THE RULE AGAINST PERPETUITIES

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State Bar of Texas
ADVANCED REAL ESTATE DRAFTING COURSE
March 8-9, 2007
Houston

CHAPTER ____

TABLE OF CONTENTS

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I. How Does the Rule Against Perpetuities Work?

A. Common Law Rule

i. What is perpetuity?

At common law, "perpetuity" is defined as a restriction on the alienability of property which causes the property to be out of commerce and free trade for the period of the perpetuity. [1] The most memorable recitation of the Rule Against Perpetuities ("the Rule") comes from Professor John Chipman Gray as he formulated the rule in 1886, "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." [2]

ii. Which interests does the Rule apply to?

The Rule applies only to the vesting of estates and interests; it is not applicable to a present interest of any kind.[3] The Rule applies to contingent remainders, executory interests, and future interests in a class whether vested or contingent.[4] If an interest is completely alienable and can be devised, then it is not taken out of commerce and is not subject to the Rule. Although some covenants and restrictions on lots of property limit their use to residential purposes; they are considered acceptable social limitations and are not barriers to alienability under the Rule. [5]

iii. When did the instrument creating the interests begin to operate?

One of the keys to unlocking the Rule, is determining when to start running the clock. For trusts, the date the instrument begins to operate is the date of creation of the trust, as provided in the trust agreement or declaration of trust. For wills, the date of operation is the date of the testator's death. For deeds, the date of operation is the date of delivery. The date of operation is the time for determining the lives in being at the creation of the interest.

Interests subject to the Rule can also be created by the exercise of a power of appointment, whether special or general, lifetime or testamentary. The time that a power of appointment begins to operate depends on the type of power of appointment. If it is a special power of appointment or a testamentary general power of appointment, then the time begins when the deed or will creating the power becomes effective while taking into account the events that occurred between when the power was created and when it was exercised. Presently exercisable general powers begin to operate when the deed or will becomes effective (i.e. at the testator's death). [6]

Practitioners should be careful to avoid using language from wills or testamentary trusts in documents that take effect during lifetime. A gift in a lifetime trust at the death of "the last surviving child of the Grantor's son, who shall be living at the death of the Grantor" was invalid because it did not say the "Grantor's son, who shall be living at the time this trust was created."[7]

iv. Is vesting of the interest contingent on someone's lifetime?

If the vesting of an interest is contingent on someone's lifetime, then that person (i.e. the measuring life) must be alive when the instrument begins to operate.

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[1] Tex. Jur. 3d, Estates § 54 Generally, 2002. *See also*, Singer v. Singer, 150 Tex. 115, 237 S.W.2d 600 (1951).

[2] JOHN CHIPMAN GRAY JR., THE RULE AGAINST PERPETUITIES, §201 (Roland Gray Ed., Boston Little Brown & Co. 4th Ed.)

[3] Tex. Jur. 3d, Estates §54 Generally at 641, 2002. *See also,* Luecke v. Wallace, 951 S.W.2d 267 (Tex. App. Austin 1997) reh'g overruled. Hamman v. Bright & Co., 924 S.W.2d 168 (Tex. App. Amarillo 1996).

[4] *Available at* http://www.uiowa.edu/~sfklaw/dj%20chapter%2011.ppt#263,8,Slide 8 (accessed January 30, 2007).

[5] Cornett v. City of Houston, 404 S.W.2d 602 (Tex. Civ. App. Houston 1966).

[6] 3 THOMPSON ON REAL PROPERTY, §28.08(i) (Second Thomas Edition, David A. Thomas, ed. in chief, 2001)

[7] Ryan v. Ward, 64 A. 2d 258 (Md. 1949).

v. What does "vested" mean, and when is an interest vested?

The term "vested" has more than one single meaning[8], but it is generally accepted that it means there is a fixed right of enjoyment, which can be a present or future right, which is not conditioned on survival and is marked by the end of any limitation of the right to alienate the interest. An interest becomes vested when there is no longer a condition precedent or when the class closes and each member of the class no longer has a condition precedent.[9] Executory interests vest when they become possessory or, in the case of shifting executory interests, by becoming vested remainders.[10]

vi. Testing the Rule

The orthodox version of the Rule used the "what-might-happen" test to determine if an interest would fail to vest within the period for vesting. The "what-might-happen" test used every conceivable hypothetical scenario to test the interest to see if it failed. People were presumed to be able to have children at any age, and probabilities or reasonable expectations were not considered.[11] The rigid and unrelenting application of this version of the Rule is infamous and can be credited with creating such law school favorites as the "fertile octogenarian", the "precocious toddler", the "unborn widow" and the "magic gravel pit".

