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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 316

Revision Date: January 18, 1994
Title: "An Act adopting the Uniform Statutory Rule Against Perpetuities..."
Sponsor: Representative Moses
Requestor: Representative Moses

Department Affected: Department of Law
BRU: Legal Services
Component: Operations
COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING:

1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Prepared by: Richard I. Peques, Director Phone: 465-3672
Division: Administrative Services Division Date: January 18, 1994
Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law Date: January 18, 1994

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 316

ANALYSIS CONTINUATION:

This bill adopts a uniform rule against perpetuities in accordance with a model act proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL). This bill deals with estate laws governing private parties and will not have a fiscal impact on the Department of Law.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

P.O. BOX 110300 — STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-5285 465-6735

February 11, 1994

Hon. Carl Moses, Chair
House Rules Committee
Alaska House of Representatives
Room 204, State Capitol
Juneau, AK 99801-1182

Dear Representative Moses:

At the request of your legislative aide, we have reviewed HB 316, an Act adopting the Uniform Statutory Rule Against Perpetuities. We find no legal or constitutional difficulties with the bill.

We believe that the bill makes important improvements in Alaska law for conformity with other states that have adopted the Uniform Act.

If you need further information, please let me know.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: *Deborah E. Behr*
Deborah E. Behr
Assistant Attorney General

DEB:cl

DIVISION OF LEGAL SERVICES

**LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

January 25, 1994

SUBJECT: Sectional summary of HB 316 (Work Order No. 8-LS1213\A)

TO: Representative Carl Moses
Attn: Tim

FROM: *TLB*
Theresa L. Bannister
Legislative Counsel

You have requested a sectional summary of the above described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Contains the Uniform Statutory Rule Against Perpetuities.

Sec. 34.27.050(a) states that a nonvested property interest is invalid unless it satisfies either of two tests dealing with when the interest vests or terminates.

Sec. 34.27.050(b) states that a general power of appointment that is not presently exercisable is invalid unless the condition precedent to the power of appointment satisfies either of the two listed criteria.

Sec. 34.27.050(c) declares that a nongeneral power of appointment or a general testamentary power of appointment is invalid unless the power of appointment satisfies either of the two listed criteria.

Sec. 34.27.050(d) states that a particular possibility will not be considered when determining the validity of a nonvested property interest or a power of appointment under (a)(1), (b)(1), or (c)(1).

Sec. 34.17.050(e) states that, when measuring time from the creation of a trust or other property arrangement, certain language in a governing instrument is not operative to the extent specified in the subsection.

Sec. 34.27.055(a) states that, except for (b) - (c), general principles of property law determine when a nonvested property interest or a power of appointment is created.

Sec. 34.27.055(b) - (c) establish two exceptions to (a) with regard to when a nonvested property interest or a power of appointment is considered to be created.

Sec. 34.27.060 requires a court under certain conditions to reform certain property dispositions in a manner that most closely approximates the transferor's plan of distribution and that is within the 90 year allowed by sec. 34.27.050(a)(2), (b)(2), or (c)(2).

Sec. 34.27.065 identifies certain transactions that are not covered by the rule stated in sec. 34.27.050.

Sec. 34.27.070(a) states that the new provisions apply prospectively to nonvested property interests or powers of appointment created after the effective date of the Act.

Sec. 34.27.070(b) authorizes a court under certain conditions to reform certain nonvested property interests or powers of appointment created before 1996 in the manner that most closely approximates the transferor's manifested plan of distribution and that is within the limits of the rule against perpetuities applicable when the interest or power was created.

Sec. 34.27.075 states that the new statutory provisions supersede the common law rule against perpetuities.

Sec. 34.27.090 gives the new provisions a short title. Directs that the provisions be applied and construed to achieve uniformity on the subject among the states.

Section 2. Repeals the present statute on this subject.

Section 3. Makes the Act effective January 1, 1996.

If I may be of further assistance, please advise.

TLB:mi
94-015.mai

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A PROFESSIONAL CORPORATION

JUNEAU

Dennis C. Bailey
 Caroline Crenna
 Paul L. Dillon
 Thomas W. Findley
 Richard D. Monkman
 Arthur H. Peterson
 Peter K. Putzier

350 N. Franklin Street
 Juneau, Alaska 99801
 Telephone (907) 586-4000
 Facsimile (907) 586-3777

ANCHORAGE

Ray R. Brown
 Mauri Long

1029 W. Third Ave., Suite 220
 Anchorage, Alaska 99501
 Telephone (907) 277-5400
 Facsimile (907) 277-9896

February 10, 1994

Hon. Brian Porter, Chair
 House Judiciary Committee
 Alaska State Legislature
 Room 118, State Capitol
 Juneau, Alaska 99801-1182

HAND-DELIVERED

Re: HB 316, Uniform Statutory Rule Against Perpetuities

Dear Representative Porter:

I understand that your committee will be hearing HB 316 February 14, 1994, and I wish to express my support for the bill. It addresses a complicated area of the law that potentially affects everybody.

