

THE RISE OF THE PERPETUAL TRUST

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For more than two centuries, the Rule against Perpetuities has served as the chief means of limiting a transferor's power to tie up property by way of successive contingent interests. But recently, at least seventeen jurisdictions in the United States have enacted statutes abolishing the Rule in the case of perpetual (or near-perpetual) trusts. The prime mover behind this important development has been the federal Generation-Skipping Transfer Tax. This Article traces the gradual decline of the common law Rule against Perpetuities, considers the dynamics behind the recent wave of state legislation, examines the problems that might result from the rise of perpetual trusts, and suggests some possible solutions.

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Jesse Dukeminier died on Easter Sunday, 2003, after a long illness but nevertheless unexpectedly. He had prepared several drafts of the manuscript before asking me to take part in finishing it some months ago. It was my privilege and pleasure to work closely with Jesse for some thirty years, and to have this last opportunity to collaborate with him. Like countless others, I will dearly miss his wit and wisdom and unbounded kindness.

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In 1951 Professor W. Barton Leach paid homage to the Rule against Perpetuities, calling it “the *sanctum sanctorum* of the law.”¹ Like much of American property law, the Rule began in England. It developed slowly there, reaching maturity only after a century and a half (1680–1833). Its history implies a certain hardness, which in fact the Rule enjoyed—until recently. Leach said it provided lawyers in the United States with “a blessed sheltering realization that lives-in-being-and-twenty-one years have the same validity after two world wars and four Democratic administrations that they had when Queen Victoria ascended the throne.”² Yet, only a year later, Leach attacked the Rule as a “technicality-ridden legal nightmare” in urgent need of reform.³ Ever since Leach’s assault, the Rule has been in decline, especially in the United States, where matters are now moving apace. In a growing number of jurisdictions, property owners are suddenly free to control the destiny of their estates with a cold dead hand, by way of perpetual trusts.

How did this reversal of an old but vital policy come about, and with what consequences?

I. THE NEW PERPETUAL TRUST

A. The Fall of the Rule Against Perpetuities

We begin with some background, familiar to many but perhaps not to all. Under the common law Rule against Perpetuities, a contingent future interest must vest, if at all, within twenty-one years after the expiration of some life in being when the interest was created. Any possibility, however remote, that an interest might vest beyond lives-in-being plus twenty-one years invalidated the interest. The orthodox Rule has been remorseless in its application, and the possibilities that void an interest are often ridiculous. Here are three classic examples:

Case 1. T devises a fund in trust to pay the income to A (age seventy) for life, then to pay the income to A’s children for their lives, then to pay the principal to A’s grandchildren then living. The law conclusively presumes that it is possible for A to have another child. Thus the remainder to A’s grandchildren is void because it may

1. W. BARTON LEACH, CASES AND TEXT ON THE LAW OF WILLS 203 (2d ed. 1951).
 2. *Id.*
 3. W. Barton Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 HARV. L. REV. 721, 723 (1952).

not vest until the death of an afterborn child of A—more than twenty-one years after the deaths of A and A's presently living children. This is the famous case of "The Fertile Octogenarian," of which Professor Leach made great sport.⁴

Case 2. T devises a fund in trust to pay the income to A for life, then to pay the income to A's widow for life, then to pay the principal to A's issue then living. The remainder to A's issue is void because it might not vest until the widow's death, and the widow cannot be used as a measuring life. If A is presently married, A's wife may be divorced or die, and A may marry a much younger woman not born by the time of T's devise, who subsequently becomes A's widow. This is the case imaginatively titled "The Unborn Widow" by Leach.⁵

Case 3. T devises a fund in trust to pay the income to A for life, then to pay the principal to A's children who reach twenty-five. The remainder is a gift to a class, and if a share in a class gift may vest too remotely for one member of the class, the whole class gift is void. The remainder to A's children who reach twenty-five is void because A might die leaving a child under the age of four. That child's share might vest more than twenty-one years after A's death, a possibility that invalidates the whole class gift.

1. Wait-and-See

Leach considered these cases absurd; in each, the Rule destroys a reasonable gift which almost surely would vest in time. Why not, he proposed, wait and see what happened? If, in *Case 1*, A did not have another child, the remainder to A's grandchildren would vest at the death of A and A's children, all lives-in-being at T's death. If, in *Case 2*, A's widow turned out to be a woman alive at T's death, the remainder to A's issue would vest at the death of A and his widow, both lives-in-being at T's death. And, in *Case 3*, if all of A's children were over the age of four at A's death, the remainder would vest within twenty-one years after A's death and would be valid.

Several events led to Leach's embrace of the wait-and-see doctrine. In 1947, Pennsylvania adopted a statute providing that the validity of an interest under the Rule against Perpetuities must be determined by what actually happens, as opposed to what might.⁶ It was the first wait-and-see statute, and a challenge to conventional thinking—including the thinking of Leach, who later explained why, in 1952, he began to change his mind about the common

4. See W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643–44 (1938).

5. *Id.* at 644.

6. PA. STAT. ANN. tit. 20, § 301.4(b) (West 1950) (current version at 20 PA. CONS. STAT. ANN. § 6104(b) (West Supp. 2002)).

law Rule. First, he had agreed to write about perpetuities for the forthcoming *American Law of Property*, and he wanted to produce more than a mere condensed version of John Chipman Gray's great book.⁷ Second, Leach had spent a sabbatical term in England, lecturing on perpetuities at Oxford, and took up wait-and-see as a provocation "which would keep the students awake and in attendance."⁸

Leach's advocacy of wait-and-see shook up the conservative academic property and trusts community. Lewis Simes, a professor at the University of Michigan Law School and one of the leading commentators on future interests, rose up immediately to speak against wait-and-see.⁹ First, he found it unclear whose lives we are to wait out. Second, he believed that wait-and-see jeopardized the certainty of title provided by the traditional Rule; considerable inconvenience could arise from not knowing for an extended period of time whether an interest is valid or void. Third, he worried that wait-and-see took a long step in favor of dead-hand control. "If the 'wait and see' doctrine is generally adopted," Simes said, "in my opinion the common law rule against perpetuities, in anything like the form in which we know it, will cease to exist."¹⁰ The first two concerns turned out to be of little moment.¹¹ The third was prescient.

Others soon joined the great debate started by Leach and Simes, which came to resemble a holy war.¹² It ended, for a time, with Leach's death in 1971. By then, wait-and-see for the full perpetuities period had been adopted in Pennsylvania, Kentucky, Mississippi, New Hampshire, Ohio, and Vermont.¹³

7. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* (Roland Gray ed., 4th ed. 1942) (1886).

8. W. BARTON LEACH & JAMES K. LOGAN, *CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING* 835 (1961).

9. Lewis M. Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179, 184-90 (1953).

10. *Id.* at 190.

11. Regarding Simes's first point, it happens that the lives relevant to vesting can in our view be ascertained rather easily. See Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1654-74 (1985). For debate on this point see Lawrence W. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, *id.* at 1714; Jesse Dukeminier, *A Response by Professor Dukeminier*, *id.* at 1730; Lawrence W. Waggoner, *A Rejoinder by Professor Waggoner*, *id.* at 1739; Jesse Dukeminier, *A Final Comment by Professor Dukeminier*, *id.* at 1742. As to the second point, in the fifty years that wait-and-see has been with us, no practical difficulties have arisen in the application of the doctrine to trusts.

12. For a comprehensive list of articles on wait-and-see, see 10 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 75A.07 (Michael Allan Wolf ed., 2000). One particularly prickly article, in which Leach replied to his critics with stinging wit, is W. Barton Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124 (1960).

13. KY. REV. STAT. ANN. § 381.216 (Michie 2002); OHIO REV. CODE ANN. § 2131.08 (West Supp. 2003); PA. STAT. ANN. tit. 20, § 301.4(b) (West 1950) (current version at 20 PA. STAT. ANN. § 6104(b) (West Supp. 2002)); VT. STAT. ANN. tit. 27, § 501 (2002); *Phelps v. Shropshire*, 183 So. 2d 158, 162 (Miss. 1966); *Merchs. Nat'l Bank v. Curtis*, 97 A.2d 207, 212 (N.H. 1953).

Limited wait-and-see statutes had been adopted in Connecticut, Illinois, Maine, Massachusetts, Maryland, and Washington.¹⁴

In the late 1970s, Professor A. James Casner, Leach's colleague at Harvard, resumed the assault on the orthodox Rule that Leach had begun. Casner was appointed Reporter for the Restatement (Second) of Property, Donative Transfers. Instead of beginning the new Restatement with "Types" of donative transfers or "Creation" of donative instruments—a traditional starting point for Restatements—Casner began with the Rule against Perpetuities. He was set on writing wait-and-see into the Second Restatement and wasted no time about it. Professor Richard R. Powell, the reporter for the First Restatement of Property, came out of retirement at age eighty-eight to speak in opposition. For two annual meetings of the American Law Institute, Casner and Powell were locked in robust debate. At the second meeting, in 1979, Casner, the Reporter, prevailed. The wait-and-see doctrine was adopted by the Second Restatement.¹⁵

Instead of using the lives relevant to vesting as the measuring lives, the Restatement drafters fashioned a list of specific measuring lives, and wrote them into the Restatement.¹⁶ Mandating an artificial list of lives for wait-and-see was a highly unusual practice for a Restatement, which is ordinarily concerned with articulating principles to be adopted by courts. In any event, it turned out that the Restatement list was unprincipled, full of holes, and unworkable.¹⁷ The idea went no further than Iowa, which by statute adopted wait-and-see with an expanded version of the Restatement list of measuring lives.¹⁸

2. The Uniform Statutory Rule Against Perpetuities

The next development in the decline of the orthodox Rule against Perpetuities, and arguably far more significant than anything that had come before, started with the work of the National Conference of Commissioners on Uniform State Laws, which in the mid-1980s appointed a group to draft

14. CONN. GEN. STAT. §§ 2912d–2916d (1955) (wait-and-see during life estate) (current version at CONN. GEN. STAT. ANN. § 45a-490–496 (West 1993 & Supp. 2002)); ILL. ANN. STAT. ch. 30, § 195 (West Supp. 1992) (wait-and-see for the lives of trust beneficiaries plus twenty-one years) (current version at 765 ILL. COMP. STAT. ANN. 305/5 (West 1993)); ME. REV. STAT. ANN. tit. 33 § 101 (West 1999) (wait-and-see during life estate); MD. ANN. CODE. of 1957 art. 16, § 197A (Michie 1966) (wait-and-see during life estate); MASS. ANN. LAWS ch. 184A, § 1 (Law. Co-op. Supp. 2002) (wait-and-see during life estate); WASH. REV. CODE ANN. §§ 11.98.010–.030 (West 2003) (wait-and-see for lives of trust beneficiaries plus twenty-one years).

15. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.4 (1983).

16. *Id.* at § 1.3(2).

17. See Dukeminier, *Perpetuities: The Measuring Lives*, *supra* note 11, at 1674–1701.

18. IOWA CODE ANN. § 558.68 (West 1992).

a Uniform Statutory Rule Against Perpetuities (USRAP). The drafters, headed by Professor Lawrence Waggoner of the University of Michigan, decided to adopt the wait-and-see approach, but to sidestep the issue of measuring lives by substituting a fixed ninety-year period. One reason for doing so (hardly the only one) was the fact that it is easier to tick ninety years off a calendar than to keep track of a bunch of life histories; and ninety years was figured to approximate "the average period of time that would traditionally be allowed by the wait-and-see doctrine."¹⁹

Under USRAP,²⁰ interests are valid if they comply with either the common law Rule against Perpetuities or the ninety-year period of wait-and-see. Thus if, at the time of its creation, a contingent interest will necessarily vest, if at all, within lives-in-being plus twenty-one years, it is valid. Similarly, if, at the time of its creation, a contingent interest will necessarily vest, if at all, within ninety years, it is also valid. If, however, a contingent interest is not certain to vest or fail within one of those two periods, we wait to see if it actually vests within ninety years. If it does not, the interest will be reformed by a court at the end of the ninety years so as

19. See Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 162 (1988) [hereinafter Waggoner, *The Rationale*]. For further discussion of the reasons behind the Uniform Statutory Rule Against Perpetuities' (USRAP's) move to a fixed period, see Lawrence W. Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, in THE TWENTIETH ANNUAL PHILIP E. HECKERLING INSTITUTE ON ESTATE PLANNING 700 (John T. Gaubatz ed., 1986).

