HB
316

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						
REVENUE						
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 L. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: January 18, 1994

Approved by Commissioner: Bruce M. Botelho, Attorney General
Richard L. Pegues/FOR
Agency: Department of Law
Date: January 18, 1994

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FISCAL NOTE

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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.

Alaska State Legislature

Representative Carl E. Moses

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HOUSE RULES COMMITTEE

CHAIRMAN
HOUSE SPECIAL COMMITTEE FISHERIES

MEMBER FINANCE SUBCOMMITTEES ON:
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SPONSOR SUMMARY

HOUSE BILL 316

HB 316 is the bill to simplify and improve Alaska's statutory rule against perpetuities. This state law deals with issues relating to inheritance of property, and identifying persons who may eventually have an interest in that property. Like the English common-law rule from which this law is derived, it is designed to prevent unreasonably long-lasting restrictions on the disposibility of property. The law does not permit perpetual nonvested property interests.

The desirability of enacting HB 316 centers upon two main criteria: One, to simplify administration of estates and trusts, and two, to reduce perpetuity litigation.

The old common-law rule has validating and invalidating sides. The validating side is performing well, and is retained in this bill. The invalidating side is the difficult one which has led to overly harsh interpretations in identifying persons with potential future interest in property.

An example of a nonvested future interest is this: I could, by deed, give my son an interest for life in specific real estate, and give the remainder to his children alive at the time he dies. In other words, my son would have the right to use the property or receive income from it during his life, but could not sell it; his children would then receive full title upon his death, and they would have the right to dispose of it. That remainder interest cannot vest until my son dies, because, until his death, it cannot be determined how many children he will have and how many will be alive when he dies. The remainder interests will vest when he dies and his life estate terminates.

Alaska's current statutory language has not been updated since

1983, when a first step to improve the common-law rule was taken. To date, twenty other states have adopted HB 316's recommended new language of the National Conference of Commissioners on Uniform State Laws. Uniformity of the rule among the states is attractive because the great mobility of American society generates a range of legal complexities in this area. Potential beneficiaries are often living in states other than the ones in which trusts and estates are created, and affected property can be located in many states.

The key element of HB 316 is the "90-year" modification and simplification of the "wait-and-see" approach to vesting a future interest in property -- the chief reform of the common-law rule. See page 1, lines 10 and 11 of the bill. Alaska has already changed from the common-law's "what-might-happen" approach. Not only was the common-law rule difficult to understand and apply, it was unfair. If there was a possibility that an interest would not vest within a "life-in-being plus 21 years," then the grant to that whole class of grantees (e.g., my son's children) would be held invalid.

The time period stipulated in the new language, to "wait-and-see" if the future interest vests, is 90 years from its creation. Specifying the number of years to wait and see whether a future interest vests -- i.e., to see what actually happens -- will avoid the administrative costs of tracing survivors, will avoid Alaska's difficulty in determining the "casual relationship" between some "life in being" and the vesting or nonvesting of the interest, and will eliminate wasteful litigation.

The bill applies the same approach to powers of appointment. For example, I could grant to my son a life estate with the remainder to go to whomever he designates in his will. His right to name the taker of that future interest is a power of appointment.

The existing language is repealed by Section 2 of the bill, an effective date of January 1, 1996 is provided by Section 3, and the bill carries a zero fiscal note from the Department of Law. It is supported by the Attorney General, the Alaska Uniform Law Commission, and the American Association of Retired Persons.

WHY STATES SHOULD ADOPT THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

The idea of reforming the common law rule against perpetuities has been percolating since the late 1940s. Various reform measures were advanced during this early period, but none was able to attract more than four or five enactments. At long last, the reform process has produced a statutory reform measure that does make uniform perpetuity reform possible. The Uniform Statutory Rule Against Perpetuities has quickly become far and away the most widely adopted perpetuity–reform measure in the country and the only realistic hope for uniform perpetuity reform.

