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Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control?

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I. INTRODUCTION

Within the past several years, at least ten states have enacted legislation to enable individuals to create private trusts that can endure forever.[1] Perpetuities repeal legislation has also been introduced in Florida,[2] Nevada,[3] Tennessee,[4] Iowa[5] and Virginia.[6] Alaska enacted perpetuities repeal legislation in 1997 in an effort to

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[1] The ten states are Idaho, South Dakota, Wisconsin, Arizona, Alaska, Delaware, Illinois, Maryland, New Jersey and Ohio. Brian Layman, Comment, *Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal*, 32 AKRON L. REV. 747, 748 (1999).

[2] H.B. 599, 102nd Leg., Reg. Sess. (Fla. 2000).

[3] A.J.R. 4, 70th Leg., Reg. Sess. (Nev. 1999).

[4] Tennessee Perpetual Trust Act, H.B. 912, S.B. 565, 101st Leg., Reg. Sess. (Tenn. 1999).

[5] H.B. 566, S.B. 2060, 78th Leg., 2d Sess. (Iowa 2000).

[6] H.B. 289, S.B. 502, 2000 Sess. (Va. 2000).

attract trust business.[7] The Alaska statute, in addition to providing a high degree of asset protection, effectively abolished the Rule Against Perpetuities by providing that the Rule does not apply if there is a living beneficiary of either the income or principal at the time of creation of the trust.[8]

Illinois passed legislation in 1997 which enables estate planners to opt out of the Rule and establish a "qualified perpetual trust."[9] In 1999, Ohio enacted legislation allowing the settlor or an individual exercising a general power of appointment over trust property to waive the Rule as to trusts if the trustee has an unlimited power of sale over the trust corpus or if one or more persons has unlimited power to terminate the trust.[10] New Jersey repealed its Rule Against Perpetuities statute the same year and in effect sanctions perpetual (dynasty) private trusts provided the trustee has the power to sell the trust property.[11]

The dynasty trust business is commercially important to lawyers, banks, certified public accountants and financial planners who stand to benefit from local trust business as well as from the ability to attract trust business from other states. South Dakota is illustrative of the intense competition for trust business. In addition to allowing perpetual family trusts, South Dakota's package of benefits includes: (a) no state income tax or capital gains tax on trust income; (b) strong asset protection laws shielding the assets of the trust in the event of a beneficiary's financial, marital or other difficulties; and (c) a high level of confidentiality.[12]

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[7] ALASKA STAT. § 34.27.050(3) (Michie 1998).

[8] Alan S. Gassman & James F. Gulecas, *Alaska Spawns a New Trust: Alaskan and Other Asset Protection Trusts*, 13 PRAC. TAX LAW. 25, 29-30 (1998).

[9] 765 ILL. COMP. STAT. ANN. 305/3 (West 1997). *See also* Richard A. Campbell & Christopher D. Dwyer, *Making the Most of the New Illinois Perpetuities Statute*, 87 ILL. B.J. 594, 597-99 (1999) (discussing utilization of Illinois' new Rule Against Perpetuities).

[10] OHIO REV. CODE ANN. § 2131.09(B) (West Supp. 2000). *See also* Roy Krall & David Kern, *The Ohio Dynasty Trust—Planning for Generations*, 70 CLEV. B.J. 14 (1999) (discussing potential benefits of Ohio Dynasty Trust).

[11] Trust Modernization Act of 1999, ch. 159, 1999 N.J. LAWS 13 (codified at N.J. STAT. ANN. § 46:2F-9 (West 2000)).

[12] South Dakota repealed the common-law Rule Against Perpetuities in 1983. *See* S.D. CODIFIED LAWS § 43-5-8 (Michie 1997) (repealing rule); S.D. CODIFIED LAWS § 43-5-4 (Michie 1997) (no undue suspension of power of alienation if trustee is given power to sell trust property). A critical analysis of asset protection trusts is contained in Randall J. Gingiss, *Putting a Stop to "Asset Protection" Trusts*, 51 BAYLOR L. REV. 987 (1999).

The principal reason for the movement to sidestep or repeal the Rule Against Perpetuities is to enable wealthy individuals to create perpetual dynasty trusts that avoid the generation-skipping transfer (GST) tax system.[13] The statutory changes to the Rule would allow residents to create GST-exempt perpetual dynasty trusts in their home states, thus keeping trust and legal business in state while attracting business from other states where the Rule has not been modified or set aside. Perpetual private trusts may also be created for non-GST reasons to meet the needs of clients of modest means who want to hold relatively small amounts of property in trust for a long period.

The dynasty trust legislation proposed for adoption in Georgia is based on the Ohio statute mentioned earlier.[14] Georgia's version requires a specific provision in the trust instrument that the Rule does not apply, together with a power of sale or power of termination given to the trustee or to some third person.[15] This allows the trust to exist in perpetuity instead of being limited to the period of the Rule.

Georgia should resist the urge to join the parade of states that have overturned the Rule. We do not need the dynasty trust in Georgia. The repeal of perpetuities laws ignores the reasons for the Rule Against Perpetuities and uncritically assumes that preserving family wealth in perpetuity is a desirable social goal. The Rule is still needed to prevent persons long removed from the current scene from tying up wealth without restriction and from unduly influencing the behavior of those living in the present.

For background purposes, this Article reviews the legislative history of Georgia's Rule Against Perpetuities from 1863 to the present time, including the effect of enactment of the Uniform Statutory Rule Against Perpetuities (USRAP) in 1990.[16] Uses of the

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[13] For discussion of the GST and the $1 million exemption, see *infra* notes 72-86 and accompanying text.

[14] *See supra* note 10 and accompanying text (discussing Ohio's perpetuities legislation). Professor Sarajane Love, a member of the State Bar of Georgia Committee charged with considering the proposed legislation, stated that "We borrowed heavily from the Ohio Statute." Letter from Sarajane Love, Professor of Law, University of Georgia School of Law, to the author (Nov. 15, 1999) (on file with author).

[15] For the text of the proposed legislation *see infra* note 87.

[16] UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1-9 (amended 1990), 8B U.L.A. 333-

GST exemption of dynasty trusts are described and their pros and cons considered and evaluated. Finally, this Article examines the contemporary policies served by the Rule, and the effect of perpetual dynasty trusts on society.

II. NATURE AND PURPOSES OF THE RULE AGAINST PERPETUITIES

Professor Gray's classic formulation of the common-law Rule Against Perpetuities reads as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[17] In 1863, Georgia enacted its own lengthier version.[18] Although it differed somewhat in formulation from Gray's statement of the Rule,[19] the Georgia courts apparently have viewed the 1863 statute as being "declaratory of the common law."[20] The Rule permitted a decedent to tie up property for the lifetime of any person alive at the time the interest was created, to keep the property in trust, and to avoid distribution to

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82 (1993 & Supp. 1999).

[17] JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942).

[18] From 1863 to 1990, the Georgia Rule Against Perpetuities was as follows:

> Limitations of estates may extend through any number of lives in being at the time when the limitations commence, and 21 years, and the usual period of gestation added thereafter. The law terms a limitation beyond that period a perpetuity and forbids its creation. When an attempt is made to create a perpetuity, the law will give effect to the limitations which are not too remote and will declare the other limitations void, thereby vesting the fee in the last taker under the legal limitations.

O.C.G.A. § 44-6-1(a) (1991).