20. The Uniform Statutory Rule Against Perpetuities (USRAP) has been adopted in twenty-four states: ARIZ. REV. STAT. ANN. § 14-2901 (West Supp. 2002) (amended to permit perpetual trusts); CAL. PROB. CODE §§ 21200-21225 (West Supp. 2003); COLO. REV. STAT. §§ 15-11-1101-1107 (2002); CONN. GEN. STAT. ANN. §§ 45a-490-496 (West 1993 & Supp. 2002); FLA. STAT. ANN. § 689.225 (West Supp. 2003) (360 years substituted for ninety in 2001); GA. CODE ANN. § 44-6-200 (Michie Supp. 2002); HAW. REV. STAT. ANN. §§ 525-1-6 (Michie 2000); IND. CODE ANN. §§ 32-1-4.5-1-6 (Michie 1995 & Supp. 2001); KAN. STAT. ANN. §§ 59-3401-3408 (1994); MASS. ANN. LAWS ch. 184A, §§ 1-11 (Law. Co-op. 1996); MICH. COMP. LAWS ANN. §§ 554.71-78 (West Supp. 2002); MINN. STAT. ANN. §§ 501A.01-07 (West 2001 & Supp.); MONT. CODE ANN. §§ 72-2-1001-1017 (2001); NEB. REV. STAT. §§ 76-2001-2008 (1996 & Supp. 2002) (amended to permit perpetual trusts); NEV. REV. STAT. ANN. §§ 111.103-1039 (Michie Supp. 2001) (amended to permit perpetual trusts); N.M. STAT. ANN. §§ 45-2-901-906 (Michie 1998 & Supp. 2001); N.C. GEN. STAT. §§ 41-15-22 (Lexis 2001); N.D. CENT. CODE § 47-02-27 (Lexis 1999); OR. REV. STAT. §§ 105.950-975 (1999); S.C. CODE ANN. §§ 27-6-10-80 (Law. Co-op. 1991); TENN. CODE ANN. §§ 66-1-201-208 (Lexis Supp. 2001); UTAH CODE ANN. §§ 75-2-1201-1208 (Lexis Supp. 2002); VA. CODE ANN. § 55-12.1 (Michie Supp. 2002) (amended to permit perpetual trusts); W. VA. CODE ANN. §§ 36-1A-1-8 (Michie 1997).

Alaska and New Jersey adopted USRAP but later repealed it, together with the Rule against Perpetuities. ALASKA STAT. § 34.27.050 (Lexis 2002) (repealed 2000); N.J. STAT. ANN. 46:2F-1 (West Supp. 2002) (repealed 1999). Both states adopted South Dakota and Wisconsin's rule against suspension of the power of alienation. See *infra* note 38.

to most closely approximate the dispositive plan of the donor and vest within that period.²¹

When considering the merits of a ninety-year perpetuities period, we need to think about why lives-in-being plus twenty-one years was fixed as the perpetuities period in the first place. At the time of the formulation of the Rule against Perpetuities, land ownership gave families power, status, and wealth. Heads of families—the fathers—were much concerned about securing family land from incompetent sons. Recognizing this concern as legitimate, English judges developed, case-by-case, an appropriate period during which the father's judgment could prevail in family settlements. The father could realistically and perhaps wisely assess the capabilities of *living* members of his family, and so, with respect to them, the judges permitted the father's informed judgment, solemnly inscribed in an instrument, to be given effect. But the head of family could know nothing of unborn persons. Hence, the father was permitted to control only so long as his judgment was informed with an understanding of the capabilities and needs of persons alive when the judgment was made. Subsequently, the judges permitted an extension of control beyond lives-in-being if any of the persons in the next generation were minors. Finally, after about 150 years, the judges fixed the period as lives-in-being plus twenty-one years thereafter. Leach observed that the balance struck by the courts permitted "a man of property . . . [to] provide for all of those in his family whom he personally knew and the first generation after them upon attaining majority."²²

USRAP abandons this centuries-old common law policy, instead permitting dead-hand control for ninety years, whether or not the beneficiaries are known to the donor. The ninety year period is not, of course, mandatory; donors may reach out to that limit, but they are hardly required to do so. To put the point another way—the way of the USRAP Reporter—"contingencies in the vast majority of perpetuity-violation cases will be resolved long before the waiting period expires. . . . Having an *unused* end-portion of the waiting period does no harm and its length has nothing at all to do with dead-hand control."²³ That is true, of course, provided that the end-portion is unused, but will it be? Some commentators see conventional wait-and-see as "principally a salvage doctrine," whereas, in their view, "USRAP is more likely to become a planning doctrine; trust settlors might intentionally use the statute's provisions

21. For a suggestion of the anomalies that can arise from USRAP's "valid-this-way-or-that" approach, see JOEL C. DOBRIS ET AL., *ESTATES AND TRUSTS: CASES AND MATERIALS* 897–98 (2d ed. 2003).

22. 6 AMERICAN LAW OF PROPERTY § 24.16, at 51 (A. James Casner ed., 1952).

23. Waggoner, *The Rationale*, *supra* note 19, at 165 n.26.

to extend the period of dead-hand control.”²⁴ If settlors do have such plans in mind, then we might expect to see moves in the direction of even longer periods, say 125 years, or 150, or 360, or 1000, or forever. And we do.²⁵

Lives-in-being, and the policy underlying them, have served as the moorings of the orthodox Rule against Perpetuities (and, for all of that, of traditional wait-and-see). By cutting free from that formulation, USRAP set perpetuities adrift, in at least two respects. First, notwithstanding that ninety years might equal the period one could accomplish under the Rule, ninety is on its face a number and not a principle. The drafters of USRAP, no doubt unintentionally, made an arguably damaging reductionist move. To reduce matters to “ninety years” is to obscure the *purposes* of restrictions on dead-hand control, especially in the minds of those people (which is to say just about everybody) who do not quite understand control of perpetuities in the first place. USRAP makes a mere number the salient thing, the topic of debates, the target of reforms, the subject of marginal alterations—extensions by a few years, by a few decades, by a couple of centuries or so.

Second, USRAP encourages lawyers to abandon the old ship. It puts the Rule in suspension for ninety years, during which period no interest may be struck as void.²⁶ It is doubtful that, after nearly a century of irrelevance,

24. JOEL C. DOBRIS ET AL., *supra* note 21, at 895.

25. 125 years. English Law Commission Report No. 251, *The Rules Against Perpetuities and Excessive Accumulations* (1998), recommends abolishing the common law Rule against Perpetuities and replacing it with a wait-and-see period of 125 years. The commission chose 125 years because it is probably the longest period that can be obtained under present law using royal lives as the measuring lives (comparable to using twelve healthy babies in this country).

150 years. WASH. REV. CODE ANN. § 11.98.130 (West Supp. 2003) was amended in 2001 to permit a 150-year wait-and-see period for trusts.

360 years. FLA. STAT. ANN. § 689.225(2)(f) (West Supp. 2003) substitutes 360 years for the ninety-year wait-and-see period of USRAP. Why 360 years? Professor Adam Hirsch of Florida State University College of Law writes:

There was a story going around that our legislators simply took USRAP's 90-year limit and multiplied it by four, but that could well be apocryphal. This much I do know: The banking lobby wanted to repeal the Rule entirely in order to retain local trust business, but legislators preferred to retain some time limit. At one point there was talk of establishing a thousand-year time limit, facilitating what were to be called “Millennial Trusts.” How 360 years ultimately came to be the magic number I cannot say, but I am quite certain that the number was arrived at arbitrarily.

Letter from Adam Hirsch to Jesse Dukeminier (Feb. 22, 2002).

1000 years. Wyoming recently adopted legislation amending its Rule against Perpetuities to provide that as to trusts created after July 1, 2003, a settlor may exempt a trust from the Rule (other than as to real property assets) if the trust instrument explicitly states that the Rule is not to apply and further states that the trust is to terminate no later than one thousand years after the trust's creation. Wyo. H.B. 77 (2003).

Forever. Statutes in seventeen states now permit perpetual trusts. See *infra* notes 37, 40–45.

26. USRAP is popular with the bar perhaps in part because it frees lawyers of potential malpractice liability for violating the Rule. Since under USRAP the Rule cannot strike down an

many lawyers will be capable of coming back to the old Rule, especially given its maddening complexities and sphinxian riddles.²⁷ Indeed, lawyers of the future are unlikely even to be introduced to the Rule in their legal educations. There is too much pressure on the curricular needs of law schools to dwell for long on dormant doctrine.²⁸

Edward Rabin and Roberta and Jeffrey Kwall, the authors of a casebook used in first-year Property courses, ask this: "Do we really have, in USRAP, a *de facto* repeal of the rule, as to interests created after USRAP is adopted? If so, why not simply repeal the rule outright and avoid the pretense that USRAP simply modifies the rule?"²⁹ To date, more than a third of the states have done just that.³⁰

B. The Rise of the Perpetual Trust

The two reforms traced above—the wait-and-see doctrine, and then, especially, USRAP—might have weakened the Rule against Perpetuities, but they honored its purpose. Neither reform embodied any intention to free the dead hand of age-old restrictions; to the contrary, both shared that central policy of the Rule. But they, as much as the old Rule, are being undermined

interest for ninety years after an instrument takes effect, lawyers are absolved of malpractice for their entire professional careers.

27. For further elucidation of this position, see Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1026–28 (1987).

28. The unreformed common law Rule against Perpetuities exists today in only a small handful of states. The only populous state where the Rule has bite is New York, if the instrument does not qualify for the limited reforms made in New York law. See N.Y. EST. POWERS & TRUSTS LAW §§ 9-1.2 & 9-1.3 (McKinney 2002).

Unsurprisingly, law school curricula appear to reflect the decline of the orthodox Rule, or so a casual survey suggests. In the 1950s, many weeks, sometimes half a semester, were spent on the subject at leading schools like Harvard and Yale. Today, a student at the Harvard Law School is likely to confront the Rule for only three or four hours in the basic Property course. Wills and Trusts is offered only intermittently at Harvard, and one visitor who taught it recalls spending only two hours on the Rule. At Yale Law School the Rule gets a single hour in Property, itself an elective course, and no coverage in Wills and Trusts. Courses at Columbia and Stanford give about three hours to the subject in the Property course; teachers at Berkeley do about the same, and devote even less attention to the Rule in Wills and Trusts. At these schools, and, we suppose, many others, only minimal attention is paid to the Rule's complex and difficult mechanics, in the belief that these will be worked out during the wait-and-see period. The focus is on abstract policy. This is probably a wise choice as a practical matter, because in states that have adopted wait-and-see, litigation involving the Rule against Perpetuities has virtually disappeared.

The situation in England, which adopted wait-and-see for lives on a statutory list in 1964, appears to be similar to that in the United States as far as teaching is concerned. See, e.g., P.H. Kenny, *Conveyancer's Notebook*, 1998 CONV. & PROP. LAW. (n.s.) 241, 243.

29. EDWARD H. RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW 201 (4th ed. 2000).

30. See *infra* notes 37–48.

by the recent wave of state legislation permitting perpetual trusts. To account for that legislation, we have to begin with the federal estate tax.

1. The Generation-Skipping Transfer Tax

The federal estate tax, first enacted in 1916, levies a tax on any property interest transferred by will, intestacy, or survivorship to another person, except for transfers to spouses and charities.³¹ The tax can be avoided, however, by the use of life estates. At the death of a life tenant, the tenancy ends, leaving no transfer to be taxed. For seventy years, lawyers took advantage of this loophole by creating trusts with successive life estates, which could continue without any estate taxes being levied against succeeding generations until after the termination of the trust. And the trusts themselves could continue until the Rule against Perpetuities, in one or another variant, called a halt. Here is an example:

Case 4. *T* devises property in trust to pay the income to his daughter *A* for life, then to pay the income to *A*'s children for their lives, then to distribute the principal to *A*'s grandchildren (with a saving clause or other wording to avoid a perpetuities violation). At *T*'s death an estate tax is levied on the property, but no estate tax is levied at the death of *A* or at the death of *A*'s children because these persons do not have interests transferable on death. An estate tax will not be levied again until the death of *A*'s grandchildren, perhaps more than a hundred years after *T*'s death.

In 1986 Congress closed this loophole in the tax laws, deciding that a transfer tax is due at the expiration of each generation. After 1986, if a transferor creates a life estate in a child that avoids ("skips") the federal estate tax at the child's death, as in *Case 4*, a generation-skipping transfer (GST) tax is due at the child's death if the property passes to the next generation.³² The GST tax is levied at the highest rate of the estate tax (50 percent in 2001). In *Case 4*, no federal estate tax is payable at *A*'s death because *A* does not have a transmissible interest. However, at *A*'s death, a generation-skipping transfer occurs, from *T* to his grandchildren. And so, at *A*'s death, the GST tax is levied on the value of the nonexempt corpus of the trust. Upon the death of *A*'s children, another generation-skipping transfer tax is levied.³³

31. There is a complementary federal gift tax on inter vivos gifts.

32. I.R.C. § 2612 (1994).

33. Trusts created before 1986 were grandfathered. They are exempt from the GST tax. I.R.C. § 2601(1) (1986). Before 1986, perpetual trusts were permitted only in Wisconsin, South Dakota, and Idaho. See *infra* note 37. In other states, trusts were governed by the Rule against Perpetuities. Although the evidence is scanty, it appears that perpetual trusts were not created in these three states prior to 1986. See Leach, *supra* note 12.

