

‘R.A.P.’ IT UP: KEEPING TEXAS’S AMENDMENT TO THE RULE AGAINST PERPETUITIES BUT CALLING FOR A MORE CLEAR-CUT DEFINITION

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ABSTRACT

Estate Planning in the 21st century has primarily followed the common law rule against perpetuities. The rule against perpetuities was enacted hundreds of years before the invention of light bulbs, cars, the x-ray, and the computer. Today, the rule does not hold the same effect it did years ago; many states have amended their codes permitting trusts to vest longer than the twenty-one-year requirement the common law rule imposed, likely in the realization of the rule’s slow collapse. This reformation from the twenty-one-year period has spurred heavy “jurisdictional competition” for trust business amongst the states, and Texas is finally entering the race. This Comment aims to show that the recent amendment to Section 112.036 of the Texas Property Code, allowing private irrevocable trusts to be valid for 300 years, is not a “perpetuity” in the context of the Texas constitution. This Comment will also discuss a much-needed definition for perpetuity through a constitutional lens and consider whether an amendment is necessary to the constitution in lieu of the rule change, and if not, what clauses practitioners should place in future instruments. Further, this Comment will analyze the public policy, societal, and economic windfall that the amendment will bring to the state.

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I. INTRODUCTION

Since the promulgation of the law governing estates, there has been a steadfast principle that one should not control the free disposition of land in perpetuity.¹ American jurisprudence has wholeheartedly embraced the principle of free use of land by ensuring that property within a trust's corpus must be transferred (or vested) within twenty-one years after the creation of the trust instrument.² This twenty-one-year requirement is referred to as the rule against perpetuities (Rule).³ The Rule places a limit on trust life, and this limit places land, assets, and other property back into the stream of commerce, lifting all restraints or covenants placed on such property and allowing the beneficiary-free disposition or use of the assets within the corpus.⁴

Trusts have offered protection to settlors and their spouses, creditors, and even the Internal Revenue Service (IRS).⁵ However, to reap these benefits, estate planners must understand how the Rule applies to trusts, which involves understanding what perpetuity is.⁶ This is difficult in a state like Texas that has a constitutional prohibition against perpetuities but provides no definition for perpetuity.⁷ Traditionally, in the legal sense, perpetuity does not last forever, but rather the length of time of a life in being plus twenty-one years; commentators have calculated that this time period is roughly over 100 years.⁸ This Comment discusses the development of trusts and the great confusion the Rule has generated among practitioners, especially in Texas.⁹ Ultimately, this Comment argues that the Texas constitution does not provide a definition for perpetuities that would usurp the new 300-year statutory period, but a constitutional amendment is not

1. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. A (AM. L. INST. 2011).

2. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942); see *Singer v. Singer*, 237 S.W.2d 600, 605 (Tex. 1951).

3. See GRAY, *supra* note 2.

4. See DAVID A. THOMAS, *THOMPSON ON REAL PROPERTY* § 28.08(i) (2d ed. 1998).

5. Robert H. Sitkoff, *Trust and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643 (2014).

6. See *id.*

7. TEX. CONST. art. I, § 26.

8. See Robert H. Sitkoff & Max M. Schanzenbach, *Unconstitutional Perpetual Trusts*, 67 VAND. L.J. 1770, 1771 (2014) (quoting “the Rule puts an outer boundary of roughly 100 years or so on the temporal reach of the dead hand”); JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 880–82 (9th ed. 2013).

9. See *infra* Part IV.

necessary because the statute adequately provides a definite perpetuity period.¹⁰

Part II discusses the history of the rule against perpetuities and trust instruments.¹¹ Part III shows the functions and applications of the Rule.¹² Part IV shows that there has been a national push for trust code reformation, calling for extended vesting periods and the ratification of the common law Rule.¹³ Part V discusses the benefits of trusts that include protecting and controlling assets.¹⁴ Part VI then discusses the counterarguments of sweeping national change, longer perpetuity periods, and fears of wealth accumulation.¹⁵

Parts VII and VIII consider other states' interpretations of perpetuity, as well as the definition of perpetuity within the Texas constitution.¹⁶ Further, Part IX of this Comment demonstrates that Texas's new 300-year period is not a "perpetuity" in the constitutional sense.¹⁷ Part X discusses the standing issue relevant to the challenging interests under the Rule.¹⁸ Part XI concludes this Comment by showing that the recent amendment provides a clear-cut definition that guides estate planning professionals in the ever confusing world of "RAP" and estate planning.¹⁹

II. THE RULE AGAINST PERPETUITIES

One way to define perpetuity:

A future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of or will not necessarily vest within the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond, and, in case of a posthumous child, a few months more,

10. See *infra* Part IX.

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part V.

15. See *infra* Part VI.

16. See *infra* Parts VII–VIII.

17. See *infra* Part IX.

18. See *infra* Part X.

19. See *infra* Part XI.

allowing for the term of gestation Such a limitation of property as renders it unalienable beyond the period allowed by law.²⁰

In 1886, Professor John Gray created the rule against the “remoteness of vesting” in which he stated: “[N]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”²¹ This statement was the formulation of the common law twenty-one-year period that was used by Texas for almost 140 years.²² At its core, a trust will be valid under this Rule if the beneficiaries would receive their right to the trust property within twenty-one years after the effective date.²³

For trusts, the effective date is usually the date of creation of the trust or when it becomes irrevocable.²⁴ For wills, the effective date is the date of the death of the settlor.²⁵ Thus, at common law the perpetuity period is twenty-one years after the effective date.²⁶ Especially important for wills and trusts is the requirement that a “validating life” (whose death the interest is contingent upon) must be alive when the instrument begins to operate.²⁷

This requirement was first applied in *The Duke of Norfolk’s Case*, in which the court created an equitable remedy between landowners and the public (over concerns of perpetual land retention and control by a select few families) that would be in effect for generations to follow.²⁸

A. Origin of Trust Instruments

People have been using trusts long before *The Duke of Norfolk*.²⁹ Crusaders leaving for war would often place their property in a basic form of a trust, called a “use,” in which the crusader was able to leave the *res* or property behind while retaining ownership and control of it.³⁰ Through *uses*

20. What is PERPETUITY, L. DICTIONARY, <https://thelawdictionary.org/perpetuity/> (last visited Mar. 27, 2022) [<https://perma.cc/4T5E-3Q54>]; see *infra* Part VII (detailing further discussion of what perpetuity is under the constitutional lens); GRAY, *supra* note 2.

21. See GRAY, *supra* note 2.

22. *Id.*

23. TEX. PROP. CODE ANN. § 112.036.

24. *Id.* § 112.036(b).

25. See TEX. EST. CODE ANN. §§ 256.001–.002.

26. See 34 TEX. JUR. 3D *Estates* § 54 (2002).

27. See GRAY, *supra* note 2; see also *Ryan v. Ward*, 64 A.2d 258, 263 (Md. 1949) (the date of operation is often referred to as the time for ascertaining the lives in being at the time the interest was created; this occurs when family members are hard to find and with complicated estate documents that are not drafted in a manner to determine who the beneficiaries and validating lives are).

28. *The Duke of Norfolk’s Case*, 22 Eng. Rep. 931, 932 (Ch. 1682).

29. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 576–77 (5th ed. 1956); W.O. BARTON, *RULE AGAINST PERPETUITIES* 173–75 (1957).

30. See PLUCKNETT, *supra* note 29; BARTON, *supra* note 29.

or similar instruments, wealthy landowners were able to perpetuate their family statuses by allowing the descendants to collect income from the land they inherited and not have to pay taxes on the inheritance.³¹ This frustrated the public because of the inability to purchase land stowed away in a *use* or trust.³² This frustration came to a head in the House of Lords, where the beginning steps of the common law Rule began.³³ The House of Lords was the stage at which *The Duke of Norfolk* (the seminal case that would generate the common law Rule) would make its debut.³⁴

B. Historical Context Surrounding The Duke of Norfolk

To better understand the holding of the House of Lords in *The Duke of Norfolk* and the creation of the Rule thereafter, this Comment will discuss the social and political situation surrounding England in the 1600s.³⁵ In 1682 the world population was around 680 million, compared to the current population of 7.7 billion.³⁶ *The Duke of Norfolk* decision was rendered at a time when the life expectancy of a human was nowhere near what it is today (life expectancies for males and females in 1841 were 40.2 and 42.2 years, respectively); the average male and female life expectancy has almost doubled (life expectancies for males and females in the U.S. in 2020 were 75.1 years and 80.5 years, respectively).³⁷ Further, before this decision England underwent significant major events and conditions, including serious turmoil, the eruption of a civil war, the rise of Oliver Cromwell and the subsequent institution of a republic, and most importantly a regicide

31. See PLUCKNETT, *supra* note 29; BARTON, *supra* note 29.

32. See PLUCKNETT, *supra* note 29; BARTON, *supra* note 29.

33. See *Duke of Norfolk's Case*, 22 Eng. Rep. at 932.

34. See *id.*

35. See *id.*

36. See *Historical Estimates of World Population*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/international-programs/historical-est-worldpop.html> (Dec. 16, 2021) [<https://perma.cc/KN6P-HVLF>]; *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited Mar. 27, 2022) [<https://perma.cc/2VLW-B7CM>].

37. *Historical Estimates of World Population*, *supra* note 36 (note that increased life expectancy has a correlation with trust or property interests that may be held in comparison to the common law Rule because it is based upon “lives in being”); see *How Has Life Expectancy Changed Over Time?*, OFF. NAT’L STAT. (Sept. 9, 2015), <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/articles/howhaslifeexpectancychangedovertime/2015-09-09> [<https://perma.cc/7ZUJ-HQ9X>] (according to the U.K.’s Office for National Statistics, a male born in 1841 had a life expectancy of 40.2 years and a female of 42.2 years); Elizabeth Arias, Betzaida Tejada-Vera, & Farida Ahmad, *Provisional Life Expectancy Estimates For January Through June, 2020*, CTRS. DISEASE CONTROL & PREVENTION (Feb. 2021), <https://stacks.cdc.gov/view/cdc/100392> [<https://perma.cc/96N9-2UMB>] (according to the CDC, the average life expectancies for males and females in the U.S. in 2020 were 75.1 years and 80.5 years, respectively; thus, the life expectancy or time of vesting has risen from 61 years to 101 years on average (a 65% increase) in less than 200 years).

bringing a new king to the throne, Charles II.³⁸ These social and political elements kindled the fire that forged the Rule in *The Duke of Norfolk* that still has an effect over 300 years later.³⁹

C. The Duke of Norfolk Case

The Duke of Norfolk concerned a landowner (settlor) attempting to establish a trust to ensure an inheritance for his great-grandchildren who would be born to the grandchildren of his then son, Henry Howard XXII, Earl of Arundel.⁴⁰ The House of Lords found two reasons it would not be in the best interest of the public to allow trust instruments (or covenants on land) to continue in perpetuity.⁴¹ First, the House of Lords found that allowing perpetual trusts would ensure that property would not be taxed on the transfer from a decedent to a beneficiary.⁴² Second, and most importantly at the time, the Lords believed that without the Rule, land would be seized up by a wealthy few and held by those families in perpetuity.⁴³ Therefore, the House of Lords rendered a decision that was deemed equitable at the time and allowed property to be controlled for one generation beyond that of the settlors' children, and in doing so created the framework for the rule against perpetuities.⁴⁴ The rule against "remoteness of vesting" and the common law twenty-one-year period were not promulgated until 150 years later.⁴⁵

III. FUNCTIONS AND APPLICATIONS OF THE RULE

The Rule has served two main functions since its formation: first, to apply the "dead hand rule," which prohibits settlors from controlling property from the grave, to any real property or trust assets beyond the twenty-one-year vesting period; and second, to ensure that trust assets and real property are free to be sold and beneficiaries can inherit full control of alienability

38. Matthew White, *The Turbulent 17th Century: Civil War, Regicide, the Restoration and the Glorious Revolution*, BRITISH LIBR. (June 21, 2018), <https://www.bl.uk/restoration-18th-century-literature/articles/the-turbulent-17th-century-civil-war-regicide-the-restoration-and-the-glorious-revolution> [https://perma.cc/HR4Y-TY39] (describing how Charles II favored land rights and was viewed by the public as a breath of fresh air; however, parliament had different ideas—they wanted land to be free and marketable, meaning they did not want a landowner to begin to accumulate more land than the sovereign).