Uniformity in this area is especially desirable. The desirability of uniformity stems mainly from the high degree of mobility in American society. Many clients, for example, retire to states other than the one in which they were domiciled during their employment years. Many other clients own land in states other than the state of their domicile. Many trusts confer a power of appointment upon the settlor's children or grandchildren who might be domiciled in different states when they exercise their powers. These and other sometimes unplanned for post–execution events can give rise to increased conflict–of–laws litigation and the potential applicability of the perpetuity law of any state in the union.

As discussed more fully in the *Questions and Answers* component of this packet, the merits of the USRAP are that it:

- fine tunes the rule against perpetuities so that it reaches only its real target, that of placing an outer time limit on long-term or perpetual trusts while validating reasonable trusts;
- extends the benefits of a perpetuity savings clause to trust clients whose lawyers neglected to put one in;
- is simple to administer;
- requires no new learning of the bar; and
- nearly eliminates perpetuity litigation.

Because of the desirability of uniformity in this area and because the USRAP method of reform is superior to other methods so far devised, enactment of the USRAP should not be restricted to states that have not yet enacted a perpetuity–reform measure. Several of the enacting states had previously adopted one of the earlier perpetuity–reform measures, which they repealed incident to enactment of the USRAP.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

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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

03-C5LH

LETTER OF SUPPORT FROM THE ATTORNEY GENERAL

Alaska State Legislature

Representative Carl E. Moses

CHAIRMAN
HOUSE RULES COMMITTEE

CHAIRMAN
HOUSE SPECIAL COMMITTEE FISHERIES

MEMBER FINANCE SUBCOMMITTEES ON
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MEMORANDUM

DATE: April 22, 1994

TO: Senator Robin Taylor, Chairman
Senate Judiciary Committee

FROM: Rep. Carl E. Moses, Chairman CEM
House Rules Committee

SUBJ: HB 316 - Uniform Rule Against Perpetuities

I have received a copy of a letter from Law Professor Jesse Dukeminier of UCLA opposing HB 316. Your assistant Kevin Sullivan has indicated the receipt of one as well.

Attached are four letters from legal scholars, all thoroughly knowledgeable with perpetuity law, attesting to the fact that Prof. Dukeminier stands alone, and has consistently stood alone, in his opposition to contemporary amendments to the Uniform Statutory Rule Against Perpetuities. In addition, there is a letter from the American Association of Retired Persons, whose legal committee has previously researched the merits of Prof. Dukeminier's position. AARP has rejected his arguments roundly, and holds to its support of HB 316.

I urge your review of these letters, and the dismissal of Prof. Dukeminier's arguments against HB 316. His particular interpretations have been routinely put aside in favor of upgrading uniform state law regarding perpetuities. I further respectfully request a hearing in your committee as soon as possible.

Please contact Tim Benintendi of my staff if you have any

questions at all on this matter, as we wish to respond promptly and completely.

c: Mr. Art Peterson,
Alaska Uniform Law Commissioner

CEM/tb/m13

UNIVERSITY OF CALIFORNIA, LOS ANGELES

UCLA

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March 18, 1994

Senator Robin Taylor
Chair, Senate Judiciary Committee
State Capitol
Juneau, AK 99801-1182

Dear Senator Taylor:

It has come to my attention that a bill adopting the Uniform Statutory Rule Against Perpetuities has been introduced in the Alaska legislature (House Bill 316). I do not know its present status, but you should be aware of the tax perils this will create for Alaska lawyers.

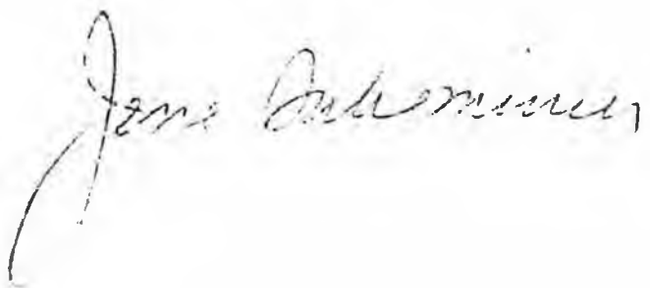
USRAP has proven extremely controversial, faulted by numerous critics on policy grounds, but perhaps its most important consequence for lawyers is the threat of malpractice liability USRAP brings in drafting trusts under the federal generation-skipping transfer tax. USRAP provides for alternative perpetuities periods: (1) the common law perpetuities period of lives in being plus 21 years, or (2) 90 years. In order to prevent the extension of trusts exempt from GST tax, Treasury has taken the position that the drafter must choose one, and only one, of the perpetuities periods to govern a GST tax-exempt trust. If the drafter attempts to obtain whichever period turns out to be longer, GST tax exemption will be denied. If the drafter violates the Rule against Perpetuities in an USRAP jurisdiction, making it uncertain whether the interest will vest within the common law perpetuities period or the 90-year wait-and-see period, exemption from GST tax will be denied. Treasury Prop. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1992).