In the "unborn widow" scenario, "T leaves property in trust 'to pay the income to A for life, then to pay the income to A's widow for her life, and then to pay the principal to the children of A then living.' The gift of principal is void, since A may marry again, his second wife may be a person unborn at T's death, and the gift of the children of A contingent upon surviving this widow may vest too remotely."[12]

The "magic gravel pit" involves a testator's testamentary gift to his then living issue to occur when his gravel pits are no longer producing gravel and are exhausted. Since the gravel pits might have replenished themselves forever, or at least more than 21 years, the gift is void.[13]

The case of the "fertile octogenarian" comes from the 18th Century case of *Jee v. Audley*[14]. In that case, a woman well beyond her child bearing years caused a gift to her children to be held invalid since she might have had more children after the death of the testator.[15]

Finally, the "precocious toddler" scenario involves a gift in trust to pay income to A for life, then pay principal to A's grandchildren living at the testator's death or born within five years who shall attain the age of twenty-one years. At the testator's death, A was a sixty-five year old widow with two children and one grandchild. If the widow remarried and had a child who also gave birth to a child within five years, then that grandchild might reach the age of twenty-one outside the period for perpetuities.[16]

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[8] Jesse Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L. J. 1, n.87 at 15 (1960).

[9] *See* THOMAS A. BERGIN& PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 66-67, 2d ed. (1984), *See also,* http://www.uiowa.edu/~sfklaw/dj%20chapter%2011.ppt#263,8,Slide 14, (accessed January 30, 2007).

[10] *Available at* http://www.uiowa.edu/~sfklaw/dj%20chapter%2011.ppt#270,15, (accessed

[11] *E.g.* In re Lee's Estate, 299 P.2d 1066, 1069 (Wash. 1956), "If, by any 'conceivable circumstances' an interest might not vest within the period for the Rule, then the interest is invalid, *ab initio*."

[12] W.O. BARTON LEACH & OWEN TUDOR, THE RULE AGAINST PERPETUITIES, App. 1 at 179 (Little, Brown & Co. 1957). Professor Leach wrote in 1957, "No one has ever found a case where this actually happened; but since some ingenious fellow pointed out that it *might* happen, many perfectly innocent gifts have been stricken down."

[13] *Id. See also,* In re Wood, [1894] 3 Ch. 381; In re Searight's Estate, 87 Ohio App. 417, 95 N.E. 2d 779 (1950), involving an honorary trust for a dog which was upheld since the fund would exhaust itself within 21 years.

[14] 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).

[15] *See* http://www.msnbc.msn.com/id/6862098/ (accessed January 30, 2007) The oldest woman to ever give birth was 66 years old.

[16] W.O. BARTON LEACH & OWEN TUDOR, THE RULE AGAINST PERPETUITIES, App. 1 at 180 (Little, Brown & Co. 1957). Even coming up with an example of the "precocious toddler" is difficult, but consider *Re Gaite's Will Trusts* 1 All E. R. 459 (Ch) 1949. As Professor Leach explains, "…the bequest was upon trust 'to pay the income to A for life and thereafter to pay the principal to such of A's grandchildren living at my death or born within five years thereafter as shall attain the age of twenty-one.' At testator's death A was a widow, sixty-five years old; she had two children living and one grandchild. However, if the widow should remarry and have another child, and that child should marry and have a child, and if all this should happen within

These are the primary examples of the thinking involved in the "what-might-happen" test. A new test, called the "wait-and-see" test gained popularity in the 1960s and has now become a popular method for retaining the purpose of the Rule without the absurd results. The wait-and-see test is based on the principle that the vesting of contingent interests should reflect actual events as opposed to mere possibilities.[17] "Jurisdictions that follow this approach will not void an interest for violating the Rule unless an actual event or the actual nonoccurrence of an event prevents an interest form vesting or failing within the Rule's period."[18]

vii. What is the penalty for violating the Rule?

The penalty for violating the Rule is that the transfer is void. The property goes to the next-of-kin or to residuary legatee who would have taken the property if the invalid gift had not been made. [19]

B. Texas Statutory Law

"Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed…"

Tex. Const. Art. I § 26.