39. See *id.*; *Duke of Norfolk's Case*, 22 Eng. Rep. at 931.

40. White, *supra* note 38; *Duke of Norfolk's Case*, 22 Eng. Rep. at 932.

41. See T.P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L. REV. 284, 284–85 (2000); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, ch. 27, intro. note (AM. L. INST. 2011).

42. *Duke of Norfolk's Case*, 22 Eng. Rep. at 932.

43. *Id.* at 934.

44. See 61 AM. JUR. 2D *Perpetuities & Restraints on Alienation* § 6 (2021).

45. See GRAY, *supra* note 2.

after the vesting period.⁴⁶ At its creation, the Rule helped allocate property to the masses at a time of exponential growth.⁴⁷ This function of the Rule stopped people who owned land from attaching covenants that would control forever or from the grave.⁴⁸

A. Dead Hand Rule

One function the Rule served was to ensure that land would not be encumbered by covenants in perpetuity.⁴⁹ Prior to the Rule, if a settlor placed real property within a trust that contained the following language, “(1) no family dwelling shall *ever* be built on this tract/parcel 2) said tract/parcel shall be used *solely* for the purposes of obtaining wheat, said parcel may not be sold until the last descendant of (the settlor) has passed,” the tract would still be a homeless wheat farm today, provided the settlor had a family to make beneficiaries of a trust.⁵⁰ Exponential population growth, advancements in technology, overall societal and economic changes, and land requiring different use with the advancement of farming technology and industrialization raised a potential problem, which the House of Lords alleviated with its decision.⁵¹ This decision was rendered in a time when the world was a predominantly agrarian society, and thus the Rule served its purpose.⁵² In the wheat farm example above, the Rule would now allow the tract to be used not only for wheat farming and become repurposed as land more suitable for the needs of the times, but it would also allow beneficiaries to receive the real property free of restrictive covenants in order to build upon or modify the land to their potential needs after the vesting period.⁵³ The Rule not only ensured that land could be used freely but it also that ensured it would be alienable and marketable.⁵⁴ Most importantly, it allowed the Crown to tax land transfers that previously evaded the tax by being in a perpetual trust or use.⁵⁵

46. *Id.* at 284.

47. See Robert C. Allen, *Tracking the Agricultural Revolution in England*, 52 ECON. HIST. REV. 209, 211–12 (1999).

48. See GRAY, *supra* note 2.

49. *Id.*

50. Author's original hypothetical.

51. See Kees Klein Goldewijk & Navin Ramankutty, *Land Use Changes During the Past 300 Years*, ENCYCLOPEDIA LIFE SUPPORT SYS. 1, 4, <https://www.colss.net/sample-chapters/c19/E1-05-01-04.pdf> (last visited Mar. 27, 2022) [<https://perma.cc/59KE-VVPX>]; Allen, *supra* note 47, at 212.

52. Goldewijk & Ramankutty, *supra* note 51, at 4.

53. See DUKEMINIER & SITKOFF, *supra* note 8.

54. *Id.*

55. *Id.*

B. Marketability of Land

As mentioned, the Rule serves to ensure the alienability and marketability of land.⁵⁶ The main idea behind this purpose is that ownership of land held in perpetuity and all future interests in that real property must vest within some allotted time.⁵⁷ This prevents future uncertainty over what restraints are on the land and who owns it because the land drops all prior covenants as soon as the trust vests.⁵⁸ The marketability function is in place because it is in the public's best interest that real property and assets are placed back into the stream of commerce, as placing undue restraints on real property that it not be sold for the rest of time (or in perpetuity) would hurt the economy.⁵⁹

Some believe this marketability purpose was the main concern of the House of Lords at the time of *The Duke of Norfolk*—the House of Lords feared a small number of wealthy families would eventually possess all available land and place it in trust, never allowing it be sold or repurposed again.⁶⁰ Thus, the House of Lords required that the land be placed back into the stream of commerce (requiring that the land be “marketable”), which allowed transfers of real property to be taxed.⁶¹ It is worth noting that the interest will not always be subject to the Rule just because a settlor creates a future interest in property rights to another person.⁶²

C. What Interests Does the Rule Apply to?

At common law, the Rule applies to contingent remainders, executory interests (including a trust), and certain vested remainders subject to open.⁶³ This means that if the interest is a future interest, and it is not totally vested, (partially or totally contingent) RAP analysis is necessary.⁶⁴ It is important to note that the Rule only applies to non-charitable transferees so charitable

56. See Allen, *supra* note 47, at 212.

57. See A.W.B. SIMPSON, *LEGAL THEORY AND LEGAL HISTORY* 159–60 (1987) (“The good patriarch looks into the future, but not too long. . . . The compromise which English law adopted was to allow property to be tied up for the lifetime of someone in existence at the time of the settlement and a reasonable period thereafter—for example, a minority.”).

58. See *id.*

59. See *id.*

60. See *id.*

61. *The Duke of Norfolk's Case*, 22 Eng. Rep. 931, 932 (Ch. 1682).

62. See 34 TEX. JUR. 3D *Estates* § 54 (2022).

63. See *id.*

64. See *id.*

trusts are not subject to the Rule.⁶⁵ In order to understand what interests are applicable, this Comment will go through the meanings of a few terms.⁶⁶

1. “Vested” Definition

An interest that has “vested” usually means there is a fixed right of enjoyment in the interest held.⁶⁷ These interests are usually present interests that are possessory, as this Comment discusses below.⁶⁸ In essence, the vesting of an interest means the interest has passed fully to the beneficiary free of any covenants from the grantor.⁶⁹ Another way to think about this is the interest is vested if a person can physically touch the interest’s owner, meaning that the owner is a living ascertainable person at the time of the conveyance.⁷⁰ Further, there must be no conditions precedent for the interest to vest, meaning that if the interest is contingent on a condition precedent, the interest is not vested.⁷¹

2. Contingent Remainders

A contingent remainder is a future interest in a grantee that follows an estate of known duration and is subject to some condition (or event) precedent before the interest fully vests, i.e. someone dying.⁷² These interests become possessory immediately upon the expiration of the prior estate.⁷³ Assume that, in a valid will, the settlor leaves the settlor’s entire estate to “my son, John, upon my death;” this would create a contingent remainder in the grantee, John, to the settlor’s estate that would vest and become possessory *immediately* upon the settlor’s death (or condition precedent).⁷⁴

3. Executory Interests

An “executory interest” is a future interest held by a third person that follows a defeasible estate, meaning that the grantee can cut off a prior person’s interest and is subject to the Rule.⁷⁵

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See* PAULA A. FRANZESE, A SHORT AND HAPPY GUIDE TO PROPERTY 31 (3d ed. 2022).

73. *See id.* at 37–39.

74. *See id.* at 39.

75. *See id.*

A “springing executory interest” is a future interest held by a grantee who cuts off or divests the grantor’s interest upon the happening of an event.⁷⁶ For example, assume a father transfers property “to Son, if and when he graduates college;” the son is currently in high school, and has a springing executory interest in the property.⁷⁷ The son’s graduating college will cut off the father’s rights to property, and the rights would spring to the son.⁷⁸

The other type of executory interest subject to the Rule is a “shifting executory interest.”⁷⁹ These interests *shift* ownership to a grantee who cuts off the interest of a prior person who is not the grantor.⁸⁰ For example, assume a husband transfers property to his wife for life, but if the spouses divorce then the property goes to Tim, the husband’s nephew.⁸¹ Tim would then have a shifting executory interest in the property because he can divest the wife of her interest in the event of the husband and wife divorcing.⁸²

These applicable interests are important, especially in Texas where mineral and other royalty rights (many oil and gas leases contain contingent remainders and executory interests) are often transferred through instruments that are subject to Section 112.036.⁸³

4. Vested Remainders Subject to Open

Interests that are vested remainders subject to open are interests given to more than one beneficiary, particularly a “class of people” (usually to children, grandchildren, or both).⁸⁴ This type of interest requires that at least one of the class members be ascertained as part of the class (measuring life) and that the member satisfies the condition(s) precedent to vesting (in most cases outliving the settlor/parent).⁸⁵ Each member’s share is subject to diminution, meaning that if more children/grandchildren are born, then the existing member shares will be affected.⁸⁶ For example, assume a settlor establishes an irrevocable trust for “A’s life, then to B’s Children;” A is currently alive, and B has two living children, C and D.⁸⁷ In this example, A has a present possessory life estate as his interest (A’s interest is vested), and

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.* at 37–38.

80. *See id.*

81. *See id.*

82. *See id.*

83. *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 867 (Tex. 2018); *see* 34 TEX. JUR. 3d *Estates* § 54 (2022).

84. *See* DUKEMINIER, KRIER, ALEXANDER, SCHILL & STRAHILEVITZ, *PROPERTY*, 236 (2d ed. 2017).

85. *See id.*

86. *See id.*

87. Author’s original hypothetical.

B does not have an interest in the trust; however, his children, C and D, have vested remainders subject to open, because B could potentially have more children.⁸⁸ The class remains “open” until B dies, and any more children B has would diminish C and D’s (the class) share.⁸⁹

D. What Interests Does the Rule Not Apply to?

The Rule does not apply to vested present possessory interests because there is no need to wait for the twenty-one-year period to determine whether the interest has vested.⁹⁰

The complicated nature of the Rule and the interests it does and does not apply to has led to the Rule being referred to as a “trap to the draftsmen;” these complications have created headaches for practitioners and drove the desire for reform.⁹¹

IV. COMMON LAW DEVELOPMENT OF THE RULE AGAINST PERPETUITIES

Many state constitutions ban perpetuities, including Texas’s constitution.⁹² Notwithstanding a prohibition on said perpetuities, states have either adopted reformation rules by statute or amended their respective estate codes.⁹³ Moreover, Exhibit C shows that, in 2022, it is rare to follow the common law Rule—only one state still has the common law Rule codified in 2022.⁹⁴

A. National Reformation of the Rule

The movement toward reformation began in 1979 when the Restatement of Trusts (Second) recommended a “wait and see” approach and spurred the birth of the Uniform Statutory Rule Against Perpetuities (USRAP) in 1986.⁹⁵

88. Author’s original hypothetical.

89. Author’s original hypothetical.

90. See 34 TEX. JUR. 3D *Estates* § 54 (2022).

91. See W. Barton Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 HARV. L. REV. 721, 723 (1965); *Lucas v. Hamm*, 364 P.2d 685, 690 (Cal. 1962) (“[A]n attorney of ordinary skill acting under the same circumstances might well have ‘fallen into the net which the Rule spreads for the unwary’ and failed to recognize the danger.” The court went on to cite Prof. Leach, writing that the Rule was “a ‘technicality-ridden legal nightmare’ and ‘dangerous instrumentality in the hands of most members of the bar.’”).

92. TEX. CONST. art. I, § 26.

93. *Id.* § 2; see *infra* Exhibit C.

94. See *infra* Exhibit B (showing that the remaining state with the true twenty-one-year period is New York).

95. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.3 (AM. L. INST. 1992); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 367 (2005).

USRAP adopted the “wait and see” approach, which added a ninety-year vesting period for the Rule along with other small changes to the common law Rule.⁹⁶ USRAP seemingly swept across the nation, and today a strong majority of states follow it.⁹⁷ Diagrams A and B put into perspective the amount of states that do not follow the common law Rule in 2021.⁹⁸

Diagram A

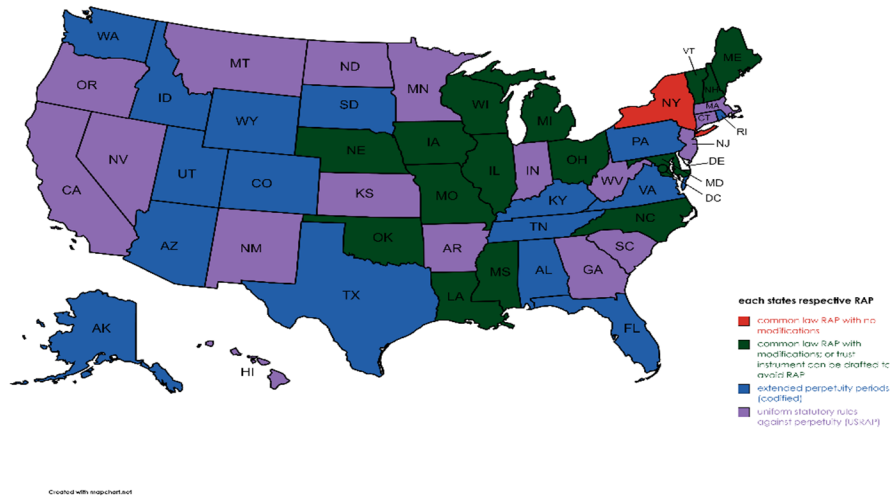
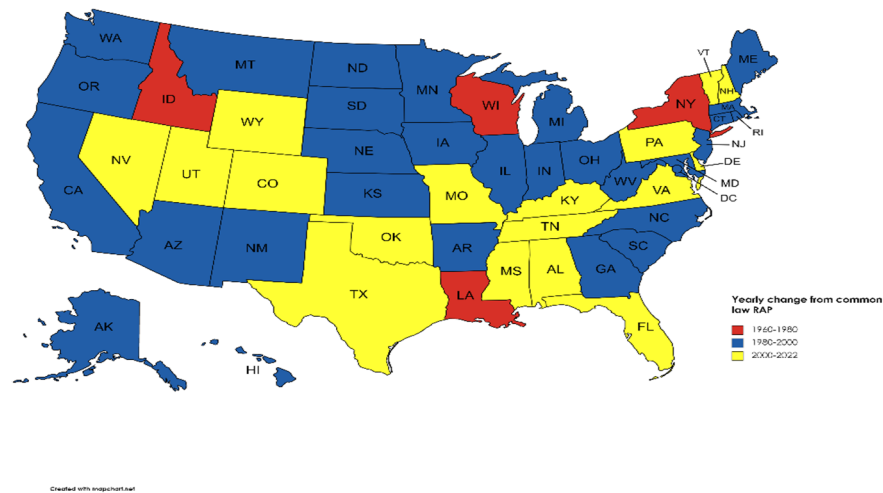


Diagram B



96. See Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP., PROB., & TR. J. 569, 575–79 (1986), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2198&context=articles> [<https://perma.cc/4THK-YVSA>].

97. See *id.*

98. See *infra* Diagram A.

Notably, in no instance has any state court found that the reforms adopted from USRAP violate a state constitutional ban on perpetuities.⁹⁹ This sweeping reform can be attributed to many different factors; some have said that it is because the common law Rule has created many drafting frustrations and problems for drafters, and others have said that the “wait and see” approach unintentionally fostered nationwide violations of the Rule.¹⁰⁰ These frustrations have even made some scholars and practitioners call for complete abolishment of the common law Rule, and in some instances, the Rule altogether.¹⁰¹ Regardless of how frustrating the Rule may be, the benefits of a trust are too great to ignore, which has led to a nearly nationwide abandonment of the common law Rule.¹⁰²

B. Jurisdictional Competition for Longer Perpetuity Periods

Trusts that have longer lives are more helpful to settlors’ attempting to avoid a Generation-Skipping Transfer Tax (GSTT).¹⁰³ The GSTT has created strong jurisdictional competition state to state to see who can get the longest duration from the common law Rule.¹⁰⁴ This competition is reflected in almost every state’s amending its respective property code to allow longer trusts.¹⁰⁵ Estimates have shown an almost three-billion-dollar increase to state income after the extension of the perpetuities period.¹⁰⁶ The impact of using a trust and the GSTT will be discussed below.¹⁰⁷ This competition goes to show that trust instruments are wholly beneficial to the American citizen and the benefits of these trusts should be extended.¹⁰⁸

V. BENEFITS OF TRUSTS

The typical benefits of trusts are to ensure that the settlor can pass the settlor’s property and assets to the settlor’s descendants and to provide financial assistance for beneficiaries in a way that allows effective tax planning and estate tax avoidance.¹⁰⁹ A trust also offers protection to the assets in the corpus from creditors, which has encouraged wealthy families

99. See Sitkoff & Schanzenbach, *supra* note 8, at 1799.

100. See *id.*

101. See *id.*

102. See *supra* Diagram A; *infra* Part V.

103. See Sitkoff & Schanzenbach, *supra* note 95, at 410 (noting that the GSTT applies to transfers that occur between someone two-generations younger than the settlor).

104. *Id.*

105. *Id.*; see *infra* Exhibit A.

106. See Sitkoff & Schanzenbach, *supra* note 95, at 410.

107. See *infra* Section V.C.

108. See *infra* Section V.C.

109. See *infra* Section V.C.

essentially to “shop” for jurisdictions that allow “dynasty” trusts to ensure that their corpus enjoys trust benefits and protections for as long as possible.¹¹⁰

A. Protection of Assets from Creditors

Settlors have also found a major benefit of placing assets in a trust—they are secured from personal creditors.¹¹¹ Placing assets in a trust is beneficial because it shields such assets from creditors in the event of bankruptcy, divorce, or even a civil settlement against either the settlor or one of the beneficiaries.¹¹²

Trusts can also be beneficial for those who have children or run a business that is susceptible to civil claims.¹¹³ For example, a settlor’s real estate assets within a trust will be shielded from liability in the event of the settlor’s teenage son or daughter getting into a car wreck (assuming he or she was not criminally negligent and the suit is a civil one); the assets placed in the trust would not be susceptible to claims by the damaged party.¹¹⁴

Considering the example above, assume the settlor is thinking about the future of the settlor’s son or daughter’s future and does not want him or her to receive an excess amount of money for fear he or she may buy an even faster car.¹¹⁵ The settlor could include a distribution standard in the trust to direct the trustee on how to distribute funds.¹¹⁶

B. Control of Assets and Real Property

Trusts protect assets and real property from misuse, fraudulent activity, and depletion.¹¹⁷ The settlor will place language in the trust that directs the trust’s operation, allocation of assets or funds, and maintenance of real property and provides other effective tools.¹¹⁸ Trusts are extremely effective

110. See Sitkoff & Schanzenbach, *supra* note 95, at 410 (“Shopping” means that grantors living in a common law state will likely ask for legal advice for a state with more accommodating rules for trusts and in turn the host state loses the opportunity to manage said trust and earn income from it.).

111. *Id.* (noting that the beneficiary does not retain control of the asset within the trust throughout his lifetime, and therefore, he cannot be taxed on the asset itself (if it is an asset that can generate income)).

112. See George D. Lambert, *How to Protect Your Assets from a Lawsuit or Creditors*, INVESTOPEDIA, <https://www.investopedia.com/articles/retirement/07/buildawall.asp#:~:text=Asset%20protection%20trusts%20offer%20a,the%20assets%20for%20your%20children> (Apr. 29, 2021) [<https://perma.cc/H6CV-J769>].

113. See *id.*

114. See *id.*; author’s original hypothetical.

115. See Lambert, *supra* note 112.

116. See *id.*

117. Julia Kagan, *Irrevocable Trust*, INVESTOPEDIA, <https://www.investopedia.com/terms/i/irrevocabletrust.asp> (Dec. 9, 2021) [<https://perma.cc/6EWJ-HGRS>].

118. See *id.*

for those who want to keep real property within a family for a certain number of years after their death, or for instance, when the settlor wants to ensure that the assets are controlled and protected for a long period of time.¹¹⁹ This is a highly beneficial aspect of the trust, and if the settlor is worried about a beneficiary who would burn through the corpus, the settlor could place a provision within the trust.¹²⁰ Texas allows for these spendthrift trusts in Section 112.035—settlor “may provide in the terms of the trust that the interest of a beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.”¹²¹ Spendthrift trusts along with use of a trustee allow a settlor to ensure the trust will be managed in accordance with the settlor’s wishes.¹²²

1. Use of a Trustee

A settlor should designate a trustee to run the trust effectively.¹²³ This trustee can be a bank, trust company, drafting attorney, non-drafting attorney, or even layperson.¹²⁴ The designation of a trustee should not be taken lightly as this person will have to keep a close eye on the corpus and the beneficiaries.¹²⁵ Having a trustee allows the settlor to know that the instructions the settlor placed in the trust will be followed and that the trustee is bound by a fiduciary standard.¹²⁶ The trustee is bound statutorily to act in accordance with the trust terms (settlor’s intent), keep accurate records, and preserve and protect the assets or corpus of the trust estate.¹²⁷

Oftentimes friends or relatives who have been chosen as trustee find the job cumbersome and overwhelming, sometimes leading to family turmoil.¹²⁸ These trustees often do not benefit from compensation because they do not have specialization in administering trusts.¹²⁹

119. See TEX. PROP. CODE ANN. § 113.051 (explaining the duties of a trustee).

120. See *id.*

121. *Id.*

122. See *id.* §§ 112.035(a), 113.051.

123. *Fiduciary Obligations*, TEX. PROB. LITIG., <https://www.txprobatelitigation.com/fiduciary-obligations> (last visited Mar. 27, 2022) [<https://perma.cc/2QRN-86ST>].

124. See *id.*

125. See PROP. §§ 113.001–051.

126. See *id.* § 113.051.

127. *Id.*

128. See Timothy J. Kay & Deborah Mallgrave, *Pitfalls for Family Trustees*, SNELL & WILMER (Oct. 1, 2018), <https://www.swlaw.com/assets/pdf/news/2018/10/01/PitfallsforFamilyTrustees.pdf> [<https://perma.cc/3CB6-D7JH>].

129. See *id.*

2. *Selecting a Trustee*

The safest option is for the settlor to hire a company or bank that specializes in trust management.¹³⁰ The settlor will have to pay a fee to name a trust company or bank as trustee, but the expertise and ease these companies can afford is oftentimes worth the fee (especially when administering large trusts).¹³¹ When dealing with a large or especially difficult estate, it is wise to consider a professional trust management service because it has expertise in administering trusts and assets to pay damages in the event of any wrongdoing, while a close friend or relative may not.¹³²

Further, fees for corporate trustees are important because they allow the banking and trust sector to benefit from managing the trust, which in turn improves the economic health of Texas for the foreseeable future by creating more jobs for both the banking industry and estate and tax lawyers alike.¹³³

C. *Tax Benefits*

Trusts not only allow the settlor to manifest the settlor's intended use of the property for the duration of the trust but can also serve as an effective tax planning tool.¹³⁴ In their early days, trusts operated as a run-around to the federal estate tax.¹³⁵ Settlers would place their assets in a trust and effectively avoided the estate tax entirely.¹³⁶ Congress became wise to this tactic and instituted a tax to ensure that trust assets would be taxed at their transfer.¹³⁷ Now, if a settlor places assets in a trust amounting to more than the federal exemption amount (discussed below), the surplus could be taxed in accordance with the rate for that year.¹³⁸ However, trusts are still an effective tool in avoiding the estate tax and the GSTT for later beneficiaries, and this Comment will briefly discuss how below.¹³⁹

130. See *Why Naming the Right Trustee Is Critical*, FIDELITY (Nov. 29, 2021), <https://www.fidelity.com/viewpoints/wealth-management/naming-the-right-trustee> [<https://perma.cc/6E4W-CQQE>].

131. See *id.*

132. See *id.*

133. See *id.*

134. Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1312 (2003).

135. See *id.*

136. See *id.*

137. See *id.*

138. See *id.*

139. See *infra* Section V.C.2.

1. Estate Tax Avoidance

When someone dies intestate in Texas, the estate of the decedent will pass to the people designated by the applicable statutory scheme; accordingly, when someone dies with a will the assets are distributed according to the testator's writing/intent in the will.¹⁴⁰ The estate of the decedent must pay a federal estate tax, if any, based on the taxable estate of the decedent.¹⁴¹ This can be extremely daunting in certain situations, as the current 2022 federal estate tax rate is 40%.¹⁴²

However, to *completely* avoid estate taxes, taxpayers must reduce their taxable estate under the (current 2022) 12.06-million-dollar lifetime exemption amount (11.7 million dollars for 2021), and trust planning is one way people can do this.¹⁴³

2. Generation-Skipping Transfer Tax (GSTT)

The GSTT was imposed to ensure individuals were not bequeathing property to grandchildren via trust and completely avoiding federal estate or gift taxes.¹⁴⁴ Professor Dukeminier explains the practice of estate tax avoidance:

The federal estate tax . . . levies a tax on any property interest transferred by will, intestacy, or survivorship to another person, except for transfers to spouses and charities. 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.¹⁴⁵

To put a stop to this, Congress allowed the IRS to place a second layer of taxes on transfers that skip a generation by imposing a GSTT.¹⁴⁶ This tax exemption is not static and has risen from 1 million dollars to the current

140. See Sitkoff & Schanzenbach, *supra* note 95, at 357.

141. See Jim Probasco, *Estate Tax Exemption, 2022*, INVESTOPEDIA, <https://www.investopedia.com/estate-tax-exemption-2021-definition-5114715> (Feb. 23, 2022) [<https://perma.cc/4ZYA-XW8X>].

142. Troy Segal, *Generation-Skipping Transfer Tax (GSTT)*, INVESTOPEDIA, <https://www.investopedia.com/terms/g/generation-skipping-transfer-tax.asp> (Sept. 17, 2020) [<https://perma.cc/74WV-DGRM>].

143. See *id.*

144. See *id.*; Sitkoff & Schanzenbach, *supra* note 95, at 410.

145. See Dukeminier & Krier, *supra* note 134, at 1312.

146. See *id.*

amount of 12.06 million dollars.¹⁴⁷ This exemption allows a transferor to transfer assets to someone who is thirty-seven and one-half years younger (skip person) free from tax liability up to the exemption amount.¹⁴⁸ For example, a grandfather who places 10 million dollars in a testamentary trust to the benefit of his grandson would be shielded from any applicable GSTT liability if, at death, he had at least 10 million of his lifetime exemption left, with 2.06 million dollars in GSTT exemption remaining (using the 2022 exemption amount).¹⁴⁹ This assumes the grandfather has not made any gifts in his lifetime.¹⁵⁰

3. Gift Tax

The exemption amount does not only apply to property at death, in trust or otherwise, but it can also be lowered by gifts made during one's lifetime.¹⁵¹ One can currently make annual gifts of up to \$16,000 to however many people and not exhaust the lifetime exemption amount (this is referred to as the annual exclusion amount).¹⁵² So, for example, assume the grandfather gave each of his two grandchildren 2 million dollars during his life.¹⁵³ The grandfather passed away in 2022 and, assuming the grandfather made no other gifts or created any other trusts, the grandfather's estate would still have \$8.09 million of exemption remaining.¹⁵⁴ To arrive at that amount the IRS subtracts the \$3.968 million (including the 2022 \$16,000 annual exclusion) gifted from the current \$12.06 million exemption amount.¹⁵⁵

4. Using a Trust to Alleviate the GSTT

Settlors will often create a trust for a living beneficiary to pay for food, health, education, and other essential items to the benefit of the beneficiary up to the 12.06-million-dollar exemption amount; allow the beneficiary to

147. See Segal, *supra* note 142; see also *infra* Exhibit A (showing the accumulation amount beginning with the federally imposed credit amount).

148. See Segal, *supra* note 142.

149. See *id.*

150. See *id.*

151. See Lisa Smith, *Gift Tax Limits: How Much Can You Gift?*, SMARTASSET (Dec. 21, 2021), <https://smartasset.com/retirement/gift-tax-limits#:~:text=The%20annual%20gift%20tax%20exclusion,to%20pay%20any%20gift%20tax> [https://perma.cc/5ZS5-5JSE].

152. See *id.*

153. Author's original hypothetical.

154. Author's original hypothetical.

155. See Nicole Hart & Richard Yam, *Basics of Federal Estate, Gift, and Generation-Skipping Transfer ("GST") Tax – 2022 Update*, WEALTHSPIRE ADVISORS (Jan. 1, 2022), <https://www.wealthspire.com/blog/gst-tax/#:~:text=Taxable%20gifts%20made%20above%20this,also%20%2412.06M%20per%20person> [https://perma.cc/8292-G5KJ].

become trustee; and then create new beneficiaries that would be completely shielded from the GSTT.¹⁵⁶

In the past the GSTT rate has been hefty (55% in previous years), and in 2022 the federal GSTT rate will be 40% of any amount transferred over 12.06 million dollars; as mentioned, the exemption amount is a dollar amount adjusted for inflation and will change again in 2023 (lowering back to 5 million in 2025).¹⁵⁷ Even after the transfer of property has been made, the potential benefits a trust can provide do not end with tax liability on the transfer; it can allow settlors to place assets within a trust and have the trust distribute income to beneficiaries, while the beneficiaries do not pay tax on the asset itself, but only the income received.¹⁵⁸

An alternative to the perpetuities problem would be to repeal the estate tax, but this is not a step that states can take on their own, and this Comment will not address the implications of such a reformation.¹⁵⁹ Regardless of congressional help, trusts have allowed Americans to effectively grow their personal finances.¹⁶⁰

D. Modern Day Perspective

To put the effectiveness of trusts into perspective, in 1934 the oil magnate and founder of Standard Oil Company, John D. Rockefeller, placed the bulk of his wealth into a trust in hopes that the corpus would provide for his family for years to come.¹⁶¹ That trust, created almost ninety years ago, is now serving its seventh generation of beneficiaries, and the corpus was estimated to contain around 11 billion dollars as of 2016.¹⁶² Another more contemporary example can be seen with the Walton family of Wal-Mart fame.¹⁶³ Sam Walton opened the first Wal-Mart on the heels of World War II in 1945, and the rest was history, as the empire generated over 170 billion dollars for the Walton Family in almost forty years.¹⁶⁴ Before his death, Sam placed part of the ownership of Wal-Mart within a family trust and the rest

156. Author's original hypothetical.

157. Author's original hypothetical.

158. Author's original hypothetical.

159. See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

160. See *infra* Section V.D.

161. See Kashual "Ken" Majmudar, *How Wealthy Families Use Trusts to Protect and Grow Their Wealth and Pay Less Taxes*, RIDGEWOOD INVS., <https://www.ridgewoodinvestments.com/how-wealthy-families-use-trusts-to-protect-and-grow-their-wealth-and-pay-less-taxes> (last visited Mar. 27, 2022) [<https://perma.cc/Q62U-U6N2>].

162. See *id.*

163. See *id.*

164. See *id.*

within Walton Enterprises.¹⁶⁵ This estate planning tactic allowed Sam the benefit and peace of mind of knowing that his family and descendants thereafter would be taken care of as he wished and helped the Waltons become one of the most affluent American families.¹⁶⁶

VI. COUNTERARGUMENTS

The main arguments proposed by critics of extended perpetuity periods nationwide is that they will cause less charitable giving and wealth accumulation.¹⁶⁷ This section will show that these critiques are unfounded.¹⁶⁸

A. Reduction in Charitable Giving

A key argument against this amendment (and those similar) is that it will reduce the amount of charitable giving.¹⁶⁹ Charitable trusts are generally excused from the Rule because they are only allowed to donate to 501(c)(3) entities and cannot be used for personal reasons.¹⁷⁰ Critics believe “the ultimate effect of this type of wealth being put into these vehicles will also be a long-term loss in revenue for charitable organizations,” and tax policy is the main reason people choose to give or not.¹⁷¹ Under President Trump’s more favorable tax policies, charitable donations dropped 1.3% in 2018 compared to the prior year, but “the Biden administration promotes its plans to raise taxes on wealthy Americans” and many people who are affected by said increases will likely donate *more* to charities to ease their tax burden.¹⁷² This shows that trusts are not the deciding factor in whether one chooses to donate to a charitable organization or not; rather, it is the applicable tax rate.¹⁷³

B. Accumulation of Wealth

Critics also fear that allowing a perpetual trust would only result in more wealth accumulation in certain families, reduce the use of land, and create a

165. *See id.*

166. *See id.*

167. *See infra* Sections VI.A–C.

168. *See infra* Sections VI.A–C.

169. Halleluya Hadero, *A Growing Worry for Charities: Tax Havens for the Rich*, ABC NEWS (Oct. 9, 2021, 5:35 AM), <https://abcnews.go.com/US/wireStory/growing-worry-charities-tax-havens-rich-80492605#:~:text=5%20min%20read-,A%20spotlight%20that%20has%20been%20thrown%20on%20how%20many%20of,money%20away%20from%20charitable%20causes> [https://perma.cc/CS67-MZLZ].

170. TEX. PROP. CODE ANN. § 112.036(a).

171. *See Hadero, supra* note 169.

172. *See id.*

173. *See id.*

“perpetually wealthy aristocracy.”¹⁷⁴ However, these views may have fallen on deaf ears because after *The Duke of Norfolk* the invention of planes and automobiles allowed settlors to travel to more friendly jurisdictions to create instruments that can circumvent the common law twenty-one-year period.¹⁷⁵

Understandably, the Crown did not want a very small percentage of the population owning all of the land at the time, and by limiting a trust it was able to slow the accumulation of wealth and land; today, everyday people can use a trust to protect assets, provide for their children’s health, or even provide the means for their grandchildren to attend college.¹⁷⁶ With the vast majority of states allowing perpetuity periods beyond the common law twenty-one-year period, the fear of a wealthy aristocracy simply does not hold the same weight it once did.¹⁷⁷

Critics also believe that longer trusts “rob future parents of the ability to decide this future for their children” by way of not allowing them to determine how much money their children will inherit.¹⁷⁸ However, there are clauses that the settlor can place in the trust to stop this exact problem, such as a spendthrift provision.¹⁷⁹ As mentioned, several states besides Texas have passed legislation allowing for longer perpetuity periods, among these are North Carolina and Nevada, each of whom have a constitutional prohibition against perpetuities.¹⁸⁰

VII. OTHER STATES’ CONSTITUTIONAL INTERPRETATIONS

Before this Comment addresses the recent Texas amendment, this section will consider other states with similar constitutional prohibitions against perpetuities, such as North Carolina and Nevada.¹⁸¹ North Carolina’s original Declaration of Rights in Article XXIII states: “[P]erpetuities and monopolies are contrary to the genius of a free State and ought not be allowed.”¹⁸² Nevada also had similar language in its state constitution, and its state legislature tried to repeal such language on perpetuities; however, the vote (attempting to permit a trust of 365 years) lost the referendum by a 20% margin.¹⁸³ Nevada was persistent and eventually passed a bill permitting

174. See Ray D. Madoff, *America Builds an Aristocracy*, N.Y. TIMES (July 11, 2010), <https://www.nytimes.com/2010/07/12/opinion/12madoff.html> [<https://perma.cc/7XUS-AAMD>].

175. See DUKEMINIER & SITKOFF, *supra* note 8.

176. See discussion *supra* Part V.

177. See discussion *supra* Part V.

178. See Madoff, *supra* note 174.

179. See *supra* Part V; TEX. PROP. CODE ANN. § 112.036(f).

180. See *infra* Part VII.

181. See N.C. CONST. art. I, § 34.

182. See *id.* art. XXIII (1776).

183. See Lucy A. Marsh, *The Demise of Dynasty Trusts: Returning the Wealth to the Family*, 5 EST. PLAN. & CMTY. PROP. L.J. 23, 24 (2012).

trusts to endure for 365 years, regardless of its state constitutional ban.¹⁸⁴ North Carolina, facing similar challenges, adopted the ninety-year period and USRAP, but it did not have to amend or abolish the constitutional provision banning perpetuities to do so.¹⁸⁵ These two states that have had constitutional bans on perpetuities found a way around them and have faced no successful constitutional challenges since the passing of the longer trusts.¹⁸⁶ The Texas amendment should be viewed in a similar lens.¹⁸⁷

VIII. TEXAS'S CONSTITUTIONAL RULE AGAINST PERPETUITIES

This section will discuss the formation and interpretation of the Rule within Texas through the Texas constitution itself and will look at cornerstone case law to demonstrate that there has never been a clear-cut definition for “perpetuity” in Texas and that the 2021 amendment does provide a clear definition for the term.¹⁸⁸ There have been several unsuccessful attempts by the Texas legislature to pass a bill repealing the common law Rule: in 2001, the Texas Senate proposed a bill with a vesting period of 360 years; in 2003, the senate proposed another bill, this time with a one-thousand-year vesting period; and in 2005, the legislature recommended 360 years.¹⁸⁹

A. Formation of the Prohibition

Texas's current Rule can be traced back to 1833 when delegates of the State of Texas proposed a constitution wanting to break off from the Mexican state of Coahuila and become independent.¹⁹⁰ Article 19 of that proposed constitution provided: “Perpetuities and monopolies are contrary to the genius of a free government, and shall not be allowed.”¹⁹¹ Further, the 1836, 1845, and current state constitution (1876) all contained identical language prohibiting perpetuities.¹⁹² During this time perpetuity was commonly

184. NEV. REV. STAT. § 111.1031(1)(b) (2013).

185. See Sitkoff & Schanzenbach, *supra* note 95, at 431; NEV. REV. STAT. § 111.1031 (2005); N.C. GEN. STAT. § 41–15 (2021).

186. NEV. REV. STAT. § 111.1031; N.C. GEN. STAT. § 41–15.

187. See TEX. CONST. art. I, § 26; TEX. PROP. CODE ANN. § 112.036.

188. See TEX. CONST. art. I, § 26.

189. See Tex. H.B. 2811, 77th Leg., R.S. (2001); Tex. H.B. 1156, 78th Leg. R.S. (2003); Tex. S.B. 1, 79th Leg., R.S. (2005).

190. See *generally Constitutions of Texas 1824–1876*, UNIV. TEX. TARLTON L. LIB. JAMAIL CTR. LEGAL RSCH. (Feb. 11, 2020, 9:29 AM), <https://tarlton.law.utexas.edu/constitutions/> [https://perma.cc/WU4E-FK2Q] (available text of all previous versions of constitutions governing Texas's lands).

191. *Id.*

192. TEX. CONST. art. I, § 26.

understood to mean twenty-one years.¹⁹³ However, Texas waited until 1984 when the Texas Trust Code was created to codify the *statutory* Rule.¹⁹⁴ In essence, the codification in the Texas Property Code was of the common law/traditional Rule of twenty-one years.¹⁹⁵ Other than the vague definition in Article I of the current Texas constitution, the constitution offers no definition or guidance as to what a “perpetuity” is, and over the years Texas courts have tried to interpret the meaning; however, this Comment will attempt to interpret the Texas constitutional definition first.¹⁹⁶

B. Texas’s Constitution Interpretation of “Perpetuity”

Article I of the Texas constitution prohibits “perpetuities” and states that perpetuities and monopolies “are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.”¹⁹⁷ The Texas constitution offers no definition of the word perpetuity, but Black’s Law Dictionary defines “perpetuity” as an interest that “vest[s] within the period fixed and prescribed by law.”¹⁹⁸

Other than disallowing perpetuity, the Texas constitution nor the Texas Property Code adequately define what a “perpetuity” is.¹⁹⁹ Without statutory or constitutional definitions the court should look to case law for interpretation.²⁰⁰

C. Texas Case Law

The Supreme Court of Texas has handled the interpretation of what perpetuity is differently over time.²⁰¹ The early holdings support a notion of following the constitution because there was not a codified statutory Rule

193. See *supra* note 37 and accompanying text.

194. TEX. PROP. CODE ANN. §112.036.

195. *Id.*

196. See TEX. CONST. art. I, § 26; PROP. § 112.036.

197. See TEX. CONST. art. I, § 26.

198. *What is PERPETUITY*, *supra* note 20 (noting the interpretative commentary states both that “perpetuity” as applied to property means an “everlasting property interest” and that “[f]or purposes of this section, a perpetuity is a restraint or restriction of the power of alienation beyond [the period required by the Rule], and as such would not be constitutionally allowed”); see also TEX. CONST. art. I, § 26, interp. commentary (including among the term’s multiple definitions both “[a]n inalienable interest” and “[a]n interest that does not take effect or vest within the period prescribed by law”).

199. See, e.g., TEX. CONST. art. I, § 26; PROP. § 112.036.

200. See *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 866–67 (Tex. 2018) (explaining that a perpetuity is a restriction on the power of alienation that lasts longer than a prescribed period); *Rekdahl v. Long*, 417 S.W.2d 387, 397 (Tex. 1967) (Steakley, J., dissenting) (stating that the rule against perpetuities “should be a check on vain, capricious action by wealthy empire builders. But it should not be a constantly present threat to reasonable dispositions which slightly overstep a technical line.”).

201. *Yowell v. Granite Operating Co.* 620 S.W.3d 335, 343 (Tex. 2020).

enacted at the time.²⁰² *Yowell* shows that the supreme court will follow the period prescribed by law.²⁰³

1. *Anderson v. Menefee*

In 1915, the Fort Worth Court of Appeals found that a decedent's will was in violation of Article I of the Texas constitution because it created a prohibited perpetuity.²⁰⁴ The court looked to an Illinois case, *Bigelow v. Cody*, for guidance in determining the definition of a perpetuity; it found:

Perpetuity is a limitation, taking the subject-matter of the perpetuity out of commerce for a period of time greater than a life or lives in being and 21 years thereafter. If, by any possibility, a devise violates the rule against perpetuity, it cannot stand. If there is possibility that a violation of this rule can happen, then the devise must be held void. Neither will its violation be tolerated when it is covered by a trust any more than when it actually appears in the creation of a legal state. The courts of equity will not permit limitations of future equitable interests to transcend those of legal interest of executory devises and shifting and springing uses at law.²⁰⁵

This was the first time a court in Texas had supplied such a definition and in doing so seemed to follow the letter of the law and what was provided by the common law at the time.²⁰⁶

2. *Brooker v. Brooker*

Brooker provides some interpretive guidance regarding the definition of “perpetuities” specifically in Texas.²⁰⁷ In 1937, the *Brooker* court found a trust directing the trust to be “held together and not partitioned during the life of my last surviving legatee, and twenty-one (21) years thereafter[.]” to be void under the Rule.²⁰⁸ The supreme court also provided the following:

According to our authorities, and also according to the authorities generally, the rule against perpetuities, as contained in the [Texas] constitutional provision, is that no interest within its scope is good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of

202. See *supra* Section VIII.A.

203. See *Yowell*, 620 S.W.3d at 343.

204. See *Anderson v. Menefee*, 174 S.W. 904, 907–08 (Tex. App.—Fort Worth 1915, writ ref’d).

205. *Id.*; see also *Neely v. Brogden*, 239 S.W. 192, 193 (Tex. Comm’n App. 1922, judgment affirmed) (demonstrating that the Texas Commission Court had equivalent standing as the Texas Supreme Court, which adopted the same definition of “perpetuity” as the *Anderson* court).

206. *Anderson*, 174 S.W. at 907–08.