[19] *See supra* note 17 and accompanying text.

[20] Lewis M. Simes & Allan F. Smith, The Law of Future Interests, § 1412 at 257 (2d ed. 1956).

> Georgia is one of the group of jurisdictions which has enacted a statute designed to declare the common-law rule against perpetuities. . . . It is, of course, arguable that the statute refers to the duration of interests and not to the time of vesting of contingencies. And it may be queried whether the effect of a period of gestation at the time the instrument takes effect would be the same under this statute as at common law, since the language of the statute is, "the usual period of gestation added *thereafter*." The Georgia courts, however, appear to have assumed that this statute is declaratory of the common law.

Id.; *see* Landrum v. National City Bank of Rome, 80 S.E.2d 300, 302-03 (1954) (applying Rule Against Perpetuities to trust); Murphy v. Johnston, 8 S.E.2d 23, 28 (1940) (applying Rule Against Perpetuities to residuary bequests in will).

ultimate beneficiaries until 21 years past the death of people alive when the decedent created the interest.[21]

According to two leading contemporary perpetuities scholars, the Rule has three basic purposes: (1) to limit 'dead hand control' over the property, which prevents the present generation from using the property as it sees fit; (2) to keep property marketable and available for productive development in accordance with market demands; and (3) to curb trusts, which can protect wealthy beneficiaries from bankruptcies and creditors, decrease the amount of risk capital available for economic development, and after a period of time and change in circumstances, tie up the family in disadvantageous and undesirable arrangements.[22]

The Georgia Supreme Court, in *Cook v. Horn*,[23] stated that the purpose of the Rule is "to prevent the tying up of property for an unreasonable length of time and to prohibit unreasonable restraint upon the alienation of property."[24] In another Georgia case, the court observed that the Rule Against Perpetuities "seeks to pry open a testator's excessive dead-hand control and give control to the living in order to maintain the alienability of property."[25]

Professor Lewis M. Simes concluded that there were two modern bases for the social policy of the Rule:

> First, the Rule against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy. . . . In a sense this is a policy of alienability, but it is not alienability for productivity. It is alienability to enable people to do what they please at death with the property which they enjoy in life. . . .

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[21] *See supra* note 18 (listing original Georgia rule).

[22] JESSE DUKEMINIER & STANLEY JOHANSON, WILLS, TRUSTS AND ESTATES 833 (5th ed. 1995).

[23] 104 S.E.2d 461 (Ga. 1958).

[24] *Id.* at 464.

[25] Norton v. Georgia R.R. Bank & Trust, 322 S.E.2d 870, 875 (Ga. 1984).

> But, in my opinion, a second and even more important reason for the Rule is this. It is socially desirable that the wealth of the world be controlled by its living members and not by the dead. I know of no better statement of that doctrine than the language of Thomas Jefferson, contained in a letter to James Madison, when he said: "The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please during their usufruct."[26]

The American Law Institute explains the need for some rule to curb excessive dead hand control over trust duration:

> The rule . . . places a limit on the period of time that the creator of a trust is allowed to force the effectuation of the material purpose of the trust, when the continued accomplishment of such purpose is against the wishes and desires of the current beneficial owners of the trust property. Some limit is desirable in order to prevent the possible undesirable social consequences of the views of persons long removed from the current scene influencing unduly the wishes and desires of those living in the present.[27]

III. THE UNBORN WIDOW CASE: CATALYST FOR PERPETUITIES REFORM IN GEORGIA

Traditionally, interests must be absolutely certain at the date of their creation to vest within the time limits of the Rule.[28] This requirement complicated the application of the Rule because to be certain of the validity or invalidity of interests, one must consider

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[26] LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 58-59 (1955) (citations omitted).

[27] RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 2.1 cmt. a (1983).

[28] THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 187-90 (2d ed. 1984) (discussing remote possibilities that could cause interest to vest beyond period of Rule).

all possible assumptions about births, deaths, marriages, and the happening of other likely or unlikely events.[29]

Standard perpetuities doctrine does not permit consideration of events occurring after the testator's death.[30] In *Pound v. Shorter*,[31] the court closed its eyes to events that had occurred since the testator's death. It refused to wait and see whether the contingency actually happened within the period of the Rule.[32] Instead, it based its decision on what might have been and ignored what was. The possibility that the testator's son might marry a person not yet born at the testator's death made the entire remainder void, even though this event did not happen.[33]

In *Pound*, the testator, Elizabeth Shorter, died in 1929, leaving a will that created a trust for her unmarried son.[34] The will provided that if Elizabeth's son died without children but was survived by a wife, then income should be paid to his wife for her lifetime.[35] Upon the wife's death the corpus of the trust was to be paid to the issue of the testator's brother and sister.[36]

The son married in 1953 and died in 1987, survived by his widow.[37] He left no descendants.[38] The trustee raised the question

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[29] *See infra* notes 48, 49 and accompanying text. The existence of a possible sequence of events, no matter how fantastic, that might postpone vesting beyond the period of the Rule rendered the disposition invalid. Remote possibilities, such as women who have passed the menopause giving birth to additional children, married persons later remarrying someone who was born after the testator's death, or the administration of estates that might take more than 21 years to complete, can cause the transferor's gifts to be void under the Rule. In a trilogy of articles, Professor Leach called these possibilities respectively, the fertile octogenarian, the unborn widow, and the administrative contingency. *See* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643-44 (1938) (naming discreet categories of highly uncertain invalidating chains of events); W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 731-45 (1952) (same); W. Barton Leach, *Perpetuities: Staying the Slaughter of the Innocents*, 68 L.Q. REV. 35, 44-47 (1952) (same).

[30] *See* LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 127(e), at 267 (2d ed. 1966) ("The rule against perpetuities, as it exists in a majority of jurisdictions, is, with a few exceptions, applied as of the time the instrument in question takes effect.").

[31] 377 S.E.2d 854 (Ga. 1989).

[32] *Id.* at 856.

[33] *Id.*

[34] *Id.* at 855.

[35] *Id.*

[36] *Id.* at 855.

[37] *Id.*

[38] *Id.*

as to the validity of the trust.[39] It was known to the court that Mildred Shorter, the son's widow, was in being in 1929 when Elizabeth Shorter died. The trial court, however, held that the remainder to the descendants of the testator's brother and sister was invalid because the preceding life estate was to the son's wife, who might have been unborn at the time of the testator's death.[40]

The author and another lawyer were hired by fifty-two descendants of the testator's siblings to take the case on appeal to the Georgia Supreme Court. In the appeal, we urged the court to uphold the remainder under the "wait-and-see" approach.[41] We argued that the court should adopt this approach, which would have allowed it to judge the validity of the remainder based on what actually had happened rather than on what might have happened. We lost. The court considered but rejected adopting the "wait-and-see" approach.[42] The court stated, "As the will encompasses the possibilities that the son might marry a woman who was unborn in 1929 (a life *not* 'in being') and then predecease her, it violated the rule against perpetuities."[43]

Since there was a possibility that, at the time of testator's death fifty-eight years ago, her son might marry a woman who was unborn at that time, the remainder might not vest within the period of the Rule because the "unborn widow" would not be a life in being. It is

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[39] *Id.*

[40] The decision of the trial court was not surprising. *Overby v. Scarborough*, 90 S.E. 67 (Ga. 1916), has been cited as authority for the application of the "unborn widow" rule in Georgia. *See, e.g.*, Lanier v. Lanier, 126 S.E.2d 776, 779 (Ga. 1962) ("The emphasis in the *Overby* case is on the contingency of the vesting at the time of the unborn widow's death."). Although the *Overby* court chose the wrong measuring life, the opinion went on to hold that vesting in a later wife would not necessarily occur within 21 years after the death of the first wife. *Overby*, 90 S.E. at 68-69. For criticism of the *Overby* decision see VERNER F. CHAFFIN, THE RULE AGAINST PERPETUITIES IN GEORGIA 17-18, 30-32 (1984).