The bill faithfully adheres to the official version of the Uniform Statutory Rule Against Perpetuities promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1986, and amended (by adding subsec. (e) of proposed AS 34.27.050) and made a part of the Uniform Probate Code by the NCCUSL in 1990. It has already been enacted in 20 states.

This bill is virtually identical to the Seventeenth Legislature's CSHB 334(Jud), which passed the House 35 to 0 (with five absent) May 1, 1992. The original HB 334 was introduced by the governor, and I am attaching a copy of his transmittal letter for it (1991 House Journal, pages 1478 -- 1480). That letter nicely explains the common law rule against perpetuities, Alaska's current statutory modification of it in AS 34.27.010, and the improvements made by this Uniform Rule.

The basic purposes of this Uniform Rule are

- (1) to simplify the common law rule,
- (2) to eliminate its harshness,
- (3) to help assure that the intent of the person creating the future interest is actually implemented, and
- (4) to help assure that the beneficiaries of that intent receive their proper shares without litigation and great expense.

The Alaska Chapter of the American Association of Retired Persons supports the bill. Please see the attached November 27, 1991 letter from AARP's Legislative Committee Chair Keith Campbell to me. Also see the attached April 22, 1992 letter from prominent Juneau Attorney Doug Gregg to former House Judiciary Committee

Representative Brian Porter
HB 316, Perpetuities
February 10, 1994

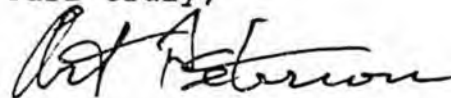
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Chair Dave Donley, supporting the bill.

Also attached is a brief article written specifically for Alaska by Professor Lawrence W. Waggoner, of the University of Michigan Law School and one of the nation's leading experts in this field. He relates the new Uniform Rule to Alaska's statute and case law.

Please let me know if you would like to have additional information on this measure. I urge a "Do Pass" recommendation. Thank you.

Yours truly,



Arthur H. Peterson
Uniform Law Commissioner
for Alaska

Enclosures (4)

cc w/o encs.: Representative Carl Moses

HB 334

HOUSE BILL NO. 334 by the Rules Committee by request of the Governor, entitled:

"An Act adopting the Uniform Statutory Rule Against Perpetuities; and providing for an effective date."

was read the first time and referred to the Judiciary Committee.

The following was published May 16, 1991:

Zero fiscal note, Department of Law

The Governor's transmittal letter, dated May 16, 1991, appears below:

"Dear Speaker Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill to adopt the Uniform Statutory Rule Against Perpetuities, promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL).

The NCCUSL has promulgated this statutory rule as both a freestanding Act and as part of the Uniform Probate Code (UPC). Since Alaska has enacted the UPC, it behooves us to keep abreast of the national standard -- especially since this new formulation of the rule is better than both the old common law rule and our own statutory modification of it, AS 34.27.010. Moreover, the Alaska Supreme Court has expressed its approval of the "wait and see" approach, a more modern and simpler version of which is proposed in this bill. See Hansen v. Stroecker, 699 P.2d 871 (Alaska 1985).

In its January 23, 1991 publication of the statutory rule, the NCCUSL's Prefatory Note explains the common law rule, its problems, and the improvements made by this statutory rule. A well-known statement of the common law rule sets it out as follows:

No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. }

In other words, under the common law rule, a nonvested property interest is determined either valid or invalid as of the time of its creation. The actual time of vesting is immaterial. The hypothetical possibility of an interest not vesting, considered at the time of the creation of the interest, determines the validity of the interest. The NCCUSL's official publication of the Act, with commentary, gives numerous illustrations.

HB 334

Like most rules of property law, the common law rule against perpetuities has two sides -- a validating side and an invalidating side. With the two sides stated separately, the rule is as follows:

Validating side. A nonvested property interest is valid when it is created (initially valid) if it is then certain to vest or terminate (fail to vest) -- one or the other -- no later than 21 years after the death of an individual then alive.

Invalidating side. A nonvested property interest is invalid when it is created (initially invalid) if there is no such certainty.