207. See *Brooker v. Brooker*, 106 S.W.2d 247, 254 (Tex. 1937).

208. See *id.* at 249.

the creation of the interest, and in some instances the period of gestation will be added.²⁰⁹

Further, the *Brooker* court stated that the constitutional provision banning perpetuities is an “express one of the cardinal and basic principles of our system of government” and that it must be “relentlessly enforced.”²¹⁰ By 1922, courts had recognized that the Texas constitution’s ban on perpetuities included all of the common law notions of restraints on alienation, lives in being plus twenty-one years, and vesting.²¹¹ It is worth noting that both *Anderson* and *Brooker* were decided before there was a codified Rule.²¹² However, this Comment will analyze a more recent decision, *ConocoPhillips Co. v. Koopmann*, which illustrates the Supreme Court of Texas’s interpretation of the rule in accordance with the statutory period and its straying from the “relentless enforcement” of the rule.²¹³

3. *ConocoPhillips Co. v. Koopmann*

In a much more recent decision concerning the vesting of a future interest in an oil and gas lease, the Texas Supreme Court gave some guidance as to whether a perpetuity is a set time limit or a discretionary measure that courts can determine on a case-by-case basis; the *ConocoPhillips* court stated:

[T]he Texas Constitution does not define “perpetuities,” and without a statute on the subject, the common law on the matter is the law of the state. . . . Our holding does not run afoul of the constitution’s prohibition of perpetuities because the future oil and gas interest at issue here does not restrain alienability indefinitely.²¹⁴

Importantly, the court noted that this decision is to be applied narrowly to vesting interests in oil and gas leases, which gives rise to the notion that the Texas Supreme Court has some gray area and can stray from the common law Rule.²¹⁵ The Texas Supreme Court *expressly* mentioned that it did not want to touch the Rule itself but applied a different interpretation to the

209. *See id.* at 245.

210. *Id.* at 254.

211. *Id.*

212. *See id.* at 250.

213. *See ConocoPhillips Co. v. Koopman*, 547 S.W.3d 858, 869 (Tex. 2018); *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 343 (Tex. 2020).

214. *See ConocoPhillips*, 547 S.W.3d at 873.

215. *Id.*

“vesting” element allowing the interest to remain and not apply the strict standards seen almost 100 years ago in *Anderson* and *Brooker*.²¹⁶

The Texas Supreme Court also looked at the purpose of the Rule and whether it was being served.²¹⁷ When defining the purpose of the Rule, the Texas Supreme Court explained that it has “recognized the purpose of the Rule as preventing landowners from using remote contingencies to preclude alienability of land for generations.”²¹⁸ The court found that invalidating a non-participating royalty interest would not be serving the purpose of the Rule because it does not preclude alienability indefinitely.²¹⁹ Clearly, the requirement in subparagraph (f) of the amendment satisfies this purpose.²²⁰

The holding in *ConocoPhillips* illustrates that because the Texas constitution does not define perpetuity and the statute contained the common law twenty-one-year period, the court had to apply the common law, implying that if the statute contained a different period, Texas courts could use a different period.²²¹ The new Texas amendment provides a clear time period on the subject (300 years), and in the case of *ConocoPhillips* this amendment would have provided the supreme court with a statute that clearly defined the perpetuity period.²²²

4. *Yowell v. Granite Operating Co.*

In the most recent case dealing with the Rule, the Supreme Court of Texas, in *Yowell v. Granite*, again addressed a royalty interest, specifically with an overriding royalty interest (ORRI) with an anti-washout clause.²²³ This means that the ORRI attached to the land and was conditioned on the lease ending, and if it did, the anti-washout clause would allow the ORRI to automatically be in effect on the next lease.²²⁴ The Rule was triggered because there was no way to tell when the interest would vest and the interest was contingent on a lease expiring; the typical oil and gas lease stays in effect until production ceases to exist, and it is impossible to ascertain when production will stop.²²⁵ The facts of this case are quite complicated, but essentially the issue was an overriding royalty subject to the Rule and whether or not the court could use *cy pres* to reform a business document.²²⁶

216. *Id.*; see *Brooker*, 106 S.W.2d at 247.

217. See *ConocoPhillips*, 547 S.W.3d at 869.

218. See *id.*

219. See *id.*

220. See TEX. PROP. CODE ANN. § 112.036(f).

221. See *Brooker*, 106 S.W.2d at 249.

222. *Id.*; see PROP. § 112.036.

223. See *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 343 (Tex. 2020).

224. *Id.* at 342–43.

225. *Id.*

226. *Id.*

The Texas Supreme Court found that ORRIs are subject to the Rule and *cy pres* is applicable when reforming a document created by an entity (i.e., not created by an individual).²²⁷ However, the most important part of this case is the Texas Supreme Court's interpretation of what a perpetuity is.²²⁸ In trying to understand the constitutional prohibition, the Texas Supreme Court cited its prior holding in *ConocoPhillips*, stating: "A perpetuity is a restriction on the power of alienation that last longer than a prescribed period."²²⁹ In the end, the Texas Supreme Court reformed the ORRI to be contingent upon the grantor's life, plus twenty-one years, making it a valid interest under the *old* Rule.²³⁰ The Texas Supreme Court follows the "prescribed period," meaning the period provided for in Section 112.036 of the Texas Property Code.²³¹

Texas is rightfully attempting to promote the productivity of land, but the Texas Supreme Court must decide which interpretation it wants to use for "perpetuity."²³² The recent decisions in *ConocoPhillips* and *Yowell* seem to indicate the Texas Supreme Court uses the period prescribed by law.²³³ If the Texas Supreme Court were to use the aforementioned interpretation, this would clearly show that the new 300-year period does not run afoul of the constitutional prohibition *because 300 years is the period prescribed by law*.²³⁴

IX. TEXAS STATUTORY AMENDMENT TO THE RULE AGAINST PERPETUITIES

Texas followed the common law Rule until September 1, 2021, when the amendment became effective.²³⁵ The amendment extends the time allotted for interests to vest with respect to private irrevocable trusts to 300 years.²³⁶ This section will now illustrate why the amendment will survive a constitutional challenge by showing that 300 years is not prohibited by the newly minted statutory language.²³⁷ Further, the new amendment to the Texas Property Code concludes with a notable provision, subparagraph (f), which requires that real property held in a trust must be sold within 100 years of the trust's effective date.²³⁸ Finally, this section will show that the amendment provides a clear meaning for what a perpetuity is by providing a definitive

227. *Id.* at 345, 350.

228. *Id.*

229. *Id.* at 343.

230. *Id.* at 350.

231. TEX. PROP. CODE ANN. § 112.036.

232. *Yowell*, 620 S.W.3d at 343.

233. *Id.*; see also *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 866 (Tex. 2018).

234. Author's original opinion.

235. PROP. § 112.036.

236. *Id.*

237. See *infra* Sections IX.A–D.

238. PROP. § 112.036(f).

time period of vesting and will conclude by explaining the public policy interests and benefits this amendment will bring to the state.²³⁹ This amendment is pertinent to this discussion because it will be the first time Texas has passed an amendment that is in direct conflict with this portion of the Texas constitution.²⁴⁰

A. 300 Years Is Not Forever

Black's law dictionary describes a perpetuity as "everlasting."²⁴¹ Texas Jurisprudence (Third) describes it as "taking property out [of commerce] for the prohibited period."²⁴² Commentary on the Texas constitution states that it is "[a]n interest that does not take effect or vest within the period prescribed by law," and the most recent decisions from the supreme court state the same, "the period prescribed by law."²⁴³ These interpretations demonstrate that in Texas, commentators, scholars, and most importantly the supreme court, all apply the period prescribed by law, and the legislature has now provided the current period of 300 years.²⁴⁴ Further, 300 years explicitly negates the notion of the amendment being in perpetuity, simply because 300 years is not forever or "everlasting."²⁴⁵

As mentioned, a definite perpetuity period is neither defined nor written *once* in the Texas constitution.²⁴⁶ The amendment not only provides the definition for the period of perpetuity of future interests (300 years), but it also provides a time period for real property placed within an irrevocable trust through subparagraph (f) of Section 112.036.²⁴⁷

B. Subparagraph (f)

The courts in *Brooker* and *Anderson* were concerned with the restraint on the alienability of property and that land would be tied up in a trust

239. See *infra* Sections IX.A–C.

240. See PROP. § 112.036; TEX. CONST. art. I, § 26.

241. See *What is PERPETUITY*, *supra* note 20.

242. *Id.*; see TEX. CONST. art. I, § 26, interp. commentary; see also *ConocoPhillips v. Koopmann*, 547 S.W.3d 858, 866–67 (Tex. 2018) (stating both "that 'perpetuity' as applied to property means an 'everlasting property interest[]'" and that "[f]or purposes of this section, a perpetuity is a restraint or restriction of the power of alienation beyond [the period required by the Rule], and as such would not be constitutionally allowed"); 34 TEX. JUR. 3D *Estates* § 55 (2018) ("The purpose of the rule against perpetuities is to prevent the taking of the subject matter of the perpetuity out of commerce or trade for the prohibited period.").

243. *ConocoPhillips*, 547 S.W.3d at 867; TEX. CONST. art. I, § 26, interp. commentary.

244. PROP. § 112.036(c)(1).

245. *Id.*

246. See TEX. CONST. art. I, § 26.

247. PROP. §§ 112.036(c)(1), (f).

forever.²⁴⁸ Subparagraph (f) of Section 112.036 prohibits real property from remaining in a trust for more than 100 years.²⁴⁹ This means that those who are concerned about perpetual land retention now have a definite time for removing real property from the trust.²⁵⁰

As mentioned, under the common law (old statute), real property could be held in a trust longer than 100 years with effective estate planning, and the new subparagraph (f) requires property to be removed from the trust in a shorter amount of time.²⁵¹ Further, the amendment provides another statutory definition to better understand the implications of RAP as it applies to real property.²⁵²

C. Section 112.036 Provides a Clear-Cut Definition

There has not once been a definition in any one of the four state constitutions, and the Texas courts have failed to give a bright-line definition; they have only offered guidance on when interests vest.²⁵³ Courts do, however, give guidance to the purpose of the Rule and what it is meant to do and protect.²⁵⁴ This means that there is no definition that could usurp the new 300-year definition passed by the Texas legislature.²⁵⁵

What this amendment does is apply a statutory time limit that is definite to trusts *and* real property.²⁵⁶ Regardless of the public policy implications, the amendment would assist courts in trust reformation proceedings and trust proceedings in general.²⁵⁷ Courts could now look at a trust instrument, determine the effective date, and do a simple calculation from that date.²⁵⁸ The amendment provides a much more digestible formula than the twenty-one-year Rule that would assist practitioners in creating future trust instruments for their clients by easily explaining and applying the new clear-cut Rule.²⁵⁹

248. See *Brooker v. Brooker*, 106 S.W.2d 247, 254–55 (Tex. 1937); *Anderson v. Menefee*, 174 S.W. 904, 908–09, 911 (Tex. App.—Ft. Worth 1915, writ. ref'd).

249. PROP. § 112.036(f).

250. See *id.*

251. See *DUKEMINIER & SITKOFF*, *supra* note 8; Richard B. Covey, *Use of Long Term Trusts in Estate Planning*, 4 REAL PROP., PROB. & TR. J., 489, 489–90 (1969); see also PROP. § 112.036 (noting that with extended life expectancy drafting to extend the perpetuities period has become much easier).

252. PROP. § 112.036(f).

253. See *supra* Section III.A.

254. See *Brooker v. Brooker*, 106 S.W.2d 247, 255 (Tex. 1937); *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880–81 (Tex. 2018); *Neely v. Brogden*, 239 S.W. 192, 193 (Tex. Comm'n App. 1922).

255. *Id.*

256. PROP. § 112.036.

257. *Id.*; see *ConocoPhillips*, 547 S.W.3d at 865.

258. PROP. § 112.036(b).

259. *Id.*; see *Leach*, *supra* note 91; *Texas Probate Guide*, FORBES & FORBES L., <https://www.>

D. Texas's Benefits

The benefits of this amendment go beyond those mentioned earlier.²⁶⁰ The benefits will be seen in more jobs coming to the state, whether it be in drafting trusts or in administering them.²⁶¹ The amendment will better equip settlors to manage their property and plan for contingencies by telling them exactly how long they need to plan for and for which type of asset; such as the one hundred year limit for real property assets.²⁶² Further, it is in the best economic interest of Texas to allow longer trusts, thus why should in-state attorneys, banks, and trust companies be required to leave Texas to enjoy longer trusts when this amendment ensures that business will stay in Texas?²⁶³

X. STANDING

To show that the amendment is unconstitutional, someone or some entity would have to show an injury.²⁶⁴ However, it would be difficult for an individual to bring suit in a beneficiary capacity because the Rule lengthens the amount of time the beneficiary would be receiving benefits from the trust under these circumstances and an injury would be hard to show in the present day.²⁶⁵

Another highly unlikely scenario would be a charitable organization (501(c)(3)) bringing suit.²⁶⁶ This scenario would require the charity being promised a certain amount of money or asset through a charitable trust and not receiving it *solely* on the grounds of an extended perpetuity period.²⁶⁷ As mentioned above, this result is highly unlikely, as those who give charitably have done so regardless of the state's perpetuity period and tend to base their

Forbeslawoffice.com/probate/texas-probate-guide/ (last visited Mar. 27, 2022) [<https://perma.cc/N2NR-2QX2>].

260. See *supra* Part V.

261. See Sitkoff & Schanzenbach, *supra* note 95 (noting a 3 billion dollar increase in trusts business to states that have veered from the common law perpetuity period); Madoff, *supra* note 174 (stating a 100 billion increase of trust dollars to the state passing a longer perpetuity period).

262. Sitkoff & Schanzenbach, *supra* note 95; see PROP. § 112.036 (allowing a practitioner to explain to a client the exact amount of time they have from the effective date in years, rather than explaining the common law twenty-one-year Rule). Further, this new Rule can better inform clients on when real property must be sold from the effective date of the irrevocable trust, and if that property is placed in the trust at a later date (other than the effective date) a practitioner can accurately explain to the client that real property must be removed (sold) from the trust no later than 100 years from the date the title of real property went into the corpus. See *id.*

263. Author's original hypothetical.

264. See *Baker v. Carr*, 369 U.S. 186, 204 (1962).

265. See *id.*; author's original opinion.

266. See Hadero, *supra* note 169.

267. See *id.*

donations on the applicable tax rate for that year; similar to a non-charitable claimant, the route to an actual injury and remedy is not a clear or easy one.²⁶⁸

XI. CONCLUSION

This amendment should not be found unconstitutional solely because it violates a constitutional ban on perpetuities.²⁶⁹ The constitution does not provide a definition and does not prohibit a period of 300 years or longer; it just contains a prohibition against perpetuities *generally*.²⁷⁰ Further, this amendment provides a much-needed statutory definition and will help prevent future potential issues like what we have seen in *Yowell*.²⁷¹ The amendment will also assist in better understanding the complicated nature of RAP by providing a definite period of perpetuity.²⁷²

The amendment also provides safeguards to ensure those who use this tool are not “free-riding” by placing *both* a 300-year limit and a 100-year limit on real property.²⁷³ The public policy arguments can be seen in real dollars staying within Texas; Exhibits A and B show how much an extended period of a trust can accumulate wealth and demonstrates how much a mere 1% management fee would garner.²⁷⁴ Allowing longer trusts will bring billions of dollars to the state through trust administration, legal fees, and will undoubtedly increase employment across multiple sectors of business within the state.²⁷⁵ Further, this amendment clears up some confusion regarding RAP and the interests applicable, especially in the oil and gas context, which is a vitally important sector to the Texas economy.²⁷⁶

It would be in Texas’s best interest to find this amendment constitutional, as Texas is one of the last states amending its respective code allowing for longer trusts.²⁷⁷ With only a few states still following the common law Rule, Texas is undoubtedly late to enter the race, but as the saying goes, “better late than never.”²⁷⁸

268. *See id.*

269. Author’s original opinion.

270. TEX. CONST. art. I, § 26.

271. *See Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 340 (Tex. 2020).

272. TEX. PROP. CODE ANN. §§ 112.036(c)(1), (f).

273. *Id.* § 112.036(f).

274. *See infra* Exhibits A–B.

275. *See* Madoff, *supra* note 174 (stating a 100 billion increase of trust dollars to the state after passing a longer perpetuity period.); Sitkoff & Schanzenbach, *supra* note 95.

276. *See ConocoPhillips v. Koopmann*, 547 S.W.3d 858, 862 (Tex. 2018); *Yowell*, 620 S.W.3d at 340.

277. Author’s original opinion.

278. Author’s original opinion; *see infra* Exhibit C.

EXHIBIT A²⁷⁹
(2022 GST (12.06 MILLION) EXEMPTION)

***Using the 2022 GSTT Exemption amount of 12.06 million		Assume the trustee receives a 1% fee of the corpus for management	Assume each beneficiary has 2 children	
Assume the corpus is compounded annually at 2.5%	Assume the corpus of the trust begins with the 2022 GST amount of 12.06 million	Noting that this number is 1% trustee fee on the amount of the corpus, not the amount of yearly income	And assume 25 years per generation gap	
Year	Dollar Amount (corpus)	1% Trustee Fee	Year	Beneficiaries
\$0	\$12,060,000	\$120,600		\$2
\$10	\$15,061,287	\$150,613	\$25	\$4
\$20	\$19,279,721	\$192,797	\$50	\$8
\$30	\$24,679,673	\$246,797	\$75	\$16
\$40	\$31,592,068	\$315,921	\$100	\$32
\$50	\$40,440,518	\$404,405	\$125	\$64
\$60	\$51,767,282	\$517,673	\$150	\$128
\$70	\$66,266,498	\$662,665	\$175	\$256
\$80	\$84,826,720	\$848,267	\$200	\$512
\$90	\$108,585,373	\$1,085,854	\$225	\$1,024
\$100	\$138,998,458	\$1,389,985	\$250	\$2,048
\$110	\$177,929,777	\$1,779,298	\$275	\$4,069
\$120	\$227,765,158	\$2,277,652	\$300	\$8,192
\$130	\$291,558,659	\$2,915,587		
\$140	\$373,219,732	\$3,732,197		
\$150	\$477,752,811	\$4,777,528		
\$160	\$611,563,990	\$6,115,640		
\$170	\$782,853,611	\$7,828,536		
\$180	\$1,002,118,808	\$10,021,188		
\$190	\$1,282,796,797	\$12,827,968		
\$200	\$1,642,088,353	\$16,420,884		
\$210	\$2,102,011,921	\$21,020,119		
\$220	\$2,690,752,972	\$26,907,530		
\$230	\$3,444,391,291	\$34,443,913		
\$240	\$4,409,112,056	\$44,091,121		

279. See *What's New – Estate and Gift Tax*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax> (Nov. 15, 2021) [<https://perma.cc/D3UZ-WBJX>].

\$250	\$5,644,036,197	\$56,440,362		
\$260	\$7,224,843,503	\$72,248,435		
\$270	\$9,248,410,502	\$92,484,105		
\$280	\$11,838,747,342	\$118,387,473		
\$290	\$15,154,597,495	\$151,545,975		
\$300	\$19,399,166,027	\$193,991,660		

EXHIBIT B²⁸⁰
(2021 GST (11.7 MILLION) EXEMPTION)

***December 2021 GSTT Exemption amount of 11.7 million		Assume the trustee receives a 1% fee of the corpus for management	Assume each beneficiary has 2 children	
Assume the corpus is compounded annually at 2.5%	Assume the corpus of the trust begins with the 2021 GST amount of 11.7 million	Note that this number is 1% trustee fee on the amount of the corpus, not the amount of yearly income	And assume 25 years per generation gap	
Year	Dollar Amount (corpus)	1% Trustee Fee	Year	Beneficiaries
0	\$11,700,000	\$117,000		2
10	\$14,976,989	\$149,770	25	4
20	\$19,171,812	\$191,718	50	8
30	\$24,541,541	\$245,415	75	16
40	\$31,415,247	\$314,152	100	32
50	\$40,214,172	\$402,142	125	64
60	\$51,477,540	\$514,775	150	128
70	\$65,895,603	\$658,956	175	256
80	\$84,351,943	\$843,519	200	512
90	\$107,977,619	\$1,079,776	225	1,024
100	\$138,220,481	\$1,382,205	250	2,048
110	\$176,933,902	\$1,769,339	275	4,096
120	\$226,490,353	\$2,264,904	300	8,192
130	\$289,926,800	\$2,899,268		
140	\$371,130,816	\$3,711,308		
150	\$475,078,822	\$4,750,788		
160	\$608,141,057	\$6,081,411		
170	\$778,471,967	\$7,784,720		
180	\$996,509,934	\$9,965,099		
190	\$1,275,616,964	\$12,756,170		
200	\$1,632,897,560	\$16,328,976		
210	\$2,039,265,296	\$20,392,653		
220	\$2,610,431,988	\$26,104,320		
230	\$3,341,573,640	\$3,341,574		
240	\$4,277,496,771	\$42,774,968		
250	\$5,475,557,504	\$54,755,575		
260	\$7,009,176,532	\$70,091,765		
270	\$8,972,338,547	\$89,723,385		
280	\$11,485,351,899	\$114,853,519		
290	\$14,702,221,450	\$147,022,215		
300	\$18,820,086,444	\$188,200,864		

280. *Id.*

EXHIBIT C²⁸¹
STATE BY STATE CODIFIED R.A.P. 2022 UPDATED

State	Rule Against Perpetuities (year of change)	Statutory Citation
Alabama	Uniform Statutory Rule Against Perpetuities (2012).	ALA. CODE § 35-4-4
Alaska	Powers of alienation cannot be suspended for more than 30 years after the death of an individual alive at the time when the power was suspended. However, a power of alienation is not considered “suspended” if the trustee has the power to sell the trust property. (1997).	ALASKA STAT. § 34.27.100
	A general or non-general power of appointment not presently exercisable because of a condition precedent is invalid unless, within a period of 1,000 years after its creation, either the power is irrevocably exercised, or the power terminates.	ALASKA STAT. § 34.27.051
Arizona	The common-law Rule does not apply to a non-vested interest under a trust whose trustee has the expressed or implied power to sell the trust assets and at one or more times after the creation of the interest one or more persons who are living when the trust is created have an unlimited power to terminate the interest. (500 years after the effective date). (1998).	ARIZ. REV. STAT. § 14-2901(A)(3)
Arkansas	Uniform Statutory Rule Against Perpetuities (1990).	ARK. CODE ANN. § 18-3-101
California	Uniform Statutory Rule Against Perpetuities (1992).	CAL. PROB. CODE § 21200
Colorado	A nonvested property interest is invalid unless it either vests or terminates within 1,000 years after its creation. (2001).	COLO. REV. STAT. § 15-11-1102.5
Connecticut	Uniform Statutory Rule Against Perpetuities (1989).	CONN. GEN. STAT. § 45a- 491
Delaware	Rule Against Perpetuities does not apply to personal property in trust. Real property in trust must vest within 110 years ; “real property” does not include any intangible personal property, such as an interest in a corporation, limited liability company, partnership, statutory trust, business trust, or other entity, regardless of whether such entity is the owner of real property or any interest in real property. (1995).	25 DEL. C. § 503
District of Columbia	Uniform Statutory Rule Against Perpetuities (2001).	D.C. CODE § 19-901
Florida	Uniform Statutory Rule Against Perpetuities (2001).	FLA. STAT. § 689.225
Georgia	Uniform Statutory Rule Against Perpetuities (1990).	GA. CODE ANN. § 44-6-200
Hawaii	Uniform Statutory Rule Against Perpetuities (1992).	HAW. REV STAT. § 525-1

281. See Gary Smith, *Summary of 50 State Rule Against Perpetuity Laws*, NETLAW (July 10, 2017), <https://step6.netlawinc.com/summary-50-state-rule-perpetuities-laws/> [https://perma.cc/X2TL-47TP]; *Rule Against Perpetuities – Summary of the 50 States*, INTERACTIVE EST. DOC. SYS., <https://ieds.online/rule-against-perpetuities-summary-of-the-50-states/> (last visited Mar. 27, 2022) [https://perma.cc/2BVD-UNP5].

Idaho	There shall be no rule against perpetuities applicable to real or personal property. (1965)	IDAHO CODE § 55-111
	The absolute power of alienation cannot be suspended for more than 25 years after the death of an individual alive at the time when the power was suspended. However, there is no “suspension” of the power of alienation if the trustee has the power to sell trust property or if there is an unlimited power to terminate in one or more persons then alive.	IDAHO CODE § 55-111A
Illinois	Rule does not apply to “qualified perpetual trusts” (any trust created on or after January 1, 1998, expressly states that the Rule doesn’t apply, and the trustee has the unlimited power to sell assets).	765 ILL. COMP. STAT. § 305/4
Indiana	Uniform Statutory Rule Against Perpetuities (1991).	IND. CODE § 32-17-8-1
Iowa	Common-law Rule codified with "wait-and see" modification (1983).	IOWA CODE § 558.68
Kansas	Uniform Statutory Rule Against Perpetuities (1992).	KAN. STAT. ANN. § 59-3401
Kentucky	The common law rule against perpetuities shall not be in force. For trusts created after July 15, 2010, the power of alienation cannot be suspended for more than 21 years after the death of the individual or individuals then alive. However, there is no “suspension” of the power of alienation if the trustee has the power to sell trust property or if there is an unlimited power to terminate in one or more persons then alive. (2010).	KY. REV. STAT. ANN. Chapter 381
Louisiana	The Rule Against Perpetuities is not known to the laws of Louisiana; laws only provide that a beneficiary must be in being and ascertainable on the date of the creation of the trust.	LA. STAT. ANN. § 9:1803
Maine	Rule does not apply to trusts created after September 18, 1999 if trust expressly states that the Rule doesn’t apply, and the trustee has the power to sell, mortgage, or lease property for any period of time beyond the period that is required for an interest created under the governing instrument to vest in order to be valid under the Rule Against Perpetuities. (1999).	ME. STAT. 33, § 101-A
Maryland	Rule does not apply if trust was formed after October 1, 1998 and expressly states that the Rule doesn’t apply, and the trustee has the power to sell, mortgage, or lease property for any period of time beyond the period that is required for an interest created under the instrument to vest in order to be valid under the Rule Against Perpetuities.	MD. EST. & TRUSTS CODE § 11- 102(b)(5)
Massachusetts	Uniform Statutory Rule Against Perpetuities (1990).	MASS. GEN. LAWS CH. 184A, § 1
Michigan	Rule Against Perpetuities does not apply to personal property in trust, trust instrument can be drafted to avoid RAP. (1998).	MICH. COMP. LAWS § 554.94
Minnesota	Uniform Statutory Rule Against Perpetuities (1991).	MINN. STAT. § 501A.01
Mississippi	Uniform Statutory Rule Against Perpetuities (2015).	MISS. CODE ANN. § 89-23-3, Added by Laws 2015, Ch. 414 (H.B. No. 153), § 2, eff. July 1, 2015.

Missouri	The Rule Against Perpetuities will not apply to a trust created after August 28, 2001, if a trustee has the power pursuant to the terms of the trust or applicable law to sell the trust property during the period of time the trust continues beyond the period of the Rule Against Perpetuities that would apply to the trust but for this subsection	MO. REV. STAT. § 456.025(1)
Montana	Uniform Statutory Rule Against Perpetuities (1989)	MONT. CODE ANN. § 72-2- 1001
Nebraska	Uniform Statutory Rule Against Perpetuities (1989)	NEB. REV. STAT. § 76- 2001
Nevada	Uniform Statutory Rule Against Perpetuities, 2005 legislation extending the perpetuity period to 365 years.	NEV. REV. STAT. §111.103
New Hampshire	The common law Rule Against Perpetuities shall not apply to any trust created after January 1, 2004 if: (1) the trust instrument contains a provision which expressly exempts the instrument from the application of the Rule Against Perpetuities; and (2) the trustee has the power under the governing instrument, applicable statute, or common law, to sell, mortgage, or lease property for any period of time beyond the period that is required for an interest created under the governing instrument to vest in order to be valid under the Rule Against Perpetuities	N.H. REV. STAT. § 564:24
New Jersey	No interest created in real or personal property shall be void by reason of any Rule Against Perpetuities, whether the common law Rule or otherwise. The common law Rule Against Perpetuities shall not be in force in this State. (1999).	N.J. STAT. § 46:2F-9
	A trust is void if it suspends the power of alienation for more than 21 years after the death of an individual alive at the time when the power was suspended. However, there is no “suspension” of the power of alienation if the trustee has the power to sell trust property or if there is an unlimited power to terminate in one or more persons then alive.	N.J. STAT. § 46:2F-10
New Mexico	Uniform Statutory Rule Against Perpetuities (1992).	N.M. STAT. ANN. § 4 5-2-901
New York	Common-law Rule codified	N.Y. EST. POWERS & TRUSTS § 9-1.1
North Carolina	Uniform Statutory Rule Against Perpetuities generally applicable	N.C. GEN. STAT. §§ 41-15
	Powers of alienation cannot be suspended for more than 21 years after the death of an individual alive at the time when the power was suspended. However, there is no “suspension of the power of alienability” if the trustee has the power to sell trust property or if there is an unlimited power to terminate in one or more persons in being. (1995).	N.C. GEN. STAT. §§ 41-23
North Dakota	Uniform Statutory Rule Against Perpetuities (1991).	N.D. CENT. CODE § 47-02-27.1
Ohio	No rule of law against perpetuities or suspension of the powers of alienation shall apply if the instrument creating the trust specifically states that no such rule applies and if either the trustee has the power to sell	OHIO REV. CODE ANN. § 2131.09

	trust property, or if there is an unlimited power to terminate in one or more persons in being. (Trust instrument can be drafted to avoid RAP). (1998).	
Oklahoma	Common-law Rule codified, but trust instrument can be drafted to avoid RAP. (2003).	OKLA. STAT. TIT. 60, § 175.47
Oregon	Uniform Statutory Rule Against Perpetuities (1990)	OR. REV. STAT. § 105.950
Pennsylvania	No interest shall be void as a perpetuity, and neither will any direction or authorization to accumulate income. However, if a power of appointment is exercised to create a new power of appointment, any interest created by the exercise of the new power of appointment is invalid if it does not vest within 360 years of the creation of the original power of appointment, unless the exercise of the new power of appointment expressly states that the provision shall not apply to the interests created by the exercise. (2006).	20 PA. CODE § 6107.1
Rhode Island	The common law rule against perpetuities shall no longer be deemed to be in force and/or of any effect in this state, provided, the provisions of this section shall not be construed to invalidate or modify the terms of any interest which would have been valid prior to the effective date of this act, and, provided further, that the provisions of this section shall apply to both legal and equitable interests. (1999).	R.I. GEN. LAWS § 34-11-38
South Carolina	Uniform Statutory Rule Against Perpetuities (1987).	S.C. CODE ANN. § 27-6-10
South Dakota	The common-law Rule Against Perpetuities is not in force in this state (1983).	S.D. CODIFIED LAWS § 43-5-8
Tennessee	Common-law Rule generally applicable, but as to any trust created after June 30, 2007, or that becomes irrevocable after June 30, 2007, the terms of the trust may require that all beneficial interests in the trust vest or terminate or the power of appointment is exercised within three hundred sixty (360) years.	TENN. CODE ANN. § 66-1-202(f)
Texas	(c) An interest in a trust must vest, if at all: (1) not later than 300 years after the effective date of the trust, if the effective date of the trust is on or after September 1, 2021; or (f) Under this section, a settlor of a trust may not direct that a real property asset be retained or refuse that a real property asset may be sold for a period longer than 100 years. (2021).	TEX. PROP. CODE ANN. § 112.036
Utah	A nonvested property interest is invalid unless within 1,000 years after the interest's creation the interest vests or terminates. (2004).	UTAH CODE ANN. § 75-2-1203(1)
Vermont	Vermont has not codified the Rule Against Perpetuities, but the common-law Rule is mentioned in other statutes and in case law. ("wait-and-see" allowed).	N/A
Virginia	Uniform Statutory Rule Against Perpetuities (2000).	VA. CODE ANN. § 55-12.1
Washington	No provision of an instrument creating a trust, including the provisions of any further trust created, and no other disposition of property made pursuant to exercise of a power of appointment granted in or created through authority under such instrument is invalid under the Rule Against Perpetuities, or any similar statute or common law, during the 150 years following the effective date of the instrument. Thereafter, unless the trust assets have	WASH. REV. CODE § 11.98.130

	previously become distributable or vested, the provision or other disposition of property is deemed to have been rendered invalid under the Rule Against Perpetuities. (1984).	
West Virginia	Uniform Statutory Rule Against Perpetuities (1992).	W. VA. CODE § 36-1A-1
Wisconsin	A future interest or trust is void if it suspends the power of alienation for longer than lives in being plus 30 years. However, an interest is not considered "suspended" if the trustee has power to sell the trust property, or if there is an unlimited power to terminate in one or more persons in being. (trust can be drafted to avoid RAP). (1969).	WIS. STAT. § 700.16(5)
Wyoming	The Rule will not apply to a trust created after July 1, 2003 if: (1) the trust instrument states that the Rule Against Perpetuities shall not apply to the trust; (2) the trust instrument states that the trust shall terminate no later than 1,000 years after the trust's creation; and (3) the trust is governed by the laws of this state and the trustee maintains a place of business, administers the trust in this state, or is a resident of this state. The common-law Rule will generally continue to apply to real property held in such a trust.	WYO. STAT. ANN. § 34-1-139