At the same time it amended the federal transfer tax laws by adding the GST tax, Congress lightened the taxpayer burden by providing a \$1 million exemption from the GST tax for each transferor (doubled in the case of married couples). An inflation adjustment in 2002 increased the amount to \$1.1 million; it will increase again to \$1.5 million in 2004 and ultimately, in gradual steps, to \$3.5 million in 2009. The exemption can be allotted to direct gifts to grandchildren or to a trust producing one or more generation-skipping transfers.³⁴ The estate tax law itself places no limitation on the duration of such trusts. A transferor can create a trust, with \$1.1 million (\$3.5 million after 2008) as principal, for his children for life, with successive life estates in succeeding generations, for as long as state perpetuities law allows. Thanks to the exemption, no estate tax or GST tax is due until the trust terminates. In states following the Rule against Perpetuities, these tax-exempt dynasty trusts³⁵ can endure for lives-in-being at the creation of the trust, plus twenty-one years;³⁶ in USRAP states they can last for that period or for ninety years.

2. State Legislation

When Congress enacted the GST tax, it probably assumed that most states would continue to adhere to the Rule against Perpetuities in one or another variation, but this has proved unfounded. Before 1986, only three states—Idaho, South Dakota, and Wisconsin—had abolished the Rule and adopted a prohibition against suspension of the power of alienation.³⁷ Perpetual trusts have thus been permitted in these states for some time, provided there is some person, such as a trustee with a power of sale, who can transfer

34. I.R.C. § 2631(a) (1994); I.R.C. § 2631(c) (2002).

35. See generally Jesse Dukeminier, *Dynasty Trusts: Sheltering Descendants from Transfer Taxes*, 23 EST. PLAN. 417 (1996). The term "dynasty trust" is usually taken to mean "a trust set up primarily to perpetuate the trust estate for as long a period as possible," commonly by way "of a chain of life interests . . ." Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 547-48 (1964). Friedman contrasts with this the "caretaker trust," which "is usually short-term, spanning one life-time or less. It exists to protect and serve the interests or needs of one or more particular beneficiaries." *Id.* at 547. Typically, "the private dynastic trust also has elements of the caretaker trust." *Id.* at 548.

36. Actually, the Rule against Perpetuities does not require that trusts terminate within the perpetuities period, but only that interests in the trust vest within that period. Requiring interests to vest, however, results in termination of a trust after the ending of all life estates vesting within the period. Saving clauses often terminate trusts within the perpetuities period. Bearing these qualifications in mind, lawyers commonly say—for ease of discussion—that a trust can endure for the perpetuities period.

37. IDAHO CODE § 55-111 (Michie 2000) (statute not entirely clear); S.D. CODIFIED LAWS §§ 43-5-1, 43-5-8 (Michie 1997); WIS. STAT. ANN. § 700.16 (West 2001).

title to (alienate) the trust property.³⁸ But since 1986, at least seventeen more states have enacted legislation permitting perpetual, or almost perpetual, trusts, with some significant variation in statutory terms.³⁹ Alaska and New Jersey adopted the law of South Dakota and Wisconsin.⁴⁰ Arizona, Indiana, and Nebraska amended USRAP to provide that it does not apply to trusts containing a power of sale in the trustee.⁴¹ In Virginia, another USRAP jurisdiction, the Rule against Perpetuities does not apply if the trust instrument so states.⁴² The same holds true in the District of Columbia, Illinois, Maine, Maryland, Missouri, and Ohio, so long as the trust gives the trustee the power of sale.⁴³ Delaware's statute states that no interest in personal property held in trust shall be subject to the Rule.⁴⁴ Rhode Island has simply abolished the Rule outright.⁴⁵ Wyoming provides that a settlor may exempt a trust from the Rule against Perpetuities if the trust document indicates that the trust will terminate within one thousand years after its creation.⁴⁶ Florida has extended its USRAP wait-and-see period from ninety years to 360 years for any interest in trust.⁴⁷ Washington now provides that no interest in trust is invalid for 150 years.⁴⁸

The foregoing list will almost certainly grow. As of this writing, at least five states are considering proposals to permit perpetual trusts, and more are likely to follow.⁴⁹ The reason has little if anything to do with some wish on

38. In South Dakota and Wisconsin the power of alienation is also not suspended if a person has the power to terminate the trust.

39. As we shall see, the terms of a statute permitting perpetual trusts are important, especially with respect to special powers of appointment. See *infra* text accompanying notes 121–128.

40. ALASKA STAT. §§ 34.27.051, 34.27.100 (Lexis 2002) (stating that a trustee must have a power of sale or a person must have a power to terminate the trust); N.J. STAT. ANN. § 46:2F-10 (West Supp. 2002) (echoing the rule in Alaska).

41. ARIZ. REV. STAT. ANN. § 14-2901 (West Supp. 2002) (noting that a trustee must have a power of sale and a person must have a power to terminate the trust); IND. H.B. 1116 (2003); NEB. REV. STAT. § 76-2005 (2002).

42. VA. CODE ANN. § 55-13.3(c) (Michie Supp. 2002).

43. D.C. CODE § 19-904(10) (2002); 765 ILL. COMP. STAT. ANN. 305/4(a)(8) (West 1993); ME. REV. STAT. ANN. tit. 33, § 101-A(1) (West Supp. 2002); MD. CODE ANN., EST. AND TRUSTS § 11-102(e) (2001); MO. ANN. STAT. § 456.236 (West Supp. 2003); OHIO REV. CODE ANN. § 2131.09(B) (West Supp. 2003). Presumably the requirement that the trust instrument declare that the Rule against Perpetuities is not to apply is meant to give some assurance that the trust will be drafted by an experienced estate planner who will create powers of appointment in the beneficiaries and powers in the trustee.

44. DEL. CODE ANN. tit. 25, § 503(a) (Michie Supp. 2000) (stating that a trust of real property is limited to 110 years).

45. R.I. GEN. LAWS § 34-11-38 (1995).

46. See *supra* note 25.

47. See *supra* note 25.

48. See *supra* note 25.

49. The five states are Connecticut, Iowa, Kentucky, New Hampshire, and Texas. The status of the proposals varies from state to state. In at least one additional state, New York, there appears to

the part of wealthy people to control the lives of their unknown descendants; rather, it has to do with their interest in saving on federal transfer taxes imposed at the descendants' deaths, and on competition among the states to cater to that interest.⁵⁰ As mentioned earlier, perpetual trusts have long been permitted in Idaho, South Dakota, and Wisconsin, but they were seldom created before the appearance of the GST tax in 1986. Once the GST tax was enacted, however, perpetual trusts became much more attractive, and suddenly the three perpetual-trust states had a comparative advantage in attracting trust business and capital.

This did not go unnoticed. Delaware, the first state to permit perpetual trusts after 1986, did so explicitly to remain competitive in the trust market.⁵¹ One state after another followed suit, and, so far as one can tell, all for that same reason. New Jersey, for example, repealed its USRAP "to permit banks and trust companies to offer 'dynasty trusts' to their customers, such as those that are being offered by banks and trust companies located in other states," like Delaware and South Dakota.⁵² In Connecticut, where perpetual trust legislation is being considered, local banks and lawyers have argued that "people who want to set up dynastic trusts for their grandchildren, great-grandchildren and down the line of generations, are doing them in other states."⁵³ Of course, Connecticut lawyers can, even without state legislation, draft trusts to be set up elsewhere, but when they do they usually work in consultation with lawyers in the other states; this increases legal fees and "sometimes causes the client to simply hire out-of-state counsel in the first place."⁵⁴

It is difficult to get hard data on the popularity of perpetual trusts among consumers, but there appears to be enough interest among the relatively wealthy to create a tidy market. South Dakota, for example, has enjoyed a substantial increase in trust business since 1986, most of it on behalf of non-resident clients ("S.D. is not a wealthy state, so there would be only a small proportion of its residents who would have call for such trusts").⁵⁵ The other

be considerable interest in perpetual trust legislation. See, e.g., Charles F. Gibbs & Colleen F. Carew, *Trusts Leaving New York, Situs in Cyberspace: Time for Legislation?*, N.Y. L.J., Dec. 20, 2002, at 3.

50. See Ira M. Bloom, *The GST Tax Tail Is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569 (2000).

51. Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP. PROB. & TR. J. 185, 208 n.54 (1995) ("The preamble to the [Delaware] statute states that its purpose is to keep Delaware competitive in the formation of trust capital, which was moving to South Dakota and Wisconsin . . .").

52. A. 2804, 208th Leg. (N.J. 1999).

53. Thomas Scheffey, *Is Immortality Just Around the Corner? "Dead Hand" Trust Law Relaxes Its Grip*, CONN. L. TRIB., Mar. 4, 2002, at 10 (quoting "veteran estate tax specialist" Frank S. Berall).

54. *Id.*

55. E-mail correspondence between Tom Foye, a South Dakota attorney, and James E. Krier, Professor of Law at the University of Michigan Law School (Feb. 18, 2003).

two bellwether states, Idaho and Wisconsin, have not fared nearly as well, and for a simple reason: Unlike South Dakota, they have a state income tax.⁵⁶ One New York City lawyer guesses, based on his own experience, that the number of perpetual trusts created nationwide now runs into the thousands per year; his firm “alone probably does 100 or more annually.” His brother works for an Alaska trust company that has done “700 or so I would guess. South Dakota and Delaware institutions probably have more.”⁵⁷

Marketing is part of the picture; people involved in the trust business have not been shy in their efforts to attract customers. At least one Wisconsin bank tried to market perpetual trusts around the country shortly after the GST tax appeared; banks in New York, California, and elsewhere set up South Dakota branches so their clients could have perpetual trusts there. One South Dakota trust company now offers dynasty trusts fashioned to provide maximum flexibility to nonresident clients. They are welcome to have their trusts drafted elsewhere, overseen by their own out-of-state investment managers, and so on, but the trusts have their situs in South Dakota. Books and records are kept in South Dakota, trades are executed there, trust administration is provided by the local trust company. These are sufficient contacts to qualify the trusts for the benefits of South Dakota law.⁵⁸

C. Ambiguity

Superficially, at least, our account thus far might suggest that the rise of the perpetual trust and the fall of the Rule against Perpetuities are bad things. The background, after all, is disturbing. Passage of the GST tax, coupled with competition for highly mobile trust capital and trust business, has

56. One Idaho attorney informed us that, the state income tax notwithstanding, a significant number of Idaho dynasty trusts have been established by nonresidents of Idaho, adding that for some of them the trust situs was changed to South Dakota for income tax reasons. Other preferred jurisdictions are Alaska and Delaware. E-mail correspondence between Ed Ahrens and James E. Krier (Feb. 19, 2003). Additional information on Idaho trusts was provided by a telephone conversation between Steve Martin, an Idaho attorney, and James E. Krier (Feb. 18, 2003); and e-mail correspondence between Greg Byron, an Idaho attorney, and James E. Krier (Feb. 20, 2003). Impressions on Wisconsin were provided by a telephone conversation between Louis Perlson, a Wisconsin attorney, and James E. Krier (Feb. 14, 2003).

57. Letter from Jonathan G. Blattmachr to Jesse Dukeminier (July 9, 2002).

58. Telephone conversation between Pierce McDowell, President, South Dakota Trust Company, and James E. Krier (Feb. 19, 2003); see Charles D. Fox IV & Michael J. Huft, *Asset Protection and Dynasty Trusts*, 37 REAL PROP., PROB. & TR. J. 287, 337-43 (2002).

It may be possible for a dynasty trust created after 1986 in a state that does not permit perpetual trusts to be moved to a state permitting such trusts—through the exercise of a special power of appointment created in a donee. If the donee is given a power to remove the trustee or to appoint in further trust with a different trustee, the donee may move the trust to a perpetual-trust state. See 5A AUSTIN W. SCOTT, *THE LAW OF TRUSTS* § 635, at 452-53 (William Fratcher ed., 4th ed. 1989).

spurred state after state to abolish the Rule in one manner or another, and the trend shows no signs of abating.⁵⁹ Notwithstanding all this activity, it appears that it was motivated not at all by any disenchantment with the Rule's central purpose of constraining the dead hand. As we have seen, perpetual trusts were available in Idaho, South Dakota, and Wisconsin well before the GST tax, yet they were seldom drafted—perhaps because most people recognized the hubris their use entailed.⁶⁰ This absence of interest in perpetual trusts prior to the GST tax gives rise to the troubling likelihood that the Rule against Perpetuities is being abolished with little if any reflection upon the merits of the Rule *on its own*, without regard to tax considerations. The tax has thus far induced over a dozen states to switch from one legal regime to another, despite evidence that the first regime was in fact the one preferred—because if it were not, the switch could have been made in any event.