[41] *See Pound*, 377 S.E.2d at 855 n.1. ("The wait-and-see principle permits a court to consider the actual sequence of events occurring after the creation of the interest. Any interest that might possibly be too remote is valid, if under the facts as they actually occur, the interest vests within the period of the Rule." (citing Verner F. Chaffin, *The Rule Against Perpetuities as Applied to Georgia Wills and Trusts: A Survey and Suggestions for Reform*, 16 GA. L. REV. 235, 345 (1982))); SIMES, *supra* note 30, at 270 ("[The wait-and-see doctrine] means that the rule is no longer to be applied as of the inception of the instrument; but that we may wait and see whether the contingency actually occurs within the period of the rule; and, if it does, the interest is valid.").

[42] *Pound*, 377 S.E.2d at 856.

[43] *Id.*

difficult, however, to see how the public interest would be damaged by a tying up of property that might but did not in fact exceed the period of the Rule.[44]

Under the common law Rule, the effect of the invalidity would have been to have the trust corpus pass to the residuary takers named in Elizabeth's will or to Elizabeth's heirs by intestacy.[45] The effect of the invalidity under Georgia law, however, was to vest the fee simple interest in Mildred, the son's widow, thus enlarging her interest from a life estate to absolute ownership.[46] Many people were disappointed by *Pound* including the author.[47] The author testified in hearings before the Georgia House and Senate Judiciary Committees in support of the Uniform Statutory Rule Against Perpetuities (USRAP). In the author's judgment, the General Assembly needed to remove the unborn widow nonsense and the other traps that the Rule posed for draftsmen such as the presumption of lifetime fertility,[48] the administrative contingency problems,[49]

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[44] It should be noted that if Elizabeth Shorter's will had contained a perpetuity savings clause, her estate plan would not have been struck down by the Rule. Her intention would have been carried out without costly litigation concerning the validity of the trust. *See infra* note 56 and accompanying text.

[45] At common law, a limitation that violated the Rule was stricken and any prior interests upheld in their original form. For example, if the prior interest were a life estate, the effect of invalidity of a succeeding remainder interest would leave the life estate as it was and create a reversion or a resulting trust for the testator's heirs or next of kin. W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 656 (1938).

[46] "When an attempt is made to create a perpetuity, the law will give effect to the limitations which are not too remote and will declare other limitations void, thereby vesting the *fee* in the last taker under the legal limitations." O.C.G.A. § 44-6-1(a) (1991) (emphasis added). Life estates are converted into fee simple interests by operation of the statute. A critical analysis of Georgia's last-legal-taker rule is contained in Verner F. Chaffin, *The Rule Against Perpetuities As Applied to Georgia Wills and Trusts: A Survey and Suggestions for Reform*, 16 GA. L. REV. 235, 322-27 (1982).

[47] *See* Jane Okrasinski, *Justices Agree: Perpetuity Forever—Court Rejects Wait-and-See in Case of Unborn Widow*, FULTON COUNTY DAILY REP., May 19, 1989, at 4. (stating various opinions on decision in *Pound*); Memorandum from Professor Verner F. Chaffin, School of Law, University of Georgia, to James R. Kanner, Esq., Chairman, Legislation Committee, Fiduciary Law Section (Nov. 15, 1989) (on file with author) (stating author's opinion on decision in *Pound*).

[48] The presumption that all persons, regardless of age or physical condition, are conclusively presumed capable of having children prevents the children of a person living at testator's death from being used as measuring lives under the Rule. Lawrence W. Waggoner, *Perpetuities Reform*, 81 MICH. L. REV. 1718, 1721-24 (1983). In *Landrum v. National City Bank*, 80 S.E.2d 300, 302 (Ga. 1954), a remainder gift to the testator's great nieces was held void because the children of the testator's living sister could not be used as measuring lives

and the all-or-nothing rule.[50] Under a wait-and-see approach, all those interests that actually vest within the period of the Rule are upheld.

Pound demonstrated that a too-rigid application of the Rule could needlessly frustrate a testator's intent even when the policy underlying the Rule was not endangered. USRAP had the potential of remedying the drafting difficulties while still preserving the basic philosophy and goals of the common law Rule. In direct response to the *Pound* decision, the Georgia General Assembly enacted the Uniform Statutory Rule Against Perpetuities the following year, and adopted, inter alia, the wait-and-see method of perpetuity reform.[51]

IV. OPERATION OF USRAP

The Uniform Statutory Rule Against Perpetuities was the cutting edge of perpetuities reform during the 1990s.[52] Promulgated in 1986

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since the sister was conclusively presumed capable of having more children. *Id.*

[49] A gift is void if its vesting is conditioned upon the happening of an event that may or may not occur within 21 years after the creation of the interest; *e.g.*, "To my issue living at the time my will is probated." It is irrelevant that the will was actually probated within 21 years following testator's death. The gift is struck down even though factually it was vested in time. 6 AMERICAN LAW OF PROPERTY § 24.23 (A.J. Casner ed., 1952). The Georgia courts have done a creative job of avoiding the administration contingency rule by construing the will to require that the condition occur within a reasonable period of time. Kirkland v. Odum, 118 S.E. 706, 708 (Ga. 1923) (holding timber lease commenced when lessee elected to begin cutting since lessee would have to begin working timber within reasonable length of time). Likewise, in *Southern Airways Co. v. DeKalb County*, 116 S.E. 2d 602, 607 (Ga. 1960), a lease to be effective from the completion and official opening of a named airport was valid because the tenant had only the "usufruct" of the premises and not an estate or interest in the land.

[50] At common law, if a gift is void as to any present or potential class member, it is void as to all members of the class. Leach, *supra* note 45, at 648. The all-or-nothing rule prevented a class gift from being split into valid and invalid portions. This rule has been followed in Georgia. *See, e.g.*, Rogers v. Rooth, 229 S.E.2d 445, 447 (Ga. 1976); Thomas v. Citizens & Southern Nat'l Bank, 163 S.E.2d 823, 826 (Ga. 1968).

[51] O.C.G.A. § 44-6-202(a)(2),(b)(2),(c)(2) (1991).

