HB

34

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 22, 2001 **FURTHER REFERRALS:**

Date of Committee Action: 2/23/01

The JUDICIARY Committee considered: **SSHB 34**

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 34 **RULE AGAINST PERPETUITIES**

"An Act relating to the statutory rule against perpetuities, to nonvested property interests and trusts, and to the suspension of the power of alienation of property; and providing for an effective date."

Recommends it be replaced with _____CS_____(_____) [ ] Same Title [ ] New Title

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____

[ ] attach amendments
[ ] add new referral to _____ Committee
[ ] Letter of Intent _____Committee

List of Abbrev. For Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*For Chief Clerk's Office Use Only

FN# *	List by Dept(s):	Fiscal	Indet.	Zero
	LAW			✓
	CRT			✓

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN #	Fiscal	Indet.	Zero

Signing with recommendations	Printed Name	DP	DNP	NR	AM
Kim Meyer	Meyer	✓			
John Coghill	Coghill	✓			
Scott Ogan	Ogan	✓			
Chair: Norm Rokeberg	Rokeberg	✓			
Chair:					

Alaska State Legislature

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Chair, House Special Committee
on Economic Development, Trade
and Tourism

Chair, Joint House and Senate
Administrative Regulation and
Review Committee

Member
Resources Committee
Rules Committee

Representative Lesil McGuire

House District 17

MEMORANDUM

DATE: February 2, 2001

FEB 07 2001

TO: Representative Norm Rokeberg, Chair
House Judiciary Committee

FROM: Representative Lesil McGuire

RE: Request for a Hearing for HB34

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i respectfully request for House Bill 34 to be scheduled in the House Judiciary committee.

Attached are the following back up:

1. The most current copy of the bill
2. A Sponsor Statement
3. A Section Analysis

If you have any questions please feel free to contact me or my staff Jacqueline Sierer at ext. #2995.
Thank you for your time regarding this matter.

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SPONSOR STATEMENT
HB 34

"An Act relating to the statutory rule against perpetuities, to non-vested property interests
and trusts, and to the suspension of the power of alienation of property;
and providing for an effective date."

Alaska has become the most forward thinking trust jurisdiction in the United States and our trust laws have become the model by which other states have changed their respective laws. Our trust laws have been carefully scrutinized and commented upon by nonresident practitioners as well as legal academicians. To maintain Alaska's position as a leader in trusts, our trust laws need to be a model of clarity. As with most technically complex areas, trust law legislation must evolve to meet its intended purpose.

Senate Bill No. 162, as passed by the Twenty-First legislature in the Second Session, corrected the deficiency found in our state's previous version of the Rule Against Perpetuities. In it, any beneficiary of a generation-skipping trust who, exercised a non-general power of appointment to create a successive trust giving the beneficiaries of the second trust a non-general power of appointment, created an immediate estate or gift tax liability under Internal Revenue Code sections 2041(a)(3) and 2514(d). This tax trap has become known in estate planning circles as the "Delaware Tax Trap." House Bill 34 is a technical correction to Senate Bill 162 and clarifies the wording and application of the previously passed statute in making the same distinction that the common law has made between a presently exercisable general power of appointment and testamentary general power of appointment.

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Resources Committee
Rules Committee

Representative Lesil McGuire
House District 17

SECTION ANALYSIS
HB 34

"An Act relating to the statutory rule against perpetuities, to non-vested property interests and trusts, and to the suspension of the power of alienation of property; and providing for an effective date."

AS 34.27.051(b) is amended to clarify that only a presently exercisable general power of appointment can create a new perpetuities period within which property must vest. On the other hand, AS 34.27.051(c) is amended to clarify that property interests subject to a testamentary general power of appointment relate back to the date of the original instrument and must vest within the prescribed time set forth in the statute. The current law does not make the distinction between presently exercisable general powers of appointment and testamentary general powers of appointment. The distinction that this bill makes, in conformance with the common law, is discussed in the Commentary to Section 2-902 of the Uniform Statutory Rule Against Perpetuities passed by the National Conference of Commissioners on Uniform State Laws, as well as in the Restatement, Second, Property (Donative Transfers) at § 1.4, Comment l.

The change in this bill is a clarification of the Suspension of the Power of Alienation as presently enacted. AS 34.27.100, passed by the Twenty-First legislature in the Second Session, adopted a second line of defense to the Delaware Tax Trap. It was meant to track the language of a similar Wisconsin statute that was found to avoid the Delaware Tax Trap, Estate of Mary Margaret Murphy v. Commissioner, 71 T.C. 671 (1979).

The modification made to AS 34.27.100 (a)(2)-(4) more clearly sets forth the computation of the permissible time period in which property must be made alienable and in addition makes a distinction between presently exercisable general powers of appointment and testamentary general powers of appointment, as noted above.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SSHB 34
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to the statutory rule against perpetuities, to nonvested property interests and trusts . . ."
BRU Civil Division
Component Commercial
Sponsor Representative McGuire
Requester House Judiciary Committee
Component No. 2211

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Under current law certain powers of appointment are invalid unless the power is exercised or it terminates within 1,000 years after its creation. SSHB 34 generally makes technical corrections to the Rule Against Perpetuities by distinguishing between a generally exercisable general power of appointment and a testamentary general power of appointment. It also determines when the time begins to compute when the property interest must vest or terminate. Finally, it applies the same general rules to the power of alienation.

Passage of SSHB 34 would have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson
Phone 465-5370
Division Attorney General's Office
Date/Time 2/21/01 11:54 AM
Approved by: Kathryn Daughhetee for Bruce M. Botelho, Attorney General
Date 2/21/01
Agency Department of Law

For distribution information, call the Governor's Legislative Office

(Rev 11/2000 OMB)

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

BILL NO. HB 34

Revision Date/Time (Note if correction) _____ Dept. Affected _____

Title: Rule Against Perpetuities — BRU: Alaska Court System

Component: Trial Courts

Sponsor: Rep. McGuire

Requester: House Judiciary — Component No. 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The court system does not anticipate any fiscal impact from the passage of HB 34.

Prepared by: Douglas Wooliver — Phone 463-4750

Division: Alaska Court System — Date/Time 2/15/01 12 p.m.

Approved by: Stephanie Cole — Date 2/15/01

Agency: Alaska Court System

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(Rev 8/2000 OMB)

Collateral references. — Right of interested party receiving due notice of tax sale or of right to redeem to assert failure or insufficiency of notice to other interested party. 45 ALR4th 447.

Sec. 34.25.090. Definition. In this chapter "conveyance" includes every instrument in writing by which an estate or interest in real property is created, alienated, mortgaged, or encumbered, or by which the title to real property is affected, except a will. (§ 22-3-21 ACLA 1949; am § 1 ch 9 SLA 1955)

Chapter 27. Modification or Abolition of Common Law Property Rules.

Article
1. Miscellaneous Common Law Rules Abolished (§§ 34.27.020, 34.27.030)
2. Rules Against Perpetuities (§§ 34.27.051 — 34.27.100)

Article 1. Miscellaneous Common Law Rules Abolished.

Section
20. Abolition of the common law rule in Shelley's case
30. Abolition of the common law destructibility of contingent remainders

Sec. 34.27.010. Rules against perpetuities modified. [Repealed, § 2 ch 82 SLA 1994, effective January 1, 1996. For comparable provisions as of that date, see AS 34.27.050 — 34.27.090.]

Sec. 34.27.020. Abolition of the common law rule in Shelley's case. If real property is granted or devised to a person and after the person's death, to the person's heirs or the heirs of the person's body, however the grant or devise is expressed, an estate for life only vests in the person, and a remainder goes to the person's heirs or the heirs of the person's body as purchasers. (§ 2 ch 51 SLA 1983)

Sec. 34.27.030. Abolition of the common law destructibility of contingent remainders. A contingent remainder is not defeated by the termination of a precedent estate before the occurrence of the contingency that was to cause the remainder to take effect. If the contingency occurs later, the remainder takes effect in the same way as a springing or shifting executory interest. (§ 2 ch 51 SLA 1983)

Article 2. Rules Against Perpetuities.

Section
51. Statutory rule against perpetuities
53. Savings provision
70. Application
75. Relationship to common law rule
100. Perpetuities and suspension of the power of alienation

Effective dates. — Section 3, ch. 82, SLA 1994 makes this article effective January 1, 1996.

Sec. 34.27.050. Statutory rule against perpetuities. [Repealed, § 9 ch 17 SLA 2000.]

Sec. 34.27.051. Statutory rule against perpetuities. (a) A general or nongeneral 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

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Sec. 34.27.070. App
provisions of AS 34.27.0

irrevocably exercised or the power terminates. For purposes of this subsection, the period in which the power must be exercised or the power terminated is computed from the time of creation of the original power of appointment under which a subsequent general power of appointment not presently exercisable or a subsequent nongeneral power of appointment not presently exercisable was created.

(b) If a nongeneral power of appointment is exercised to create a new general power of appointment, all property interests subject to the exercise of that new general power of appointment are invalid unless, within 1,000 years after the creation of the new general power of appointment, the property interests that are subject to the general power of appointment either vest or terminate.

(c) If a nongeneral power of appointment is exercised to create a new or successive nongeneral power of appointment, all property interests subject to the exercise of that new or successive nongeneral power of appointment are invalid unless, within 1,000 years from the time of creation of the original instrument or conveyance creating the original nongeneral power of appointment that is exercised to create a new or successive nongeneral power of appointment, the property interests that are subject to the nongeneral power of appointment either vest or terminate. (§ 3 ch 17 SLA 2000)

Effective dates. — Section 10, ch. 17, SLA 2000, makes this section effective April 22, 2000, in accordance with AS 01.10.070(c).