But these observations, familiar ones having to do with the substitution effects of taxation,⁶¹ might be misleading. It could well be that the Rule against Perpetuities had grown outmoded, unpopular, and unwise well before the time of the GST tax, but not so troublesome as to be worth the effort of abolition. Reformers would no doubt have confronted considerable difficulties in organizing an effective campaign to abolish such an arcane doctrine, especially because only a relative handful of wealthy people would be the chief beneficiaries, and they could avail themselves of the law in the three bellwether states in any event. Then along came the GST tax and suddenly the perpetuities issue was not only salient—always of help to reformers—but salient among a larger and more powerful interest group, wealthy clients and their lawyers, banks, and trust companies.⁶² On this account, abolition of the Rule is pure serendipity.

II. PROBLEMS AND PALLIATIVES

The wisdom of abolishing the Rule against Perpetuities in the case of perpetual trusts has to turn on the merits of the Rule's underlying policies.

59. Cf. Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1037–39 (2000). As John Langbein has nicely remarked to us, the GST tax proved to be “a natural predator” for the Rule against Perpetuities.

60. In 2002, Nevada enacted legislation permitting perpetual trusts, subject to a popular vote in November 2002 to amend the state's constitutional prohibition of perpetuities. NEV. REV. STAT. ANN. § 111.1037(7) (Michie Supp. 2001). The vote failed.

61. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 523–24 (5th ed. 1998).

62. Enactment of the GST tax worked a dramatic increase in federal estate taxes for the wealthy. The original estate tax allowed the well-advised rich to create successive life estates and thereby avoid taxes on the death of their descendants for several generations (about sixty to one hundred years, depending on the case). The GST tax, in contrast, imposes a 50 percent levy on family wealth at the end of each generation, or about every twenty-five years.

The policy analysis has to be done in context, because an argument that supports restrictions on perpetuities in general might carry little weight with respect to perpetual trusts. Let us begin with a sketch of what a typical perpetual dynasty trust might look like.

Here is an outline: O transfers \$1.1 million to a trust that will pay the income to O's daughter, A, for life, then the trust principal is divided into separate shares for each of A's children. Each child allocated a trust share is given a life estate in that share, and upon the child's death, his or her trust share is further divided per stirpes to be held in trust for that child's issue. This process of dividing and subdividing on a stirpital basis continues down through the succeeding generations until one line runs out of issue, at which time the assets will be shifted to other branches of the family. To provide flexibility to deal with changing circumstances, A is given a special (or limited) power to appoint the trust principal during life or by will,⁶³ outright or in further trust, to any one or more of a class of persons consisting of A's spouse, the descendants of O, and spouses of those descendants. This power permits A to modify or terminate the trust at any time during her life or at death by distributing the trust principal among her family. Each successive income beneficiary is given a special power of appointment over the share of the principal from which the beneficiary is receiving the income. The special power enables the beneficiaries, in succession, to modify or terminate their shares of the trust in any way that does not benefit the donees of the special powers.⁶⁴ In addition, or in the alternative, the settlor may create as a dynasty trust a discretionary trust with discretionary powers in the trustee.

A gift of \$1.1 million put into a dynasty trust for descendants can grow into many millions. If the trustee invests \$1.1 million in common stocks, which appreciate in value at the same rate stocks have appreciated over the twentieth century,⁶⁵ the original trust capital of \$1.1 million will grow to over \$200 million in one hundred years (or, adjusted for inflation, to \$10 million). In addition, there are several ways to increase the \$1.1 million initial contribution into several million. If a settlor who creates a dynasty trust directs the trustee to buy insurance on the settlor's life with the \$1.1 million gift, the trust assets will be considerably larger than \$1.1 million at the settlor's death. If the settlor is age fifty and a standard risk, for example, the trustee can purchase

63. Property subject to a special power of appointment is not subject to federal estate taxation at the death of the holder of the power, whereas property subject to a general power of appointment is. See *infra* text accompanying note 122.

64. See *infra* text accompanying notes 121–122.

65. See IBBOTSON ASSOCIATES, STOCKS, BONDS, BILLS, AND INFLATION, 1995 Yearbook 49 (noting a compound annual growth rate of 5.3 percent between 1925 and 1994); *id.* at 65 (reporting an inflation rate of 3.1 percent between 1925 and 1994).

\$7 million worth of life insurance with a \$1.1 million premium. If the settlor is sixty, the trustee can buy a policy paying \$4.4 million. If the settlor's spouse joins in with a \$1.1 million contribution to a policy payable on the death of the second to die, the policy proceeds could be worth many times these amounts on the survivor's death, depending on the spouses' ages. When the GST tax exemption rises to \$3.5 million in 2009, these figures will more than triple. The perpetual tax-exempt dynasty trust thus offers extraordinary advantages in avoiding death taxes on descendants.⁶⁶

We are now in a position to consider the policies underlying the Rule against Perpetuities—in the context of perpetual trusts. There are essentially three concerns,⁶⁷ each of which can be stated in terms of a problem arising from a persistent dead hand. The first, the problem of inalienability, is of little importance in our context because it can be avoided by any well-drafted trust. The second, which we shall call the problem of first-generation monopoly, is contentious; we shall satisfy ourselves simply with describing the competing outlooks. The third, the problem of duration, is a catch-all for a host of difficulties that can arise as an uncertain future unwinds, and it will require the bulk of our attention.

A. The Problem of Inalienability

Transferability (or "alienability") of property promotes efficiency; it allows the movement of resources from lower to higher valued uses through voluntary transactions between buyers and sellers that leave both sides of the bargain better off. So it is unsurprising that free alienability is one of the enduring principles of English, and subsequently American, property law. It was manifested early on in the Statute Quia Emptores,⁶⁸ enacted in 1290 by the English Parliament. The statute provided that a free tenant could transfer his land to another person without the consent of his lord, who previously could veto the substitution of another tenant. But there was a counter thrust by the lords, who wanted to keep their land within the family, and over the years they searched for ways of preserving their land for their descendants, opposing the principle of free alienability. At the behest of the barons,

66. See JONATHAN G. BLATTMACHR, *THE COMPLETE GUIDE TO WEALTH PRESERVATION AND ESTATE PLANNING* 238–44 (1999); James J. Costello Jr. & Anthony M. Vizzoni, *Creating Dynasty Trusts: How New Jersey's Modified Rule Against Perpetuities Generates Powerful Estate Planning Techniques*, N.J. L.J. 778 (2000); Dukeminier, *supra* note 35; Brian Layman, Comment, *Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal*, 32 AKRON L. REV. 747 (1999).

67. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS pt. 1, introductory note (1983); LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 32–60 (1955).

68. 18 Edw. 1, cc. 1–3 (1290).

Parliament enacted the statute de Donis Conditionalibus in 1285,⁶⁹ prior to the Statute Quia Emptores. This statute authorized the creation of a fee tail, an estate in land that descends to the original fee tail tenant's lineal descendants generation after generation—in reality a perpetual series of life estates. In the two hundred years after the Statute de Donis, English judges came to dislike the inability of the fee tail tenant to cut out succession by his issue and sell the entailed land in fee simple. In order to promote alienability, they approved a method by which the tenant in tail could bar the entail.⁷⁰ By bringing a collusive lawsuit known as a common recovery, the fee tail tenant in possession could obtain a court decree awarding him a fee simple absolute, cutting off all rights of his issue and extinguishing any reversion or remainder. Later, the common recovery was abolished, and a tenant in tail was permitted to convey a fee simple by a deed. (Around the time of the American Revolution, the fee tail—which had become a toothless fetter on alienability—was abolished in almost all American states.)

The lawyers for England's wealthy landed families turned next to another means to control inheritance; they began to create life estates in one generation, followed by contingent remainders in the next. Alienability was once again threatened, because contingent remainders are commonly unmarketable. The English judges responded, developing the law of future interests, and in particular a cluster of rules that destroyed the troublesome contingent remainders under certain circumstances.⁷¹ But executory interests, made possible by the Statute of Uses in 1536, avoided the constraints on contingent remainders. So once again there was the threat of an infinite series of future interests that might remove land permanently from commerce. The judges invented the Rule against Perpetuities in response. Originating in the *Duke of Norfolk's Case*,⁷² the Rule developed over a century and a half into its modern form. Early on, it permitted transferors to control inheritance of the family estate for a period equal to the lives of persons they knew and whose competence they could judge, plus any actual minorities thereafter; later, the period of actual minorities turned into twenty-one years in gross.

In the early years of the Rule against Perpetuities, future interests were usually in land, then the chief form of wealth in England, and the court's concern was with its alienability. But commerce expanded greatly in the latter half of the seventeenth century, money lending became socially respectable and government debt common, corporations grew and spread, a stock market

69. 13 Edw. 1, cc. 1–50 (1285).

70. Taltarum's Case, Y.B. 12 Edw. IV, 19 (1472).

71. Principally the doctrine of destructibility of contingent remainders, and the rule in *Shelley's Case*.

72. 22 Eng. Rep. 931 (Ch. 1681).

developed, and “the portion of the nation’s total wealth consisting of land and other tangible things gradually declined, replaced more and more by mobile pieces of paper, representations of intangible fractions of a future stream of income.”⁷³ The rich began to pass this new intangible wealth from generation to generation, finding a convenient vehicle in the trust.

In the United States today, the assets of the wealthy consist largely of personal property, not land. Transfers of personal property, and of land as well, for the benefit of succeeding generations are almost always in trust, and trustees almost always have a power to sell the trust property and invest in other assets. In almost all states permitting perpetual trusts, trustees must be given this power by the instrument if it is not granted by statute.⁷⁴ A well-drafted trust will grant the power in any event. Hence, perpetual trusts do not give rise to a problem of inalienability; the trust assets are freely marketable.⁷⁵

B. The Problem of First-Generation Monopoly

Another sort of inalienability problem arises with perpetual successive life estates. Simes alluded to the problem in his attack on the wait-and-see doctrine, when he noted that “life estates . . . are unmarketable, and may be said to be practically inalienable.”⁷⁶ His concern was not with the free marketability of the assets themselves, for he acknowledged that there is no difficulty in changing assets so long as a life estate is in trust with the trustee having a power of sale.⁷⁷ What Simes had in mind instead is what we call the problem of first-generation monopoly, meaning by “first generation” the generation of the settlor who sets up a perpetual trust. Simes wrote:

[I]t is good public policy to allow each person to dispose of his property as he pleases. The policy extends not only to the present generation but to future generations. If we are to permit the present generation to tie up all existing capital for an indefinitely long period of time, then future generations will have nothing to dispose of by will except what they have saved from their own income; and the property which each generation enjoys will already have been disposed of by ancestors long dead. The rule against perpetuities would appear to strike

73. STUART BANNER, *ANGLO-AMERICAN SECURITIES REGULATION* 24 (1998).

74. See *supra* notes 38–43.

75. For discussion of this point in the context of trusts generally, see SIMES, *supra* note 67, at 32–54. Readers should bear in mind that this Article is about the Rule against Perpetuities in the context of perpetual trusts, not about the Rule generally. In most jurisdiction the Rule in one form or another remains in force with respect to such legal future interests as contingent remainders and executory interests, and we are not suggesting that this situation should be altered.

76. Simes, *supra* note 9, at 193.

77. *Id.* at 190–91.

a balance between the unlimited disposition of property by the members of the present generation and its unlimited disposition by members of future generations.⁷⁸

This is an old and appealing sentiment. Simes himself cited Thomas Jefferson in support of it.⁷⁹ Adam Smith, one of the great founders of economics, expressed the sentiment in his attack on entails in Scotland, unaffected by England's Statute de Donis, which he considered to be "founded upon the most absurd of all suppositions, the supposition that every successive generation have not an equal right to the earth"⁸⁰

Simes, and no doubt all the other believers, thought that the force of the argument against first-generation monopoly "can scarcely be denied."⁸¹ And yet it can. Professor Thomas Gallanis notes, for example, that sentiments about the dead hand rest on dubious assumptions about what people actually want.⁸² Conceding that some future trust beneficiaries would prefer outright ownership to an equitable life estate, he argues that hardly all of them would. Consider, for example, the likely preferences of the mentally incompetent; of minor children; of bad money managers who lack the discipline to lash themselves to the mast; of people (maybe those same people!) hounded by creditors and vulnerable to bankruptcy; of people, supported by the state, who are beneficiaries of discretionary trusts, which the state cannot touch; of people contemplating divorce and interested in having their property out of reach of the other half; of people who reap nice tax advantages from trusts, including spouses who benefit from the marital deduction, and beneficiaries of tax-exempt dynasty trusts, among others. And even as to the class of those who would prefer their property outright, it isn't clear that the aggregate satisfaction of all class members, present and future combined, is increased by the Rule against Perpetuities.⁸³

Professor Gallanis also makes a normative point about sentiments regarding the dead hand. The "balance" between the wishes of present and future

78. *Id.* at 191–92. For a similar statement, see RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, at 8 (1983).

79. Simes, *supra* note 67, at 59 (noting that Jefferson, in a letter to James Madison, wrote "The earth belongs always to the living generation.") (quoting 5 PAUL LEICESTER FORD, WRITINGS OF THOMAS JEFFERSON 115 (1895)).