[52] *See e.g.*, Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. REV. 1783, 1785 (1996) (stating North Carolina joined national movement toward enactment of USRAP); Amy Morris Hess, *Freeing Property Owners From the RAP Trap: Tennessee Adopts the Uniform Statutory Rule Against Perpetuities*, 62 TENN. L. REV. 267 (1995) (explaining Tennessee version of USRAP); John D. Moore, Comment, *The Uniform Statutory Rule Against Perpetuities: Taming the "Technicality-Ridden Legal Nightmare,"* 95 W. VA. L. REV. 193, 193 (1992) (noting that West Virginia recently joined ranks of jurisdictions seeking to reform common law rule by adopting USRAP).

by the National Conference of Commissioners on Uniform State Laws, USRAP has been enacted into law in about half of the 50 states.[53] Georgia adopted USRAP in 1990.[54]

Since Georgia adopted USRAP, the Rule Against Perpetuities has declined in practical importance, although it is still taught in law schools.[55] The decline has occurred because most draftsmen today use a standard perpetuities savings clause,[56] and also because there is virtually no chance that the Uniform Statutory Rule will be violated because of its provisions for wait-and-see for 90 years.[57] If an interest is not vested at the end of that period, mandatory reformation will be invoked to cut the offending limitation down to size.[58] Consequently, today's lawyers in Georgia rarely, if ever, consider the Rule as a great threat in estate planning or drafting.

The maximum permissible term of a private trust under USRAP is lives in being and 21 years after the date of gift to an irrevocable inter vivos trust or the date of the donor's death in a testamentary trust, or within 90 years after its creation.[59] Since private trusts must have identifiable beneficiaries,[60] the interests of each benefi-

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[53] LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS AND FUTURE INTERESTS 1154 (2d ed. 1997). USRAP has also been incorporated into the 1990 Uniform Probate Code sections 2-901 to 2-906.

[54] O.C.G.A. §§ 44-6-200 to 44-6-206 (1991).

[55] Perpetuities litigation has been non-existent in Georgia since the enactment of USRAP. The writer has discovered no Georgia appellate cases involving the Rule Against Perpetuities since 1990.

[56] The savings clause is designed to avoid a violation of the Rule Against Perpetuities. It typically specifies the time at which the trust will terminate if its provisions would otherwise violate the Rule, and also specifies the persons entitled to the corpus of the trust at the time of termination. David M. Becker, *Estate Planning and the Reality of Perpetuities Problems Today: Reliance Upon Statutory Reform and Savings Clauses is Not Enough*, 64 WASH. U. L.Q. 287 (1986). *See* Norton v. Georgia R.R. Bank & Trust, 322 S.E.2d 870 (Ga. 1984) (upholding validity of traditional perpetuity savings clause).

[57] O.C.G.A. § 44-6-201(a) (1991).

[58] O.C.G.A. § 44-6-203 (1991).

[59] UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1(a) & 2(a) (amended 1990), 8B U.L.A. 333, 359 (1993 & Supp. 1999). Professor Waggoner, the Reporter for the Uniform Rule, gives a detailed explanation of how the 90-year period was derived. *See* Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 162-68 (1988) (detailing background of 90-year period).

[60] Except for charitable trusts, beneficiaries of a private trust must be ascertainable with reasonable certainty. ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES 100 (2d ed. 1999). An express trust requires intent to create, trust property, a beneficiary, a trustee and active trustee duties. O.C.G.A. § 53-12-20 (1997). The requirement that private trusts

ciary must vest within the period of the Rule. As a result, a private trust cannot endure forever under either the common law Rule or USRAP.[61]

By way of contrast, because a charitable trust need not have identifiable beneficiaries,[62] the Rule imposes no limit on its duration. Given a charitable purpose and a class of sufficient breadth, a person can create a charitable trust to endure forever.[63] Moreover the cy pres power of a court of equity may be invoked to prevent obsolescence of a charitable trust.[64]

In *Hardage v. Hardage*,[65] the testator sought to create a trust to pay the hospital and medical expenses of his blood relatives who were in need and were unable to provide such care for themselves.[66] The Supreme Court of Georgia held that the trust violated the Rule Against Perpetuities.[67] The Court explained that the trust was not charitable on account of the exclusiveness of the group of beneficiaries; it was instead a private trust that was void for remoteness of vesting.[68]

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have identifiable beneficiaries is designed to ensure that someone has the power to enforce the trust. ANDERSEN, *supra*, at 99.

[61] The continuance of a private trust beyond the perpetuity period can occur only by inaction of the beneficiaries. The beneficiaries of a trust can join together to compel termination of the trust and distribution of its assets. RESTATEMENT (SECOND) PROPERTY: DONATIVE TRANSFERS § 2.1 (1983). Where the trustee is given discretionary power to affect the interests of the beneficiaries, as for example, to pay, apply or withhold income or principal, the power is invalid if it may be exercised beyond the period of the Rule. SIMES & SMITH, *supra* note 20, § 1274.

[62] Charitable trusts are an exception to the rule that a trust must have definite beneficiaries. Since they provide a public benefit, the Attorney General has standing to enforce charitable trusts. O.C.G.A. § 53-12-115 (1997).

[63] Title 53, section 53-12-114 of the Georgia Code sanctions the perpetual charitable trust. The traditional justification is that charitable trusts benefit the community and that this public benefit outweighs the policy against the perpetual "tying-up" of property. 4 AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 365 (William Franklin Fratcher ed., 4th ed. 1989).

[64] When the particular purpose of a charitable trust becomes impossible or impracticable to be carried out, the cy pres doctrine allows the court to direct the application of the property in furtherance of the general charitable purpose of the settlor. RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). The cy pres doctrine is codified at title 53, section 53-12-113 of the Georgia Code.

[65] 84 S.E.2d 54 (Ga. 1954).

[66] *Id.* at 54.

[67] *Id.* at 56.

[68] *Id.*

The maximum term of a private trust thus ranges from eighty to one hundred years, and in past years this was generally considered long enough to satisfy the needs of virtually all clients. A person would rarely want to set up a perpetual or long-term trust beyond the maximum term permitted under USRAP, with its escape mechanisms of wait-and-see and deferred reformation.

USRAP upholds a contingent future interest if it satisfies the common-law Rule Against Perpetuities or if the interest actually vests within ninety years from the time of its creation.[69] USRAP is built around the common-law Rule. If an interest is valid under the common-law Rule, it is also valid under USRAP. If the interest is not valid under the common-law Rule, we wait for up to ninety years to see whether the interest does, in fact, vest within the ninety-year period.[70] If the interest is still contingent, the interest is invalid. In that case, the statute provides for reformation "in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed. . . ."[71]

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[69] UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1(a)(1)-(2) (amended 1990), 8 U.L.A. 333 (1993 & Supp. 1999).

[70] Professor Waggoner asserts that the salvage aspect of wait-and-see "in effect supplies a perpetuity saving clause to trusts or other property arrangements that failed to contain one in the first place." Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: Oregon Joins Up*, 26 WILLAMETTE L. REV. 259, 262 (1990). Wait-and-see thus would have validated the trust in *Pound v. Shorter*, 377 S.E.2d 854 (Ga. 1989), allowing Elizabeth Shorter's intention to be carried out without the need for litigation. *See supra* text accompanying note 31.

[71] UNIF. STATUTORY RULE AGAINST PERPETUITIES § 3 (amended 1990), 8B U.L.A. 346-65 (1993). The right to reformation does not arise until the 90-year period has expired and the interest becomes invalid. The deferred reformation adopted by USRAP requires the court, upon the petition of an interested party (usually a trustee) to reform an invalid disposition within the limits of the 90-year period, in the manner that most closely approximates the transferor's plan of distribution. *Id.* § 3 cmt. The identical Georgia reformation statute is codified at title 44, section 44-6-203 of the Georgia Code.