Sec. 34.27.053. Savings provision. A property interest that, under AS 34.27.051, becomes invalid shall, upon the expiration of the 1,000-year period set out in AS 34.27.051,

(1) if income from the property interest is payable

(A) to one person, be distributed to the person to whom the income is then payable;

(B) to more than one person, be distributed to the persons to whom the income is then payable

(i) in the shares to which the persons are entitled to the income; or

(ii) equally among all persons who are entitled to the income if shares are not specified;

(2) if income from the property interest is payable in the discretion of a trustee and is payable

(A) to one person, be distributed to the person then eligible to receive the income; or

(B) to more than one person, be distributed to the persons then eligible to receive the income

(i) in the shares to which the persons are entitled to the income; or

(ii) equally among all persons who are entitled to the income if shares are not specified; or

(3) when there is no person then living to whom the property interest may be distributed under (1) or (2) of this section, be payable to one or more organizations described in 26 U.S.C. 2055(a) (Internal Revenue Code), or to one or more organizations described in any successor provision to 26 U.S.C. 2055(a), in the shares or proportions that the trustee or trustees then acting may determine. (§ 3 ch 17 SLA 2000)

Effective dates. — Section 10, ch. 17, SLA 2000, makes this section effective April 22, 2000, in accordance with AS 01.10.070(c).

Secs. 34.27.055 — 34.27.065. When nonvested property interest or power of appointment created; reformation; exclusions from statutory rule against perpetuities. [Repealed, § 9 ch 17 SLA 2000.]

Sec. 34.27.070. Application. (a) Except as extended by (b) of this section, the former provisions of AS 34.27.051 — 34.27.100 apply to a nonvested property interest or a power

of appointment that is created on or after January 1, 1996, and before April 2, 1997. For purposes of this subsection, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before January 1, 1996, and is determined in a judicial proceeding, commenced on or after that date, to violate this state's rule against perpetuities as that rule existed before January 1, 1996, or if a nonvested property interest or a power of appointment was created on or after January 1, 1996, but before April 2, 1997, and is determined in a judicial proceeding, commenced on or after that date, to violate this state's rule against perpetuities as that rule existed, on or after January 1, 1996, and before April 2, 1997, a court, upon the petition of an interested person, may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created. For purposes of this subsection, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(c) The provisions of AS 34.27.051 apply to a trust instrument or conveyance executed on or after April 2, 1997, if the trust instrument or conveyance creates a contingent power of appointment or nonvested property interest subject to the exercise of a power of appointment that creates a new or successive power of appointment. (§ 1 ch 82 SLA 1994; am §§ 4, 5 ch 17 SLA 2000)

Effect of amendments. — The 2000 amendment, effective April 22, 2000, in subsection (a) inserted "the former provisions of" and ", and before April 2, 1997" and made a minor stylistic change; in subsection (b) inserted the language beginning "or if a nonvested property interest" and ending "and before April 2, 1997" in the first sentence and added th second sentence; and added subsection (c).

Editor's notes. — Section 8, ch. 17, SLA 2000 provides that subsection (c) "is retroactive to April 2, 1997, and applies to a trust instrument or conveyance executed on or after that date upon the conditions set out in subsection (c)."

Sec. 34.27.075. Relationship to common law rule. AS 34.27.051 — 34.27.100 supersede the rule of the common law known as the rule against perpetuities. The common law rule against perpetuities does not apply in this state. (§ 1 ch 82 SLA 1994; am § 6 ch 17 SLA 2000)

Effect of amendments. — The 2000 amendment, effective April 22, 2000, made a section reference substitution and added the second sentence.

Sec. 34.27.090. Short title and uniformity of application and construction. [Repealed, § 9 ch 17 SLA 2000.]

Sec. 34.27.100. Perpetuities and suspension of the power of alienation. (a) A future interest or trust is void if, as to property subject to the future interest or trust,

(1) the future interest or trust suspends the power of alienation of the property, the suspension of the power is for a period of at least 30 years after the death of an individual alive at the time of the creation of the future interest or trust, and the suspension of the power of alienation occurs in the document creating the future interest or trust;

(2) the future interest or trust suspends the power of alienat..on of the property and the suspension of the power is for a period of at least 30 years after termination of a power to revoke the trust;

(3) the future interest or trust suspends the power of alienation of the property, the future interest or trust is created by the exercise of a general power of appointment,

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Article
1. Foreclosure (§§ 34.35.00
2. Mechanics and Material
3. Mines and Wells (§§ 34.
4. Improvement of Chattel
5. Transportation, Storage
6. Timber and Lumber (§§
7. Fish Packers and Proce
8. Fishermen's Lien (§ 34.
9. Watchmen (§§ 34.35.395
10. Attorneys (§ 34.35.430)
11. Wages (§§ 34.35.435 —
12. Hospitals, Physicians, a
13. Hotels and Boardinghou
14. Miscellaneous Provision

Section
05. Action for foreclosure
10. Joinder of claimants ir
15. Joinder in foreclosure
20. Sufficiency in lien noti

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whether by will or otherwise, and the suspension of the power is for a period of at least 30 years from the time the power of appointment is exercised; or

(4) the future interest or trust suspends the power of alienation of the property, the future interest or trust is created by the exercise of a power of appointment that is not a general power of appointment, and the suspension of the power is for a period of at least 30 years from the time of creation of the original instrument or conveyance creating the original power of appointment that was exercised to create a new or successive nongeneral power of appointment.

(b) For purposes of (a) of this section, the power of alienation

(1) is suspended if there is no person alive who, alone or in combination with others, can, as to property that is part of the future interest or trust, convey

(A) title to real property in fee; or

(B) complete ownership of personal property;

(2) is not suspended by a future interest or trust or by an equitable interest in a trust if

(A) the trustee of the trust has power, either express or implied, to sell the property; or

(B) at least one person alive at the time the trust was created has an unlimited power to terminate the trust.

(c) The provisions of (a) of this section do not apply to a transfer

(1) made outright or in trust for a charitable purpose;

(2) to a literary or charitable organization;

(3) to a veterans' memorial organization; or

(4) to a cemetery corporation, society, or association. (§ 7 ch 17 SLA 2000)

Effective dates. — Section 10, ch. 17, SLA 2000, makes this section effective April 22, 2000, in accordance with AS 01.10.070(c).

Chapter 35. Liens.

Article

Article 1. Foreclosure.

Section

Sec. 34.35.005. Action for foreclosure. (a) When an action is required to enforce a lien provided for in this chapter and the action falls within the monetary jurisdiction of the district court, the action shall be started in the district court in the judicial district in which venue lies. An action that exceeds the monetary jurisdiction of the district court

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The Dela[illegible]Trap and the Abo[illegible]he Rule Against Perpetuities

Advisors should keep in mind the relationship between the Delaware Tax Trap and the applicable rule against perpetuities when drafting a trust that permits a beneficiary to exercise a nongeneral power of appointment to create successive ones.

STEPHEN E. GREER, ATTORNEY

This article discusses the relationship between the Delaware Tax Trap and the abolition of the rule against perpetuities. The principal premise of the author is that in some states, a beneficiary of a dynasty trust can safely exercise a nongeneral power of appointment to create a successive power of appointment without running afoul of the Delaware Tax Trap, while in other states this cannot be done without causing gift or estate tax liability.

Retaining flexibility in perpetual trusts via nongeneral powers of appointment

The settlor of a typical "dynasty trust" establishes an irrevocable trust with an inclusion ratio of zero. Beneficiaries can be given extensive control and use of the trust assets but not to the extent that the trust assets will be included in their own estates.[1] In addition, the trust can be made flexible to address future circumstances by giving a beneficiary an inter vivos or testamentary nongeneral power to appoint the trust assets to anyone in the world except the donee of the power, his creditors, his estate, or creditors of his estate.[2]

The primary, though not sole, barrier to any trust continuing into perpetuity is the rule against perpetuities.[3] The common law rule against perpetuities (hereinafter the "Perpetuities Rule") and the Uniform Statutory Rule Against Perpetuities ("USRAP") complement the transfer tax system because under the rule, the trust principal eventually must be distributed to the trust beneficiaries.

The main reason formerly given in support of a perpetuities rule was to ensure the alienability of property by invalidating remotely nonvested interests that had the effect of restraining alienation.[4] Now, the principal reason given in support of the rule is to prevent the control of capital by a settlor long since dead.[5] Giving beneficiaries the ability to alter the disposition of a trust through the use of nongeneral powers of appointment in many respects overcomes this objection.

Powers of appointment and the rule against perpetuities

The common law Perpetuities Rule and USRAP both provide that the validity of an interest in trust created by the exercise of a nongeneral or general testamentary power of appointment is measured from the date the original trust was created.[6] Thus, the measuring period for determining the validity of non-vested interests created by the exercise of a nongeneral or a general testamentary power of appointment "relates back" to the date the original trust was created.[7]

The "relation back" doctrine not only determines the inception of the time period in which trust interests must vest but also the inception of the time period in which nongeneral and general testamentary powers of appointment must be exercised.[8] As a result, under both the Perpetuities Rule and USRAP, whenever the donee of a nongeneral power of appoint-

STEPHEN E. GREER has a law practice limited to estate planning in Anchorage, Alaska. He is also a member of the Florida and Ohio Bars. Mr. Greer has previously written for professional publications including Estate Planning.

ment (the first power) exercises it by giving a beneficiary the further ability to exercise a nongeneral power of appointment (second power), the time period within which the second power may be exercised and the time period in which an interest created by the second power must vest, is measured by calculating the perpetuities period from the date of the trust instrument creating the first power.[6]

The 'Delaware Tax Trap,' the Code, and Regulations

Delaware's former Perpetuities Rule as originally enacted in 1933 stated that the validity of an interest in trust which is created by the exercise of a power of appointment is measured from the date the power of appointment is exercised to create the appointed interest rather than from the date the power of appointment is created.[10] Accordingly, in Delaware, it was possible to create a trust—giving the beneficiary a nongeneral power of appointment, which could then be exercised to create a successive nongeneral power of appointment, and a trust not only could last forever in Delaware, but the trust assets could escape federal estate tax at each beneficiary's generation.