The GST tax is imposed at the highest rate of the estate tax, which is 55 percent. If Alaska were to adopt USRAP, and a donee of a power of appointment in a pre-1986 tax-exempt trust were to exercise the power in a manner violating the Rule against Perpetuities, the tax exemption would be lost and 55 of the trust corpus would be payable to Uncle Sam. Presumably, a lawyer who drafted the donee's will would be liable in malpractice for that amount.

This peril does not exist under present Alaska law, which provides for wait-and-see for the common law perpetuities period only. It is the enactment of an alternative period of 90 years that brings on this danger. I have written a note about this tax trap for a book I am writing which I enclose. It explains the tax dangers of USRAP more thoroughly.

Alaska Statutes § 34.27.010 (1986), adopting wait-and-see for the common law perpetuities period, is a perfectly workable statute. It has proven so in the several other states that have adopted a similar statute. It would, in my judgment, be a great mistake to repeal it and slip lawyers into the tax trap of USRAP.

Sincerely,



JD:mrk

Enclosure

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.

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March 31, 1994

Hon. Robin L. Taylor, Chair
Senate Judiciary Committee
Alaska State Legislature
Room 30, State Capitol
Juneau, Alaska 99801-1182

HAND-DELIVERED

Re: HB 316, Uniform Statutory Rule Against Perpetuities

Dear Senator Taylor:

Please schedule HB 316 for a Judiciary Committee hearing soon. It presents an extremely helpful modification of the law of future interests.

Although most non-attorneys have not heard of the rule against perpetuities, and most attorneys wish that they never had, it is part of the foundation of Anglo-American jurisprudence. This bill simplifies it and makes it more fair. And it avoids a problem in Alaska's current modification of the common law rule (see AS 34.27.010).

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 at least 20 states.

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 Chair Dave Donley, supporting the bill. Both letters pertain to the 17th Legislature's HB 334, which passed the House 35 to 0, but arrived in the Senate too late for action that year.

LETTER FROM ART PETERSON UNIFORM LAW COMMISSIONER FOR AK

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,

Art Peterson

Arthur H. Peterson
Uniform Law Commissioner
for Alaska

Enclosures (3)

cc w/o encs.: Representative Carl Moses

DIVISION OF LEGAL SERVICES

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M E M O R A N D U M January 25, 1994

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

TO: Representative Carl Moses
Attn: Tim

FROM: 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 an 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

A Few Facts About

The Uniform Statutory Rule Against Perpetuities

Purpose: To invalidate interests in property that are intended to belong to somebody at a future time, but for which the actual determination of ownership cannot be or will not be accomplished within a specified period of time.

Origin: Completed by the Uniform Law Commissioners in 1986, and amended in 1990 by adding Section 1(e).

Approved by: House of Delegates of American Bar Association, on unanimous recommendation of the Council of the ABA Section of Real Property, Probate and Trust Law

Board of Regents of American College of Trust and Estate Counsel (unanimous)

Board of Governors of American College of Real Estate Lawyers (unanimous)

Leading scholars, including: Gregory S. Alexander, *Cornell*; Olin L. Browder, Jr., *Michigan*, Verner F. Chaffin, *Georgia*; Mary Louise Fellows, *Minnesota*; Edward C. Halbach, Jr., *Cal-Berkeley*; Thomas L. Jones, *Alabama*; Sheldon F. Kurtz, *Iowa*; John H. Langbein, *Yale*; Allan F. Smith, *Michigan*; Robert A. Stein, *Minnesota*; and Richard V. Wellman, *Georgia*

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1994 Introductions:

Alaska
Mississippi

For further information regarding the Uniform Statutory Rule Against Perpetuities, please contact John McCabe or Katie Robinson at 312-915-0195, or Lawrence W. Waggoner (committee reporter) at 313-763-2586.