V. THE GST EXEMPTION AND DYNASTY TRUSTS

The Generation-Skipping Transfer Tax (GST)[72] applies when a person transfers property to another person two or more generations below the transferor, while passing through a generation in a form that allows it to escape gift or estate taxation in the skipped generation.[73] The generation-skipping transfer tax is imposed at the maximum estate tax rate, 55%.[74] Section 2631 of the Internal Revenue Code allows an exemption from the GST of $1 million per person,[75] which may be freely allocated to any property transferred during life or at death. This GST exemption is now indexed for inflation under the Taxpayer Relief Act of 1997.[76] A single allocation of the original transferor's $1 million exemption to trust property fixes an inclusion ratio that continues to apply to all generation-skipping involving the property throughout the duration of the trust.[77]

GST planning involves passing only the amount exempt from the GST to future generations of descendants. The property in the GST-

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[72] I.R.C. §§ 2601-2663 (1994). The GST is imposed on taxable terminations, taxable distributions, and direct skips. Detailed explanations of the GST are contained in PAUL R. MCDANIEL ET AL., FEDERAL WEALTH TRANSFER TAXATION - CASES AND MATERIALS 712-22 (4th ed. 1999); BORIS I. BITTKER ET AL., FEDERAL ESTATE AND GIFT TAXATION 627-42 (8th ed. 2000); REGIS W. CAMPFIELD ET AL., TAXATION OF ESTATES, GIFTS AND TRUSTS 694-704 (21st ed. 1999).

[73] The 1986 generation-skipping tax was enacted in an effort to ensure that wealth is taxed once each generation. A. MacDonough Plant, *Generation Skipping Transfer Tax*, 17 U. BALT. L. REV. 271, 271 (1988). It is an excise tax on gratuitous transfers that "skip" a generation. John A. Miller & Jeffrey A. Maine, *Fundamentals of Estate Tax Planning*, 32 IDAHO L. REV. 197, 236 (1996). The statutory details are set forth in chapter 13, section 2601 et seq. of the Internal Revenue Code. Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP. PROB. & TR. J. 185 (1995).

[74] I.R.C. § 2641(a)(1) (1994).

[75] I.R.C. § 2631(a) (1994). The mechanism by which the GST exemption operates is through the use of an inclusion ratio calculated as provided under I.R.C. § 2642 (1994). The inclusion ratio determines the fraction of the trust that is subject to the GST. Internal Revenue Code section 2641(a) creates a zero tax liability for a GST where the § 2642 inclusion ratio is zero.

[76] I.R.C. § 2631(c) (1994). The cost of living adjustment is contained in I.R.C. § 2631(c)(1)(B) (Supp. 1999).

[77] Once the inclusion ratio is determined for a trust, that value is used to calculate the applicable rate to be applied to all subsequent taxable distributions and terminations of the trust so long as no further transfers to the trust occur. *See* Treas. Reg. § 26.2642-1(b)-(d) (1999).

exempt trust is not subject to the GST, nor is it subject to federal estate tax at the level of the intervening generations until the trust terminates and the trust property is distributed to the beneficiary of the trust. If trust property is not distributed to a beneficiary, it accumulates tax-free in the GST-exempt trust for generations in perpetuity. Thus the potential exists to accumulate a large trust fund for all descendants.[78]

It is important to note that the Internal Revenue Code currently permits trusts to last as long as permitted by state law for perpetuities purposes.[79] This means that a trust established in a state that has repealed the Rule or permits it to be waived could last forever, permitting discretionary distributions of income and principal for as many generations as the settlor desires. Such a perpetual dynasty trust would, if properly drafted and funded, be exempt from GST and would avoid estate and gift taxes after creation of the trust until the last beneficiary dies.[80]

Competition for trust business has been the catalyst for most, if not all, of the dynasty trust statutes.[81] Individuals, especially wealthy ones, are offered the opportunity to preserve family wealth in a highly tax-advantaged manner. After any gift or estate tax is paid on the initial transfer, property transferred to an "exempt" trust can grow without being subject to estate tax or GST in perpetuity. Because of the transfer tax-free compounding, the trust should recognize significant wealth accumulation, doubling every ten years.

Proponents of the dynasty trust have not been reluctant to tout its benefits.[82] For example, if we assume that the generations are twenty-five years apart and the after-tax growth rate is five percent,

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[78] The most recent article on GST exemption planning is by Professor Ira Mark Bloom, a vigorous critic of the perpetuity-repeal movement. Ira Mark Bloom, *The GST Tax Tail is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569 (Apr. 24, 2000).

[79] I.R.C. §§ 2601-2663 (1994).

[80] *See supra* notes 75 and 77 and accompanying text.

[81] Professor Bloom concludes that the major reasons behind the repeal movement are economic, i.e., to allow residents to create GST-exempt dynasty trusts in their home states so that trust and legal business will not leave the state, and to attract new GST-exempt trust business from other states. Bloom, *supra* note 78.

[82] *See supra* notes 8-10 and accompanying text.

the corpus of a $1 million inter vivos dynasty trust would, in four generations, grow to approximately $39 million.[83]

Once the settlor allocates her full $1 million GST exemption to the trust property,[84] the inclusion ratio would remain fixed at zero throughout the trust term, regardless of subsequent appreciation in the value of the property.[85] This opportunity to lock in a fixed rate of zero for up to $1 million of property makes the GST exemption an important planning tool.

Using a dynasty trust for GST planning will thus allow a settlor to shelter potentially large amounts of money for future generations without paying transfer tax, while allowing her to provide discretionary funds for the future needs of his descendants. If a married couple uses GST planning, they can transfer in excess of $2 million to their grandchildren, great-grandchildren or to generations below without paying any transfer tax. Furthermore, since the GST exemption will be adjusted annually for inflation,[86] annual additions of property can be made to the trust in the amount of the increased GST exemption.

VI. THE PROPOSED GEORGIA PERPETUITIES LEGISLATION

The Fiduciary Law Section of the State Bar of Georgia is currently debating whether Georgia should join the states in which a client can exempt the trust from the Rule Against Perpetuities by making specific reference to the statute.[87] The Ohio statute, with its

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[83] These figures are set forth in a grid appearing in Krall & Kern, *supra* note 10, at 14.

[84] The exemption may be allocated to any property that is transferred during life or at death. I.R.C. § 2631(b) (1994). An allocation of the exemption may be made by the individual (or by her executor) at any time before the date prescribed for the filing of the estate tax return. *Id.* § 2632(a)(1).

[85] *See supra* note 77 and accompanying text.

[86] *See supra* note 76 and accompanying text.

[87] The proposed bill would amend title 44, section 44-6-204 of the Georgia Code by adding a new subsection, subsection (8), to provide that creators of trusts and others may exempt the trust from the Rule Against Perpetuities. *See* Anne S. Emanuel, *Proposal Re: The Uniform Statutory Rule Against Perpetuities*, FIDUCIARY LAW INSTITUTE PROGRAM MATERIALS 2000 § 05-001, at 003 to 004 [hereinafter Proposed Bill] (presenting Proposed Georgia Perpetuities legislation). The new subsection (8) reads as follows:

> 8 (A) Any real or personal property held in trust subject to the laws of this State if the instrument creating the trust specifically states that the rule against perpetuities or the provisions of section 44-6-201 of the Code

opt out provisions, is used as a model.[88] The proposed legislation would make it possible for the settlor of an inter vivos trust,[89] a testator creating a trust by will,[90] or an individual exercising a general power of appointment over trust property[91] to ensure that such trusts will last forever or for as long as they like. The Uniform Statutory Rule Against Perpetuities would remain in effect and would govern trusts or powers created before the effective date of the proposed legislation and trusts and powers created after the effective date which did not specifically exempt such interests from application of the Rule.[92]

The proposed legislation is prospective in operation. This means that a currently existing irrevocable trust created before the effective date of the new statute could not opt out of the Rule.[93] Any

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> shall not apply to the trust and if (i) the trustee of the trust has unlimited power to sell all trust assets or (ii) if one or more persons, one of whom may be the trustee, has the unlimited power to terminate the entire trust.
>
> (B) Subsection (8) of this Code section shall be effective with respect to all of the following:
>
> (I) An interest in real or personal property in trust created by will of decedents dying on or after the effective date of this Code section;
>
> (II) An interest in real or personal property created by an inter vivos or testamentary trust instrument executed on or after the effective date of this Code section; and
>
> (III) An interest in real or personal property in trust created by the exercise of a general power of appointment on or after the effective date of this Code section.
>
> (C) Subsection (8) of this Code section shall not apply to the exercise of a power of appointment other than a general power or appointment. For purposes of subsection (8), "general power of appointment" means a power that is exercisable in favor of the individual possessing the power, the individual's estate, the individual's creditors, or the creditors of the individual's estate.

Id.

[88] *See supra* notes 10 & 14 (discussing Ohio statute).

[89] Proposed Bill, *supra* note 87, § (8)(B)(II).

[90] *Id.* § (8)(B)(I).

[91] *Id.* § (8)(B)(III).

[92] The Uniform Statutory Rule Against Perpetuities would still apply to trusts in Georgia unless the settlor elected to opt out of the Rule. Subsection (8) would not repeal our existing perpetuity legislation, O.C.G.A. §§ 44-6-200 through 44-6-206. USRAP would per force remain in effect unless the client follows the opt out requirements spelled out in Subsection (8)(A).

[93] Subsection (8) by its terms applies only to interests created after the effective date of the proposed legislation. Proposed Bill, *supra* note 87, § (8)(B)(I)(II) & (III).

new trust created after its effective date could opt out of the Rule.[94] A trust created pursuant to the donee's exercise of a general power of appointment could opt out of the Rule if the power were exercised on or after the effective date of the new bill.[95] The opt out provisions would not apply to a trust created by a non-general power of appointment.[96]

To exempt the trust from the Rule, the trust instrument must specifically state that the Rule does not apply to the trust. In addition, the instrument must either: (1) give the trustee unlimited power to sell all trust assets; or (2) give an unlimited power to terminate the trust to one or more persons, one of whom may be the trustee.[97]

VII. SOME COMMENTS ABOUT PERPETUAL DYNASTY TRUSTS

If the dynasty trust becomes a reality in Georgia, it will affect every draftsman's basic estate planning forms and the perpetuities savings clauses formerly utilized. Estate planners will need to revamp their strategy regarding the Rule, and be prepared to advise their clients, including those of modest means, about the new law.

A. TRUSTEE CONSIDERATIONS

Since perpetual dynasty trusts are designed to avoid transfer taxes and preserve wealth through accumulation of assets, few distributions will be made from the trust.[98] Because of the extended duration of dynasty trusts, however, the settlor should thoroughly analyze the abilities and the qualities of the candidates for trustee.

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[94] *Id.* § (8)(B)(I)(II) & (III).

[95] *Id.* § (8)(C).

[96] *Id.* The definition of a general power of appointment for dynasty trust purposes is analogous to the definition set forth in I.R.C. § 2041 (b)(1) for determining whether property subject to a power is includible in the decedent's gross estate.

[97] Proposed Bill, *supra* note 87, § (8)(A).

[98] A distribution of trust income or corpus would deplete the tax-free buildup of wealth in the dynasty trust, and the amounts so distributed would be included, unless spent or given away, in the estate of the beneficiary-recipient. I.R.C. § 2033 (1994). If, however, trust income is not distributed, it continues to accumulate tax-free in the GST-exempt dynasty trust. *See supra* notes 75 & 77.

If the settlor names an "independent trustee," this trustee can be given complete discretion to distribute income and principal without causing inclusion of the trust assets in either the settlor's or beneficiary's estate.[99] The trust principal, enhanced by accumulations of trust income, would remain in trust. Any discretionary distributions of trust income or principal would be free from GST taxation, although the unconsumed distribution would be subject to transfer taxation at the beneficiary's level.

Most settlors would probably choose to retain control of the power to remove and replace the trustee of a perpetual dynasty trust and then transfer this power to the beneficiaries upon the settlor's death in order to provide for unforeseen circumstances that may arise perhaps more than a century or so after the settlor has created the trust.[100] Because the Internal Revenue Service recently changed its position with respect to such a power, the retention by the settlor of the power to remove and name a successor trustee no longer causes inclusion in the settlor's estate.[101]

Obviously an individual will never have the ability to serve as trustee for the duration of a perpetual dynasty trust. The inevitable choice of a corporate trustee would result in a tremendous increase of financial power in the hands of banks and trust companies.[102] In

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[99] Internal Revenue Code section 2038(a)(1) brings into the gross estate the value of all property over which the transferor has retained the right to change the enjoyment, alone or in conjunction with any other person. Internal Revenue Code section 2036(a)(2) triggers inclusion where the decedent, either alone or in conjunction with any person, retains the right "to designate the persons who shall possess or enjoy the property or the income therefrom." A power held solely by a third person, even a non-adverse party, is not attributed to the transferor. Helvering v. City Bank Farmers Trust Co., 296 U.S. 85, 89 (1935).

[100] Providing for succession in the trusteeship will prove to be a very difficult problem. The beneficiaries of the trust will be numerous, often non sui juris, or perhaps constitute an unascertainable group. Even if selection is limited to adult beneficiaries, there may well be a problem of self-interest involved. JAMES F. FARR & JACKSON W. WRIGHT, JR., AN ESTATE PLANNER'S HANDBOOK, 181-82 (4th ed. 1979).

[101] Rev. Rul. 95-58, 1995-2 C.B. 191 (reversing previous position of IRS stated in Rev. Rul. 79-353, 1979-2 C.B. 325, which had caused inclusion in settlor's estate if settlor could remove and replace trustee). The IRS stated that it would no longer claim that a retained power to remove and replace a trustee holding discretionary power results in an inclusion under I.R.C. § 2036(a)(2) so long as the grantor's power does not permit the grantor to name himself as trustee or any party defined as a related or subordinate party under I.R.C. § 672(c).

[102] "The chief reservation which must be expressed upon the exclusive use of the corporate fiduciary as trustee . . . is that it is very difficult indeed for a great financial organization to serve *in loco parentis* toward a group of divergent human beings. . . ." FARR & WRIGHT, *supra*

addition, the corporate trustee's discretionary distributive powers would confer an extraordinary ability to control the wealth and well-being of the trust beneficiaries.[103]

Professor Lawrence W. Waggoner, Director of Research of the Joint Editorial Board for the Uniform Probate Code, warns that the administration of dynasty trusts is likely to become an administrative nightmare over time.[104] Additionally, the National Conference Commissioners on Uniform State Laws in a January 2000 press release stated:

> Government statistics indicate that the average married couple has 2.1 children. Under this assumption, the average settlor will have more than 100 descendants (who are beneficiaries of the trust) 150 years after the trust is created, around 2500 beneficiaries 250 years after the trust is created, and 45,000 beneficiaries 350 years after the trust is created. Five hundred years after the trust is created the number of living beneficiaries could rise to an astounding 3.4 million.[105]

It is comforting that the quoted statistics end at 500 years. But we can easily imagine the difficulty of keeping up with the beneficiaries' needs in a 1000-year dynasty trust, not to mention the costs of administration involved.

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note 100, at 176. They also point out that frequent changes in the trust officers assigned to the trust "belie the advantage of continuity." FARR & WRIGHT, *supra* note 100, at 177.

[103] Discretionary trusts typically authorize the trustee to pay income and/or to invade principal for the benefit of one or more described beneficiaries. The settlor imposes no mandatory obligation on the trustee. The trustee is free to use its judgment as to when or how the power should be used. Courts generally will not interfere with the decision of the trustee unless there is evidence of bad faith. Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425, 1425-27 (1961).

[104] *See* National Conference of Commissioners on Uniform State Laws, *Uniform Statutory Rule Against Perpetuities is Law in 26 States: Move of a Few States to Abolish the Rule In Order to Facilitate Perpetual (Dynasty) Trusts is Ill-Advised*, [hereinafter Press Release] ("[T]he creation of such trusts is problematic. Over time, the administration of such trusts is likely to become unwieldy and very costly.") (visited Oct. 23, 2000) <http://www.nccusl.org/pressreleases/prl-00-7.htm>.

[105] Press Release, *supra* note 104.

B. DRAFTING CONSIDERATIONS

There are no automatic provisions for the dynasty trust. The draftsman must expressly exempt the trust from operation of the Rule. In addition, he must give the trustee the power to sell the trust property at any time beyond the period of the Rule, or to terminate the trust without any time constraints.[106] Many draftsmen will continue to use the standard perpetuities savings clause in addition to the opt out provisions, and to add a clause allowing the trust to be divided if only certain property is to be held in a perpetual dynasty trust.

A client who intends to create a dynasty trust would not want to give the trustee the power to end the trust. Although a termination power would comply with the statutory requirements for opting-out of the Rule Against Perpetuities, the client would certainly not wish or expect the termination power to be exercised because it would defeat the client's purpose to have the trust last forever.[107] The prudent draftsman would use the power of sale rather than the power of termination to qualify the dynasty trust under the proposed legislation. The power of sale, unlike the power to terminate, poses no threat to the continued existence of the trust.

Questions about the new legislation persist. What problems, if any, are created if the draftsman opts out, but the trust does not continue beyond the period of the Rule? What can be done with an existing irrevocable trust if the client now wants to convert it to a dynasty trust? Should a provision be included for a change of the situs of the trust assets, administration and governing law?[108] If so,

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[106] Proposed Bill, *supra* note 87, § (8)(A).

[107] The power to terminate a trust that otherwise would go on forever is analogous to powers given to beneficiaries to make rightful demand for property held in trust in order to qualify for the $10,000 per donee annual exclusion allowed under I.R.C. § 2503(b). Although the exclusion can only be claimed for transfers of present interests in property, the demand powers convert the right to receive future interests in the trust into excludable present interests. These powers are commonly called "Crummey powers," named after a Ninth Circuit case, *Crummey v. Comm'r*, 397 F.2d 82 (9th Cir. 1968). Exercise of the demand powers is discouraged because this defeats the purpose of the settlor. The same is true of the power to terminate a trust which the settlor intends to endure forever.

[108] The draftsman has, within limits, the ability to choose the jurisdiction whose laws will, in his judgment, best protect and promote his client's objectives. As a general rule, the settlor is permitted to designate which state's law is to govern the validity of the trust so long as the

what factors and standards should be provided for the trustee to consider when deciding whether to change the situs?

VIII. DYNASTY TRUSTS AND PUBLIC POLICY

No state that has repealed the Rule appears to have given any consideration to the negative consequences of sanctioning GST-exempt trusts.[109] As previously mentioned, the Rule Against Perpetuities attempts to strike a fair balance between the desires of the living and the rights of the deceased to control the enjoyment of property.[110] The dynasty trust destroys this balance by allowing the present generation to do as it wishes with the property it owns, without regard for the wishes of succeeding generations, even those whom the settlor cannot know and see.[111] The creator of a dynasty trust could know nothing of unborn persons, their capabilities and needs.[112] Members of subsequent generations will never have the same opportunity to use or control this wealth because the donor's generation will have specified for all time who will succeed to enjoyment of the trust, when, and for what purposes the wealth can be used.

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state has some contact with the trust, such as the trustee being domiciled in the state or trust assets being located in the state. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268-270 (1971). *See* PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 320 (2d ed. 1994) ("The law is fluid and inconclusive in many subjects.").

[109] *See* Bloom, *supra* note 78. Professor Bloom decries the mad dash to repeal the Rule and the haste to jump on the repeal bandwagon. *Id.*

[110] *See supra* note 26 and accompanying text; *see also* SIMES, *supra* note 30, at 255 (describing "fair balance" maintained by Rule between giving full scope to desires of present generation and wishes of future generations).

[111] The Rule draws a line between persons and events which the settlor knows and sees, and those which he cannot know and see, and to whom natural affection does not extend. Professor Waggoner points out that the know-and-see theory allows donors "to exert control through the youngest generation of descendants they knew and saw, or at least one or more but not necessarily all of whom they knew and saw." Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP. PROB. & TR. J. 569, 587 (1986).

[112] Professors Dobris and Sterk observe that the Rule denies the "decedent the right to control disposition of property for longer than 21 years after the death of persons alive at the creation of the interest." JOEL C. DOBRIS & STEWART E. STERK, RITCHIE, ALFORD AND EFFLAND'S ESTATES AND TRUSTS - CASES AND MATERIALS 748 (1998). They conclude that the policy behind the Rule is that "it is unreasonable for a decedent to attempt to control property beyond the period during which decedent might plausibly assert some special knowledge of the propensities of one of her beneficiaries." *Id.*

The dynasty trust thus allows a testator to force his will on future generations, thereby destroying the freedom of beneficiaries by presuming to make rules for distant takers.[113] Property should be available to meet the needs of the living generation, and its current successive owners.

Will many present-day clients realize the inefficiency and inequity of dynasty trusts? Some perhaps, but not all. Egocentric donors will always be with us. If given the opportunity, many individuals undoubtedly will desire to tie up wealth in trusts for many generations to come, or even forever, regardless of the unfairness to future generations.[114]

It is no answer that the proposed bill allows a perpetual trust to be terminated before the transferor's line of descendants runs out. Absent some emergency, termination cannot be compelled unless the trustee exercises its discretion to end the trust.[115] Moreover, a trustee would be unlikely to exercise its discretion to terminate since to do so would invite a lawsuit.[116]

Similarly, the power to sell contained in the proposed bill does nothing to alleviate the tying up of wealth afforded by the dynasty trust. Even if the trustee sells the assets and reinvests, the proceeds of any sale would still be controlled by the trust's provisions forever.[117] Trustees, by virtue of their position as fiduciaries, tend to be risk averse. They cannot speculate or take substantial

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[113] The promotion of intergenerational equity is said to be "[t]he most persuasive argument for the Rule today." WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS & ESTATES § 13.2, at 508 (1988).

