suit against Sun requesting specific performance of their preferential rights to purchase.⁸¹

On Motion for Summary Judgment, Sun argued that Murphy's and Como's preferential rights were invalid pursuant to the Rule Against Perpetuities.⁸² The chancery court agreed, granted Sun's motion, and dismissed the lawsuit.⁸³ An appeal to the Mississippi Supreme Court followed.⁸⁴

Justice Waller, writing for the majority, reversed the lower court's holding, and stated that the rule against perpetuities did not apply.⁸⁵ In making the decision, the court discussed the purpose of the rule and that "[t]he Rule was designed to prevent undue accumulations of land and

75. *Pace v. Culpepper*, 347 So. 2d 1313, 1317 (Miss. 1977).

76. *See* *Murphy Exploration & Prod. Co. v. Sun Operating Ltd. P'ship*, 747 So. 2d 260 (Miss. 1999).

77. *Id.* at 260.

78. *Id.*

79. *Id.* at 261.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 260.

wealth in the hands of a few.”⁸⁶ Further, the court discussed that the rule’s adoption was in reaction to “donative transactions such as wills or deeds” where wealthy landowners would pass their estates to their families or heirs by controlling the property’s devolution “by directing the disposition [of the property] upon the happening of certain contingencies.”⁸⁷ Therefore, the rule was adopted for policy reasons in order to prevent tying up title to property for generations and generations.⁸⁸

Furthermore, the court discussed that the rule did not apply to this situation because free alienation of the property at issue was not restrained and the interest in question was not a “donative transaction” but a leasehold interest in minerals.⁸⁹

In reaching its decision, the court relied on the Fifth Circuit’s 1936 case, *Weber v. Texas Co.*, depicting the inapplicability of the Rule Against Perpetuities in regards to the analogous right of first refusal.⁹⁰ In *Weber*, the Fifth Circuit held that certain types of options within oil and gas leases would not be subject to scrutiny under the Rule Against Perpetuities.⁹¹ There the court focused on the underlying purpose of the rule: “to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil.”⁹²

The court further held that because the right of first refusal in *Weber*, much like a preferential right to purchase, was not an exclusive option at a fixed price that could be exercised beyond the time limit imposed by the Rule Against Perpetuities, the right of first refusal did not fall within either the purpose of or the reason for the rule.⁹³ Therefore, under this type of right, the holder cannot prevent a sale or impinge alienation but is merely afforded the first opportunity to buy in the event the owner decides to sell.⁹⁴

In *Weber*, the Fifth Circuit focused on the purpose and the policy behind the adoption of the Rule Against Perpetuities and held that invalidating preferential rights did not fulfill the underlying public policy aims intended by the rule.⁹⁵ The court also pointed out its continued pattern of

86. *Id.* at 261.

87. *Id.*

88. *Id.*

89. *Id.* at 262.

90. *Id.*

91. *See Weber v. Texas Co.*, 83 F.2d 807 (5th Cir.), *cert. denied*, 299 U.S. 561 (1936).

92. *Id.* at 808 (citing *London Sw. Ry. Co. v. Gomm*, (1882) 20 Ch. D. 562 (Eng.); *Barton v. Thaw*, 92 A. 312 (Pa. 1914); TEX. JUR. PERPETUITIES AND RESTRAINTS § 4, at 830; 3 THOMPSON ON REAL PROPERTY 724; 1 TIFFANY ON REAL PROPERTY 592 (2d ed.); 48 C.J. 934; 21 R.C.I. 288).

93. *Id.*

94. *Id.*

95. *Murphy Exploration & Prod. Co. v. Sun Operating Ltd. P'ship*, 747 So. 2d 260, 262 (Miss. 1999).

following sound Texas precedent in areas of first impression concerning oil and gas law.⁹⁶ Relying on said precedent:

Texas Courts have long held that the Rule is “only a means of preventing unreasonable restraints on alienation,” and “if a preferential right to purchase does not operate to restrain alienation, but only dictates who shall have the first right to acquire property when and if the owner desires to sell it, then the agreement is not within the prohibition.”⁹⁷

The Mississippi Supreme Court further pointed out that oil and gas transactions are a special breed given that courts that do apply the rule to preferential rights refrain from doing so in oil and gas leases because these types of leases have a limited duration, i.e., the lease is only valid while production is ongoing, and the preferential rights only exists while the lease exists.⁹⁸

However, it is important to note that not all members of the court were on board with overturning years of precedent in order to carve out a “commercial transaction” exception.⁹⁹ Justice McRae dissented from the court’s decision in *Murphy*. Joined by both Justices Sullivan and Pittman, Justice McRae disagreed with overturning previous Mississippi precedent.¹⁰⁰ McRae believed that the chancery court was correct in holding that the preferential right to purchase violated the Rule Against Perpetuities and that commercial transactions were not exempt from the rule.¹⁰¹ McRae supported a mechanical interpretation of the rule “that the ‘exclusion of property from the channels of commercial development for extended periods of time is a public evil’ ” and “operates to void *any* conveyance of property that creates a future estate which might possibly not become vested within a life or lives in being at the time of its creation plus twenty-one years thereafter.”¹⁰²

McRae noted Mississippi’s adoption of the wait-and-see doctrine and discussed the measuring life of twenty-one years when all parties to an agreement are corporations.¹⁰³ Under this view, McRae agreed with Sun’s argument that the preferential right failed to vest within twenty-one years of the contract and was therefore void under the rule against perpetuities.¹⁰⁴ Overall, Justice McRae felt that overturning precedent to “carve[]

96. *Id.* at 263 (quoting *Phillips Petroleum Co. v. Millette*, 72 So. 2d 176, 182 (Miss. 1954)) (citing *Williamson v. Elf Aquitaine, Inc.*, 138 F.3d 546, 550 (5th Cir. 1998)).

97. *Id.* at 262 (quoting *Forderhouse v. Cherokee Water Co.*, 623 S.W.2d 435, 438 (Tex. Civ. App. 1981)).

98. *Id.* at 263.

99. *Id.* at 264 (McRae, J., dissenting).

100. *Id.*

101. *Id.*

102. *Id.* at 265 (McRae, J., dissenting) (emphasis added) (quoting *Sanders v. Hicks*, 317 So. 2d 61, 63 (Miss. 1975)).

103. *Id.*

104. *Id.*

out an exception,” solely to please the “big-moneyed oil interest[],” was inappropriate.¹⁰⁵

C. Mississippi's Rule Today—the Modern Approach

Over the past thirty years, the majority of courts have begun to follow the contemporary trend of exempting commercial preferential rights to purchase from the Rule Against Perpetuities. This contemporary trend is reiterated in both the Restatement of the Law Third—Property (Servitudes) and the Uniform Statutory Rule Against Perpetuities. The Mississippi Supreme Court's decision in *Murphy* conforms to this modern trend.

Prior to 1999, commercial transactions were not exempt from the rule in Mississippi. The court's decision in *Murphy* followed the judicial trend to exempt commercial transactions from the rule's application. Following the court's decision in *Murphy*, the rule was viewed not only as “a technical rule to be mechanically applied,” but also as a judicial creation which serves important public policy considerations that “should be applied with those policies in mind.”¹⁰⁶

The modern trend is to relax the inflexible application of the Rule Against Perpetuities with a number of courts taking the view that the rule should not automatically apply but instead “follow tenable legal theories which will give effect to the intention of the parties.”¹⁰⁷ These courts follow the rationale that:

[T]he Rule is *only* a means of preventing unreasonable and indefinite suspensions of the power to alienate or transfer property interests, and if a [preferential right] only dictates who shall have the right to acquire the property and does not impinge on the owner's ability or desire to sell, then such a right does not fall within the common law prohibition.¹⁰⁸

This modern trend on preferential rights follows the Fifth Circuit's holding in *Weber* that a preferential right to purchase is no more than a right to buy *if* the buyer decides to sell and therefore does not restrain alienation.¹⁰⁹ The owner may sell at any time, but must merely afford the holder the first right to buy.¹¹⁰ The holder cannot prevent the sale of property; therefore, the right is not invalid as a perpetuity.¹¹¹

105. See *id.* at 264 (McRae, J., dissenting).

106. Kemp & Newman, *supra* note 2, at § 16.04.

107. *Id.* at § 16.05; First Nat'l Bank & Trust Co. of Okla. City v. Sidwell Corp., 678 P.2d 118, 126 (Kan. 1984).

108. Kemp & Newman, *supra* note 2, at § 16.05 (emphasis added).

109. *Weber v. Texas Co.*, 83 F.2d 807, 808 (5th Cir.), *cert. denied*, 299 U.S. 561 (1936).

110. *Id.*

111. *Id.*

Along the same lines as *Weber*, the Mississippi Supreme Court also looked to an Oklahoma case, *Producers Oil Co. v. Gore*.¹¹² The issue in *Producers Oil Co.* was whether a preferential right that created reciprocal rights of first refusal violated the rule.¹¹³ The United States District Court for the Eastern District of Oklahoma held:

[T]he Rule Against Perpetuities should not apply to oil and gas operating agreements . . . [The rule] could not have been intended to apply, it should not apply and no worthwhile social or economic purpose is served by applying it to this common, frequent and useful type of oil and gas transaction. The provision in question does not clog alienation.¹¹⁴

The Oklahoma Supreme Court, via certified question from the federal court, upheld the preferential right provision as well; however, the court took a different course to arrive at its result.¹¹⁵ The Oklahoma Supreme Court focused on the duration of the preferential rights provision and stated:

Mineral leases and their accompanying operating agreements have built in duration. Oil and gas production cannot last indefinitely and rights are always terminable. As stated [by the Federal District Court], the provision for preemptive rights is not a restraint on alienation and can last only as long as the agreement and the lease itself continues.¹¹⁶

In other words, the Oklahoma Supreme Court did not view preferential rights as contingent interests.

In addition, some courts who follow the modern trend exempt all preferential right to purchase provisions from the rule as they consider the provisions to be vested interests, not contingent interests and therefore exempt all together, much like the Oklahoma Supreme Court in *Producer's Oil Co.*¹¹⁷ These courts view preferential rights as a presently vested right which "create[s] a conditional fee . . . [that] is vested and presently reserved in the [holder of the right]."¹¹⁸

Even courts that apply the rule to preferential rights distinguish preferential rights within oil and gas leases. Due to their limited duration, and because the preferential rights only exists while the oil and gas lease exists,

112. 610 P.2d 772 (Okla. 1980).

113. *Id.* at 772.

114. Kemp & Newman, *supra* note 2, at § 16.05[8] (quoting *Producers Oil Co.*, 437 F. Supp. at 742) (The Federal District Court's judgment was vacated by the Tenth Circuit (634 F.2d 487 (1980)) when the question was certified to the Oklahoma Supreme Court which rendered a decision discussed *infra*).

115. *Producers Oil Co.*, 610 P.2d at 772; *see also* Kemp & Newman, *supra* note 2, at § 16.05.

116. *Producers Oil Co.*, 610 P.2d at 774; *see also* Kemp & Newman, *supra* note 2, at § 16.05.

117. *Robertson v. Murphy*, 510 So. 2d 180, 182-83 (Ala. 1987).

118. *Id.*

it therefore cannot be considered a contingent interest susceptible to the rule.¹¹⁹ Therefore, under the modern approach, preferential rights to purchase under oil and gas leases are exempt from the Rule Against Perpetuities.

Additionally, mineral leases and oil and gas agreements occur in a commercial context, and invalidating such agreements under a strict application of the rule does not address policy concerns but merely creates more concern.¹²⁰ Mississippi's new approach is now consistent with the Restatement Third of Property and the Uniform Statutory Rule Against Perpetuities.

1. The Uniform Statutory Rule Against Perpetuities

The adoption of the Uniform Statutory Rule Against Perpetuities also follows the modern judicial trend. Under section 4 of the Uniform Rule, "commercial" or "non-donative" transactions are explicitly exempt from the Rule Against Perpetuities.¹²¹ The section states that the statutory rule does not apply to "a nonvested property interest or a power of appointment arising out of a nondonative [commercial] transfer."¹²² The rationale for such an exclusion is that "the Rule Against Perpetuities is a wholly inappropriate instrument of social policy to use as a control over such [commercial] arrangements. The period of the rule—a life in being plus twenty-one years—is not suitable for nondonative transfers."¹²³

2. Restatement of the Law Third—Property (Servitudes)

Also following the contemporary approach is the American Law Institute's Third Revision of the Restatement of Property. Adopted in 2000, the comments to the Restatement now state that the application of the rule to commercial transactions is highly criticized and this criticism has led to many courts rejecting "application of the rule against perpetuities [to commercial transactions], *recognizing that it needlessly invalidated legitimate transactions*."¹²⁴ The comment itself states:

The trend of modern decisions is to avoid applying the rule against perpetuities to commercial transactions in land by reading a reasonable time limit into the transaction or by holding that the policies behind the Rule would not be advanced by applying it to the particular transaction. The focus of discussion in most cases is the extent to which the servitude or other contingent interest will interfere with the

119. See, e.g., *Ferrero Constr. Co. v. Dennis Rourke Corp.*, 536 A.2d 1137, 1141 (Md. 1988) (cited in *Murphy Exploration & Prod. Co. v. Sun Operating Ltd. P'ship*, 747 So. 2d 260, 263 (Miss. 1999)).

120. See Conine, *supra* note 7, at 1376–77.

121. UNIF. STATUTORY RULE AGAINST PERPETUITIES §4 (1990).

122. *Id.*

123. *Id.* at §4 cmt.

124. Jonathan F. Mitchell, *Can a Right of First Refusal Be Assigned?*, 68 U. CHI. L. REV. 985, 996 (2001).

alienability of the burdened property or with the willingness of the owner or possessor to make improvements to the property. In taking the position that commercial transactions must be concluded within reasonable time limits that are less than the time permitted by the Rule, and in permitting the social utility of the particular arrangement to avoid invalidation, courts in fact are applying the rule against unreasonable restraints on alienation rather than the rule against perpetuities.¹²⁵

Due to the majority of recent court decisions, the provisions of the Uniform Statutory Rule Against Perpetuities, and the Third Restatement of Property, Mississippi's new approach conforms with recent precedent and the modern trend to exempt preferential rights to purchase in oil and gas transactions from the Rule Against Perpetuities.

3. Measuring Lives for Corporations

Determining the measuring life is also an interesting endeavor when dealing with oil and gas transactions. Since many oil and gas transactions occur between two corporations and no individuals, there is no 'life' to measure the perpetuity period. However, the Mississippi Supreme Court addressed this issue in *C & D Investment Co. v. Gulf Transportation Co.* and held that the perpetuity period between corporations is twenty-one years.¹²⁶

But this seems unfair for commercial transactions to be limited to such a short period of time. Although the lower court's decision was overturned in *Murphy*, it is still important to look at the unfairness of the *C & D* rule. Under the wait-and-see doctrine, corporate entities are limited to only twenty-one years to validate their interest, whereas individuals have the benefit of the entire length of a human life plus the additional twenty-one years.

In *Murphy*, the lower court held for Sun that preferential rights to purchase were subject to the rule but used the wait-and-see exception and because all parties were corporations the measuring life was a mere twenty-one years. So twenty-one years after the Joint Operating Agreement was entered into, the preferential right to purchase provision of the agreement did not vest and was therefore void.

Although the issue is moot in regards to *Murphy*, Mississippi should undertake to correct the injustice against corporate entities in the future in areas where the Rule Against Perpetuities does apply. As an alternative, the Uniform Statutory Rule Against Perpetuities suggests a wait-and-see period of ninety years, a reasonable estimation of an expected life span plus twenty-one years.¹²⁷ This ninety-year rule would at least put corporate

125. RESTATEMENT (THIRD) OF PROP. SERVITUDES § 3.3 cmt. b (emphasis added).

126. See 526 So. 2d 526 (Miss. 1988).

127. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(2) (1990).

entities on the same footing as individuals if they are being subjected to the consequences and harsh restraints imposed by the Rule Against Perpetuities.

4. Why Preferential Rights to Purchase Fall Outside the Rule's Intended Purpose

Simply put, preferential rights do not impinge on the policy concerns that garnered the adoption of the rule in the first place. The rule was adopted for donative transactions, not commercial transactions. Given that these are "commercial [agreements] between competent and sophisticated business persons," we should defer to their intentions in entering into such agreements and not void provisions based on mere technicalities.¹²⁸ Commercial transactions are fully negotiated and executed by parties with legal capacity to contract.¹²⁹ Courts should merely enforce the provisions for which the parties have bargained for.¹³⁰ Invalidating preferential rights in commercial transactions does not achieve the goals intended by the *Duke of Norfolk Case*.¹³¹ Additionally, "[t]he only party to a contract who reaps an advantage from successfully applying the Rule to a commercial transaction is the party that wishes to escape a contractual obligation for which good consideration was given."¹³²

5. Other Jurisdictions that Exempt Preferential Rights from the Rule

Mississippi's new approach follows in the footsteps of many jurisdictions that provide an exception for preferential rights or rights of first refusal; however, this list is not intended to fully exhaust all jurisdictions that do so.

In *Hinson v. Roberts*, the Georgia Supreme Court held that preferential rights do not violate the rule and stated:

Even though a [preferential right] may be unlimited in duration, if it requires merely matching the offer of a third party, the future interest of the preemptor constitutes no impediment to the transfer of the property. The clause does not then run contrary to the purposes of the rule against perpetuities, such as preventing the tying up of land for an unreasonable length of time, prohibiting restraints on alienation, and assuring the utilization of wealth through development of land by its current beneficial owners.¹³³

128. Brief of Appellants at 5–6, *Murphy Exploration & Prod. Co. v. Sun Operating Ltd. P'ship*, 747 So. 2d 260 (Miss. 1999) (No. 98-CA-00429).

129. *Id.* at 6.

130. *Id.*

131. *Id.*

132. *Id.*

133. 349 S.E.2d 454, 456 (Ga. 1986) (internal citations omitted).

Faced with similar preferential rights provisions in *Cambridge Co. v. East Slope Investment Corp.*, the Colorado Supreme Court admitted that a mechanical application of the rule may void that particular preferential right, but the court recognized that the rule is not merely to be applied mechanically but should be applied with public policy considerations in mind, emphasizing that the rule should not be mechanically applied in instances where the purposes behind the rule will not be served.¹³⁴ Further, the court reasoned that the preferential rights at issue did not pose any threat to alienability, and therefore, application of the rule did not further the intended purposes of the rule.¹³⁵

Similarly, the Washington Supreme Court addressed the issue in *Robroy Land Co., Inc. v. Prather*, where the court upheld an unlimited right of first refusal within an agreement to purchase real estate.¹³⁶ The Washington Supreme Court also noted that application of the Rule Against Perpetuities in this context did not serve the purposes of the rule and again distinguished between a right of first refusal and an ordinary option stating that the holder of a preferential right holds far less interest than the holder of an ordinary option.¹³⁷

The Alabama Supreme Court has also addressed preferential rights. In *Robertson v. Murphy*, the court addressed a preferential right in a partnership agreement.¹³⁸ There the Alabama Supreme Court ruled that the provision did not restrict alienability and was therefore exempt from the rule.¹³⁹ The court found that the purpose of the rule was "to favor commerce and the circulation of property by preventing the right of absolute disposition from being tied up or restrained beyond a certain period."¹⁴⁰ Further, because preferential rights do not inhibit the sale of property, they are not contrary to the main purposes of the rule.¹⁴¹

Additionally, courts in Connecticut, Idaho, Michigan, New Mexico, Pennsylvania, and Wyoming have held that preferential rights or rights of first refusal are exempt from the Rule Against Perpetuities.¹⁴² As the preceding decisions indicate, the modern trend is that preferential rights to purchase do not violate the Rule Against Perpetuities. Mississippi's new approach conforms to this line of cases and is consistent with the modern majority rule.

134. 700 P.2d 537, 540 (Colo. 1985).

135. *Id.*

136. 622 P.2d 367 (Wash. 1980).

137. *Id.* at 369.

138. *Robertson v. Murphy*, 510 So. 2d 180, 180 (Ala. 1987).

139. *Id.* at 182.

140. *Id.*

141. *Id.*

142. See *JLJ Assoc., Inc. v. Persiani*, 550 A.2d 650 (Conn. 1988); *Meridian Bowling Lanes, Inc. v. Meridian Athletic Ass'n, Inc.*, 670 P.2d 1294 (Idaho 1983); *Stenke v. Masland Dev. Co., Inc.*, 394 N.W.2d 418 (Mich. 1986); *Gartley v. Ricketts*, 760 P.2d 143 (N.M. 1988); *Se. Penn. Transp. Auth. v. Phila. Transp. Co.*, 233 A.2d 15 (Penn. 1967), *cert. denied*, 390 U.S. 1011 (1968); *Harnett v. Jones*, 629 P.2d 1357 (Wyo. 1981).

IV. CONCLUSION

Ultimately, the purpose of the Rule Against Perpetuities was to prevent tying up property and restraining alienability. Simply put, oil and gas leases do not tie up land or prevent alienability and therefore should not be subject to scrutiny under the rule. Mississippi is now following the modern approach to the Rule Against Perpetuities and looking to the underlying purposes of the rule before striking down preferential rights provisions that do not impinge on alienability.

Post *Murphy*, Mississippi is taking a step back from an ill-suited, mechanical rule and is now actually looking at the root of property interests and whether public policy supports their validity, instead of strictly focusing on remote vesting. In the oil and gas context, this new approach upholds contractual obligations that parties bargain for, rather than invalidating obligations for mere technicalities, and in doing so, prevents parties from avoiding the consequences of breaching preferential right to purchase provisions.