(2/1/94)

THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES: QUESTIONS AND ANSWERS

1. *What is the "rule against perpetuities" and what is its purpose?*

Anglo-American law has traditionally and wisely prohibited people from tying up family property in trusts or other property arrangements for the duration not only of an existing generation but for numbers of future generations. The legal rule that prohibits these perpetual or unreasonably long-lasting trusts is called the "rule against perpetuities."

The common law rule against perpetuities is a complicated rule, but shorn of its complexities, it functions to impose a time limit on trusts. What is the time limit? The time limit thought appropriate is one basically geared to the duration of an existing generation (which can be an existing generation more remote than the one immediately below the person creating the trust), with an extra tack-on period of 21 years for good measure. Specifically, the rule against perpetuities measures the time limit by the period of "lives in being plus 21 years." The term "lives in being" is the law's arcane way of referring to the lifetimes of persons who were living when the trust was created.

2. *If the rule against perpetuities wisely invalidates perpetual or unreasonably long-lasting trusts, why is there a need for a Uniform Statutory Rule Against Perpetuities?*

Under the common law rule, a trust is invalid if it might exceed the lives-in-being-plus-21-years time limit. To be valid, in other words, there cannot be any possibility that the trust will exceed the time limit, even if that possibility is so remote that reasonable people would dismiss it as absurd. This is sometimes referred to as the "what-might-happen" approach.

The what-might-happen approach causes the common law rule against perpetuities to have bad as well as good effects. The good effect is that it invalidates perpetual or unreasonably long-lasting trusts. The bad effect is that it sometimes overreaches and invalidates perfectly reasonable trusts such as one that requires the donor's grandchildren to reach age 25 in order to be entitled to receive a sum of money. The common law rule, in other words, is harshly over-inclusive.

3. *What are the main purposes of the USRAP?*

The Uniform Statutory Rule Against Perpetuities (USRAP) is a remedial statute that adopts a what-*does*-happen approach (also called the "wait-and-see" approach). By the simple expedient of switching from a what-might-happen to a what-does-happen standard, the USRAP returns the rule against perpetuities to its original purpose of preventing perpetual or unreasonably long-lasting trusts without defeating reasonable trusts.

Expert estate planning attorneys have already found a way of establishing a what-does-happen (wait-and-see) rule for trusts they draft. They routinely make trusts such as the one described in Question 2 valid. The way they do this is by inserting a so-called perpetuity savings clause into the document. A perpetuity savings clause acts as an outer time limit on the trust. The time limit is often geared to the 21-year period following the death of the survivor of a group of people (such as the client's descendants) living when the trust was created.

The USRAP is a perpetuity reform statute that, in effect, extends the benefits of a

perpetuity savings clause to citizens whose lawyers, through mistake or ignorance, neglected to put one in. The USRAP does this by adopting the wait-and-see plus deferred reformation method of perpetuity reform. This is the same approach adopted by the American Law Institute in the Restatement (Second) of Property (1983). In fact, the USRAP essentially codifies the Restatement (Second) of Property.

4. *How does the USRAP accomplish its purposes?*

The USRAP uses four principal features to accomplish its purposes:

Feature 1: Common Law Validity Preserved. The USRAP provides that a will or trust that is valid under the common law rule against perpetuities remains valid.

Feature 2: Wait and See. The USRAP's wait-and-see feature provides that a will or trust that would have been invalid under the common law rule against perpetuities is given up to 90 years to run its course.

Feature 3: Deferred Reformation. The deferred reformation feature only applies to trusts that are subject to the wait-and-see feature. For those few cases in which such a trust extends beyond 90 years, the USRAP provides for court reformation to make it valid; within the 90-year constraint, the reformation is to come as close as possible to the transferor's plan of distribution as manifested in the trust document itself. Because court reformation will so seldom become necessary, the USRAP method can be described as a *"judicial hands-off" approach* to perpetuity questions.