[114] Professor Robert J. Lynn states, "If the rule did not exist, some kind of device to curb the whims of the egotist would have to be invented. . . . [W]e should not assume that the Rule has outlived its usefulness and can be forgotten. The Rule exists, and it will persist in some form." Robert J. Lynn, *Perpetuities Literacy for the 21st Century*, 50 OHIO ST. L.J. 219, 239 (1989).

[115] RESTATEMENT (SECOND) OF TRUSTS § 335 (1959) provides that a trust may be terminated if the trust purposes become impossible to accomplish. Title 53, section 53-12-153 of the Georgia Code authorizes judicial termination of a trust only in certain specified instances, *i.e.*, if the purpose of the trust would be defeated or substantially impaired by the costs of administration, or by circumstances not anticipated by the settlor, or if its purpose has been fulfilled or has become illegal or impossible to accomplish.

[116] Unless all the beneficiaries consent, the trustee's decision to terminate the trust could always be challenged as an abuse of discretion. GEORGE T. BOGERT, TRUSTS § 89, at 321 (6th ed. 1987). Moreover, this writer posits that it is unlikely the trustee would voluntarily forego the receipt of lucrative fees for administration of the perpetual dynasty trust.

[117] *Supra* note 77.

risks.[118] As a result, they often make less than productive investments. The dynasty trust may well exacerbate these tendencies because the discretionary income beneficiaries have little, if any, leverage to press for investments that maximize income. And the value of the corpus is irrelevant because it is unreachable.

The dynasty trust, moreover, could have serious social as well as economic consequences because it separates the control of large quantities of wealth from the right to receive its benefits. Dynasty trusts promote infinite dead-hand control, and this is undesirable for two reasons: (1) society should be controlled by the living, not the dead, and (2) property should be kept responsive to the needs, demands and requirements of its current owners. Such trusts, if widely employed, moreover, could predictably lead to a shortage of risk capital for investment in new industry in the years ahead.

Finally, it should be recognized that Congress or the Treasury will likely take steps in the future to close this loophole in the Generation-Skipping Tax to prevent revenue loss or other perceived abuses from the use of dynasty trusts. There is no guarantee that the Congress will continue to allow the perpetual exemption of dynasty trusts from GST taxation. Indeed, in 1997, the Treasury promulgated and later deleted a regulation limiting the effectiveness of the GST exemption.[119] Congress has the power to establish a federal rule limiting the duration of trusts for generation-skipping purposes to whatever period it chooses, for example, to 90 or 100 years. Generation-skipping is governed by federal law, and a uniform perpetuities rule could be enacted, just as Congress did when it enacted federal disclaimer legislation.[120] Such a uniform

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[118] "The hallmark of trustee investment policy is conservatism; significant risk-taking for the purpose of realizing large capital gains is not permissible, in the absence of some specific provision in the trust instrument authorizing or directing speculative investment." HASKELL, *supra* note 108, at 286. Title 53, section 53-12-232(3) of the Georgia Code contains a codification of statutory investment powers that may be incorporated by reference into a will or trust.

[119] *See* Treas. Reg. § 26.2652-1(a)(4) (as amended in 1997). The 1997 regulation imposed a time limit on the tax savings that could be obtained through the use of GST-exempt trusts. It was deleted because of the Treasury Department's concern that it might have unintended consequences. This abortive effort is described in Mitchell M. Gans, *Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance?*, 48 EMORY L.J. 871, 878-79 (1999).

[120] The Tax Reform Act of 1976 introduced provisions on disclaimers into the Internal

rule would undoubtedly reduce the significance of state perpetuities law. Qualification under the federal statute would become of primary importance since federal tax savings are a major motivating factor in establishing dynasty trusts.[121]

IX. CONCLUSION

The dynasty trust is troublesome. The dynasty trust permits donors to send increasingly large accumulations of wealth down through the generations, insulated not only from GST, but also from the desires of any future generation. Settlors are permitted to use wealth as a base value for influencing the distribution of other values to remote descendants. It is difficult enough for the living to appraise and control the variables that condition the wisest and best use of wealth. Is it reasonable to assume that the dead can do better? Critics have been skeptical about the wisdom of such wholesale changes and continue to stress both the utility of the Rule and the need to understand it.[122]

By contrast, USRAP places a time limit on the vesting of future interests. It preserves the alienability of property interests by requiring a return to marketable title by the end of the permissible period, thereby curtailing excessive dead hand direction and control. USRAP is premised on the fact that contingent future interests impair marketability and prevent the wisest and best utilization of property. Its underlying philosophy is that resources should, after eighty to one hundred years, be responsive to the current needs of the living generation.[123]

Revenue Code in order to achieve uniform treatment and to provide a uniform standard for determining the time within which a disclaimer must be made. The requirements for a "qualified disclaimer" are set forth in I.R.C. § 2518 (1994). *See generally* Grayson M.P. McCouch, *Timely Disclaimers and Taxable Transfers*, 47 U. MIAMI L. REV. 1043 (1993) (focusing on federal tax treatment of disclaimers).

[121] Dynasty trusts are almost entirely tax-driven. *See supra* note 73.

[122] Becker, *supra* note 79. Professor Waggoner concludes that the dynasty trust movement is "ill-advised" and strongly advocates retention of USRAP. Press Release, *supra* note 104. Professor Bloom criticizes the perpetuity-repeal movement for placing the Rule Against Perpetuities "under siege," and urges the repealing states to rescind such legislation retroactively. *See also* Bloom, *supra* note 78.

[123] VERNER F. CHAFFIN, THE RULE AGAINST PERPETUITIES IN GEORGIA § 1.2 (1984). This theme is also expressed in Gregory S. Alexander, *Dead Hand and the Law of Trusts in the*

USRAP is simple to administer. It confers the benefits of a perpetuities savings clause to donors whose attorneys neglected to include one in the will or trust. Furthermore, USRAP requires no new forms and no new learning for the estate planning professional, and it virtually eliminates malpractice suits occasioned by violations of the Rule.[124]

We should not tamper with USRAP because it sensibly limits the period of dead hand control. USRAP provides a fair compromise between the desires of the present generation and future ones without restricting the activities of lineal descendants yet to be born.

The dynasty trust's principal function is to exploit the GST tax system. This is hardly a reason for allowing clients to opt out of the Rule and create trusts that may last forever.

The dynasty trust has many undesirable features. It would create extraordinary administrative difficulties, would give the corporate trustee an excessive amount of control over the well-being and behavior of the trust beneficiaries, and would make possible the amassing of an extraordinary amount of wealth and power. Furthermore, there is no guarantee that Congress will continue to permit perpetual exemption from GST taxation.

Our perpetuities and tax laws should be based on principles for the good of society, not expediency. The dynasty trust would not be good for Georgia, and we should refuse to go along with the states that have sanctioned it.

Nineteenth Century, 37 STAN. L. REV. 1189 (1985).

[124] The 90-year waiting period and deferred reformation offered by USRAP eliminated the traps infiltrating the common law Rule that often defeated a client's estate plan and exposed the attorney to possible liability. *See supra* notes 46-50 and accompanying text. The assurance that no trust created under USRAP will be held invalid for the next 90 years offers great comfort and peace of mind to the draftsman.