"The rule against perpetuities applies to trusts other than charitable trusts. Accordingly, an interest is not good unless it must vest, if at all, not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation. Any interest in a trust may, however, be reformed or construed to the extent and as provided by Section 5.043"

TEX. PROP. CODE ANN. §112.036 (2006).

Since prior application of the common law occasionally brought about unexpected results for lawyers and settlors alike, the statutes authorize the courts to reform or construe the interests, if possible, so that they will be valid within the application of the Rule.[20] The ability to reform an instrument that creates an interest that does not vest within the period of the Rule is called *Cy Pres*, and is one of two very common adjustments that have been made to the Rule to bring it into the scope of modern application.(See Exhibit A)

The "perpetuities saving clause" is common in Texas, and often included in a will or trust.The purpose of the perpetuities saving clause is to give authority in the instrument itself for saving any interests which might violate the Rule from doing so, if at all possible.

II. Brief History of the Rule Against Perpetuities

A. The Origins of the Rule

The events that spurred the need for the Rule were set into motion long before The Duke of Norfolk's Case.[21] It began in Europe, as far back as The Crusades, when wealthy landowners would leave for battle in the Middle East and leave their land in a primitive form of trust, called a "use". [22] The use allowed a person to have the *res* or "thing" for a period of time without having actual ownership of it. The wealthy figured out that they could perpetuate their family's financial position and status indefinitely. However, this caused the land held to lie in waste for generations, as it could not be bought or sold and no one was interested in its long term productivity since no one actually owned it. The descendants of the wealthy sat and collected the income from the land and never learned how to manage or develop the land. The middle and lower classes were frustrated by this situation and, perhaps more so, by the inability to purchase any of that increasingly large amounts of land that was locked away in trust.

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five years, the baby who was the product of this impetuous and libidinous episode might reach the age of twenty-one beyond the period of perpetuities."

[17] Angela M. Vallario, *Death By A Thousand Cuts: The Rule Against Perpetuities*, 25 J. LEGIS. 141 at 146-147 (1999).

[18] *See Id.*

[19] W.O. BARTON LEACH & OWEN TUDOR, THE RULE AGAINST PERPETUITIES, App. 1 at 182 (Little, Brown & Co. 1957).

[20] TEX. PROP. CODE ANN. § 5.043 (2006), attached as Exhibit A .

[21] 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682)

[22] *See generally* James E. Hughes, Jr. *The Often Unexpected Consequences of the Creation of a Perpetual Trust*, 5 The Chase Journal Issue 3, 1-3 (2001). *See also,* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 576-577 (5th Ed. 1956). *See also,* W.O. BARTON LEACH & OWEN TUDOR, THE RULE AGAINST PERPETUITIES, App. 1 at 173-175 (Little, Brown & Co. 1957).

In 1680, in the Duke of Norfolk's Case, the courts finally held that a settlor could control the disposition of property for someone's lifetime, as long as that someone was alive at time the interest was created.[23] The exact period for the Rule was not set until about 150 years later.[24] It wasn't until Professor John Chipman Gray began working on the Rule that it became a rule against "remoteness of vesting". [25] He crafted the classic formulation of the orthodox Rule, "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in begin at the creation of the interest."[26]

B. United States History and Texas History of The Rule

By 1966, there had been sweeping reforms of the orthodox Rule by legislation and judicial action alike.[27] Professor Robert J. Lynn wrote of the Rule then that, "[a]lthough the Rule is far from perfect, it is doubtful that it exists today in Gray's classic form, recent legislation apart…the Rule has been updated through the interplay of inextricably intertwined factors…the Rule in orthodox form is hardly the threat it once was."[28]

i. Early Reform

Reform of the Rule was following three patterns, according to Professor Lynn, (1) judicial *Cy Pres* reformation of interests that inadvertently violated the Rule, (2) the rejection of the "what-might-happen" test for the "wait-and-see" test, and (3) and a combination of *Cy Pres* and "wait-and-see". [29]

In 1963, California adopted a *Cy Pres* version of the Rule. Pennsylvania had adopted a "wait-and-see" test under which the actual events determined if the interests vested within the period of the Rule.[30] Kentucky, New Hampshire, and Vermont had adopted a combination of the *Cy Pres* and "wait-and-see" test. Idaho had abolished the Rule in 1949 by decision of the Idaho Supreme Court. [31]

ii. Uniform Statutory Rule Against Perpetuities

In 1986, the Uniform Statutory Rule Against Perpetuities was approved, which adopted a 90 year "wait-and-see" period as well as *Cy Pres*, allowing courts to reform invalid interests within the context of the settlor's intent.[32] As recently as 2007 the Uniform Rule was introduced in Arkansas[33], New York and U.S. Virgin Islands.[34] The Uniform Rule is currently adopted in Arizona, California[35], Colorado, Connecticut, District of Columbia, Florida (360 year term instead of 90 year)[36], Georgia, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, Virginia, and West Virginia. Nebraska, Nevada and Virginia have subsequently enacted laws permitting perpetual, or virtually perpetual, trusts.