Feature 4: Non-family Oriented Transactions Exempted from Perpetuity Law. Commercial transactions are exempted from the rule against perpetuities.

5. *Why does the USRAP preserve validity under the common law rule against perpetuities rather than subject all trusts to a 90-year period?*

Preserving common law validity is a "must" feature. The mobility of society makes it necessary. Preserving validity under the common law rule against perpetuities allows a testamentary trust, drawn by a lawyer in a USRAP state in compliance with accepted common law practice, not only to be valid in the USRAP state, but also to be valid if the client dies domiciled in (or owns land covered by the trust in) a common law jurisdiction. Conversely, this feature allows a testamentary trust, drawn in compliance with accepted common law practice by a lawyer in a common law jurisdiction, to still be valid if the client dies domiciled in (or owns land covered by the trust in) a USRAP state.

Compliance with the common law rule against perpetuities confers another very attractive benefit. It insulates the trust or other property arrangement from any possible future reformation suit under the deferred reformation feature. Only interests whose validity is governed by the wait and see element are vulnerable to reformation. Reformation is never necessary—or permitted—for dispositions that are initially valid under the common law rule against perpetuities.

In estate planning practice, then, the USRAP creates every incentive to comply with the common law rule against perpetuities, through the use of a traditional perpetuity savings clause, if appropriate, or one tailored to the particular trust. Practitioners who now successfully draft for initial validity, as most do, by far, should continue with business as usual. They need not learn a new and complicated scheme of perpetuity law and they need not make any adjustment in their forms or practice.

6. *What are the advantages of using a flat period of 90 years for the wait-and-see element?*

The use of a flat period of 90 years simplifies the process of measuring the permissible vesting period for the wait-and-see element. The alternative would be to measure the period on a case-by-case basis by the controversial measuring-lives approach. The 90-year period is designed to approximate the average margin-of-safety period provided under the wait-and-see method using actual measuring lives (or by traditional perpetuity saving clauses). This margin-of-safety period is ample enough so that almost all trusts will run their course long before the 90 years expires, and that will be the end of the matter.

7. *Does the USRAP require new learning of the bar? Is the USRAP a complicated statute?*

No to both questions. Among the USRAP's great strengths are that it is not a complicated statute and that it does not require new learning on the part of the bar. Although it is true that the Official Commentary to the USRAP is quite lengthy, that fact belies the simplicity of the statute. The lengthy Commentary is not "needed" to explain the statute. The Commentary is supplied so that even lawyers and judges not familiar with the common law rule against perpetuities can understand both the common law rule and how the USRAP alters it.

A full appreciation of the point requires noticing the distinction between what lawyers must know in planning and drafting legal documents and what they must know if they actually have a perpetuity-violation case.

With respect to the planning and drafting end of the practice, lawyers need to know only one thing: *Continue to use the same traditional perpetuity-saving/termination clause, using specified lives in being plus 21 years, you used before enactment.*

The picture is entirely different for the rare lawyer or judge who has an actual or potential perpetuity-violation case. These lawyers and judges will very much appreciate the extensive Official Comments because those Comments will provide great assistance in analyzing the case. Remember that an actual or potential perpetuity-violation case will arise very infrequently under the USRAP. When such a case does arise, however, lawyers (or judges) involved in the case will find considerable guidance for its resolution in the detailed analysis contained in the Commentary accompanying the USRAP itself. In short, the detailed analysis in the Commentary accompanying the USRAP need not be part of the general learning required of lawyers in the drafting and planning of dispositive documents for their clients. The detailed analysis is supplied for the assistance in the resolution of an actual violation. Only then need that detailed analysis be consulted and, in such a case, it will prove extremely helpful.

8. *Why does the USRAP use a flat period of years to measure the permissible vesting period for the wait-and-see element?*

The traditional method of measuring the permissible vesting period under the wait-and-see method of perpetuity reform has been by reference to lives in being at the creation of the interest (the measuring lives) plus 21 years. There are, however, various difficulties and costs associated with identifying and tracing a set of actual measuring lives to see which one is the survivor and when he or she dies. In addition, it has been documented that the use of actual measuring lives plus 21 years does not produce a period of time that self-adjusts to each disposition, extending dead-hand control no further than necessary in each case; rather, the use of actual measuring lives (plus 21 years) generates a permissible vesting period whose length

almost always exceeds by some arbitrary margin the point of actual vesting in cases traditionally validated by the wait-and-see strategy. The actual-measuring-lives approach, therefore, performs a margin-of-safety function. Given this fact, and given the costs and difficulties associated with the actual-measuring-lives approach, the USRAP forgoes the use of actual measuring lives and uses instead a permissible vesting period of a flat 90 years. The expiration of a permissible vesting period measured by a flat period of years is litigation free, easy to determine, and unmistakable.

9. *How was the 90 years derived?*

The 90-year period was derived using average life expectancy tables to approximate the average period of time that would be produced by the traditional perpetuity period of a life in being plus 21 years.

10. *Does the 90-year period mesh with the federal generation-skipping transfer tax?*

Yes. Although the U.S. Treasury Department originally issued temporary regulations under the "grandfathering" provisions of the federal generation-skipping transfer tax that did not allow for the USRAP's use of a 90-year period, these regulations were issued in ignorance of the existence of the USRAP. When the USRAP's approach was called to the attention of the Treasury Department, the Department issued a letter of intent to revise the regulations to accommodate the USRAP's 90-year approach.

11. *Does the USRAP require "waiting" for 90 years in all cases?*

No. First of all, the only trusts that are subject to the 90-year period are those that fail to qualify for validity under the common law rule against perpetuities. Those trusts make up a small fraction of all trusts. With respect to that small fraction of trusts that are subject to the 90-year period, most of them by a large margin will run their course well within the allowed 90 years. Very few such trusts will still be in operation at the end of the 90-year period.

12. *Does the USRAP allow trusts to last longer than they now can under the common law rule against perpetuities? Does the USRAP extend dead hand control?*

No to both questions. The flat-period-of-years method was not used as a means of increasing permissible dead-hand control by lengthening the permissible vesting period beyond its traditional boundaries. In fact, the 90-year period falls substantially short of the absolute maximum period of time that could theoretically be achieved under the common-law rule itself, by the so-called "twelve-healthy-babies" ploy—a ploy that would average out to a period of about 115 years, which is 25 years or 27.8% longer than the 90 years allowed by the USRAP.

13. *Does the USRAP cause harm because it puts the validity of property interests in abeyance for 90 years?*

No. At one time, those who opposed the wait-and-see method of perpetuity reform argued that wait-and-see could cause harm because it puts the validity of property interests in abeyance during the permissible vesting period. During the permissible vesting period, it was argued, no one could determine whether an interest was valid or not. This argument has been shown to be

false. Keep in mind that the wait-and-see element is applied only to interests that would be invalid were it not for wait-and-see. Such interests are always *nonvested* future interests. Wait-and-see does nothing more than add an *additional* contingency, which is that the other contingencies must be resolved one way or the other *within a certain period of time. If* that period of time is easily determined, as it is under the USRAP, then the additional contingency causes no more uncertainty in the state of the title that would have been the case had the additional contingency been originally expressed in the governing instrument, *as it is would have been had the drafting attorney inserted a perpetuity savings clause.* It should also be noted that only the status of the affected *future* interest in the trust is deferred. In the interim, the other interests, such as the interests of current income beneficiaries, are carried out in the normal course without obstruction. In short, the USRAP causes no more "uncertainty" in the state of the title than routinely occurs in the vast majority of trusts that contain a perpetuity savings clause.

14. *Why is uniformity among the states important?*

Because of the high degree of mobility of American society. In the few short years since promulgation, the USRAP has become far and away the most widely adopted perpetuity reform measure in the country. If more and more states move to enactment, uniformity will ultimately become realizable, to the benefit of citizens with multi-state connections.