The Powers of Appointment Act of 1951 added Sections 811(f)(4) and 1000(c)(4) to the Internal Revenue Code of 1939. These sections, the predecessors to Sections 2041(a)(3) and 2514(d), were enacted in response to the perceived "Delaware" problem.[11] The legislative history to this Act notes that "in at least one State a succession of powers of appointment, general or limited, may be created and exercised over an indefinite period without violating the rule against perpetuities. In the absence of some special provision in the statute, property could be handed down from generation to generation without ever being subject to estate tax."[12]

Code Sections 2041(a)(3) and 2514(d) provide that a gift or estate taxable event will occur if a power of appointment is exercised so as to create another power of appointment which, under applicable local law, can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power. Under former Delaware law, one did not refer back to the date the first power was created to determine the time in which the property subject to this power must vest. Hence, vesting was "without regard to the date of the creation of the first power." The result was that the donee of the power who exercised it to create a successive power was subject to either gift tax or estate tax on all property subject to this power, depending on whether the power was exercised during life or at death.

Eventually, Sections 2041(a)(3) and 2514(d) became known as the "Delaware Tax Trap" because a beneficiary of a trust established in Delaware could inadvertently subject the trust property to gift or estate tax if the trust gave a beneficiary a nongeneral power of appointment which was exercised to create a successive nongeneral power of appointment. On the other hand, this "trap" might prove advantageous where it is better to subject the trust property to a non-skip beneficiary's gift or estate tax rate as opposed to having the trust assets subjected to GST tax (for instance, if insufficient GST exemption was allocated to the trust).

The non-skip donee could exercise the nongeneral power (first power) by giving a presently exercisable general power of appointment (second power) to new donee. The creation of the presently exercisable general power of appointment (second power) commences a new perpetuity period, which is "without regard to the date of the creation of the first power."[13] Depending on when the first power was exercised to create the second power, the donee of the first

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[1] See Dukeminier, "Dynasty Trusts: Sheltering Descendants From Transfer Taxes," 23 ETPL 417 (Nov 1996); Oshins and Blattmachr, "Megatrust: An Ideal Family Wealth Preservation Tool," Tr. & Est. (Nov 1991); Blattmachr, "The Right Answer: Put It All In Trust," Tr. & Investments (Sept/Oct 1998); Oshins and Oshins, "Protecting and Preserving Wealth Into the Next Millennium," Part I, 137 Tr. & Est. 52 (Sept 1998), Part II, 137 Tr. & Est. 68 (Oct 1998).

[2] Reg. 20.2041-1(c)(1). See Forsberg, "Special Powers of Appointment: The Key to Flexibility in Planning," 27 ETPL 13 (Jan 2000).

[3] Some states have statutes that expressly limit the duration of private trusts, but more typically it might be the common law of a state, aside from the rule against perpetuities, which prevents perpetual trusts. Bogert, *Trusts and Trustees*, § 218 (Rev. 2d ed., 1992); Restatement, Second, Property (Donative Transfers) § 2.1, Duration of Trust.

[4] Bloom, "The GST Tax Tail Is Killing the Rule Against Perpetuities," 87 Tax Notes 569, ¶ 10 (4/21/00). This article provides an excellent discussion of past and present reasons for the rule.

[5] *Id.*

[6] Waggoner, *Estates in Land and Future Interests in a Nutshell*, p. 320 (2d ed., 1993).

[7] The "relation back" doctrine does not apply to a presently exercisable general power of appointment, which is the equivalent of ownership for perpetuities purposes.

[8] Restatement, Second, Property (Donative Transfers) § 1.2 *h*.

[9] USRAP (with 1990 amendments) at § 2.

[10] Del. Laws 1933, ch. 198 (codified at Del. Code Ann. Tit. 25) § 501 (1974).

[11] The Revenue Act of 1942 was the first attempt to fix the "Delaware problem" but it was roundly criticized, and the Powers of Appointment Act of 1951 was made retroactive to 10/21/42. This date is important because unexercised general powers created before this date are exempt from taxation.

[12] S. Rep't 382, 82d Cong., 1st Sess., 1951 U.S. Code Cong. & Ad. Serv., Vol. 2 Legislative History, p. 1535.

[13] See Blattmachr and Pennell, "Adventures in Generation-Skipping or How We Learned to Love the 'Delaware Tax Trap,'" 24 Real Prop., Prob. and Tr. J. 75 (1989).

power (who was the donor of the second power) would expose the appointive property to gift or estate tax. The appointive property would again be subject to either gift or estate tax, depending on when the second power was subsequently exercised, lapsed, or released by the donee of the second power.

Notably, Sections 2041(a)(3) and 2514(d) involve only beneficially held powers of appointment. Although the Second Restatement of Property characterizes a trustee's discretionary power to invade principal as a power of appointment,[14] the legislative history of these Code sections excludes a trustee's discretionary power to invade principal, which is not coupled with an interest, as a power of appointment for purposes of these sections.[15]

Interestingly, the legislative history provides an explanation of these sections only in terms of traditional Perpetuities Rule analysis (i.e., the rule against remoteness of vesting).[16] The legislative history does not illustrate the application of these sections in terms of the rule against the suspension of the power of absolute ownership or the suspension of the power of alienation. This suggests, as do the Regulations, that the rule against perpetuities as it relates to vesting and the rule against the suspension of the absolute power of alienation are one and the same.[17] Conceding that there is a similarity in objective between the two—namely, to foster the alienability of property—they operate in two very different ways.[18]

The rule against perpetuities invalidates those categories of future interests which indirectly impede the alienation of property.[19]

Example. O at death directs income to A for life in trust, then to A's children for their lives (who are unborn) at O's death, then income to A's grandchildren for their lives, remainder to B, but if not then surviving, to B's heirs. The income interests to A, A's children, and A's grandchildren are subject to a spendthrift clause.

Under the traditional rule against perpetuities, the income interest to A's children is valid because this interest must either vest or fail by A's death. The executory interest to B's heirs is also valid because this interest is certain to vest or terminate within the period of the rule. The income interest to A's grandchildren is invalid because it is not certain that this interest will vest within the period of the rule.[20] If it were held otherwise and the income interest to A's grandchildren were indestructible, it is unlikely the corpus, particularly when a trust isn't involved, could be restored to commerce within the period of the rule because of the difficulty in valuing the non-vested interest to A's grandchildren and joining this interest in a sale to another person.[21]

Importantly, the Perpetuities Rule does not require possession of the property within the period of the rule but requires only a certainty of vesting within the permissible period. In the above example, although the remainder to B is presently vested, more than likely B will be dead at the death of the last surviving child of A. The property will be distributed to B's heirs but not be included in their estates until well after the perpetuities period has ended.[22]

The statutory rule against the suspension of the absolute power of alienation ("Alienation Rule") operates differently. The Alienation Rule should not be confused with direct restraints against alienation which per se may be ineffective, no matter what their length.[23] The common law rule generally forbids direct restraints against alienation, whether expressed as prohibition or forfeiture clauses and whether applied to legal or equitable interests, except as they might apply to equitable interests under a spendthrift provision.[24]

Early in its history, the Alienation Rule was interpreted to mean that *not later than at the end of the permissible period,* there must exist persons in being who—alone or in combination with others—could convey an absolute fee in possession of land, or full ownership of personalty. The test was whether or not the trust would or could end during the permissible period, thus providing the beneficiaries the ability to sell the trust assets.[25] In other words, the pow-

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14 Restatement, Second, Property (Donative Transfers) § 11.1 *d.*

15 S. Rep't 382, *supra* note 12, at 1535.

16 S. Rep't 382, *supra* note 12, at 1636. The Senate Report reads "Under Section 811(f)(4), the exercise of any power of appointment after October 21, 1942, will be taxable if it is exercised by creating another power of appointment which under local law can in turn be exercised *so as to postpone the vesting* (emphasis added) of the property for a period which is ascertainable without regard to the date of the creation of the first power."

17 Regs. 20.2041-3(e)(1)(iii) and 25.2514-3(d).

18 For purpose of this article, the rule against perpetuities and the rule against the suspension of the power of alienation are discussed only in the context of trusts.

19 Restatement, Second, Property (Donative Transfers) Pt. 1, Rationale, at 9.

20 Leach, "Perpetuities in a Nutshell," 51 Harv. L. Rev. 638, 647 (1938).

21 Bloom, *supra* note 4, at ¶ 10, and Newman, "Perpetuities, Restraints on Alienability, and the Duration of Trusts," 16 Vand. L. Rev. 57, 62 (1962-1963).

22 *Id.* See, generally, Levin and Mulroney, "The Rule Against Perpetuities and the Generation-Skipping Tax: Do We Need Both?," 35 Vill. L. Rev. 333 (1990).