80. A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 157 (1987).

81. Simes, *supra* note 67, at 58.

82. Thomas P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284, 287–90 (2000); see also Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2603–08 (2003) (discussing ways in which dynasty trusts increase control by future generations).

83. Cf. Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 739–42 (1990).

property owners referred to by Simes⁸⁴ is, in the view of Gallanis, too narrow in outlook. One should consider not just the satisfaction of present and future owners, but of present and future members of society generally, the haves and the have-nots alike. Beyond that, one should consider goals other than satisfaction of preferences. A goal of equality, for example, might support placing restraints on the ability of one generation to limit the opportunities of the next; a goal of donative freedom, on the other hand, would cut in the opposite direction.⁸⁵ Stephen Munzer is similarly skeptical about the normative support for controls on the dead hand, finding it “problematic to reduce the satisfaction of a given generation in order to enhance that of future generations.”⁸⁶ Gregory Alexander considers the intergenerational-balance argument “either tautological or so vague as to be meaningless.”⁸⁷

Another approach to the first-generation monopoly problem is to think about its social and economic implications. Begin with arguments against inheritance generally, on the ground that it unjustifiably rewards the accident of a fortunate birth and deprives the unfortunate of equal opportunity.⁸⁸ Even supposing these are good arguments in general, they become problematic in the case of inheriting *income* from trusts. There is indeed a strong correlation between income and successful competition in life, but income is not limited to inheritances; it includes earnings from work and from capital (savings). Capital wealth is quite unevenly distributed in this country; the wealthiest 1 percent of households own 30 to 40 percent of all assets.⁸⁹ Income, on the other hand, is far more evenly distributed. Over the last century there has been an extraordinary rise in earned income; of the total income in the United States, income from capital (including inherited wealth) declined from 55 percent in the 1920s, to 35 percent in the 1950s–1960s, to 15 percent in the 1990s.⁹⁰ Hardworking entrepreneurs have steadily replaced coupon clippers. Thus earnings provide a far greater share of the

84. See *supra* text accompanying note 78.

85. Gallanis, *supra* note 82, at 289–90.

86. STEPHEN R. MUNZER, A THEORY OF PROPERTY 220 (1990).

87. Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1257 (1985); see also John H. Langbein, *Mandatory Rules in the Law of Trusts*, at 11 n.25 (2003) (unpublished manuscript on file with the authors), stating that the notion of striking a fair balance between the wishes of present and future generations “is a slogan, explaining nothing.”

88. See BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 160 (1999).

89. KEVIN PHILLIPS, WEALTH AND DEMOCRACY 122–23 (2002).

90. THOMAS PIKETTY & EMMANUEL SAEZ, INCOME INEQUALITY IN THE UNITED STATES, 1913–1998, at 14 (Nat’l Bureau of Econ. Research, Working Paper No. 8467, 2001). The authors do not separate income from capital into income from inherited capital and income from earned capital, so we cannot tell whether the income comes from an old or a new fortune, but it is clear that the share of income from inherited capital, compared to income from other sources, decreased dramatically in the twentieth century.

income necessary to offer equality of opportunity to children than does inherited wealth.

Equality of opportunity in this country also owes a great debt to one of the most farsighted contributions to education established in the nineteenth century: land-grant state universities with low tuition and scholarships, open to almost all on the basis of merit. In the late twentieth century, elite universities began need-blind admissions, admitting students on the basis of merit alone. Educational opportunities open to children without regard to the earnings of their parents increase equality of opportunity.

Finally, equality of opportunity is not provided by income alone. As Professors Blum and Kalven pointed out years ago, the gravest source of inequality of opportunity is inequality of human capital, the knowledge and education embodied in individuals.⁹¹ Human capital is created by family cultural influence on children, as well as by education. The knowledge and education of parents and more remote ancestors are passed along from generation to generation. Judge Posner puts the point in another way: "The inheritance of a large amount of money may seem to confer an unfair advantage, but why more unfair than inheriting brains and energy?"⁹²

Equal opportunity aside, there is an argument that trusts concentrate economic power in the rich or, more accurately, in the trustees for the rich. In the case of trusts, the trustees, not the beneficiaries, have the power of investment. They decide where the trust capital is to be invested, and are required to act prudently—for example, by diversifying trust holdings. Trustees tend to be conservative investors, perhaps in part because the conventional legal constraints have not allowed them to put money behind risky new enterprises. As we shall see, however, this situation is changing.⁹³ In any event, the wealth invested by trustees is only a small fraction of the total amount of risk capital made available by other investors. There is no evidence that private trusts restricted to cautious investments harm the economy or give trustees undue economic power.

Consider finally the argument that the certainty of receiving trust income makes beneficiaries lazy and unproductive. Alexander Hamilton is reported to have said that "we do not want a large leisure class in this country;

91. Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 504 (1952). Cf. WILL & ARIEL DURANT, *THE LESSONS OF HISTORY* 55 (1968) ("The concentration of wealth is a natural result of this concentration of ability, and regularly recurs in history. The rate of concentration varies (other factors being equal) with the economic freedom permitted by morals and the laws. . . . [D]emocracy, allowing the most liberty, accelerates it.").

92. POSNER, *supra* note 61, at 553.

93. See *infra* text accompanying notes 132–137.

we want to give people an incentive to work.”⁹⁴ This nicely encapsulates the thinking of Franklin, Jefferson, and Adams as well. When the Republic was established, England had a “leisure class,” composed of nobles and country gentlemen who lived off their land rents and inheritances and refrained from something as low as work. They looked down on commercial occupations as beneath them. “The eldest son inherited the land, the second son went into the military, another went into law, and the youngest son went into the church”—or so went the saying. To go into trade was not condoned. But this country has never had a leisure class like England’s. We have no sense of inherited hierarchy. Our work ethic, deeply imbedded from the times of the Puritans, has spared us a class of great drones.

We do not know exactly what percentage of the great fortunes was created by work and what percentage by inheritance. Various studies have produced different estimates and ongoing controversy among economists.⁹⁵ Of the four hundred richest persons in the United States, *Forbes Magazine* estimates that two-thirds are self-made and one-third inherited some or all of their wealth.⁹⁶ Many inheritors of small fortunes have parlayed them into large ones, which makes estimating even harder. Clearly many inheritors enjoy working and making more money.⁹⁷ They are not, by and large, unproductive.

In this country, the work ethic is paired with another ethic: The rich should share their wealth with the less fortunate.⁹⁸ From the time when great fortunes were accumulated at the end of the nineteenth century to the

94. *Jim Lehrer News Hour* (PBS television broadcast, June 14, 2002) (quote attributed to Alexander Hamilton by David Brooks, senior editor of *The Weekly Standard*).

95. See Paul L. Menchik & Nancy A. Jianakoplos, *Economics of Inheritance*, in *INHERITANCE AND WEALTH IN AMERICA* 45, 51 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998); see also STANLEY LEBERGOTT, *THE AMERICAN ECONOMY: INCOME, WEALTH, AND WANT* 161–75 (1976) (concluding that 75 percent to 85 percent of the rich throughout American history were self-made); JAMES P. SMITH, *UNEQUAL WEALTH AND INCENTIVES TO SAVE* 16 (1995) (indicating in a statistical survey that for those in the top 5 percent of the richest, inheritances make up only 7.5 percent of their wealth).

96. *FORBES*, Oct. 8, 2001, at 236, 251.

97. Because of this, Professors Hirsch and Wang argue that the dead-hand rationale truly had merit only prior to the industrial age, when a fixed stock of land represented the main source of wealth . . . [I]n modern times, when each generation can produce its own wealth, the loss of opportunity to bequeath *prior* wealth does not clearly crowd later comers to their overall detriment . . . [A] legal regime permitting *unlimited* future interests gives each generation the opportunity to bequeath new wealth only, but with the longest duration of control; and each generation will also have the maximum incentive to produce new bequeathable wealth.

Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 *IND. L.J.* 1, 17–18 (1992). Hirsch and Wang conclude that in a dynamic wealth-producing society the generational equity argument has no merit. *Id.* at 16.

98. See FRANCIE OSTROWER, *WHY THE WEALTHY GIVE* 132–34 (1995) (concluding that philanthropy gives an elite social status and legitimates the wealth).

present, the American rich, to justify their moral instinct, have given great sums to philanthropic enterprises. John D. Rockefeller built the University of Chicago and Rockefeller University in Manhattan; Andrew Carnegie built libraries across the country; Henry Clay Frick, Andrew Mellon, and others founded great art museums; Henry Ford created the Ford Foundation, which has spent hundreds of millions attacking the systemic causes of poverty. This tradition of giving, reflecting conceptions about how society should be organized and what benefits the public, continues to this day. The newest billionaires, Bill and Melinda Gates, have established a foundation with assets exceeding \$23 billion, the largest philanthropic foundation in the country, for the purpose of supporting initiatives in health and learning in the global community.⁹⁹ The lesser rich too give considerable sums to charity, unlike the rich in Britain.¹⁰⁰ This charitable support has given us in the United States universities and hospitals and cultural institutions that are the envy of the world.¹⁰¹ The diversity of privately supported philanthropic enterprises is enormous, far greater than in Western European countries where the charitable agenda is largely set and supported by the government.

But perhaps this final argument has been pushed off center. Perhaps the objection is to the creation of family dynasties, which receive trust income

99. BILL AND MELINDA GATES FOUNDATION, *Bringing Innovations in Health and Learning to the Global Community*, at <http://www.gatesfoundation.org/AboutUs/>.

100. Comparing the endowments of American and British universities is eye opening. "Harvard has an endowment revealed last year of \$18.3 [billion]—more than double the endowment of all UK universities. The top 20 U.S. universities all have an endowment of more than \$1 [billion]. Oxbridge [Oxford, Cambridge, University College London, and Imperial College]—universities and colleges together—has an estimated . . . 4 billion pounds [\$5.8 billion] between them." Will Woodward, *Universities in Crisis*, GUARDIAN (London), May 22, 2002, at 8; see also John Elliott & Rosie Waterhouse, *Why Oxford Is Going Begging*, SUNDAY TIMES (London), Mar. 31, 2002, at 1 (reporting that the endowment of the Oxford colleges totals \$1.8 to \$2.2 billion).

Another article in the London *Sunday Times* reported that more than half of Dartmouth graduates give something to the college, whereas the most successful Oxbridge college had alumni contributions of not above 12 percent. Paul Durman, *Bosses Should Go into the Business of Philanthropy*, SUNDAY TIMES (London), Aug. 19, 2001, at 6. Durnam reports that "[i]n America, the very rich are much more generous" in charitable giving, and quotes one new British philanthropist as saying, "The English can be a bit mean [about gifts to charity]. They would rather be lords of the manor or buy a football club." *Id.*

These newspaper articles all conclude that the British universities are falling behind American universities quite rapidly, both in hiring the best teachers and in attracting the best students. Ironically, Americans may come to the rescue. The Bill and Melinda Gates Foundation gave \$210 million in 2000 to Cambridge University to endow a scholarship program.

101. The immense amount of money contributed to scientific research in this country has resulted in a raft of Nobel awards. In the 50 year period between 1950 and 2000, Americans have won or shared the Nobel prize 73 times in physiology or medicine, 63 times in physics, and 40 times in chemistry. In the 33 year period between 1969 and 2000, the Nobel prize in economics has been won or shared by an American 30 times. THE WORLD ALMANAC AND BOOK OF FACTS 2002, 692–94 (William A. McGeveran, Jr., ed., 2002).

generation after generation. The answer is this: The Rule against Perpetuities has not prevented the creation of family dynasties. Witness the Rockefellers (now in their fifth generation), the Du Ponts of high dynastic numbering (whose fortune dates from the War of 1812), and the Mellons (with a fortune predating the Civil War). These are extreme cases, but the fact is that smaller fortunes have supported many other families over several generations. Dozens of the lesser rich families have entrenched themselves from generation to generation in communities across the United States. The same is true in England, where the Rule against Perpetuities has not prevented the great families from maintaining their power and wealth for centuries. If family dynasties are to be prevented, only the federal government, through income and death taxes, can do it. As Susan French has noted, the power of the dead hand is always at the sufferance of the living, who are perfectly free to change the laws that created the power in the first place.¹⁰²

C. The Problem of Duration

The longer trusts endure, the more troublesome they become, thanks largely to uncertainty. The problem is not peculiar to perpetual trusts; it arises in the case of long-term trusts generally, including trusts in full compliance with the Rule against Perpetuities. Because the Rule tolerates contingencies that might persist as long as a hundred years or so, there has always been a need for other means to deal with unforeseen exigencies, and courts and lawyers developed them. The means remain available, even where the Rule has been abolished. The issue is their effectiveness in coping with the most significant difficulties.