Since actual post-interest-creation events are immaterial at common law, even those that are known at the time of the lawsuit in which various parties' rights are being disputed, interests that are likely (and in fact would, if given the chance) to vest well within the period of a life in being plus 21 years are nevertheless invalid if at the time of the interest's creation there was a possibility, no matter how remote, that they might not have done so. This makes the invalidating side of the common law rule harsh: the possibility of events that rarely, if ever, happen can invalidate an interest (and the intent of the donor).

The statutory rule, including Alaska's 1983 version (AS 34.27.010), alters the common law rule by establishing a "wait and see" element. Briefly, Alaska's current approach alleviates the harsh aspects of the common law rule by stressing actual rather than possible events.

However, our causal-relationship method of determining the measuring lives has been shown to be ambiguous and uncertain in application. It is difficult to understand. The NCCUSL's statutory rule in the attached bill alleviates the harshness of the common law rule by allowing an otherwise invalid nonvested property interest a maximum period of time to vest. The Uniform Rule adopts a flat period of 90 years for marking off the maximum period for vesting. This approach grants a nonvested interest a period of time during which it can validly vest or terminate. It also avoids the confusion and ambiguity of identifying actual measuring lives and it avoids the administrative costs of tracing those persons to see when the survivor dies. And it eliminates potentially wasteful litigation.

This new rule has been approved by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, the Board of Governors of the American College of Real Estate Lawyers, and the Joint Editorial Board for the Uniform Probate Code. By August 1989, this Uniform Statutory Rule Against Perpetuities had already been enacted in nine states. Upon request, the Department of Law will be pleased to furnish the legislature with informative material (one item specifically analyzing Alaska law) written by Professor

HB 334

Lawrence W. Waggoner, of the University of Michigan Law School, and provided by the NCCUSL, along with the NCCUSL's official publication of the Act and its commentary.

I believe that this bill will make a significant improvement in Alaska perpetuities law. It will alleviate the harshness of the common law rule and provide a much more workable and less costly rule than our current AS 34.27.010. The statutory rule embodied in this bill is strongly recommended and supported by national organizations most concerned with and knowledgeable about this area of the law.

The multi-state nature of most family and other relationships in American life urges uniform treatment of these inheritance issues. I urge your favorable consideration of this bill.

Sincerely,

/s/

Walter J. Hickel
Governor"

HB 335

HOUSE BILL NO. 335 by the Rules Committee by request of the Governor, entitled:

"An Act relating to grants to municipalities, named recipients, and unincorporated communities; and providing for an effective date."

was read the first time and referred to the Community & Regional Affairs, State Affairs and Judiciary Committees.

The following was published May 16, 1991:

Zero fiscal note, Department of Administration

"Dear Speaker Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to regulation of grants to municipalities, named recipients, and unincorporated communities.

This bill proposes to repeal and reenact AS 37.05.318, to allow the Department of Administration to adopt regulations governing grants to municipalities under AS 37.05.315, the Department of Community and Regional Affairs to adopt regulations for grants to unincorporated communities under AS 37.05.317, and other departments to adopt regulations for administering grants to named recipients under AS 37.05.316. Currently, AS 37.05.318 prohibits a state agency from adopting regulations or imposing additional requirements or



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ALASKA STATE LEGISLATIVE COMMITTEE

CHAIRMAN
Mr. C. Keith Campbell
P.O. Box 722
Seward, AK 99664
(907) 224-5631

VICE CHAIRMAN
Mrs. Mary Lou Meiners
805 Gold Bell
Juneau, AK 99801
(907) 586-2568

SECRETARY
Miss Ann L. Walsh
924 Kellum #201
Fairbanks, AK 99701
(907) 456-6737

COORDINATOR
Capital City, Park Plaza
Mr. Jon Allen
Box 20301
Juneau, AK 99801
(907) 586-6680

November 27, 1991

Mr. Art Peterson
P.O. Box 20444
Juneau, Alaska 99802

Dear Mr Peterson

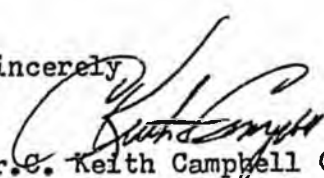
The State Legislative Committee of AARP wishes to inform you that we support HB 334 in its present form.

The Association advocates that states "Adopt the Uniform Probate Code and other probate procedures that simplify, expedite, and reduce the costs of settling an estate, including probating wills, appointment of personal representatives, administrating estates, small estate procedures and fees."

The support of AARP would need to be reevaluated should substantial changes be made in the legislative process. We will have a member of our organization monitor the progress of HB 334.

