HB 34

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SSHB 34
(H) Publish Date: 2/26/01

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
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Division Attorney General's Office
Date/Time 2/21/01 11:54 AM
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Date 2/21/01
Agency Department of Law

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FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SSHB 34
(H) Publish Date: 2/26/01

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 12:46 p.m.
Approved by: Stephanie Cole
Date 2/15/01
Agency: Alaska Court System

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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 that version 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.

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.

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.

Add'l Information

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 see" 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).

The Dela[redacted]Trap and the Abo[redacted]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-

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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.[9]

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. 66 (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 excessively 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*, § 216 (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. 166 (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 1535. 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)(ii) 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 8.

[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).

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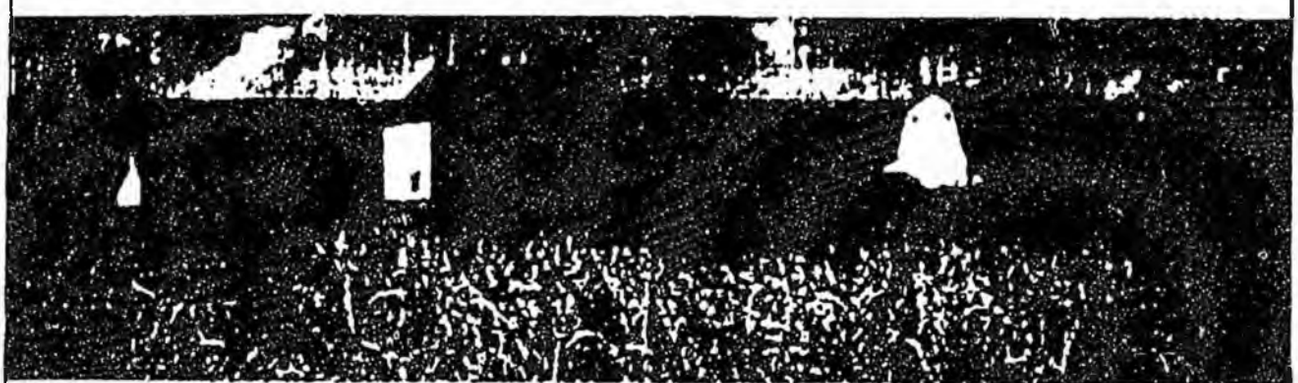

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government's position was that Section 2041(a)(3) applied whenever a power was exercised to create a successive power if, as a result, only one of the three prohibited conditions of title existed: "a postponement of vesting, the suspension of absolute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

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[32] *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. 4529 (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(c) and 25.2514-3(d) are Title 26, Chapter I, Subchapter B, Part 81.24(b)(2)(vi) 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 263.