1. Change in Circumstances

No one can foresee the future. After some years pass, events never anticipated by trust settlors and their lawyers are likely to occur—for example, changes in the number, needs, and abilities of beneficiaries; changes in tax law and trust doctrine; changes in investment opportunities, in the rate of inflation and the value of the dollar; changes in trustees and the quality of their performance. The welfare of beneficiaries might be reduced in consequence, or economic waste might result. The Rule against Perpetuities mitigates the difficulty by finally terminating trusts and forcing distribution of assets.¹⁰³

102. See Susan F. French, *Perpetuities: Three Essays in Honor of My Father*, 65 WASH. L. REV. 323, 350–52 (1990).

103. See, e.g., RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, at 9 (1983) (noting that the Rule against Perpetuities responds to problem of circumstances unforeseen by the

Absent the Rule, termination or modification after a change in circumstances must be dealt with in other ways.

One option, termination or modification by a court, is only grudgingly available to beneficiaries, at least according to the majority rule set down in *Claflin v. Claflin*.¹⁰⁴ The *Claflin* doctrine holds that a trust may not be terminated by a court prior to the time fixed for termination, even though all the beneficiaries consent, if ending the trust prematurely would be contrary to a material purpose of the settlor. A material purpose is generally found in the case of a spendthrift trust, a discretionary or support trust, or a trust postponing distribution of principal until beneficiaries reach a given age.

Judicial modification of the dispositive provisions of a trust is also difficult to obtain. For example, the Restatement (Second) of Trusts provides that:

The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust.¹⁰⁵

A Comment to this provision states that a court should not "permit or direct the trustee to deviate from the terms of the trust merely because such deviation would be more advantageous to the beneficiaries than a compliance with such direction."¹⁰⁶

The Restatement (Second) reflects an outmoded view of the world, based on a sentiment that Adam Smith called "piety to the dead."¹⁰⁷ The Restatement provision assumes that a settlor would not want a deviation if its only purpose were to make trust beneficiaries better off, notwithstanding that most trusts are set up for just that reason—to provide advantages for beneficiaries by way of tax savings, competent management, protection from creditors, and so forth. The trust provisions, created at a given time, presumably aim to advantage the beneficiaries under the circumstances as they existed at that time. No one can see how circumstances will change, but we can reasonably suppose that, whatever happens, settlors would rather hold to the beneficial purposes of their trust than to precise terms that have come

settlor); POSNER, *supra* note 61, at 560 (explaining that the Rule helps avoid inefficient use of resources brought about by unforeseen contingencies); Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 736 (1986) (arguing that the Rule effectively limits problems of multiple owners).

104. 20 N.E. 545 (Mass. 1889).

105. RESTATEMENT (SECOND) OF TRUSTS § 167(1) (1959).

106. *Id.* cmt. b.

107. ADAM SMITH, LECTURES ON JURISPRUDENCE 64 (R.L. Meek et al. eds., 1978).

to be inconsistent with those purposes, given subsequent events. Trust law needs modernizing in this respect, and the decline of the Rule against Perpetuities makes the need more acute. We have to discard the nineteenth-century idea, developed largely in ancestor-worshiping Massachusetts ("where the Lowells talk to the Cabots, and the Cabots talk only to God"), that trusts are written in stone by an omniscient settlor.

The situation in England is quite different.¹⁰⁸ At the behest of trust beneficiaries who urgently sought to modify trusts to escape serious tax disadvantages resulting from changes in the tax laws, Parliament enacted the Variation of Trusts Act of 1958,¹⁰⁹ which greatly expanded the power of courts to modify or terminate trusts. The act provides that a court may consent to modification or termination of a trust on behalf of incompetent, minor, or unborn beneficiaries whenever the court finds it to the beneficiaries' advantage. The function of the court is to protect those who cannot protect themselves, considering educational and social benefits, and reduction in family dissension, as well as financial benefits.¹¹⁰ The settlor's intent is a relevant but not controlling consideration.¹¹¹

Recently, the American Law Institute and the Commissioners on Uniform State Laws have taken steps to relax the *Claflin* doctrine. Both the Restatement (Third) of Trusts¹¹² and the Uniform Trust Code¹¹³ adhere to the doctrine's requirement that modification or termination be not inconsistent with a material purpose of the trust, but, as the oft-used adage goes, they pour new wine in old bottles.¹¹⁴ In order to be material, the

108. In *Saunders v. Vautier*, 49 Eng. Rep. 282 (Ch. 1841), the English court held that a trust can be terminated at any time if all the beneficiaries are adult and sui juris and consent. Unfortunately the English courts took a far more restrictive view of judicial power to modify trusts. In *Chapman v. Chapman*, A.C. 429 (H.L. 1954), the House of Lords held that courts could modify trusts only in extremely limited circumstances. *Chapman* was overruled by the English Variation of Trusts Act of 1958.

109. Variation of Trusts Act, 1958, 6 & 7 c. 53, § 1; see GRAHAM MOFFATT, TRUSTS LAW: TEXTS AND MATERIALS 262–73 (3d ed. 1999).

110. In a memorable opinion, refusing to modify a trust for tax advantages that would result from moving the minor beneficiaries to the Isle of Jersey, Lord Denning said: "There are many things in life more worth-while than money. One of these things is to be brought up in this our England, which is still 'the envy of less happier lands'. I do not believe it is for the benefit of children to be uprooted from England and transported to another country simply to avoid tax." *Re Weston's Settlements*, 3 All E.R. 338, 342 (C.A. 1968).

111. See *Re Remnant's Settlement Trusts*, 2 All E.R. 554, 559 (Ch. 1970).

112. RESTATEMENT (THIRD) OF TRUSTS § 65 (Tentative Draft No. 3, 2001).

113. UNIFORM TRUST CODE § 411(b) (2000) (amended 2001).

114. See generally Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP., PROB. & TR. J. 697 (2001); Julia C. Walker, Note, *Get Your Dead Hands Off Me: Beneficiaries' Right to Terminate or Modify a Trust Under the Uniform Trust Code*, 67 MO. L. REV. 443 (2002).

purpose must be of some substantial significance. The Restatement (Third) says:

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.¹¹⁵

Both the Code and the Restatement (Third) provide that a spendthrift clause prohibiting alienation of the beneficiaries' interests is not presumed to constitute a material purpose of the trust.¹¹⁶ Moreover, both apply the "equitable deviation doctrine" to dispositive trust provisions, empowering trustees to deviate from the administrative and investment provisions of a trust because of circumstances not anticipated by the settlor.¹¹⁷ The Code buttresses its positions by stating that "[a] trust and its terms must be for the benefit of its beneficiaries."¹¹⁸

Another limitation on the judicial power of modification needs to be noted. Following some pioneering Massachusetts cases allowing trust modification after the settlor's death to achieve the *settlor's* tax objectives,¹¹⁹ Uniform Trust Code section 416 permits judicial modification of defectively drafted trusts. Section 416 does not appear to authorize modification to meet the tax objectives of the beneficiaries which arise after the settlor's death. And no cases yet permit this.

If the Code or the Restatement (Third) is adopted, courts will have a much greater latitude in modifying trusts than they have now under the *Clafin* doctrine. Even then, however, modification or termination by a court will be

115. RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d, cited approvingly in UNIFORM TRUST CODE, § 411 cmt.

116. UNIFORM TRUST CODE § 411(c); RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. e.

117. RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. b: "Upon a showing of changed circumstances, or a petitioner's credible presentation that relevant circumstances were unknown to the settlor, the burden of persuasion shifts to the person(s) seeking to show that the circumstances were anticipated by the settlor during the formulation and execution of the trust." See also UNIFORM TRUST CODE § 412.

118. UNIFORM TRUST CODE § 404. We leave it to the reader to decide whether this provision is consistent with the relaxed *Clafin* doctrine adopted by the Uniform Trust Code. See also RESTATEMENT (THIRD) OF TRUSTS § 27 (Tentative Draft No. 2, 1999).

119. *Walker v. Walker*, 744 N.E.2d 60, 65 (2001) (citing earlier cases). Uniform Trust Code section 416 is copied from The Restatement (Third) of Property: Donative Transfers section 12.2 (2003).

more limited than in England, where it is not necessary to show a change in circumstances, as it is in this country. All that is required in England is that the modification or termination be deemed beneficial to the beneficiaries.

The modification and termination provisions of the Uniform Trust Code and the Restatement (Third) seem likely to prove satisfactory for most trusts governed by the common law Rule against Perpetuities. The restrictions on modification and termination, derived from the *Claflin* doctrine, will end, at the latest, after lives-in-being plus twenty-one years. With a perpetual trust, however, the restrictions will go on forever. Even though perpetual trusts were one of the most significant trust developments of the late twentieth century, they are not mentioned in the Uniform Trust Code. It should be amended to apply different modification and termination rules to perpetual trusts.¹²⁰

Judicial modification or termination of a trust can be costly. A lawsuit is required; legal fees, perhaps including legal fees for guardians ad litem representing minor, disabled, and unascertained beneficiaries, must be paid. Inasmuch as it will often be doubtful whether a court will be moved to terminate or modify a trust, beneficiaries may be reluctant to incur liability for legal fees in a risky lawsuit. In forcing a fixed termination point for trusts, the Rule against Perpetuities has played a useful role—one it would be good to replicate through legislation creating means that would allow beneficiaries to modify or terminate trusts without court intervention.

Skilled estate planners can get around some of the limitations of judicial modification and termination of trusts through the creation of powers of appointment—general or special—in trust beneficiaries. A general power of appointment enables a donee of the power to modify or terminate a trust in favor of the donee, the donee's creditors, the donee's estate, or the creditors of the donee's estate. A general power is treated under the Internal Revenue Code as ownership of the appointive property, meaning that the trust principal is included in the donee's taxable gross estate. For this reason, general powers of appointment are created almost exclusively in spouses of the donor, together with a life estate, to qualify the gift for the marital deduction.¹²¹ The appointive property is not included in the decedent spouse's estate but is included in the surviving spouse's estate when she dies because she holds a general power over it.

120. THE RESTATEMENT (THIRD) OF TRUSTS ch. 13, introductory note, dodges the issue: "It is worth noting, however, that this section [on modification and termination of trusts] applies in the common-law context and that different issues—and different planning and drafting considerations—may arise with respect to trusts of indefinite duration in jurisdictions that have adopted legislation to abolish the rule against perpetuities."

121. I.R.C. § 2041(b) (1994). A marital deduction is also allowed for a qualified terminable interest property trust, which is a trust giving the surviving spouse a life estate only. *Id.* § 2056(b)(7).

A special power of appointment (sometimes called a limited or nongeneral power) is a power to appoint to a class of persons that does not include the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate. Special powers most often permit appointment to the donor's descendants and the descendants' spouses. In contrast to a general power, special powers are not treated as ownership under the Internal Revenue Code,¹²² so they bring flexibility to a trust at no tax cost. They permit the holders of the power to terminate an interest, or to modify trust terms, including terms designating beneficiaries, as may be desirable. Many changes in circumstances—unexpected deaths, marriages, divorces, remarriages, children with special needs, children with disabilities, changes in the tax laws—can be dealt with by special powers of appointment. The skilled estate planner may give the life tenant a special power of appointment or, if the life tenant is unsuitable because incompetent or because of adverse personal relations with remaindermen (stepparents, for example), create a special power of appointment in a remainderman.

Of course, many trusts are not drafted by expert estate planners. With respect to these, the beneficiaries are stuck with meeting the requirements of the *Claflin* doctrine in order to modify or terminate the trust. Even powers that are created by experts are often too narrowly drawn. Sometimes, for example, they can be exercised only by will, which means the trust cannot be modified or terminated until the donee of the power dies.

Although powers of appointment bring flexibility, as time goes on successive powers cannot be exercised in a trust without adverse estate tax consequences under Internal Revenue Code section 2041(a)(3).¹²³ Under the orthodox Rule against Perpetuities, exercises of special powers are read back into the original trust instrument creating the trust. The donee of the power is viewed as the agent of the donor. Any interest created by an exercise of a special power must vest or fail within lives-in-being at the creation of the trust, plus twenty-one years, or the interest is invalid. At one time, Delaware had a statute providing that the exercise of a special power began a new perpetuities period, and all interests had to vest or fail within lives-in-being at the time of exercise of the power, not at the creation of the power, plus twenty-one years.¹²⁴ Thus it was possible in Delaware to create a perpetual trust through the creation of successive special powers of appointment.

122. Treas. Reg. § 20.2041-1(c)(1) (1958).

123. I.R.C. § 2041(a)(3) (1994).

124. Delaware repealed this statute in 2000. DEL. CODE ANN. tit. 25, § 504 (Michie Supp. 2000), provides that any interest created by a special power of appointment shall be deemed to have been created at the time of the creation rather than of its exercise.

Congress responded by enacting section 2041(a)(3) of the Internal Revenue Code. The section provides that the donee's gross taxable estate shall include the value of the appointive assets if the donee exercises a special power "by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, *for a period ascertainable without regard to the date of the creation of the first power.*"¹²⁵ This statute means that if O creates a special power of appointment in her daughter, A, in, say, 2000, and if in 2025 A exercises a special power of appointment by creating in her son, B, another special power of appointment, and the perpetuities period that governs B's exercise of the power is not calculated from the date the trust is created (2000), the trust assets are taxable in A's federal gross estate. This section of the Code, applicable in all states, is called the Delaware Tax Trap because it was enacted to close the loophole in Delaware that permitted trusts to avoid the estate tax forever through the use of successive powers of appointment.

In a jurisdiction that has repealed the common law Rule against Perpetuities and substituted a rule against suspension of the power of alienation, with a proviso that the power of alienation is not suspended if the trustee has a power of sale, it is impossible for section 2041(a)(3) to apply. The power of alienation is not suspended at all, and therefore an exercise of a power does not suspend the power of alienation for a period of time that cannot be ascertained by referring back to the creation of the trust.¹²⁶ Thus successive special powers of appointment can be created indefinitely in these states, without the trust property being included in the donee's taxable gross estate.¹²⁷

On the other hand, in a jurisdiction that has abolished the Rule against Perpetuities, or made it inapplicable to perpetual trusts, and has not adopted a rule against suspension of the power of alienation, there is no perpetuities period beginning at the creation of the trust within which the appointed interests must vest. If a statute permitting a perpetual trust does not require that the beneficial interests created by the exercise of a special power must vest within a period beginning with the trust's creation, the value of the trust principal is included in the donee's taxable gross estate.¹²⁸ Therefore, in the preceding

125. I.R.C. § 2041(a)(3) (1994) (emphasis added).

126. Estate of Murphy v. Commissioner, 71 T.C. 671, 674 (1979).

127. This is true in Alaska, Idaho, New Jersey, South Dakota, and Wisconsin, which have only a rule against suspension of the power of alienation and a proviso that the power of alienation is not suspended if the trustee has a power of sale. See *supra* notes 37–40.

128. This appears to be true in Arizona, Delaware, Illinois, Maine, Maryland, Missouri, Nebraska, Ohio, Rhode Island, and Virginia. See *supra* notes 41–45.

example, an exercise of a special power by A creating another special power in B requires the inclusion of the trust property in A's federal gross estate.

Another way of avoiding Internal Revenue Code section 2041(a)(3) is to provide that a special power must be exercised within a very long period of years beginning at the creation of the trust. Alaska, Florida, Washington, and Wyoming have done this, and apparently avoided section 2041(a)(3) for the time specified in the local statute.¹²⁹

Except in Alaska, Florida, Idaho, New Jersey, South Dakota, Washington, Wisconsin, and Wyoming, the usefulness of special powers in bringing flexibility to a trust is basically limited to lives-in-being at the creation of the trust plus twenty-one years. After this period expires, the heavy tax cost on the creation of special powers eliminates their usefulness. After that time, the beneficiaries must rely on the power of a court to modify or terminate the trust, on discretionary powers given the trustee, or on powers in the beneficiaries to remove and replace a trustee.

Another way to create flexibility in a trust is by giving a trustee discretionary powers: for example, to distribute income and principal among the beneficiaries as the trustee sees fit, to make alterations to accommodate changes in the tax laws, or to terminate the trust.

A power of appointment in a trust beneficiary is not subject to fiduciary obligations and may be exercised arbitrarily within the scope of the power. A discretionary power in a trustee, however, is a fiduciary power subject to judicial control to prevent abuse of discretion. The permissible income beneficiaries and the presumptive remaindermen have standing to bring an action against the trustee for abuse of discretion. Even a trust instrument granting the trustee "sole" or "absolute and uncontrolled" discretion may not protect the trustee from a lawsuit by a disgruntled beneficiary. As Judge Learned Hand remarked:

[N]o language, however strong, will entirely remove any power held in trust from the reach of a court of equity. After allowance has been made for every possible factor which could rationally enter into the trustee's decision, if it appears that he has utterly disregarded the interests of the beneficiary, the Court will intervene. Indeed were that not true, the

129. ALASKA STAT. § 34.27.051(a) (Lexis 2002) (stating that interests created by exercising a special power must vest within one thousand years from creation of the trust); FLA. STAT. ANN. § 689.225(2)(f) (West Supp. 2003) (vesting within 360 years from trust creation); WASH. REV. CODE ANN. § 11.98.130 (West Supp. 2003) (vesting within 150 years from trust creation); WYO. H.B. 77 (2003) (vesting within one thousand years from trust creation). The Alaska statute was purposely designed to circumvent Internal Revenue Code section 2041(a)(3) (1994). See Stephen E. Geer, *The Alaska Dynasty Trust*, 18 ALASKA L. REV. 253, 281-82 (2001).

power would not be held in trust at all; the language would be no more than a precatory admonition.¹³⁰

Because there is personal liability for breach of fiduciary obligation, a trustee may be reluctant to modify a trust in ways that favor the income beneficiaries on the one hand, or the remaindermen on the other, unless all beneficiaries agree to the change. In most cases, however, the remaindermen will be unascertained, making such an agreement impossible. But the living beneficiaries can put pressure on the trustee to modify the trust if they are given a power to remove the trustee. If a beneficiary of a discretionary trust can be appointed trustee by the beneficiaries, the beneficiaries have a general power of appointment, with resultant adverse tax consequences, because the trustee selected by the beneficiaries can distribute the trust property to the beneficiaries. If, however, a beneficiary cannot be named trustee, the beneficiaries may be given the power to appoint a successor trustee, without adverse tax consequences, provided that the successor trustee is not related or subordinate to the beneficiaries.¹³¹

A trustee may be reluctant to exercise a power to terminate a trust, unless the trust has become impractical or uneconomical to administer, because termination deprives the trustee of his fees. Similarly, a trustee might be reluctant to make distributions of principal which will reduce the base upon which fees are figured. A power in the beneficiaries to remove and replace a trustee, given them by the trust instrument, may make the trustee more amenable and lessen the inefficiencies.

2. Trustees

Any number of problems can arise with trustees, and the longer a trust lasts, the greater the burden of these. Consider trust investments. There is an old saw in the banking business: "How do you make a small fortune? Give a bank a large one to manage in trust." Trustees have long been risk averse, conservative investors, reducing the return to the beneficiaries, particularly in an inflationary economy such as we have experienced over the twentieth century.¹³²

130. *Stix v. Commissioner*, 152 F.2d 562, 563 (2d Cir. 1945); see also RESTATEMENT (SECOND) OF TRUSTS § 50 (1959), for extensive discussion of discretionary powers.

131. REV. RUL. 95-58, 1995-2 C.B. 2.

132. As one commentator has observed:

It's simple mathematics: If you invested \$1 in 1952 and your investment kept pace with the rate of inflation—nothing more, nothing less—that dollar would be worth \$5.29 today. That's a 429% increase.

So how come the \$2-million trust fund a Berkeley woman and six members of her family inherited in 1952 is worth "only" \$3.2 million today—a 63% rate of return over the last four decades.

Lewis Beale, *An Heir-Raising Enterprise*, L.A. TIMES, Nov. 18, 1992, at E1.

In the nineteenth and early twentieth centuries, most states maintained statutory lists of investments suitable for trustees. These usually included government bonds, first mortgages, and preferred stocks. Investment in common stock was severely restricted. Courts also required trustees to look first at the safety of investments. Preservation of the principal was the primary object. Speculation was strictly forbidden. The "prudent man" investor rule, first formulated by the Massachusetts court in *Harvard College v. Amory*,¹³³ purported to liberalize the rules for trustee investment. The rule dispensed with legal lists but prohibited investments "for the purpose of speculation" and continued to emphasize the safety of capital. From the 1930s through the 1960s, a majority of states replaced legal list statutes with the prudent man rule. Nonetheless, trustees continued to be conservative investors. Settlers could authorize the trustee to use discretion in investing, but permissive investment powers were construed narrowly by courts, which held the settlor could not have meant to authorize speculative investments. Because courts judged investments with 20-20 hindsight, it was easy for them to decide any investment was speculative.

In the late twentieth century, the prudent man investor rule came under severe criticism.¹³⁴ As a result, a new "prudent investor" rule was formulated and incorporated first in the Restatement (Third) of Trusts¹³⁵ and later in the Prudent Investor Act.¹³⁶ The prudent investor rule is based on modern portfolio theory. It increases the freedom of trustees to choose investments based on the traditional duties of care, skill, and caution. They can put together a balanced portfolio of diversified investments, which may include investments with more risks than would be permitted under the prudent man rule because the whole portfolio is evaluated, not each specific investment. The word "speculation" does not appear in the new rule. Commentators are hopeful that this liberalization of permitted trustee investments will increase the total return from the trust principal.¹³⁷ The prudent investor rule has been adopted by about three-fourths of the states, and many of the rest have provisions patterned on the uniform rule or on the Restatement (Third). This should

133. 26 Mass. (9 Pick.) 446, 461 (1830).

134. See John H. Langbein & Richard A. Posner, *Market Funds and Trust Investment Law*, 1976 AM. B. FOUND. RES. J. 1, 3-6 (1976); Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52 (1987); RESTATEMENT (THIRD) OF TRUSTS, Topic 5, Investment of Trust Funds.

135. RESTATEMENT (THIRD) OF TRUSTS § 227.

136. UNIFORM PRUDENT INVESTOR ACT § 2 (2000).

137. For an excellent summary of trust investment rules and an empirical study encouraging hope for increased trustee returns, see generally Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act—An Empirical Study of Trust Investment Practices*, 51 ME. L. REV. 27 (1999).

help considerably in dealing with the problem of unduly cautious investments by trustees.

Trustees' fees are another problem. Trustees are paid for managing the trust principal. Corporate trustees usually use graduated fee schedules, charging around 1 percent on the first \$1 million of principal, with declining percentages for additional millions. Some trustees charge a percentage of the value of income earned as well, some charge a minimum annual fee, and some add on a charge for distribution of principal during the term of a trust and upon its termination.¹³⁸ Beyond this, trustees usually have legal counsel to advise them on problems arising during the term of the trust, resulting in further fees. These charges combined can significantly reduce the overall return on trust investments, and perhaps with no offsetting gains. Trust beneficiaries may be able to procure equally good management of assets, and at a much lower cost, by investing in index funds. They have this option when a trust terminates and the principal is distributed—but perpetual trusts don't usually terminate (absent judicial or statutory relief or exercise of a power of appointment).¹³⁹

Accounting fees are yet another cost, which can be increased by legal fees in connection with an accounting, including fees of guardians ad litem for incapacitated or unascertained beneficiaries. Accounting requirements vary from state to state.¹⁴⁰ In some jurisdictions, trustees of testamentary trusts must account annually to the court, with attendant legal fees. In others, trustees may ask for court approval every four or five years. Trustees like to have their accounts approved after a short period of time. A trustee unknowingly engaging in a trust violation wants to limit its liability by means of a timely judicial determination. Trustees of inter vivos trusts may be permitted to account annually to the beneficiaries, particularly if the trust instrument so provides, avoiding costly court accountings. Whenever a new trustee replaces an old trustee, an accounting is necessary to terminate the liabilities of the old trustee.

Beneficiaries dissatisfied with a trustee because of the fees charged or for some other reason have rather limited remedies. The standard rule is that a trustee, in whom the settlor supposedly reposed special confidence, cannot be removed unless guilty of a breach of trust or shown to be otherwise unfit;

138. CHARLES E. ROUNDS, JR., *LORING: A TRUSTEE'S HANDBOOK* § 8.4 (2003).

139. Statutes in a number of states provide for the termination of trusts when the value of the trust principal becomes so small that it is uneconomic to continue the trust. See, e.g., *UNIFORM TRUST CODE* § 414 (2000) (amended 2001).

140. For comprehensive lists of state statutes regulating the duty of the trustee to account, see AMY MORRIS HESS, *GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES* §§ 965–968 (2000).

mere dissatisfaction on the part of beneficiaries is not enough.¹⁴¹ This lessens competition among trust companies and presumably contributes to higher fees.

When settlors choose a trustee, they cannot know the course of future events. This might well lead them to choose a corporate trustee instead of a trusted friend, if for no other reason than that friends eventually die. But then, so too do corporate trustees, in a sense. Their employees pass on, or away; the corporate trustee itself may merge with another company; entire inventories of trust accounts are routinely bought and sold by banks. Beneficiaries, especially beneficiaries of long-term and perpetual trusts, may end up with a trustee of a sort the settlor would never have wished to choose—such as a bank the beneficiaries find to be distant, cold, and unresponsive to their needs.

The Uniform Trust Code broadens the grounds for removing a trustee. It provides that a court may remove a trustee if, “because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries.”¹⁴² The term “‘unwillingness’ includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries”; “[a] ‘persistent failure to administer the trust effectively’ might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts.”¹⁴³ The Uniform Trust Code further provides that if there has been a substantial change of circumstances or all the beneficiaries ask for removal, a court may remove a trustee if that best serves “the interests of the beneficiaries” and is not inconsistent with a material purpose of the trust. The term “interests of the beneficiaries” means the beneficial interests as provided by the terms of the trust, not as defined by the beneficiaries.¹⁴⁴ Restatement (Third) of Trusts adopts similar grounds for removal of a trustee.¹⁴⁵

Even under this more relaxed approach, however, a lawsuit is required to remove a trustee. This might well dissuade action by beneficiaries reluctant to incur the heavy legal fees that could result, especially when under either the strict standards of the common law or the more relaxed standards of the Uniform Trust Code and the Restatement, it is doubtful that the beneficiaries would prevail. A nice remedy to this problem is a trust provision that gives the

141. RESTATEMENT (SECOND) OF TRUSTS § 107 (1959); 2 SCOTT, *supra* note 58, §§ 107–07.3.

142. UNIFORM TRUST CODE § 706(a)(3).

143. *Id.* § 706(a)(3) cmt.

144. *Id.* § 706(b)(4).

145. RESTATEMENT (THIRD) OF TRUSTS § 37 (1992); see also Ronald Chester & Sarah R. Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and other Current Law: Does a Contractual Lens Help Clarify the Rights of Beneficiaries?*, 67 MO. L. REV. 241, 253–56 (2002).

beneficiaries power to remove a trustee on their own; beneficiaries may also be given a power to appoint a successor trustee.

If a trustee dies or is removed, and the beneficiaries do not have power under the terms of the trust instrument to name a successor, a court will do so. According to the general rule, the court is not required to appoint someone agreed upon by the beneficiaries, but it must give due regard to their wishes. Once again, the Uniform Trust Code goes further, providing that a successor trustee may be appointed by “unanimous agreement of the qualified beneficiaries,” without the need for court approval, if no person is designated by the trust instrument as successor trustee.¹⁴⁶

3. Multiplication of Beneficiaries

When a trust is limited to one hundred years or so, the number of beneficiaries will usually stay a manageable size, even though administrative costs may rise as the class of beneficiaries increases. In a perpetual trust, the number of beneficiaries can multiply relentlessly from generation to generation. If a trust is set up for two children of the settlor and their descendants, and each child has two children—which is pretty close to the statistical average—and each grandchild has two children, and so on down the generations, and each generation is measured by twenty-five years, there will be sixteen beneficiaries of the trust after one hundred years and 256 after two hundred years. Eventually the trust might become unmanageable. But the problem can be avoided if separate trusts can be created for the various beneficiaries—say by a power of appointment created in trust beneficiaries that permits such a division. Alternatively, the trust could give a similar power to a trustee. The Uniform Trust Code grants just such a power to trustees, letting them divide a trust into two or more separate trusts without court approval, so long as notice is given to the beneficiaries.

Multiplication of beneficiaries is not such a bad thing, provided it does not result in burdensome and costly trust administration. It tends to dilute the concentration of wealth—unless family wealth increases as fast as the family itself.

III. DEFAULT RULES

If there is a case against perpetual trusts, it must in our judgment be found in the argument that their costs and burdens at some point become too great. As we have seen, most of the difficulties of duration can be eliminated

146. UNIFORM TRUST CODE § 704(c)(2).

by skillful drafting of the trust instrument: creating special powers of appointment in beneficiaries; discretionary powers in trustees; enabling beneficiaries to remove trustees and, when a trustee's office is vacant, to appoint a successor trustee; providing that trustees account to adult beneficiaries, so as to avoid judicial accountings; and so on.

Several states permitting perpetual trusts require the trust instrument to state that the Rule against Perpetuities does not apply, or require that some person must have power to terminate the trust. These have the effect, perhaps the purpose, of offering some assurance that the trust instrument is prepared by an expert.¹⁴⁷ An important question is what rules should govern when the trust instrument is inexpertly drafted. Should trust provisions that have come to be undesirable—disadvantageous to beneficiaries, economically wasteful—be dealt with by laying down a general rule that terminates a trust after a period of time, or rather by a more fine-tuned approach dealing with the problems as they arise?

The Rule against Perpetuities opts for the first approach, but perhaps in ways no longer worth their complexities. There are several possible alternatives. First, legislation could provide that, after the income beneficiaries alive at the creation of the trust are dead, a court has power to modify or terminate the trust if it is to the advantage of the then income beneficiaries. This power would be broader than that given by the English Variation of Trusts Act, because the court would consider only the benefit to the life tenants, not to the remaindermen, as under the English Act. The principle of foreseeability underlying the orthodox Rule against Perpetuities would be preserved, because the court's authority would not take effect until the income beneficiaries known by the settlor are dead.

Something close to this approach has been adopted in the Canadian Province of Manitoba, which in 1983 abolished the Rule against Perpetuities altogether and empowered courts to alter or terminate any trust when doing so would benefit beneficiaries.¹⁴⁸ The statute differs from the one mentioned above in that the court's power of alteration kicks in immediately, not after the income beneficiaries alive at the creation of the trust are dead. The primary disadvantage of the Manitoba approach, or of any statute requiring

147. See *supra* notes 42–43.

148. MAN. STAT. chs. 38, 43 (2000), R.S.M. ch. P-33 (1987). The Manitoba approach is approved by D.W.M. WATERS, *THE LAW OF TRUSTS IN CANADA* 1074 (2d ed. 1984), and by Note, *Long Live the Dead Hand: A Case for Repeal of the Rule Against Perpetuities in Washington*, 75 WASH. L.R. 1237, 1265 (2000) ("Because the rule prescribes a limit, it is necessarily insensitive to economic conditions that might preserve the beneficial consequences of trusts that endure past the perpetuities period. Reactive, court-ordered variations from trust terms, however, can find context-sensitive results where the rule presumes that one size fits all.").

court intervention, is that termination or modification requires a lawsuit, perhaps of uncertain outcome, with resulting legal fees.

A second alternative—a rule terminating trusts after a given period of time—would avoid the costs and uncertainties of Manitoba's approach, but at the price of a new difficulty: In many instances, beneficiaries may be better off if their trust continues than if it does not. The observation suggests the appeal of a third possible approach, a statute giving the power of modification or termination to the income beneficiaries in succession, but only after the income beneficiaries known to the settlor die. This would be a general power of appointment if, by exercising it, the successive income beneficiaries could withdraw the principal for themselves,¹⁴⁹ thus giving rise to the tax disadvantages discussed earlier.¹⁵⁰ They would be avoided if the statute in question gave the beneficiaries not a general power but instead a special power enabling them to appoint the trust principal during life or at death to anyone except themselves, their creditors, their estates, or the creditors of their estates.¹⁵¹ A special power exercisable during life or at death gives the donee the power to modify or terminate the trust so as to benefit others. Thus the donee of a special power could terminate a trust and order the principal distributed to the donee's children. The statute might go further and give each income beneficiary, in addition to a special power, a power to withdraw principal for the beneficiary's own benefit, limited by an ascertainable standard relating to the beneficiary's health, education, support, or maintenance (such as a power to withdraw principal required to maintain the beneficiary in the style of living to which the beneficiary is accustomed). Giving the income beneficiaries special powers of appointment plus a power to withdraw principal for their support would go a substantial way in satisfying any demand for intergenerational equity.

A fourth way of avoiding a mandatory termination rule or a lawsuit over termination or modification of a trust is to give the trustee, by statute, a power to terminate the trust. This would be in addition to any discretionary powers given the trustee in the trust instrument to distribute income

149. Giving the income beneficiaries a general power of appointment resembles the law of Scotland, which has no Rule against Perpetuities. Under Scottish law, any life estate (called "liferent") created in a person who was not living when the trust was created gives the property to such person absolutely. Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, ch. 70, pt. IV, § 18 (1).

150. See *supra* note 121. The trust instrument could give the income beneficiaries the power to go into corpus if necessary for support. A support power is not a general power. I.R.C. § 2041 (b)(1)(A) (1994). The income beneficiaries might also be given the power to withdraw each year \$5,000 or 5 percent of the corpus, whichever is greater. This is not a general power. *Id.* § 2041 (b)(2).

151. See *supra* note 122.

and principal among the beneficiaries.¹⁵² A handful of the states permitting perpetual trusts require that some person, who may be the trustee, have the power to terminate the trust.¹⁵³ The apparent purpose of this is to be able to terminate the trust without a lawsuit.

There are variations on this scheme. A statute could give the beneficiaries power to remove or replace a trustee at will. The power to remove a trustee gives "the beneficiary a powerful weapon to put pressure on the trustee to exercise the trustee's powers in the way the beneficiary wants them exercised."¹⁵⁴ Provided the trustee's successor is not related or subordinate to the power holder, under current federal tax law, the power to replace a trustee is not a general power of appointment.¹⁵⁵

IV. THE FUTURE OF PERPETUAL TRUSTS

The federal estate tax and the GST tax give substantial advantages to perpetual trusts. Although a trust termination rule would provide a way to avoid the inefficiencies of perpetual trusts, trust beneficiaries might prefer to bear the costs of those inefficiencies in order to save large sums in taxes. The beneficiaries of a tax-free trust earning the income from \$20 million every year will likely view trust costs as peanuts compared to the \$8 million they would pay in taxes if the trust were terminated and their shares were distributed outright. Given the federal tax advantage of perpetual trusts free of death taxes, the Rule against Perpetuities has the effect of penalizing beneficiaries of trusts located in states that do not permit perpetual trusts.

Now, of course, the future of the estate tax and the GST tax is in doubt. In 2001, Congress enacted legislation that calls for abolition of the estate tax and the GST tax (but not the gift tax) in 2010.¹⁵⁶ Between 2002 and 2009, the exemption from both estate and GST taxes rises in gradual steps from \$1 million in the case of the estate tax and \$1.1 million in the case of the GST tax to \$3.5 million in 2009.¹⁵⁷ The top rate of 50 percent in 2001 will decrease in gradual steps to 45 percent in 2007. In 2010, both taxes are scheduled to be

152. See *supra* text accompanying notes 130–131. Professors Hirsch and Wang, *supra* note 97 at 53, argue that discretionary family trusts should be permitted to exist in perpetuity. A discretionary family trust "can affirmatively benefit a family by providing its members with comprehensive insurance against need, while availing society by spreading wealth more equally within that group." *Id.* at 53.

153. See *supra* notes 38, 40–41.

154. 3A A. JAMES CASNER, ESTATE PLANNING § 12.0 n.3 (5th ed. 1988).

155. REV. RUL. 95-98 1995-2 C.B. 2.

156. ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001, 115 Stat. 38 (2001), amending I.R.C. § 501 and adding I.R.C. § 2210 (terminating the estate tax) and § 2664 (terminating the GST tax).

157. See I.R.C. § 2010 (unified credit against estate tax), § 2631 (GST exemption) (2001).

repealed, but a sunset clause in the act causes the entire 2001 act to expire, and the estate tax and GST tax, as they existed in 2001, to be revived in 2011. Nobody can believe that will happen. Between now and 2011, three courses of action are open to Congress.

First, Congress may let the death taxes expire permanently in 2010. If Congress does so, there will be no death tax advantages in perpetual trusts. But given the possibility of reimposition of death taxes someday, estate planners may continue to recommend perpetual trusts on the theory (or in the hope) that if the taxes are reimposed existing perpetual trusts may be grandfathered.

Second, Congress may continue the death taxes in their present form, with perhaps increased exemptions and reduced rates. The exemption will be \$3.5 million in 2009, but a compromise solution might raise that figure to \$5 million or more. Family farms and family businesses might be exempted. With an increased dollar exemption, the tax advantages of perpetual dynasty trusts will increase enormously. With \$3.5 million or more as the original trust principal, the value of the trust, especially considering leveraging with life insurance or other schemes, might grow into hundreds of millions of dollars over time. In that event, more states can be expected to provide for perpetual trusts, in order to put their residents in the same position as taxpayers in states permitting perpetual trusts, and allow their banks to compete for trust business. A compromise of this sort—taxing the Really Rich but not the Merely Rich—seems the most likely outcome in the struggle over abolishing death taxes.

Third, Congress may continue death taxes but amend the generation-skipping transfer tax so that the exemption for gifts in trust applies only to trusts ending upon the death of persons in being at the creation of the trust (plus any actual minority thereafter), or ending after some other given period of time. By limiting the tax exemption, Congress would effectively be enacting a rule terminating trusts after a given period, but there is at present no sentiment in Congress to do this. The move would increase death taxes, and the prospect for increasing death taxes now is quite remote. Moreover, the tax advantages of perpetual trusts will not be realized as cash in hand for at least half a century, and Congress seems not to have noticed them. It is not likely that Congress will pay any attention to this loophole in the near future.

The short of it is that Congress has come to be in charge of trust duration. The future of perpetual trusts is in its hands, to be dealt with through the tax system. The role of the states is to develop affordable means for modifying and terminating trusts when that is in the best interests of the beneficiaries. We have reached a great turning point in the law of trusts.