Thank you for bringing this piece of legislation to our attention.

Sincerely


Mr. C. Keith Campbell Chmn.

DOUGLAS L. GREGG, Esq.

A PROFESSIONAL CORPORATION

ATTORNEY-AT-LAW

107 MUNICIPAL WAY, SUITE 2

JUNEAU, ALASKA 99801

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APR 22 1992

April 22, 1992

RECEIVED

The Honorable Dave Donley
Chairman, House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Re: House Bill 334;
Rule Against Perpetuities

Dear Mr. Donley:

The proposed Uniform Statutory Rule Against Perpetuities is, I understand, in your committee and may be coming up for consideration shortly. I am writing in support of the legislation. I think it would be fine if it were made part of the Uniform Probate Code (Title 13) but it could stand as a separate act, also.

There is common law rule against perpetuities as well as various state enactments including the Alaska statute on that subject and now this proposed legislation. All of these rules have one thing in common: They keep property from being held "in limbo" indefinitely. The ability to reach out "from the cold hand of the grave" and control property for excessive periods of time is very bad public policy and I think we all support the idea that sooner or later property has to vest in some person or entity.

The reason that we don't like some of the existing rules that attempt to remedy the problem is that they are subject to varying interpretations. Typically, the IRS will challenge someone's estate plan on the basis that it is "possible" that the property will not vest soon enough under the rule. The result can be the levying of a huge Federal estate tax. Some of the legislation already on the books around the country helps alleviate the problem of dealing with perpetuities but problems persist.

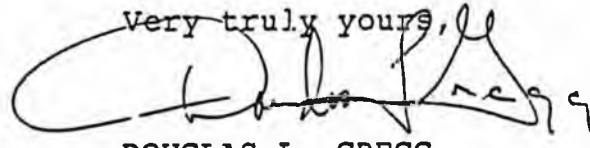
The Honorable Dave Donley
Page 2
April 22, 1992

Bar examinations for hapless would-be attorneys may still include complicated questions involving the rule against perpetuities. Maybe HB 334 will even discourage such vicious practices in the preparation of bar examinations! Everyone who ever studied law remembers it as a difficult subject.

Any legislation that lays easy to follow ground rules for deciding whether the rule has been violated in a given document will be a blessing.

The proposed legislation makes it much easier to analyze any particular fact situation thereby resulting in fewer contests, court cases, and heartbreaks.

Thank you for allowing me to comment on this legislation.

Very truly yours,

DOUGLAS L. GREGG

DLG:wmg
Hand Delivery

THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES:
AN OPPORTUNITY FOR IMPROVING ALASKA PERPETUITY LAW

Lawrence W. Waggoner
1989

Noted for its harsh consequences, the common-law Rule Against Perpetuities (common-law Rule) provides that a contingent future interest is invalid if it is not certain to vest within a life in being plus 21 years.

In 1983, Alaska joined a growing number of states that modified the common-law Rule by adopting the wait-and-see approach. Briefly, wait-and-see alleviates the harsh aspects of the common-law Rule by allowing an otherwise invalid nonvested property interest a maximum period of time to vest.

Under the common-law Rule, the actual time of vesting is immaterial; the only thing that counts under the common-law Rule is what possibly might happen. The common-law Rule invalidates a nonvested property interest if, at the time the interest is created, there is any possibility -- no matter how remote -- that the interest might not vest (or terminate) within the period of a life in being plus 21 years. Under wait-and-see, such an interest is not invalidated on that basis alone, but is given a second chance: The interest becomes invalid only if it actually fails to vest (or terminate) within a given period of time, also measured by a life in being plus 21 years; this given period of time is called the maximum allowable vesting period.

The Alaska statute (copy attached) was a second-generation wait-and-see statute, having been copied from a 1960 Kentucky statute. This type of statute was preceded by a statute in Pennsylvania in 1948 that adopted wait-and-see. The Pennsylvania statute -- the first-generation wait-and-see statute -- was heavily criticized on the ground that it did not identify the people who were to be used as the measuring lives to mark off the maximum allowable vesting period. The Kentucky-type statute, later enacted in Alaska and a small number of other states, was drafted in response to the criticism of the Pennsylvania statute. The Alaska statute expressly restricts the measuring lives to those having "a causal relationship to the vesting or failure of the interest."

After the Alaska statute was enacted, much further thought and refinement have gone into the wait-and-see idea. On further reflection, the causal-relationship method of determining the measuring lives has been shown to be ambiguous and uncertain in application. The Drafting Committee of the Uniform Act considered the causal-relationship approach, but rejected it

because it was too hard to understand. During the course of the Committee's deliberations, one of the Advisors to the Committee, a nationally prominent estate-planning attorney, was asked whether he thought he could apply that causal-relationship approach to an actual case. His reply was swift and telling: "Heavens no," he said.