23 McDonnell, "Trusts-Perpetuities-Restraints on Alienation of Property Held in Trust," 36 Marq. L. Rev. 97 (1952).

24 Bogert, *supra* note 3, at § 219.

25 Bloom, "Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation," 45 Alb. L. Rev. 261 (1981). This excellent and definitive article examines the history of the rule against perpetuities, the rule against the suspension of the power of alienation, Sections 2041(a)(3) and 2514(d), and *Estate of Murphy,* discussed later.

er of alienation had to reside in the beneficiaries.

Therefore, in the example above, the contingent income interests to A's grandchildren would be invalidated under the Alienation Rule because the grandchildren might not be ascertainable within the period of the rule.[26] However, the Alienation Rule goes farther than the Perpetuities Rule by invalidating A's children's income interest, or at least shortening it so that it would not last longer than the permissible period.[27] The theory is that any impediment (such as a spendthrift clause), which prevents the trustee from selling the trust assets, distributing the proceeds to the beneficiaries, and terminating the trust within the perpetuities period, results in the entire interest that is subject to the legal impediment being held invalid.[28]

Whatever subtleties exist between the two rules, if it were held that a trustee's power of sale prevented a suspension of the power of alienation and there was no requirement that beneficial interests vest, a trust could continue into perpetuity. It was generally held, though, that a trustee's power of sale did not prevent a suspension of the power of alienation.[29] However, in 1950, the Supreme Court of Wisconsin held, in *In re Walker's Will*,[30] that a trustee's power of sale satisfied the Alienation Rule, and noted the possibility that trusts could continue indefinitely in that state.

In *Estate of Murphy*,[31] a beneficiary of a Wisconsin trust exercised a power of appointment by creating in her husband another power, which he in turn could validly exercise by placing the property subject to the power in a perpetual trust for the benefit of his children and descendants. The

[26] See, generally, Newman, *supra* note 21.

[27] Bloom, *supra* note 25, and Newman, *supra* note 21, at 71 and 73.

[28] Bogert, *supra* note 3, at § 218. The American and majority rule is that a trust cannot be terminated if doing so would defeat a material intention of the settlor in establishing the trust. Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889). A spendthrift provision indicates a material intention of the settlor that the beneficial interest should not be assigned or terminated.

[29] McDonnell, *supra* note 23, at 104.

[30] 258 Wis. 65, 45 N.W.2d 94 (1950).

[31] 71 TC 671 (1979).

government's position was that Section 2041(a)(3) applied whenever a power was exercised to create a successive power if, as a result, only one of the three prohibited conditions of title existed: "a postponement of vesting, the suspension of absolute ownership or suspension of the power of alienation of property."[32]

Under the government's interpretation, in a state adopting the Alienability Rule without a corresponding Perpetuities Rule, a taxable event would occur when a power is exercised to create a successive power because the exercise would delay *vesting* for a period ascertainable without regard to the date of the creation of the first power. The reason is that under the laws of that state, there is no period within which property must vest which can be ascertained by referring back to the date the first power was created.

Although the Tax Court in *Murphy* agreed that the government's position comported with a literal reading of the statute, the court nonetheless found the government's position unsupported by its own Regulations, and held that Section 2041(a)(3) required only an examination of the applicable *local law* to determine whether there is a postponement of vesting or a suspension of the absolute ownership or power of alienation. The court found Section 2041(a)(3) inapplicable because the trustee was given a power of sale and under Wisconsin law, the permissible alienation period is measured from the date the first power is created.

The government with prescience asserted that the court's holding would leave open the possibility that other states would enact laws similar to those in Wisconsin and thus avoid the provisions of Section 2041(a)(3). The court responded by saying that the 1976 generation-skipping transfer (GST) tax provisions indirectly closed the loophole perceived by the government, and the court believed any potential for abuse would be better curbed by Congress.[33]

Ironically, the IRS became the author of its own demise in *Murphy* when the IRS changed its Regulations in 1958 as part of a wholesale change of all existing estate tax Regulations under the Internal Revenue Code of 1939.[34] The original Regulations to Sections 811(f)(4) and 1000(c)(4)[35] did not contain the following language found today in Regs. 20.2041-3(e) and 25.2514-3(d): "if a power is exercised by creating another power of appointment, which ....can be validly exercised so as to (a) postpone ... vesting ..., *or (b) (if the applicable rule against perpetuities is stated in terms of the suspension of ownership or of the power of alienation, rather than of vesting)*." (Emphasis added.) It was this language which the Tax Court in *Murphy* found decisive in its determination that Congress did not intend for Section 2041(a)(3) to apply in a state that had only a rule against the suspension of the power of alienation. Furthermore, the IRS acquiesced in this decision.[36]

The vast majority of states that allow perpetual trusts have followed the Wisconsin model. That is, they have repealed the Perpetuities Rule and have adopted instead a rule against the suspension of the power of alienation, but specify that the power of alienation is not suspended if a trustee has a power of sale. Moreover, state law will provide a "relation back doctrine" regarding the exercise of nongeneral and general testamentary powers of appointment.

Implications for states that have abolished the Perpetuities Rule but have not adopted a rule against the suspension of the power of alienation

In a jurisdiction that abolished the rule against perpetuities and has no rule against the suspension of the power of alienation, there is no stated period of time within which a property interest must vest. When a power of appointment is exercised to create a successive nongeneral power of appointment, the property subject to this power will have its vesting postponed for a period of time that can not be ascertained by referring back to the date of the instrument creating the first power of appointment. As stated in the legislative history accompanying Florida's HB 599, "there is no 'period' ascertainable by reference to the date [a] .. power was created, because there is no rule against perpetuities and thus there simply is no "period."[37] Thus, if trust property is subject to the exercise of a nongeneral power of appointment, the exercise of that

[33] *Id.* at 678.

[33] *Id.* at 681. Section 1433(c)(1) of TRA '86 retroactively repealed the 1976 GST tax provisions of Chapter 13.

[34] TD 6296, 23 F.R. 4525 (6/24/58), which reenacted and changed the existing estate tax Regulations found in Part 81, Subchapter I, Title 26, Code of Federal Regulations (1939), Regulations 105, Estate Tax, as prescribed and made applicable to the Internal Revenue Code of 1954 by TD 6091, 19 F.R. 5167 (8/17/54).

[35] The predecessors to present-day Regs. 20.2041-3(e) and 25.2514-3(d) are Title 26, Chapter 1, Subchapter B, Part 81.24(b)(2)(iv) and Part 86.2(b)(6), respectively. Part 81 was revised by TD 6078, 19 F.R. 4303 (7/14/54), and TD 6077, 19 F.R. 4308 (7/14/54), to conform the estate and gift tax Regulations, respectively, to the Powers of Appointment Act of 1951.

[36] 1979-2 CB 2.

[37] See House of Representatives Committee on Real Property & Probate Analysis to HB 599, prepared by Bruce Stone, which in turn cited Summary of Committee Proposal to Modify the Rule Against Perpetuities and for Statutory Authority to Reform Trusts, prepared for the Real Property, Probate and Trust Law Section of the Florida Bar, Rule Against Perpetuities Committee. It was Mr. Stone's insight that caught the attention of this author and proved the impetus behind Alaska's move to amend its perpetuities statute.

power to create a trust giving the beneficiaries nongeneral powers of appointment renders that property subject to estate tax or gift tax.

The solution for states that have this problem is to introduce an Alienation statute or, alternatively, to merely extend the permissible period when non-vested interests must vest and the time in which nongeneral and general testamentary powers of appointment may be exercised. It is this latter course of action that Alaska and Florida have chosen. Alaska extended its perpetuities period to 1,000 years but only in the limited circumstance of the time in which a nongeneral and general testamentary power of appointment must be exercised and the time in which property subject to the exercise of these powers must vest.[38] Florida amended its USRAP provisions by extending the permissible "wait and see" period to 360 years.[39]

If there was concern that existing "perpetual" trusts might stumble into the Delaware Tax Trap, then a better solution would be to make these provisions retroactive to the date when perpetual trusts became possible in the state, but no farther back than 9/25/85; otherwise, grandfathered GST trusts would lose their GST-exempt status under the final GST modification Regulations.[40] Alaska gave retroactive effect to its statute back to the time when perpetual trusts became possible in Alaska, or 4/2/97.[41]

The ability to make the provisions of a perpetuities bill retroactive is sanctioned in section 5(a) of USRAP.[42] This section provides that, with respect to a non-vested property interest and a power of appointment created by the exercise of a power of appointment, the law in effect at the time a power of appointment is exercised to create a successive power of appointment controls, even though for purposes of determining the vesting period, the date of exercise relates back to the date of the instrument creating the first power of appointment. The purpose of this provision was to make the "wait and see" provision of 90 years applicable to trust instruments created prior to the enactment of USRAP.

States that may have avoided or stumbled into the Delaware Tax Trap

This article is not intended to be an extensive survey of all state law in the rapidly evolving area of perpetuity legislation but, based on the foregoing analysis, this author is of the opinion that a state which doesn't have a rule against perpetuities as it relates to vesting but which has (1) the Alienability Rule, (2) a statute which provides that the power of alienation is not suspended if the trustee has a power of sale, and (3) a "relation back" statute regarding the exercise of a nongeneral and general testamentary power of appointment, falls within the safe harbor of *Murphy* and thus such state's statute is outside the reach of Sections 2041(a)(3) and 2514(d).[43] As a result, the following states are within this safe harbor: Ohio,[44] New Jersey,[45] South Dakota,[46] and Wisconsin.[47]

Analyzing the laws of Illinois,[48] Maryland,[49] and Maine[50] is more problematic. Illinois and Maryland both provide an "opt-out" provision regarding the rule against perpetuities for property held in trust. Illinois, Maryland, and Maine all contain a provision that the trustee must be given a power of sale while the trust is in existence. This indirect-

[38] AS 34.27.051, signed into law on 4/22/00 but retroactive to 4/2/97. In addition, a new section 34.27.100 was adopted, which adds a rule governing the rule against perpetuities and the suspension of the power of alienation. If the attempt to extend the perpetuity period to 1,000 years was considered a de facto repeal, coming within the holding of the *Murphy* will provide a second line of defense. A technical amendment will be introduced in the next legislative session to clarify the language of the new rule governing the rule against perpetuities and the suspension of the power of alienation.

[39] Fla. Stat. Ann. § 689.225, signed into law on 6/7/00 and applicable after 1/1/01.

[40] Reg. 26.2601-1(b)(4), Example 4, involving a change in trust situs from a state that had a perpetuities provision to a state that had abolished the rule against perpetuities. TD 8912 effective 12/20/00.

[41] AS § 34.27.070(c).

[42] The pertinent provision is found in the second sentence of section 5(a) of USRAP with 1990 amendments.

[43] This opinion is based solely on the holding in *Murphy*. If the Regulations were changed and made retroactive or the acquiescence withdrawn, this author would be of a different opinion. See *Manhattan General Equipment Co.*, 297 U.S. 129, 17 AFTR 214 (S.Ct., 1936), in which a legislative Regulation was subsequently amended after taxpayer reliance on an original Regulation and the Court upheld application of the subsequent amendment to the taxpayer's transaction.

[44] Ohio Rev. Code § 2131.09.

[45] N.J.S.A. 46:2F-9.

[46] SDCL 43-6-3.

[47] Wis. Stat. Ann. § 700.16.

[48] 765 ILCS 305/3.

[49] Md. Est. & Trusts Code Ann. § 11-102.

[50] 33 M.R.S.A. § 101-A.

ly suggests that each of these states has a statutory period against the suspension of the power of alienation. While not posing a problem, it would have been helpful if there had been a direct expression of the rule prohibiting the suspension of the power of alienation, as was done in New Jersey.[51] Furthermore, although not statutorily expressed, it can be assumed that nongeneral powers under the common law "relate back," and thus these statutes also come within the holding of *Murphy*.

The statutes of two states, Alaska and Florida, are outside the reach of Sections 2041(a)(3) and 2514(d) because, in Florida, and in Alaska (but only in circumstances where 2041(a)(3) and 2514(d) would have otherwise applied), the Perpetuities Rule was not abolished—only extended. However, there may be an additional problem in Florida. The Florida legislature added judicial and non-judicial trust modification provisions in a salutary attempt to eliminate concerns over dead-hand control. F.S.A. § 737.4032 permits a non-judicial modification of a trust, including a full termination with the consent of the trustee and all beneficiaries. If the trustee and the beneficiary are the same person, an argument can be made that the beneficiary possesses an unexercised general power of appointment as a matter of state law. Additionally, even where there may be more than one beneficiary, there still could be a general power of appointment as to each beneficiary's aliquot share.[52]

The statutes of five states seem especially at risk of being within the reach of Sections 2041(a)(3) and 2514(d). In Arizona,[53] Delaware,[54] Idaho,[55] Rhode Island,[56] and Virginia,[57] the rule against perpetuities either was never in force, was repealed, or can be repealed at the option of the settlor. The problem lies in the apparent absence of a state statute prohibiting the suspension of the power of alienation.

Delaware repealed the Perpetuities Rule with respect to personal property held in trust in 1995. That state recently amended its perpetuities statute on 7/6/00.[58] The amendment provides that if a first power is exercised to create a second power, then the second power of appointment and every interest in property created through the exercise of this power "relate back" to the creation of the first power. It is unclear how this amendment avoids the Delaware Tax Trap because the "period" within which the property must vest by referring back to the date the first power was created still cannot be determined, even though the successive power of appointment relates back to the creation of the first power.

Arizona has a potentially bigger problem. Arizona adopted USRAP in 1994. In 1998, the state amended its statute to allow perpetual trusts.[59] However, Arizona failed to amend the corresponding USRAP provision which requires the exercise of a general testamentary and nongeneral power of appointment within the 90-year permissible period. Moreover, there appears to be no rule governing the period of time in which the power of alienation may be suspended. As a result, Sections 2041(a)(3) and 2514(d) would apply if a nongeneral power of appointment were exercised within the permissible USRAP period to create a successive power of appointment. An exercise of a nongeneral power of appointment beyond the permissible USRAP period would be invalid.[60]

Conclusion

The central problem with the language of Sections 2041(a)(3) and 2514(d) is that Congress used a rule of local property law in an attempt to solve a tax problem perceived to exist only in Delaware, but which also existed in Wisconsin for a different reason.[61] The disquieting aspect of the Delaware Tax Trap is that in some states a beneficiary of a dynasty trust creates a gift or estate tax liability if a nongeneral power of appointment is exercised in a manner that gives a successive beneficiary a nongeneral power of appointment. At the same time, an equivalent exercise by a beneficiary of a dynasty trust established in another jurisdiction is unlikely to fall into the Delaware Tax Trap. Accordingly, practitioners should keep in mind the relationship between Sections 2041(a)(3) and 2514(d) and the applicable perpetuities rule when drafting a dynasty trust that gives a beneficiary the ability to exercise a nongeneral power of appointment to create a successive nongeneral power of appointment. ■

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51 N.J.S.A. 46:2F-14

52 Reg. 20.2041-3(c)(3)

53 A.R.S. § 14-2901

54 25 Del. Code Ann. § 503. The Perpetuities Rule was abolished as to interests created in personal property in trust.

55 I.C.A. § 55-111 No Alienability Rule regarding personal property held in trust.

56 R.I. Gen. Laws § 34-11-38

57 Va. Code § 55-13.3

58 25 Del. Code Ann. § 504

59 See note 53, *supra*.

60 See Covey, "Rule Against Perpetuities Changes and Perpetual (Dynasty) Trusts: Problems and Opportunities," Practical Drafting, pp. 5871-5893, at p. 5877 (Jan 2000), for an excellent analysis of (1) the problem confronting Arizona and (2) the Rule Against Perpetuities as it relates to the Delaware Tax Trap.

61 The problems associated with the language used in the Code and Regulations are best exemplified by the effect in Delaware at the time the provisions became applicable. If the first power was exercised without creating a second power, taxation in Delaware could be extended for at least another generation. See Bloom, *supra* note 25, at 283.

The Rule Against Perpetuities (or "a review of the most complicated damn legal rule ever!")

No future interest is valid unless it can be shown that it will necessarily vest, if at all, no later than 21 years after some life in being at the creation of the interest.

For posterity, that is our plain language contribution to the hundreds of definitions now out there on "the rule against perpetuities." Perhaps we could have said: "hey man, if you goin' to delay some gift, either by will or while you're still alive, full title has to land fair and square within 21 years after the death of a person alive at the time of the gift."

The rule is a clear expression of the common law's abhorrence of things uncertain. The rule attempts to limit the duration of legal documents which split property rights in perpetuity. The common law prefers that property be fully owned by just one person. The common law will tolerate temporary contingent interests (i.e. legal time bombs which are attached onto property titles like a leech) for a certain time only, and that is no longer than 21 years after the death of a person alive (including those not born but conceived) at the time the document takes effect.

The "time the document takes effect" will vary depending whether the document is a will or an *inter vivos* transfer. For wills, the date is the date of death. For inter vivos transfers, it is the date when the transaction is completed. It is at that time that the transaction is measured.

The rule is very unforgiving. One legal article on it was called "Perpetuities: Staying The Slaughter Of The Innocents." Some places, like the Canadian province of Manitoba have abolished the rule altogether. Others propose replacing it with a much easier 80 or 90 year vesting rule. Still others, such as British Columbia (in 1975), have passed a *Perpetuity Act* which removes some of the harshness of the rule against perpetuities.

But the rule, for all it's apparent simplicity, is one of the most complicated in the law. For example, in *Lucas v. Hamm* (1961), a California lawyer was excused from a charge of professional negligence due to his misunderstanding of the rule!

So if you want to attach some lingering interest onto property, such as a trust or a life tenancy, it must come to an end within the perpetuity period of "the lives in being at the date the instrument takes effect plus 21 years." The rule does not shoot down normal or full property title; just those which are lingering and contingent.

The rule is very aggressive too. It does not apply on a wait-and-see basis. It must be apparent from the date the document takes effect that it will eventually rid itself of all lingering and contingent interests and finally vest completely in one person. In the *Lucas v. Hamm* case, the property was to vest five years after the will was probated. But the court said that even though virtually all wills are probated within 21 years (even the most hotly contested ones are usually resolved in a few years), it was not impossible that probate takes more than 21 years. The gift of the property was voided.

The "if at all" part is the law's way of saying: "I don't care if it ever actually vests or not. We're not going to wait and see. It is enough if it may vest." But legislation in many states has changed this to a "wait and see" policy, where the courts will decline voiding an interest just because it might fail by not vesting during the perpetuity period. Instead, they will let it carry-on and void it when the time comes if, in fact, it transpires that it has failed.

Understanding the "rule against perpetuities" game is only possible if you work through a few examples:

THE FACTS	ANALYSIS
To the first child of Adam to attain the age of 21 years."	This is the same as the 21-year limit of the perpetuity period and it is therefore certain that the threshold of 21 years will be attained, if at all, within the perpetuity period.
In 1997, Greg, who is still childless, sets up an *inter vivos* gift "To my sons who marry."	Greg is the only life in being at the time of the transfer so the perpetuity period is his life plus 21 years. It is feasible that Greg has a son in 1998 and dies in 1999. There is no guarantee that the child will marry on or before 1999+21 years or 2020 so the gift is void. This shows how strict the rule is and why is has been called the "slaughter of the innocent."
"To the first child of Adam to marry."	Void. There is no life in being to attach the perpetuity clock to. It is not certain that Adam's first child to marry will do so within 21 years of any person living at the time of the will or transfer taking effect.
"To the first of my grandchildren to marry during the perpetuity period."	No problem because the gift is so closely attached to the perpetuity period and, by definition, expires when it does.
"To all my grandchildren to marry."	No dice! It is conceivable that a marriage might yet occur after the last of the grandchildren in being at the date of the testator's death, dies and 21 more years have passed.
"To the first great-great-grandchild of Adam to go for a walk with Barbara."	Ok because it must occur, if at all, during the lifetime of Barbara.
"To the first child of Adam to attain the age of 18."	Adam's first child must reach 18 within 21 years of Adam's death.
	No dice because the following is possible: let's assume Harry had only an 18-year old

Harry makes an *inter vivos* transfer in 1990 "to my first grandchild to turn 21."	daughter, Katey, at the time of the transfer so the perpetuity period is Katey's life plus 21 years. Another daughter is born two years later (in 1992), Kerri. Both Harry and Katey die in 1994. The 21-year clock is started and is set to expire in 2015. Kerri's child can't possibly reach 21 by or before 2015 so the gift is void.
A 1992 will from Shane's father: "To Shane for life, remainder to Shane's widow for life, remainder in fee simple to their eldest surviving daughter."	Shane was not married when his father died so the remainder to his widow is contingent but the gift remains valid on that ground since Shane is a life in being. Consider, though, that Shane marries Nicole in 2013 (who was born in 1993) and they have a child, Celine, born in 2014. Shane dies the next year, 2015, and Nicole, in 2037. At that time, Celine is still alive but let's look at the perpetuity period. It started from the date of the transfer in 1992. The life in being was Shane so from his death in 2015, there is an additional 21 years to count. That brings us to 2036. Since al of this was possible from the date of the transfer, the remainder gifts are void as against the rule against perpetuities.
"Unto and to the use of Kay, in trust for Jane's first grandchild to turn 21."	At the time the instrument takes effect, Jane is already 65 years old, and she has two children, Mary and Michelle.
"When a candidate for the priesthood comes forward from St. Saviour's Church, St. Alban's."	Void. There is no life in being to which the perpetuity clock can be set.
"When a house ceases to be a dwelling house."	Void. Again, the time of vesting does not relate to the life of any living person.

As a sample of how legislation, in some jurisdictions, has modified the rule against perpetuities, readers are invited to consult the legislation in place in British Columbia, reproduced in its entirety at cabcperp.htm.

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in which he had not before, nor has by the instrument creating the power, any estate whatsoever.

Power of revocation. A power which is to divest or abridge an existing estate.

Powers in gross. Those which give a donee of the power, who has an estate in the land, authority to create such estates only as will not attach on the interest limited to him or take effect out of his interest, but will take effect after donee's estate has terminated.

Real property law. An authority to do some act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner granting or reserving such power might himself perform for any purpose. An authority expressly reserved to a grantor, or expressly given to another, to be exercised over lands, etc., granted or conveyed at the time of the creation of such power. *See* Power of alienation.

For other compound terms, such as Power of appointment; Power of sale; etc., see the following titles.

Power coupled with an interest. A right or power to do some act, together with an interest in the subject-matter on which the power is to be exercised. It is distinguished from a *naked* power, which is a mere authority to act, not accompanied by any interest of the donee in the subject-matter of the power. Arcweld Mfg. Co. v. Burney, 12 Wash.2d 212, 121 P.2d 350, 355.

Power of acceptance. Capacity of offeree, upon acceptance of terms of offer, to create binding contract.

Power of alienation. The power to sell, transfer, assign or otherwise dispose of property.

Power of appointment. A power or authority conferred by one person by deed or will upon another (called the "donee") to appoint, that is, to select and nominate, the person or persons who are to receive and enjoy an estate or an income therefrom or from a fund, after the testator's death, or the donee's death, or after the termination of an existing right or interest.

A power of appointment may be exercisable by deed or by will depending upon the terms established by the donor of the power, and is defined, generally, as power or authority given to person to dispose of property, or interest therein, which is vested in person other than donee of the power. In re Conroy's Estate, 67 C.A.3d 734, 136 Cal.Rptr. 807, 809.

Powers are either: *Collateral,* which are given to strangers; *i.e.,* to persons who have neither a present nor future estate or interest in the land. These are also called simply "collateral," or powers not coupled with an interest, or powers not being interests. Or they are powers relating to the land. These are called *"appendant"* or *"appurtenant,"* because they strictly depend upon the estate limited to the person to whom they are given. Thus, where an estate for life is limited to a man, with a power to grant leases in possession, a lease granted under the power may operate wholly out of the life-estate of the party executing it, and must in every case have its operation out of his estate during his life. Such an estate must be created, which will attach on an interest actually vested in himself. Or they are called *"in gross,"* if given to a person who had an interest in the estate at the execution of the deed creating the power, or to whom an estate is given by the deed, but which enabled him to create such estates only as will not attach on the interest limited to him. Of necessity, therefore, where a man seised in fee settles his estate on others, reserving to himself only a particular power, the power is in gross.

An important distinction is established between *general* and *particular* powers. By a general power we understand a right to appoint to whomsoever the donee pleases including himself or his estate. By a particular power it is meant that the donee is restricted to some objects designated in the deed or will creating the power.

A general power is *beneficial* when no person other than the grantee has, by the terms of its creation, any interest in its execution. A general power is *in trust* when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from the alienation.

When a power of appointment among a class requires that each shall have a share, it is called a "distributive" or "non-exclusive" power; when it authorizes, but does not direct, a selection of one or more to the exclusion of the others, it is called an "exclusive" power, and is also distributive; when it gives the power of appointing to a certain number of the class, but not to all, it is exclusive only, and not distributive. A power authorizing the donee either to give the whole to one of a class or to give it equally among such of them as he may select (but not to give one a larger share than the others) is called a "mixed" power.

For the estate tax and gift tax effects of powers of appointment, see I.R.C. §§ 2041 and 2514.

See also General power of appointment; Illusory appointment; Limited power of appointment.

Special power of appointment. A power of appointment that cannot be exercised in favor of the donee or his or her estate but may be exercised only in favor of identifiable person(s) other than the donee. *See also* Limited power of appointment.

Testamentary power. A power of appointment that can only be exercised through a will (*i.e.,* upon the death of the holder).

Power of attorney. An instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of principal. Complaint of Bankers Trust Co., C.A.Pa., 752 F.2d 874, 885. An instrument authorizing another to act as one's agent or attorney. The agent is attorney in fact and his power is revoked on the death of the principal by operation of law. Such power may be either general (full) or special (limited).

Durable power of attorney. Exists when person executes a power of attorney which will become or remain effec-

...ense a share of products or proceeds therefrom, reserved to owner of land for permitting another to use the property. Barry v. Frizzell, Okl., 371 P.2d 460, 464.

In patent law, signifies sums paid to owner of a patent for its use or for the right to operate under it, and may also refer to obligation giving rise to the right to such sums. Taylor v. Peck, 160 Ohio St. 288, 116 N.E.2d 417, 418.

See also Minimum royalty clause; Overriding royalty; Running royalty.

Reasonable royalty. Under patent law, a "reasonable royalty" is that amount which the trier of facts estimates a person desiring to use a patent right would be willing to pay for its use and a patent owner desiring to license the patent would be willing to accept. University Computing Co. v. Lykes-Youngstown Corp., C.A.Ga., 504 F.2d 518, 538.

Overriding royalty. A retained royalty by a lessee when the property is subleased. Common in oil and gas leases.

Royalty acres. That part of the oil that goes to landowner, whether it be in place or after production. Dickerson v. Tisdale, 204 Ark. 838, 164 S.W.2d 990, 992.

Royalty bonus. The consideration for oil and gas lease over and above the usual royalty. Sheppard v. Stanolind Oil & Gas Co., Tex.Civ.App., 125 S.W.2d 643, 648.

Roy est l'original de touts franchises. The king is the origin of all franchises.

Roy n'est lie per ascun statute si il ne soit expressment nosme. The king is not bound by any statute, unless expressly named.

Roy poet dispenser ove malum prohibitum, mais non malum per se. The king can grant a dispensation for a *malum prohibitum,* but not for a *malum per se.*

R.S. An abbreviation for "Revised Statutes."

Rubber check. Slang for a check which has been returned by the drawee bank because of insufficient funds in the account of the drawer.

Rudeness. Roughness; incivility; violence. Touching another with rudeness may constitute a battery.

Rule, *v.* To command or require by a rule of court; as, to rule the sheriff to return the writ, to rule the defendant to plead, to rule against an objection to evidence. To settle or decide a point of law arising upon a trial, and when it is said of a judge presiding at such a trial that he "ruled" so and so, it is meant that he laid down, settled, or decided such and such to be the law.

Rule, *n.* An established standard, guide, or regulation. Prescribed guide for conduct or action, regulation or principle. State ex rel. Villines v. Freeman, Okl., 370 P.2d 307, 309. A principle or regulation set up by authority, prescribing or directing action or forbearance; as the rules of a legislative body, of a company, court, public office, of the law, of ethics. Precept attaching a definite detailed legal consequence to a definite detailed state of facts.

An order made by a court, at the instance of one of the parties to a suit, commanding a ministerial officer, or the opposite party, to do some act, or to show cause why some act should not be done. It is usually upon some interlocutory matter. *See also* Decree; Order.

For purposes of the Administrative Procedure Act, includes each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy. Vega v. National Union Fire Ins. Co. of Pittsburgh, Pa., Inc., 67 Haw. 148, 682 P.2d 73, 78.

A rule of law. Thus, we speak of the rule against perpetuities; the Rule in Shelley's Case, etc. *See also Rule of law, below.*

Rule absolute. One which commands the subject-matter of the rule to be forthwith enforced. It is common, for example, when the party has failed to show sufficient cause against a rule *nisi,* to "make the rule absolute," *i.e.,* imperative and final.

Rule against perpetuities. Principle that no interest in property is good unless it must vest, if at all, not later than 21 years, plus period of gestation, after some life or lives in being at time of creation of interest. Perkins v. Iglehart, 183 Md. 520, 39 A.2d 672, 676; St. Louis Union Trust Co. v. Bassett, 337 Mo. 604, 85 S.W.2d 569, 575. The "rule against perpetuities" prohibits the granting of an estate which will not necessarily vest within a time limited by a life or lives then in being and 21 years thereafter together with the period of gestation necessary to cover cases of posthumous birth. Nelson v. Mercantile Trust Co., Mo., 335 S.W.2d 167, 172.

This common law rule or principle has been modified by statute in certain states; *e.g.* under some statutes an inquiry may be made as to whether the gift *did* vest in fact within the period. If it actually vested, it will be upheld. Under original rule, the inquiry was whether it *must* vest by its terms. See *e.g.* M.G.L.A. c. 184A (Mass.).

See also Perpetuity.

Rule in Shelley's Case. *See* Shelley's Case, Rule in.

Rule nisi. A rule which will become imperative and final *unless* cause be shown against it. This rule commands the party to show cause why he should not be compelled to do the act required, or why the object of the rule should not be enforced. An ex parte order directing the other party to show cause why such a temporary order should not become permanent.

Rule of apportionment. Rule that, where subdivided tract contains more or less than aggregate amount called for, excess or deficiency is apportioned among several tracts.

Rule of four. Working rule devised by Supreme Court for determining if a case is deserving of review; the theory being that if four justices find that a legal question of general importance is raised, that is ample proof that the question has such importance. Rogers v. Missouri Pac. R. Co., Ill., 352 U.S. 521, 77 S.Ct. 459, 478, 1 L.Ed.2d 515.

Explanation of Changes
The Who, When, What & Why of SB 162
By Stephen E. Greer

This bill follows the intent of originally proposed SB 162 which would abolish the Rule Against Perpetuities but does so in a manner which avoids a potential tax trap, discovered after SB 162 was introduced last year. The following discussion is as close as the law comes towards approaching rocket science. Nonetheless even though complicated, the proposed legislative fix encompassed by this bill is extremely important to: individuals who have established dynasty trusts in our state; the lawyers who drafted them; and our reputation as the premier state in which to establish a trust. This legislation is strictly remedial in nature and attempts to fix a later discovered tax problem attendant with the manner in which the Rule Against Perpetuities was abolished in April of 1997.

I. Who is behind this bill and why?

A group of estate planning attorneys in Alaska meet informally on a continual basis to discuss the very complex and continually changing aspects of the estate planning profession. These attorneys are dedicated to the improvement of Alaska's laws to keep us in the forefront of the trust industry. Alaska has been on the cutting edge of this industry on a nationwide basis in recent years. This reputation is the result of our state enacting creative and innovative trust laws, which not coincidentally is being replicated by an increasing number of other states. Nonetheless if we in Alaska are to remain in the forefront, our laws must be kept current. Being a leader has its disadvantages. The strength and weakness of any new law can not be fully assessed at the outset. Only after some time passes can this assessment be made. The burden of constantly improving existing law and the willingness to address change is the one which any leader must bear whatever the profession. Make no mistake about it, we in Alaska are nationally respected as a leader in the trust industry. Unfortunately compounding our responsibility of remaining a leader in trust law is its inextricable link with federal tax law. As we all know, federal tax law constantly changes. Our laws must both anticipate and keep current with these changes. If we fail in this effort, all previous efforts to establish a trust industry in this state will go for naught. This bill addresses and answers that challenge. There are other bills concerning trust and probate law which have been or will be introduced in this legislature which address the challenge of remaining a leader in the field of trusts. No attorney who has expressed a desire to participate in the formulation of these laws has been excluded; on the contrary all those who have been willing to contribute have been invited to participate. It can also be said none of these bills represents the exclusive position of the drafter but more often than not are a product of compromise and painstaking review.

II. History of our state law concerning the Rule Against Perpetuities and its importance to trusts.

The common law rule against perpetuities ("RAP") as it relates to trusts states every beneficial interest and the property subject to those beneficial interests, must vest within a period of time measured from the time the trust was originally created. The period of time is the lifetimes of all beneficiaries alive at the time the trust was created, plus 21 years. If it is determined at the time the trust was created that there exists a possibility an interest of a beneficiary might not vest within this period of time, then this interest is void. The Alaska legislature enacted the Uniform Statutory Rule Against Perpetuities ("USRAP") effective January 1, 1996. This Uniform Rule ameliorates the harshness of the common law rule and adopts a "wait and sec" approach to determine whether a beneficial interest might vest and establishes a term of 90 years as an alternative within which time a beneficial interest can vest.

In April of 1997, our legislature amended AS 34.27.050(a) by including (3) which states the RAP is inapplicable to those trusts where a trustee has the ability to make a distribution to a person who is living at the time the trust is created. Because in almost every case a trustee can make the above described distribution, it was generally accepted we had abolished the RAP, if not explicitly, at least implicitly. Abolishing the RAP is a significant reason for the growth of our state's trust business since 1997. By rendering the RAP ineffective as applied to trusts, it became possible to create a trust which could continue forever. These trusts are frequently referred to as "perpetual trusts " or "dynasty trusts" and the terms are used interchangeably here. By making a trust "perpetual" it is also possible to avoid the diminishing effect of estate tax as the trust property passes from one generation to the next. As a result trust assets can grow dramatically, resulting in Alaska becoming a very attractive place to create a trust. When we enacted this legislation in 1997, we were not the first state to abolish the RAP, although we were one of the few states to have done so. Unfortunately an increasing number of other states have seen the benefit of abolishing the RAP. Illinois, Idaho, South Dakota, Maryland, Wisconsin and Ohio are just a few of those states which have joined the parade. Many other states have legislation either pending or under consideration.

III. Why was it decided to abolish the RAP with the introduction of SB 162?

The manner in which we abolished the RAP left some uncertainty in the minds of outside practitioners whether or not we had in fact done so. As a result it was felt it would be better for us to just come out and say so by statute. This would have the practical effect of making our trust laws more understandable to outside observers and would naturally increase the marketing potential of our state. In addition it would also cure a technical glitch which was discovered after the 1997 law was passed, where it was unclear whether a charitable lead dynasty trust could be created in our state or whether a trust funded exclusively with Crummy withdrawal rights would be considered perpetual. That was the frame of mind which existed when SB 162 was originally introduced.

IV. What was wrong with SB 162?

The intent of SB 162 was commendable. However after SB 162 was introduced it was discovered the manner in which we abolished the RAP in April of 1997 created a potential tax consequence. Passage of SB 162 would only perpetuate this problem. The tax problem is very difficult to understand but it exists with any perpetual trust in which a beneficiary is given a special power of appointment. This bill follows the intent of SB 162 in abolishing the RAP except in the one limited circumstance where property is subject to a special power of appointment which is exercised to create a successive power of appointment. Even then the perpetuity term is being extended for all practical purposes into perpetuity. This bill is distinguishable from SB 162 because this bill provides a legislative fix for perpetual trusts drafted after April 1, 1997 by avoiding the "Delaware Tax Trap." As will be discussed, giving future beneficiaries special powers of appointment are an indispensable tool in the formulation of a perpetual trust. By giving beneficiaries the special power to appoint trust assets, it is possible to make this otherwise irrevocable trust, flexible so future events can be addressed.

V. Typical Perpetual Trust with Special Powers of Appointment.

In a trust it is quite common to give beneficiaries special powers of appointment. A beneficiary who has a special power of appointment can decide who can benefit from the trust property either at their death or during their life depending on whether the power is a testamentary or an inter vivo special power of appointment. If a special power of appointment is not exercised then the trust document invariably provides for a disposition in some alternative manner.

> **Example 1.** A creates a trust for B and gives B a special power to appoint the trust property at B's death to any individual other than to B's estate or creditors of B's estate. The trust document further states if B fails to exercise the special power of appointment, the property will be distributed outright to B's 2 children, C and D. C turns into a drug addict and D is an anesthesiologist with a high exposure to liability. B could exercise the special power of appointment and appoint the trust property away from C and give it to D in trust for the benefit of D. The trust for D could be drafted to prevent the attachment of the trust assets by D's creditors. Furthermore D could be given a special power of appointment to further appoint the trust assets to those beneficiaries which D might choose and in the manner in which D might choose, whether as an outright distribution or in trust for those beneficiaries.

VI. Detailed explanation of tax problem.

The Internal Revenue Code ("Code") imposes estate tax on property owned by a person at the moment of death. Property subject to the exercise of a special power of appointment will not be included in the estate of a person who holds this special power of appointment. This is because the ownership rights attendant to a special power of appointment do not rise to a level where the property subject to this power of appointment would be included in a person's estate for estate tax purposes. On the other hand property subject to a general power of appointment will be included in the holder's estate.

In 1951 virtually every state in the country had adopted the RAP. The federal government was satisfied with this rule because this rule states all trusts must eventually terminate. When trusts terminate and the assets are distributed to the beneficiaries, the property will be exposed to estate tax when the beneficiaries die. The RAP states whenever the holder of a special power of appointment exercises it to create other trusts which in turn give beneficiaries of those trusts the further ability to exercise special power of appointments, the time period within which these powers may be exercised and the time period in which the property interests subject to these successive special powers of appointment must vest, is measured by calculating the perpetuities period from the date of creation of the trust instrument granting the first special power of appointment. Sounds complicated but really not.

> **Example 2.** A creates a trust for B and gives B a special power of appointment. B exercises the special power of appointment to create trusts for C and D, and gives both C and D special powers of appointment. C and D can validly exercise their special power of appointments only if those special powers can be exercised within the applicable perpetuities period. This period is measured from the date of the instrument creating the first special power of appointment. Moreover the property subject to this power also must vest within this same time period.

Delaware modified its RAP to provide whenever a holder of a special power of appointment exercises a special power of appointment to create another trust which in turn gives the beneficiaries of those trusts the ability to exercise special power of appointments, a new beginning date for measuring the perpetuities period arises at the moment a special power of appointment is exercised to create a successive special power of appointment. Thus it was possible in Delaware to create a trust which gave holders of special powers of appointment the ability to exercise them to create successive special powers of appointment and these trusts could last forever. Furthermore if a beneficiary was given a special power of appointment as opposed to a general power of appointment, the trust property would not be included in the beneficiary's estate and would escape estate tax. The ability to have trusts go on forever and avoid the imposition of estate tax naturally promoted the trust industry in Delaware.

The federal government attempted to fix the Delaware problem by enacting the predecessor to now Internal Revenue Code section IRC 2041(a)(3) and its gift tax counterpart 2514(d). These sections provide property subject to special power of appointment will be included in the estate of the holder of a special power of appointment if the holder exercises the special power of appointment in a manner which creates successive special powers of appointment, but only if on the date in which the successive power of appointment was created, the determination of the perpetuity period did not relate back to the date of the instrument creating the first special power of appointment. As indicated in the example 2, above, in every other state, except Delaware, the date for determining the validity of the exercise of a special power of appointment and the determination of the vesting period of property subject to its exercise relates back to the date of the instrument creating the first special power of appointment. In Delaware successive special power of appointments did not relate back, instead a whole new perpetuities period is commenced when successive special power of appointments are exercised. Eventually Internal Revenue Code sections 2041(3) and 2514(d) became known as the "Delaware Tax Trap" because a Delaware practitioner could inadvertently "fall into the trap" and subject the trust property to either gift or estate tax if they created a trust which gave beneficiaries the ability to exercise special powers of appointment to create a successive special powers of appointment.

VII. How have other states avoided the Delaware Tax Trap when they abolished the RAP? As previously indicated, other states have seen it in their interest to abolish the RAP. However in at least a few of those states, they have done so in a way which does not run afoul of the Delaware Tax Trap by coming under the holding of a Tax Court case, known as the Estate of Murphy v. Commissioner, 71 T.C. 671 (1979). These jurisdictions do not state their RAP as a time in which property interests must vest but rather as a time in which the power of alienation can not be suspended. A rule against the suspension of power of alienation states by implication that it is permissible to create a trust which prevents the trust property from being sold. At common law this would be considered a restraint on alienation and this direction would be considered void as against the public policy of promoting the free transferability of property. In those states which have stated their RAP as a time in which the power of alienation can not be suspended, they place a time period on the inalienability of property after which time the property must be capable of being sold. This period of time is invariably stated as a variation of the same time period found in the RAP pertaining to vesting of property interests.

Treasury regulations under 2041(a)(3) provide whether a state articulates its RAP as a rule against the remote vesting of property or as a rule against the suspension of the power of alienation, if a power of appointment is exercised to the create another power of appointment then the period of time in which the vesting of property is delayed (if local law states the rule as one against the remote vesting of property) or in which the power of alienation is suspended (if local law states the rule as one against the power of alienation) must be ascertainable by referring back to the date the first power of appointment was created. When one thinks about it this makes little sense. Even though a local law might state its rule as one against the suspension of power of alienation, having the power of alienation does not address the concern which Congress had in mind when it passed the predecessor of sections 2041(a)(3) and 2514(d). If a trust is created in a jurisdiction where a trust can continue forever but the only condition is the property of the trust must be capable of being sold at either the direction of the trustee or the beneficiaries, then it is still possible to have property continue in trust forever without the imposition of estate tax. The only requirement is the property of the trust must be capable of being exchanged for other property within a stated period of time. The Tax Court in Estate of Murphy v. Commissioner, held 2041(a)(3) is to be read in the alternative, so, if Wisconsin had no RAP pertaining to the vesting of property, but instead had a rule limiting the time in which the power of alienation can be suspended, and furthermore provided that all special powers of appointment relate back, then 2041(a)(3) is not violated. Even though this interpretation does nothing to prevent the use of perpetual trusts to avoid estate tax, the Court found itself bound by Treasury's own regulations. Furthermore Treasury acquiesced in the Tax Court's decision which means the IRS will be bound by the Tax Court's interpretation in future cases. As a result some states which permit perpetual trusts simply provide that although the RAP is otherwise abolished they do have a rule against the suspension of the power of alienation. Furthermore they go on to state any exercise of a special power of appointment must relate back to the date the first special power of appointment was created. These states have a distinct competitive edge over Alaska because in these states a beneficiary can exercise a special power of appointment and exercise it to create successive special powers of appointment, without fear of IRC sections 2041(a)(3) and 2514(d) being violated. Although the vesting of property interests might be delayed, the power of alienation will not be suspended beyond the permissible period, provided the trustee or beneficiaries are given the ability to direct the sale or exchange of trust property for other property.

VIII. How does the Murphy case affect Alaska?

In our state the RAP has always been stated as a rule against the remote vesting of property and not as a rule against the suspension of the power of alienation. When we changed AS 34.27.050 in 1997 we continued to state the RAP as a rule against the remote vesting of property. As a result, any perpetual trust created after April 1, 1997 which gave a beneficiary a special power of appointment which could be exercised to create successive powers of appointment, has the potential for running afoul of Internal Revenue Code sections 2041(a)(3) and 2514 (d). This is because under present Alaska law when a special power of appointment is exercised to create a successive power of appointment, the property subject to these powers will have its vesting delayed for a period of time that can not be ascertained by referring back to the date of the instrument creating the first power of appointment. In Alaska for trusts created after April 1, 1997, there is no stated period of time in which property interests must vest. As a result, the maximum length of time in which vesting can be delayed can not be determined by referring back to the date of the instrument creating the first power of appointment. Thus, all trust property subject to the exercise of a special power of appointment, which was exercised to create a further trust giving those beneficiaries special powers of appointment, renders that property subject to estate tax or gift tax. This creates a potential problem because it defeats the expectations of those individuals who created these trusts.

IX. Legislative Fix.

We in Alaska could fix this problem by abolishing the RAP and enacting a rule against the suspension of the power of alienation. In so doing we would fall squarely within the Murphy decision. This is what many other states have seen fit to do and this would protect all perpetual trusts drafted after the date of enactment of this bill. However this would do nothing to protect perpetual trusts created after April, 1997 which contain special power of appointments.

This legislation is meant to fix the potential tax problem in both scenarios. For all trusts created after the effective date, the RAP would be abolished except in those instances in which property interests are subject to a special power of appointment which in turn is exercised to create a successive special power of appointment. In this one limited circumstance, the period of time within which these property interests must vest will relate back to the date the first special power of appointment was created, thus avoiding 2041(a)(3). The period of time in which property interests must vest which are subject to a special power of appointment exercised to create a successive special power of appointment would be extended to 1000 years. Although this trust might not be perpetual, a 1000 year term is nonetheless a very large period of time for a trust to last. The 1000 year term is not unique to Alaska. In fact the idea of a 1000 year term was taken directly from legislation now pending in Florida.

Alaska's legislation further provides contingent special power of appointments are valid if exercised within a 1000 years from the date the trust was first created. This corrects an oversight in the 1997 legislation which left in tact a USRAP provision that contingent special power of appointments were valid only if exercised within a 90 year period from the date the trust was created. This oversight dramatically reduces the effectiveness of using special power of appointments in perpetual trusts created under our present law and thus makes Alaska noncompetitive with other states which permit perpetual trusts.

The ability to make the provisions of this bill retroactive to April of 1997 is possible by the clear wording of the second sentence of AS 34.27.070(a) as it now exists in our law. This provision provides the law in effect at the time a power of appointment is exercised to create a successive power of appointment controls, even though for purposes of determining the vesting period the date of exercise relates back to the date of the instrument creating the first power of appointment, which of course predates the date of enactment of this bill. This provision would be removed from 34.27.070(a) and restated and added as a new subsection (d).

> **Example 3.** A created an inter-vivo trust for B on May 1, 1997 and gave B a special power of appointment which B exercised on January 1, 2001 (or any date after April 1, 1997) to create trusts for C and D, giving both C and D special powers of appointment. A's exercise of the special power of appointment on January 1, 2001 would take into account the law in effect on January 1, 2001. If this bill becomes law, it would provide the determination of the period of time in which the vesting of all property interests which are subject to the power of appointment exercised on January 1, 2001 relate back to May 1, 1997 (the date of the instrument creating the first special power of appointment). The period of time in which the property must vest is 1000 years computed from May 1, 1997. Because the period of time in which this property must vest can not be ascertained without regard to the date of the first power, there is no violation of IRC sections 2041(a)(3) or 2514(d).