iii. Common Law Rule States

Alabama follows the common law Rule and it is applicable to interests of personal as well as real property.[37]Iowa has codified the Rule with room for

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[23] *See* ANGELA M. VALLARIO, DEATH BY A THOUSAND CUTS: THE RULE AGAINST PERPETUITIES, 25 J. LEGIS. 141, 143 (1999).
[24] Cadell v. Palmer, 1 Cl. & Fin. 372, 6 Eng. Rep. 936 (H.L. 1832, 1833).
[25] ROBERT J. LYNN, THE MODERN RULE AGAINST PERPETUITIES, 192 (The Bobbs-Merrill Co., Inc. 1966).
[26] JOHN CHIPMAN GRAY JR., THE RULE AGAINST PERPETUITIES, §201 (Roland Gray Ed., Boston Little Brown & Co. 4th Ed.).
[27] ROBERT J. LYNN, THE MODERN RULE AGAINST PERPETUITIES, 197-203 (The Bobbs-Merrill Co., Inc. 1966).
[28] *See Id* at 188.
[29] *See Id* at 198.
[30] *See Id* at 198.
[31] *See* ANGELA M. VALLARIO, DEATH BY A THOUSAND CUTS: THE RULE AGAINST PERPETUITIES, 25 J. LEGIS. 141, 153 (1999).
[32] Uniform Statutory Rule Against Perpetuities, 8B U.L.A. 223 (2001).
[33] AS 34.27.100 (2000) (http://www.legis.state.ak.us/cgi-bin/folioisa.dll/stattx06/query=[jump!3A!27as3427051!27]/doc/{@14000}?) (accessed February 26, 2007).
[34] Telephone Interview with Katie Robinson with the Uniform Law Commissioners (January 30, 2007). *See also,* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-usrap.asp .
[35] CAL. PROB. CODE §21220 (HTTP://WWW.LEGINFO.CA.GOV/CGI-BIN/WAISGATE?WAISDOCID=27659527504+2+0+0&WAISACTION=RETRIEVE) (accessed January 31, 2007).
[36] FLA STAT. § 689.225 (2006).
[37] CODE OF ALABAMA SECTION 35-4-4 (http://alisdb.legislature.state.al.us/acas/ACASLogin.asp) (accessed January 31, 2007).

reformation of interests and an actual events test.[38] Kentucky also has codified the common law Rule and adopted a "wait-and-see" approach.[39] Oklahoma has adopted the Rule as modified by *Cy Pres*.[40] Vermont follows the common law rule with *Cy Pres* reform and a "wait-and-see" approach. [41]

iv. Radical Reform in the Twenty-first Century

"Reform" in the middle and late twentieth century was primarily concerned with correcting mistakes made by attorneys. In one remarkable case a court held holding that it was not malpractice for an attorney to violate the Rule in drafting because it was so difficult to understand! [42] Reformation of interests in violation of the Rule and the "wait-and-see" test buffered unintentional violation of the Rule. Groups had begun persuading Legislatures that there should be complete abolishment of the Rule.

Legislators, who had been making the Rule easier to understand and apply, decided in some states that the easiest version of all would be absolutely no Rule. Some scholars believe that the shift was and is due to states' clamoring for increased trust business. Others claim that settlors are responding to the Generation-Skipping Transfer tax, which applies to transfers to someone two generations younger. They have pointed to an increase of about $6 billion trust assets in states which have permitted perpetual trusts. [43]

Of course, one of the two primary reasons for creating the Rule was to promote marketability of assets, and the other reason was to prevent dead-hand control. Several of the abolishment states have enacted statutes which permit trustees to sell assets in perpetual trust. Recall that King Henry VIII was concerned that the Crown was suffering from assets being held in perpetuity.

v. Perpetual Trust States

Arizona[44], District of Columbia[45], Nebraska, Nevada (360 years) and Virginia, each originally adopted the Uniform Rule but have enacted law which allowed for perpetual trusts. [46] Colorado, Maine[47], Maryland[48], Missouri[49], Washington (150 years)[50], Wyoming (1,000 years), Illinois[51], and Ohio[52] have also authorized perpetual trusts. [53]

vi. Abolishment States

Alaska, New Jersey and Utah adopted the Statutory Rule and then revoked or modified it drastically so as to make it unrecognizable as the Rule. Alaska originally enacted the Uniform Statutory Rule Against Perpetuities but revoked it in 2000. Currently, the common law Rule is completely revoked by statute.[54] They have also enacted a special provision requiring the exercise of certain powers of appointment

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[38] IOWA CODE § 558.68 (2005).
[39] KY. REV. STAT. ANN. § §381.215-6.
[40] OKLA. STAT. TIT. 60 § 60-75 (2006).
[41] VT. STAT. ANN. 27 § 501 (2006).
[42] Lucas v. Hamm, 364 P.2d 685, 690 (Cal.1962), "…an attorney of ordinary skill acting under the same circumstances might well have 'fallen in to the net which the Rule spreads for the unwary' and failed to recognize the danger." The court went on to cite Prof. Leach, writing that the Rule was, "a 'technicality-ridden legal nightmare' and a 'dangerous instrumentality in the hands of most members of the bar.' "
[43] *See* Robert H. Sitkoff & Max M. Schanzenbach, Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 Yale L. J. 356, 410 (2005).
[44] ARIZ. REV'D. STAT. 14-209 (HTTP://WWW.AZLEG.STATE.AZ.US/ARIZONAREVISEDSTATUTES.ASP?TITLE=14) (accessed January 31, 2007).
[45] D.C. CODE ANN. §19-904(10). (WESTLAW) (accessed January 31, 2007).
[46] Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L.R. 6 2474 (2006).
[47] MAINE REV. STAT. ANN. §§33-101-6. Maine has adopted a "wait-and-see" approach as well as exempted trusts from the Rule altogether.
[48] MD. CODE ANN. §11-101. Maryland has codified the Rule and adopted the "wait-and-see" approach, as well as exempted trusts from the Rule.
[49] MO. REV. STAT. § 456.025.Missouri has adopted the Rule but has exempted trusts.
[50] WASH. REV. CODE §11.98.130 (2006).
[51] 765 ILL. COMP. STAT. 301-305 (http://www.ilga.gov/legislation/ilcs/ilcs.asp) (accessed January 31, 2007). Illinois has modified the common law Rule by statute, allowing reformation of invalid interests, perpetual trusts, and by prohibiting persons under 13 and over 65 from being presumed to be able to give birth
[52] OHIO REV. CODE ANN. §§2131.08-09 (2006).
[53] *See Id.*
[54] ALASKA STAT. § 34.27.075 (2000) (http://www.legis.state.ak.us/cgi-bin/folioisa.dll/stattx06/query=[jump!3A!27as3427051!27]/doc/{@13980}?) (accessed January 30, 2007).

within 1,000 years. New Jersey repealed the Uniform Statutory Rule Against Perpetuities [55] and completely abolished the Rule altogether. Utah adopted the Uniform Statutory Rule Against Perpetuities but changed the period of time from 21 years to 1,000 years.[56] Delaware repealed the Rule except for a carve-out for trusts of real property which are limited to a 110 year term from the time the property is contributed to the trust.[57] Idaho[58], New Hampshire[59], Pennsylvania[60], Wisconsin, Rhode Island[61] and South Dakota[62] have completely repealed the Rule.

III. Current Status of the Rule in Texas

Texas follows the common-law Rule, but allows for reformation of interests in violation of the Rule. However, the repeal movement has been knocking on Texas' door for the past four legislative sessions.

A. Legislative Movement for Repeal of the Rule

i. 1999 Legislative Session

In 1999, Rep. Tom Craddick introduced H.B. 1553, attached as Exhibit B, which would repeal the Rule as it applies to Trusts and allowed for the creation of perpetual trusts in Texas. This bill stalled in Committee.

ii. 2001 Legislative Session

In 2001, Rep. Averitt and Sen. Carona submitted nearly identical bills, attached as Exhibit C**,** which sought to repeal the Rule as it applies to trusts, except this time they proposed 1,000 year trusts, and when that did not work, 360 year trusts. The House and Senate bills passed, but they were not identical and did not come out of the House committee charged with reconciling them. As Professor Stanley Johanson remarked in the summary of provisions which were not enacted in his Annotated Probate Code:

> "The Texas Bankers Association, concerned about losing trust business to states that have either repealed the Rule (e.g., Alaska, Delaware) or extended the Rule's time period (e.g., Florida – 360 years), was behind a bill that would have extended the perpetuities period from "lives in being plus 21 years" to 1,000 years. To consider how preposterous that is, look in the other direction, and consider what the world was like in the year 1,001 A.D. An approach that would have repealed the Rule was not taken (as if a 1,000-year perpetuities period doesn't amount to a repeal!) because that would have required a constitutional amendment. (A bill that would have put a constitutional amendment on the ballot also died.) When concerns were raised about the 1,000-year perpetuities period, the time period was revised down to a more "reasonable" 360 years." [63]

[55] N.J. STAT. ANN. §46.2F-9 (HTTP://LIS.NJLEG.STATE.NJ.US/CGI-BIN/OM_ISAPI.DLL?CLIENTID=45364292&DEPTH=2&DEPTH=2&EXPANDHEADINGS=ON&HEADINGSWITHHITS=ON&HITSPERHEADING=ON&INFOBASE=STATUTES.NFO&RECORD={12F16}&SOFTPAGE=DOC_FRAME_PG42) (accessed January 30, 2007).

[56] UTAH CODE ANN. §§ 75-2-1201 – 75-2-1209 (HTTP://WWW.LIVEPUBLISH.LE.STATE.UT.US/LPBIN22/LPEXT.DLL?F=TEMPLATES&FN=MAIN-J.HTM&2.0) (accessed January 30, 2007).

[57] DEL. PROP. CODE § 503 (HTTP://WWW.DELCODE.STATE.DE.US/TITLE25/C005/INDEX.HTM) (accessed January 31, 2007).

[58] *But see* IDAHO CODE §55-111. While the Rule is abolished by the statute; it appears that 55-111 prohibits suspension of the power of alienation of real property 25 years beyond lives in being at the creation of the limitation on the property.

[59] N.H. Rev. Stat. Ann. §564:24 (2004).

[60] *See* Pennsylvania HB 660 approved in July of 2006. Apparently, the repeal became effective January 1, 2007. S*ee also* http://lawprofessors.typepad.com/property/2006/07/pennsylvania_ab.html (accessed January 31, 2007).

[61] R.I. GEN. LAWS § 34-11-38 (

[62] S.D. CODIFIED LAWS §43-5-1. South Dakota has abolished the Rule, but has picked up the restriction on restraint of alienation of property. (*See* all of Chapter 43-5)

[63] STANLEY JOHANSON, JOHANSON'S TEXAS PROBATE CODE ANNOTATED, XVII (Thomson West 2002 Ed.).

iii. 2003 Legislative Session

In 2003, Rep. Paxton and Sen. Carona attempted to pass a bill, attached as Exhibit D, that would have abolished application of the common law Rule in Section 5.042 of the Texas Property Code and permitted a 1,000 year vesting period for interests in Trust in Section 112.036 of the Texas Property Code. Both bills failed.

iv. 2005 Legislative Session

The last effort came in 2005. In HB 2561, attached as Exhibit E, Rep. Eiland proposed to completely abolish the Rule as it applies to trusts, with no pretense of a 1,000 year "compromise". An attempt was also made to alter the Texas Constitution by specifically amending it to allow the Texas Legislature to repeal the Rule as to trusts. The bill got a hearing but did not come out of committee

v. 2007 Legislative Session

The Texas Bankers Association has discussed a bill that would provide for a 200 year Rule. As of February 26, that bill has not been filed.

B. Arguments For and Against Retaining the Rule

As noted in Prof. Johanson's quote above, the primary argument for the repeal of the Rule in Texas relates to retaining or stimulating trust business in Texas. The primary arguments against the repeal of the Rule relate to economic policy, tax policy, social policy, charitable giving, and litigation. For a summary discussion of those points, see the author's short position paper, attached as Exhibit F.

IV. Conclusion

The Rule has been part of Texas law for over 130 years, and part of the Common Law for over 400 years. Despite the modification or repeal of the Rule in some states, the Texas Legislature has not changed our Rule. The argument for repeal of the Rule primarily involves retaining or stimulating trust business in Texas. It can be strongly argued that the basic, fundamental principles that gave rise to the Rule, which related to good economic and social policy, and the modern issues related to the good tax policy and charitable giving, more than support retaining the Rule in its present form.