. . .

The Uniform Act takes a different tack in marking off the maximum period for vesting -- it adopts a flat period of 90 years. The rationale for the 90-year period is as follows.

The first step in the analysis is to recognize that wait-and-see operates, in effect, as a perpetuity saving clause. A perpetuity saving clause is a privately established version of wait-and-see, for such a clause also grants a nonvested property interest a period of time during which it can validly vest (or terminate). The period of time typically granted by a perpetuity saving clause is measured by the lifetime of the last surviving member of a group comprised of the grantor's descendants living when the nonvested property interest was created, plus 21 years. (In most cases, it may also be noted that the grantor's descendants living when the nonvested property interest was created would be among the "causal-relationship" measuring lives under the Alaska statute.)

The second step in the analysis is to note that the youngest member of the group of the grantor's descendants typically is the one to live the longest. The Drafting Committee then set out to determine the average age of that youngest descendant. Using four hypothetical families deemed to be representative of actual families, the Committee determined that, on average, the transferor's youngest descendant in being at the transferor's death -- assuming the transferor's death to occur between ages 60 and 90, which is when 73 percent of the population die -- is about 6 years old.

The third step in the analysis was to determine the average remaining life expectancy of a 6-year-old, and then to add in the traditional 21-year period. Government statistics show that the remaining life expectancy of a 6-year-old is 69 years; with the 21-year period tacked on, this gives a period of 90 years.

. . .

Using a flat period of years, derived on this basis, has great advantages over the "causal-relationship" method of marking off the maximum allowable vesting period. It avoids the confusion and ambiguity of identifying actual measuring lives and it avoids the administrative costs of tracing those persons to see when the survivor dies. This approach also eliminates

potentially wasteful litigation at one point or another during the running of the waiting period. An example of such wasteful litigation is the recent Rhode Island case of Fleet Nat'l Bank v. Colt, 529 A.2d 122 (R.I. 1987), where litigation arose some 66 years into the term of a trust to determine who the measuring lives were under a causal-relation-type wait-and-see statute. The trust in the Colt case was upheld, but there would have been no need for the litigation under the Uniform Act (nor would the matter have been litigated if only the drafter of the trust had inserted a standard perpetuity-saving clause). (It may also be noted that legal commentators have disputed the Rhode Island court's selection of the measuring lives in the Colt case, providing further evidence of the unworkability of the causal-relationship method.)

The Uniform Statutory Rule Against Perpetuities is a comprehensive, state-of-the-art perpetuity-reform statute that reflects the most recent thinking about the subject. The Uniform Act has been approved by the House of Delegates of the American Bar Association, on the unanimous recommendation of the Council of the A.B.A. Section of Real Property, Probate and Trust Law. It has also been unanimously endorsed by the Board of Regents of the American College of Probate Counsel, the Board of Governors of the American College of Real Estate Lawyers, and the Joint Editorial Board for the Uniform Probate Code.

As of early August 1989, the Uniform Act has been enacted in nine states -- Connecticut, Florida, Michigan, Minnesota, Montana, Nebraska, Nevada, Oregon, and South Carolina. These enactments make the Uniform Act the predominant legislative reform measure in the country, and the Act appears to be on its way toward enactment in several other states. Alaska will hopefully soon join this group of enacting states.

If so, Alaska would not be the first state that had previously adopted a "causal-relationship" type wait-and-see statute to repeal that older version and replace it with the Uniform Act. Nevada was the first state to have done that, followed by Florida. Prior to the adoption of the Uniform Act, Nevada and Florida had adopted a "causal-relationship" type wait-and-see statute similar to the current Alaska statute. By enacting the Uniform Act, Nevada and Florida corrected their earlier mistake in using that approach.

The great advantage of the Uniform Act is that it has overcome the uncertainty and awkwardness associated with the earlier statutory attempts at wait-and-see. By adopting a maximum allowable period measured by a flat period of years, the wait-and-see approach has, for the first time, been made easy to understand, apply, and administer.

Alaska Statutes

§ 34.27.010. Modification of the common law rule against perpetuities. In determining whether an interest would violate the rule against perpetuities, the period of perpetuities shall be measured by actual rather than possible events. However, the period of perpetuities shall not be measured by a life whose continuance does not have a causal relationship to the vesting or failure of the interest. An interest that would violate the rule against perpetuities as modified by this section shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest.