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INTRODUCTION

The Baby Boom generation, those born between 1946 and 1964, and their parents, have amassed a significant amount of personal wealth. As the parents of the Baby Boomers age and the Boomers themselves retire, the intergenerational transfer of this wealth has become the subject of much speculation. Rather than as an outright gift, the trust is increasingly employed by donors as a mechanism for the transfer of this wealth, and in an effort to ensure the longevity of the mechanism, many donors have turned to what is known as the perpetual trust. This form of trust avoids the historical restrictions on the duration of trusts, namely, the Rule Against Perpetuities. As the Rule is eliminated or substantially modified in an increasing number of jurisdictions, these perpetual trusts can ostensibly operate forever. Both of these developments, the anticipated mass transfer of wealth and the increased use of the perpetual trust, have created pressure to change the longstanding rule prohibiting the ability of trust beneficiaries to modify the administrative and distributive terms of trusts. Whether seeking to mitigate circumstances unforeseeable at the time of the drafting of the trust instrument or simply attempting to exercise more control over trust assets, beneficiaries have developed a number of creative approaches.

THE RIVER OF WEALTH

Although the current recession has almost certainly diminished the vast personal wealth amassed in recent decades, a significant amount of assets are expected to be transferred by mid-century. This transfer of wealth was perhaps first acknowledged in a 1990 report by Cornell University economists Robert Avery and Michael Rendall. Avery and Rendall predicted that some \$10.4 trillion would be transferred to the Baby Boom generation via inheritance between 1990 and 2045.<sup>1</sup> Nine years later, John Havens and Paul Schervish of Boston College estimated

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that the actual amount transferred from 1998 to 2052 would fall somewhere between \$41 trillion and \$136 trillion.<sup>2</sup> These projections have been the subject of much controversy and debate, particularly as a result of the current recession.

Other factors such as rising health care costs, longer life expectancies, and an increasingly diminutive savings rate have led many to allege that these calculations are erroneously inflated.<sup>3</sup> Although a “second gilded age” may not be imminent, most theorists agree that an unprecedented amount of wealth will be transferred in the next half century. A mechanism frequently utilized for the transfer of this wealth is the trust. As Professor Joel Dobris has noted, “everyone wants to slurp at the great river of money that is roaring through our society at the end of the century, as the depression generation starts to pass its money to the baby boomer generation, and as the market soars to new heights. And a lot of those slurpers think the trust is the vessel that will give them a nice long drink.”<sup>4</sup>

THE TRUST AS A MECHANISM OF WEALTH TRANSFER

A private express trust is an arrangement under which one person, known as the trustee, holds legal title to property and manages that property as a fiduciary for one or more beneficiaries.<sup>5</sup> The trust has traditionally been employed as a wealth transfer mechanism in order to assure proper financial management of trust assets, avoid probate, add flexibility in asset distribution, and realize tax savings.<sup>6</sup> Not insignificant, however, is the settlor’s use of the trust as a means of controlling wealth past his or her own death. The reasons behind this desire to control personal wealth past death are many. Examples include a settlor’s desire to ensure that those for whom they care are assured some amount of financial security, a guarantee that hard-earned wealth will not be put to objectionable uses, and a testament to personal success and accomplishment. Regardless of a settlor’s reasoning for establishing a trust and despite the

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benefits associated with the transfer of wealth by trust, the form is not without its limitations. One such limitation has traditionally been the restriction on the duration of trusts.

THE RULE AGAINST PERPETUITIES

The duration of trusts has historically been limited by the Rule Against Perpetuities, which establishes a time by which a trust must terminate and the trust assets be distributed to its beneficiaries. The purpose of the Rule is to ensure the free alienability of property and to limit the control of the dead hand on the living.<sup>7</sup> The Rule Against Perpetuities voids future interests that may not vest within a certain period of time after their creation (i.e., 21 years after lives in being at the creation of the interest).<sup>8</sup> The operation of the Rule can have the effect of terminating a trust by prohibiting the remote vesting of a beneficiary's interest.<sup>9</sup> Increasingly, however, those with an interest in projecting their wealth beyond their own deaths have sought to alter the legal means that restrict the duration of trusts.<sup>10</sup> The law of trusts has begun to respond to this pressure to remove restrictions on the duration of trusts, and a number of jurisdictions have either abolished or substantially modified the Rule Against Perpetuities. If, as is almost invariably the case, the trustee has the power to alienate trust assets, a trust can endure in perpetuity in those states in which the Rule has been abolished. These trusts of perpetual duration can conceivably last forever, or for hundreds of years, and need not be limited to charitable purposes.<sup>11</sup>

THE RULE AGAINST PERPETUITIES: ABOLITION, REPEAL AND MODIFICATION

The first state to engage in perpetuities reform was Idaho in 1957.<sup>12</sup> The states of Wisconsin and South Dakota followed in 1969 and 1983, respectively.<sup>13</sup> Although each of these three states ostensibly abolished the Rule Against Perpetuities, the reach of their reforms was

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still limited. Specifically, the perpetuities reforms in these states provided that trusts were still subject to some restraints on alienation beyond the common-law perpetuities period.<sup>14</sup>

Essentially, these initial reforms maintained some deference to the long-standing policy against the remote vesting of trust assets.<sup>15</sup> Subsequent reforms in other states, however, have been more sweeping and have thus had the effect of permitting and encouraging the widespread use of the perpetual trust. The reasons for this are primarily twofold: the 1986 Congressional enactment of the Generation-Skipping Transfer (“GST”) Tax, and the states’ desire to attract and retain trust and banking business within their borders.<sup>16</sup>

THE GENERATION-SKIPPING TRANSFER TAX (“GST”)

In 1916, Congress enacted a federal estate tax.<sup>17</sup> This estate tax did not initially apply, however, to the termination of a life estate in a child.<sup>18</sup> That is, taxpayers could avoid the estate tax through the creation of a generation-skipping trust, which could last as long as the rule governing trust duration permitted.<sup>19</sup> For example, one could devise one’s property to their child for life, then to their grandchild. Under this example, there would be no estate tax when, at the death of the transferor’s child, their grandchild’s interest became possessory.<sup>20</sup> This result occurs because a life tenancy, such as that devised to the transferor’s child, terminates at death; the estate tax is only levied on a decedent’s transferrable interest.<sup>21</sup> Congress attempted to close this loophole through a tax on generation-skipping transfers by way of the 1976 Generation-Skipping Transfer (“GST”) Tax, which was superseded by the 1986 GST.<sup>22</sup> The 1986 GST closed the loophole for successive life estates by levying a tax equal to the highest rate of the estate tax on generation-skipping transfers to one’s grandchild, great-grandchild, or any beneficiary two or more generations below the transferor.<sup>23</sup>

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The 1986 GST tax may have ostensibly closed the estate tax loophole for successive life estates, but the closure was only partial. The 1986 code (as amended through 2006) provides for a generous exemption from the estate tax. As of 2009, each taxpayer possessed an exemption of \$3,500,000 or \$7,000,000 for a married couple.<sup>24</sup> Further, the current estate tax exemption became unlimited in 2010. This has had the effect of eliminating the GST tax, however, the law authorizing this is set to expire in 2011.<sup>25</sup> As of this writing, it remains uncertain if Congress will act to extend or repeal the current law regarding the GST exemption. In the event that Congress fails to extend the law authorizing the GST exemption, the exemption will then return to \$1,000,000, narrowing, but not closing, the GST loophole.<sup>26</sup>

The prevailing view is that the exemption from the GST tax that Congress created in 1986 was the ultimate catalyst for the movement to abolish the Rule Against Perpetuities.<sup>27</sup> The intersection between modification or abolition of the Rule Against Perpetuities and the GST tax lies in the fact that in enacting the 1986 GST, Congress placed no limit on the duration of the transfer-tax-exempt trust, essentially leaving the matter to state perpetuities law. Specifically, the Staff of the Joint Committee on Taxation of the 108<sup>th</sup> Congress noted that “(m)ost states have a rule against perpetuities which limits the duration of a trust.”<sup>28</sup> As a result, by funding a trust within the amount of the exemption, successive generations can reap the rewards of the trust free from federal estate taxes for as long as the governing state perpetuities law will allow. The longer the trust can be extended, the more generations can benefit, and the longer the dreaded estate tax can be avoided. Accordingly, estate planners began to note that in any jurisdiction that has abolished the Rule Against Perpetuities, beneficiaries could conceivably avoid federal wealth transfer taxes forever.<sup>29</sup> In some cases, states have moved to abolish the Rule as a means of attracting and retaining lucrative trust business within their borders, a phenomenon some have

characterized as a “race between the states to allow donors to exploit a loophole in the federal transfer taxes.”<sup>30</sup>

### THE ATTRACTION OF TRUST ASSETS BY STATES

The movement by states to repeal or abolish the Rule Against Perpetuities as applied to interests in trusts began to gain traction following the 1986 revision of the GST tax. South Dakota, where the Rule had been abolished in 1969, seized this opportunity by advertising in practitioner journals, stating that South Dakota was a place where the “generation skipping trust” was “possible” because “there is no rule against perpetuities.”<sup>31</sup> Fearful of losing trust business, other states began to follow suit. Notable among them was Delaware, long considered a trust-friendly jurisdiction. In 1995, Delaware abolished the Rule, expressly indicating the reasoning behind its repeal:

Several states, including Idaho, Wisconsin, and South Dakota, have abolished altogether their rules against perpetuities, which has given those jurisdictions a competitive advantage over Delaware in attracting assets held in trusts created for estate planning purposes... The multi-million dollar capital commitments to these irrevocable trusts, and the ensuing compound growth over decades, will result in the formation of a substantial capital base in the innovative jurisdictions that have abolished the rule against perpetuities. Several financial institutions have now organized or acquired trust companies, particularly in South Dakota, at least in part to take advantage of their favorable trust law. Delaware’s repeal of the rule against perpetuities for personal property held in trust will demonstrate Delaware’s continued vigilance in maintaining its role as a leading jurisdiction for the formation of capital and the conduct of trust business.<sup>32</sup>

Following Delaware’s lead, Alaska, Arizona, Illinois, Maine, Maryland, New Jersey, Ohio, and Rhode Island had each abolished their Rule Against Perpetuities by the end of 2000.<sup>33</sup> Within five years, several additional states had enacted similar legislation either permitting perpetual trusts or trusts whose allowable duration was so long as to have the effect of permitting a perpetual trust. For example of the latter, the permitted duration for trusts in the states of

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Colorado, Florida, Missouri, Nebraska and Nevada is 360 years; New Hampshire, Utah, Virginia and Wyoming each permit trusts with a duration of 1,000 years.<sup>34</sup> As of September 2009, the Rule Against Perpetuities existed, unreformed, in only one state: Alabama.<sup>35</sup>

THE MODIFICATION OF PERPETUAL TRUSTS

This trend toward allowing for the creation of perpetual trusts has given rise to serious concerns about the common law rules on modification: if trusts can last in perpetuity, should the ability of beneficiaries to modify the administrative and distributive terms of the trust also be expanded? Under the common law, the modification or termination of a trust by its beneficiaries is quite difficult without settlor consent, for example, following the settlor's death.<sup>36</sup> Given the historical resistance to allowing the dead hand, or settlor, to exercise too much control over assets and the high likelihood of changed circumstances during the existence of a perpetual trust, how much dead hand control of trust property is too much?

THE CLAFLIN DOCTRINE

In the United States, the relaxation of the restriction on modification and termination of the private express trust will require a reexamination of the principle embodied in *Claflin v. Claflin*.<sup>37</sup> In *Claflin*, the decedent settlor, Wilbur Claflin, gave one-third of the residue of his estate to trustees to pay the proceeds to his son as follows: \$10,000 at age 21; \$10,000 at age 25; and the balance at age 30.<sup>38</sup> After the trustee fulfilled the dispositive terms of the trust and conveyed \$10,000 to the son at age 21, but before he reached the age of 25, the son filed a bill in equity to obtain the balance of the trust fund.<sup>39</sup> The Massachusetts Supreme Judicial Court upheld the father's protective intent, stating that the settlor's "intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy."<sup>40</sup>



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The test established by *Clafin* is widely stated as follows: “a trust cannot be terminated prior to the time fixed for termination, even though all of the beneficiaries consent, if termination would be contrary to a material purpose of the settlor.”<sup>41</sup> This principle, known as the *Clafin* doctrine, protects an irrevocable private express trust with a dead (or otherwise resistant) settlor from living beneficiaries who demand termination of the trust’s dispositive terms to meet changing circumstances, if such circumstances would contravene a material purpose of the settlor.<sup>42</sup>

By 1900, American courts began the widespread adoption of the *Clafin* doctrine. Subsequent debate has centered around the determination of what, exactly, constitutes a material purpose of the settlor. Some scholars have noted that “if the trust in question is a spendthrift trust...it would seem that there is always an unaccomplished purpose.”<sup>43</sup> Thus, modification or termination of a spendthrift trust is typically deemed to contravene a material purpose of the settlor. Similarly, a trust generally cannot be terminated if the beneficiary is not to receive the principal until attaining a specified age, if it is a discretionary trust, or if it is a trust for the support of the beneficiary. These provisions, too, are usually deemed to constitute a material purpose of the settlor.<sup>44</sup>

Because modern trusts often contain a spendthrift clause as well as many of the other foregoing clauses, those wishing to modify or terminate the trust are confronted with serious obstacles. Unless the power of beneficiaries to modify or terminate the trust is created in the trust instrument, those beneficiaries wishing to modify the administrative or distributive terms of a trust may be out of luck. These restrictions on the power to modify or terminate trusts largely trace their roots to *Clafin*, and demonstrate American courts’ widespread acceptance of trusts as embodied in the inquiry, “What good were the restraints imposed by settlors if beneficiaries,

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according to their whims, could alter the trust containing the restraints or eliminate the altogether by terminating the trust?”<sup>45</sup>

THE TRUST LAW OF ENGLAND

The issue of prolonged trust duration is largely one of American origin. The *Clafin* doctrine has had a remarkable influence on trust law in the United States, where dead hand settlor control of trusts is still the majority position. Specifically, the holding in *Clafin* rejected decisions in American courts prior to 1875 which typically followed the English common law regarding trust modification and termination.<sup>46</sup> Under the English rule, or what is known as the *Saunders v. Vautier* rule, a trust remains indestructible only until the party becomes *sui juris*.<sup>47</sup> In effect, the Rule Against Perpetuities limits the duration of the trust. In sharp contrast to American trust law, in England, after the settlor’s death, the trust is regarded as the beneficiaries’ property and the only way for the dead hand of the settlor to rule the trust is by the sufferance or acquiescence of the beneficiaries.<sup>48</sup>

THE CURRENT LANDSCAPE OF TRUST MODIFICATION: RESPONSES TO THE PERPETUAL TRUST

The proliferation of perpetual trusts in the U.S. has made beneficiaries’ historic inability to modify the terms of trusts problematic. Although the *Clafin* Doctrine of settlor intent largely remains the rule in American trust law, the trend in recent years has been to carve out exceptions to this rule by providing beneficiaries and courts with additional power to terminate or modify trusts. This trend is perhaps best embodied in the Restatement (Third) of Trusts (2003) and the Uniform Trust Code (“UTC”) (2005).<sup>49</sup>

THE RESTATEMENT (THIRD) OF TRUSTS

The Restatement (Third) of Trusts incorporates several provisions that make it somewhat easier for beneficiaries to compel the termination or modification of a trust, at least due to a change in circumstances.<sup>50</sup> The reasoning behind this shift is that a settlor, if he or she were still living at the time that termination or modification of their trust were proposed, would approve of the changes when they would not impair a material purpose of the trust.<sup>51</sup> Specifically, the Third Restatement provides that, if all the beneficiaries of an irrevocable trust agree, they can compel the modification or termination of the trust, provided that this would not be “inconsistent with a material purpose of the trust.”<sup>52</sup> Although the Restatement (Third) of Trusts retains the express requirement that *all* beneficiaries must consent to the proposed trust modification or termination, one comment provides that “the consent of potential beneficiaries who cannot consent for themselves... may be provided by guardian ad litem, by court appointed or other legally authorized representatives, or through representation by other beneficiaries under the doctrine of virtual representation.”<sup>53</sup> In the case of a trust of perpetual duration where the class of beneficiaries decades or centuries after trust formation is difficult to ascertain at best, this comment makes obtaining the consent of *all* beneficiaries a less arduous task.

The Restatement (Third) of Trusts also places limits on what may constitute a material purpose of the settlor of a trust in the context of the trust’s termination or modification, thereby limiting the reach of the Claflin Doctrine.<sup>54</sup> Under the Third Restatement, “material purposes are not readily to be inferred” and a “finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to a beneficiary’s management skills, judgment, or level of maturity.”<sup>55</sup> Further, the Third Restatement states that a spendthrift clause does not necessarily constitute a material purpose of

the trust.<sup>56</sup> Significantly, the Third Restatement also permits a court to modify or terminate a trust even if the modification or termination would contravene a material purpose of the settlor with the requirement that the court make a determination that the reasons for modification or termination advanced by the beneficiaries outweigh the material purpose whose contravention is proposed.<sup>57</sup>

The Restatement (Third) of Trusts also expands the equitable doctrine of *cy pres*, or equitable deviation, from the terms of a trust. The *cy pres* doctrine allows a court to reform a written instrument such as a trust to prevent its failure.<sup>58</sup> When applied to a trust instrument, this equitable deviation permits modification of the trust terms when the settlor's objectives become impossible, impracticable, or illegal to perform. Traditionally, the application of the *cy pres* doctrine was observed only in charitable trusts where the settlor's intent was frustrated. The Third Restatement, however, applies the doctrine to all trusts by allowing courts to modify the dispositive provisions of a trust in order to carry out the settlor's intent where an unanticipated change in circumstances is present.<sup>59</sup>

Lastly, the Third Restatement allows a court, in its discretion, to remove a trustee if the trustee's continuation would be detrimental to the interests of all beneficiaries.<sup>60</sup> Traditionally, beneficiaries could not remove a trustee absent extreme circumstances such as a lack of capacity to administer the trust, the commission of a crime of dishonesty, or a breach of trust.<sup>61</sup> Under the Third Restatement, the bar for trustee removal has been lowered, at least theoretically, potentially allowing the beneficiaries of a trust to remove a trustee averse to their interests and subsequently modify the trust. Thus, when considered in the aggregate, the reforms to trust law proposed by the Restatement (Third) of Trusts provide trust beneficiaries and courts with more power to terminate or modify perpetual trusts.

THE UNIFORM TRUST CODE (“UTC”)

Like the Restatement (Third) of Trusts, the UTC provides beneficiaries and courts with greater flexibility to modify trusts. As in the Third Restatement, the UTC allows for easier modification and termination of trusts by providing that “a noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.”<sup>62</sup> Although this language does not, on its face, appear to erode the Claffin Doctrine regarding material trust purpose, the UTC does provide that “if not all of the beneficiaries consent to a proposed modification or termination of the trust...the modification or termination may be approved by the court if the court is satisfied that: (1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and (2) the interests of a beneficiary who does not consent will be adequately protected.”<sup>63</sup>

Additionally, like the Third Restatement, the UTC manages to narrow the definition of “material purpose” by providing that a spendthrift provision of a trust is not presumed to constitute a material purpose of the trust.<sup>64</sup> The UTC also adopts a somewhat expanded equitable deviation or *cy pres* doctrine, though its application is still limited to charitable trusts.<sup>65</sup> With regard to the removal of a trustee, the UTC also features a provision allowing for trustee removal by the court when the trustee is unwilling or persistently fails to administer the trust effectively, or when the beneficiaries request removal.<sup>66</sup> As in the Third Restatement, the UTC provision regarding the removal of trustees broadens the power of beneficiaries and courts to remove a trustee absent settlor consent, and in jurisdictions where either is adopted, these provisions constitute mandatory law that cannot be avoided by the drafting of the trust instrument.<sup>67</sup>

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Where the UTC and the Third Restatement most conspicuously differ in terms of broadening the powers of beneficiaries and courts to modify or terminate trusts relates to the Clafin Doctrine. The Third Restatement incorporates a balancing test whereby a court can determine that the basis for modification under the circumstances outweighs the interest in accomplishing a material purpose of the trust. In contrast, the UTC contains no such balancing test. Instead, under Section 410(b), the UTC prescribes that modification by beneficiaries must not in any way be inconsistent with a material purpose of the trust.<sup>68</sup> Some have posited that the reason behind the exclusion of this balancing test in the UTC is the improbability of such a provision being adopted by state legislatures given their historic concern for protecting settlor intent.<sup>69</sup>

LIMITATIONS OF THE RESTATEMENT (THIRD) OF TRUSTS AND THE UNIFORM  
TRUST CODE

Although the trend toward allowing beneficiaries and courts greater latitude in the modification and termination of trusts is reflected in both the Restatement (Third) of Trusts and the UTC, neither reform is without its limitations. First, both exhibit some deference to the traditional rule embodied in the Clafin Doctrine, that is, compliance with the purposes of the settlor is often the default for trust modification or termination. Second, under both the Restatement (Third) of Trusts and the UTC, trust modification and termination as well as the removal of trustees require some level or degree of court participation.<sup>70</sup> The issue with this requirement is that obtaining the consent of the court is potentially both costly and time-consuming for beneficiaries, possibly deterring beneficiaries from availing themselves of this remedy. Further, the UTC has only been adopted in 21 jurisdictions, and although it is being considered in others, its reach is thus far limited.<sup>71</sup>

AFTER THE RESTATEMENT (THIRD) OF TRUSTS AND THE UNIFORM TRUST CODE:

WHERE DO WE GO FROM HERE?

The perpetual trust has proliferated in recent years due largely to settlors efforts to avoid the estate tax and to perpetuate control over trust assets after death. Changes in tax law, however, could conceivably defeat the former purpose. With regard to the latter objective, settlors may be defeating themselves: it's nearly impossible for a settlor (or any estate planner, for that matter) to anticipate all changed circumstances that may arise in perpetuity. For example, how can either party foresee all of the as-yet-unknown classes of beneficiaries at the time the trust instrument is drafted? The successive generations of beneficiaries in the case of a perpetual trust could result in such a fractionalization of trust assets (and correspondingly small payouts) that the trust could, in effect, become meaningless. Since beneficiaries often rely on an adversarial system to ensure proper trust management and trustee conduct, an issue arises if the interests of beneficiaries are so fractionalized as to become trivial; there's simply no incentive for nominal beneficiaries to get involved in the dissolution or termination of the trust.

This scenario evokes imagery of the "tragedy of the anticommons" wherein multiple owners each have a right to exclude others from a scarce resource over which no one owner has adequate control or an exclusive privilege of use. Beneficiaries with overly-fractionalized interests or negligible stakes in a perpetual trust and who may be geographically dispersed are unlikely to concern themselves with monitoring a perpetual trust. Under these circumstances the trustee will be insulated from beneficiary oversight.<sup>72</sup> This scenario begs the question: is such a result a material purpose of the settlor? In establishing a perpetual trust, how many settlors actually intend for the trust assets they devise to be governed by a potentially obsolete trust instrument and managed by a trustee whose conduct, however egregious, is unlikely to be

challenged? Two potential answers to the question “Where do we go from here?” arise: either the perpetual trust should be abolished by reinstating a limit on trust duration, or if the perpetual trust is to survive in its current form, beneficiaries must be empowered to modify the terms of the trust or terminate it altogether.

### ABOLITION OF THE PERPETUAL TRUST

There are two primary means to abolish the perpetual trust, or at least deter its use - reinstating limits on trust duration or eliminating the tax incentives that encourage the use of the perpetual trust. Restoration of the Rule Against Perpetuities is unlikely given the incentive for states to attract perpetual trust business by eviscerating the limits on trust duration. A federal response appears necessary in order to abolish the perpetual trust in a meaningful and uniform manner and avoid a “race-to-the-bottom” between the states. As one scholar has proposed:

First, the federal government must develop new tax laws or modify the existing law to somehow avoid the vast accumulations of wealth that can be created by perpetual trusts, which allow millions of dollars to escape estate taxation from generation to generation in perpetuity. Second, the government must address the effect of the abolition of the Rule on the free alienability of property. Third, the government must find a way to replace the billions in tax revenues that will be lost over the years through the use of perpetual trusts.<sup>73</sup>

Some commentators have also observed that given investment patterns and beneficiary dispersion, most trusts inevitably involve interstate commerce.<sup>74</sup> Accordingly, the Commerce Clause of the U.S. Constitution could serve as the mechanism for the federal requirement that states reinstate the Rule Against Perpetuities in order to abolish the perpetual trust.<sup>75</sup> It is difficult to envision, however, such Congressional action not resulting in widespread resistance. Perhaps a preferable approach would be to deter the use of the perpetual trust through modifications to the tax code. For example, in 2005, the Joint Committee on Taxation proposed just such a modification by prohibiting the allocation of the transfer tax exemption to a trust for



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the benefit of a generation more remote than the transferor's grandchildren.<sup>76</sup> Others have posited that imposing a periodic tax on trusts or resetting the inclusion ratio after a period of years would have a similar deterrent effect. These measures might not *abolish* the perpetual trust, but given the likelihood that settlors of perpetual trusts seek to avail themselves of its tax benefits, perhaps "the best solution to the problems created by the abolition of the Rule (Against Perpetuities) is to eliminate the generation-skipping transfer exemption."<sup>77</sup>

RETAIN THE PERPETUAL TRUST BUT PROVIDE BENEFICIARIES WITH THE POWER  
TO MODIFY ITS TERMS

If the perpetual trust is to survive, how can its adverse consequences be mitigated? One solution is to provide beneficiaries with more broad powers to modify or terminate the perpetual trust. One means to achieve this goal is through the skilled drafting of the trust instrument. Unless a settlor was motivated to establish a perpetual trust solely by dynastic impulse, assurance that tax benefits could still be realized and that their intent would not be thwarted by changed circumstances could encourage settlors to accept a more flexibly drafted perpetual trust instrument that doesn't leave beneficiaries powerless in perpetuity. Flexible drafting could provide beneficiaries with special powers of appointment including, for example, the power to appoint trust property to the next generation either outright or in further trust.<sup>78</sup> Special powers of appointment of this nature would enable each generation of beneficiaries to decide whether to continue the trust and its tax exemption or to terminate the trust.

Another potential solution to the dilemma of the perpetual trust is expansion of the *cy pres* doctrine to private perpetual trusts. Discussion of the *cy pres* doctrine typically involves charitable trusts where the original goal of the settlor is establishing the trust has become impracticable or illegal to perform. Under these circumstances, the *cy pres* doctrine allows

courts to modify the terms of charitable trusts to prevent their failure due to changed circumstances. Extending the doctrine of *cy pres* to private, perpetual trusts could allow for more liberal modification and termination in light of changed circumstances, at least following the expiration of the perpetuities period or perhaps after every member of the generation known to the settlor has died and every member of the next generation has reached the age of majority.<sup>79</sup>

Yet another way in which the beneficiaries of perpetual trusts could be empowered is by enhancing their power to remove unresponsive trustees or trust protectors. Creating this power expressly either in the trust instrument or by statute would protect the interests of beneficiaries of perpetual trusts. If, under this scenario, trust protectors or trustees with the discretionary authority to terminate perpetual trusts fail to exercise their powers or perform their duties, beneficiaries can and should be given the power to remove or replace the protector or trustee without court consent. As noted above, trustees generally cannot be removed absent unfitness, commission of a crime, or breach of trust.<sup>80</sup> Although beneficiaries have a similar right to remove a trustee under the UTC, trustee removal still requires some degree of court participation, namely, the filing of a lawsuit.<sup>81</sup> If beneficiaries have the power to remove or replace an unresponsive trustee or trust protector at will and without the encumbrance and cost of filing a lawsuit, this power will give them added leverage to ensure the trustee or protector carries out their wishes.

Lastly, legislation could provide courts with broad powers to terminate perpetual trusts if termination would benefit current income beneficiaries, at least after the beneficiaries alive at the time of the trust creation are no longer living. This reform, initially proposed by Dukeminier and Krier, would be statutory in origin and function as an extension of the reforms found in both the Restatement (Third) and UTC.<sup>82</sup> Unlike the Restatement and the UTC, the statute proposed by

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Dukeminier and Krier would not require courts to consider settlor intent.<sup>83</sup> That is, the statute would not incorporate the Restatement's balancing test between the interests of the beneficiaries and the material purposes of the settlor. To avoid any adverse tax consequences that may arise (either from Dukeminier and Krier's proposed statute or from the vesting of special powers of appointment in beneficiaries) Dukeminier and Krier recommend that this be a special power that cannot be exercised in favor of the holders of the power or their creditors or estates, however, there would be no prohibition of the exercise of such power for the benefit of beneficiaries' spouses or children.<sup>84</sup> A statute of this nature could have the effect of making it impossible for the settlor of a perpetual trust to impose permanent, binding conditions on beneficiaries' access to the trust property.

CONCLUSION

Many predict that an unprecedented intergenerational wealth transfer is imminent and will occur over the next half-century. The trust will almost undoubtedly continue to serve as the mechanism used to transfer this substantial wealth. In recent years, the use of a relatively new form of trust, the perpetual trust, has markedly increased. The reasons for the proliferation of the perpetual trust are many and include settlors' dynastic impulse to control their wealth beyond their own death, the desire to avoid federal estate taxes, and the erosion of limits on trust duration, namely, the Rule Against Perpetuities. Regardless of the catalyst, the widespread use of the perpetual trust in the United States has given rise to serious concerns. Changed circumstances and other unforeseeable events at the time of the creation of the trust are almost inevitable in the absence of limits on trust duration. These unforeseeable changes in circumstances are often to the detriment of perpetual trust beneficiaries. Changed circumstances

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are also frequently adverse to perpetual trust settlors themselves, whose material purpose in establishing the trust are often frustrated by change in the decades, and in some cases centuries, following trust creation. Furthermore, the perpetual trust has the capacity to affect not only its beneficiaries and settlors, but society at large by indefinitely encumbering vast sums of money and property in potentially interminable trusts. When viewed in this manner, as a three-legged stool of settlor, beneficiaries, and society, the availability and increasingly widespread use of the perpetual trust creates a moral hazard. Accordingly, if the perpetual trust is neither abolished nor its use deterred by the elimination of its tax benefits, beneficiaries must be empowered with new tools to modify the terms of the perpetual trust or terminate it altogether.

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<sup>1</sup> Richard B. Avery and Michael S. Rendall, *Estimating the Size and Distribution of Baby Boomer's Prospective Inheritances*, American Statistical Association, Proceedings of the Social Statistics Section, 1993, pp. 11-19.

<sup>2</sup> John J. Havens and Paul G. Schervish, *Millionaires and the Millennium: New Estimates of the Forthcoming Wealth Transfer and the Prospects for a Golden Age of Philanthropy*, Boston College Social Welfare Research Institute, October 1999, available at [www.bc.edu/research/swri/meta-elements/pdf/m&m.pdf](http://www.bc.edu/research/swri/meta-elements/pdf/m&m.pdf) last accessed on November 3, 2009.

<sup>3</sup> Liz Pulliam Weston, *The \$41 Trillion Inheritance: Will You Get a Piece?* MSN.com, available at <http://www.moneycentral.msn.com/content/RetirementandWills/P43427.asp> last accessed on November 3, 2009.

<sup>4</sup> Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 Alb.L.Rev. 543, 543-45 (1998).

<sup>5</sup> See generally Restatement (Third) of Trusts § 2 (Tentative Draft No. 1, 1996); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 1 (rev. 2d ed. 1984).

<sup>6</sup> Vollmar, Hess and Whitman, *An Introduction to Trusts and Estates*, (2002).

<sup>7</sup> See Bogert, *supra* note 5, at 184.

<sup>8</sup> Sanford J. Schlesinger and Martin R. Goodman, *Estate Planning Update*, 351 PLI/Est 41 (2009).

<sup>9</sup> *Id.*

<sup>10</sup> Jesse Dukeminier and Stanley M. Johanson, *Wills, Trusts and Estates*, 854 (6<sup>th</sup> ed, 2000).

<sup>11</sup> Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. Kan. L. Rev. 595, 601 (2005).

<sup>12</sup> Max M. Schanzenbach and Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 Cardozo L. Rev. 2465, 2470 (2006).

<sup>13</sup> *Id.*

<sup>14</sup> See Tate, *supra* note 11, at 599.

<sup>15</sup> See Schanzenbach and Sitkoff, *supra* note 11, at 2470.

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<sup>16</sup> See Tate, *supra* note 11, at 599.

<sup>17</sup> *Id.* at 603.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Tate, *supra* note 11, at 603.

<sup>23</sup> *Id.*

<sup>24</sup> Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 501, 901, 115 Stat. 38, 69, 150 (2001) (repealing the estate and generation-skipping transfer taxes after December 31, 2009 and reinstating those taxes after December 31, 2010).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Schanzenbach and Sitkoff, *supra* note 11, at 2475.

<sup>28</sup> See Staff of Joint Comm. on Taxation, 108<sup>th</sup> Cong., Options to Improve Tax Compliance and Reform Tax Expenditures 392-95, at 394

<sup>29</sup> See Schanzenbach and Sitkoff, *supra* note 11, at 2475.

<sup>30</sup> *Id.* at 2478.

<sup>31</sup> See Dukeminier and Johanson, *supra*, note 10 at 714 (reproducing a Wells Fargo advertisement).

<sup>32</sup> H.R. 254, 138<sup>th</sup> Gen. Assemb. (Del. 1995) (bill synopsis).

<sup>33</sup> Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 Yale L.J. 356, 430-33 (2005).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Tate, *supra* note 11, at 599.

<sup>37</sup> Clafin v. Clafin, 20 N.E. 454 (Sup. Judicial Court of Mass., 1889).

<sup>38</sup> *Id.* at 455.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 456.

<sup>41</sup> Dukeminier & Johanson, *supra* note 10, at 656.

<sup>42</sup> See Clafin 20 N.E. 454 at 456; See also Dukeminier & Johanson, *supra* note 10. at 656.

<sup>43</sup> George T. Bogert, *Trusts* (6<sup>th</sup> ed. 1987) at 543.

<sup>44</sup> Dukeminier and Johanson *supra* note 10, at 656.

<sup>45</sup> Ronald Chester, *Modification and Termination of Trusts in the 21<sup>st</sup> Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 Real Prop. & Tr. J. 697 at 705.

<sup>46</sup> Willard M. Bushman, *The Invalidity of Spendthrift Trusts*, 47 OR.L.Rev. 304, note 59 at 305 (1968).

<sup>47</sup> See Chester, *supra* Note 45, at 705.

<sup>48</sup> Dukeminier & Johanson *supra* note 10, at 651.

<sup>49</sup> See Tate, *supra* note 11, at 607.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Restatement (Third) of Trusts § 65 (2003).

<sup>53</sup> *Id.* § 65 cmt. b.

<sup>54</sup> See Tate, *supra* note 11, at 607.

<sup>55</sup> Restatement (Third) of Trusts § 65 cmt. d.

<sup>56</sup> Restatement (Third) of Trusts § 65 cmt. e.

<sup>57</sup> Restatement (Third) of Trusts § 65(2) (2003).

<sup>58</sup> Black's Law Dictionary, p. 173 (3<sup>rd</sup> pocket ed. 2006).

<sup>59</sup> Restatement (Third) of Trusts § 66 (2003)

<sup>60</sup> *Id.* at § 37 cmt. d.

<sup>61</sup> *Id.* (See generally Restatement (Second) of Trusts § 107 cmt. b (1959) listing “lack of capacity to administer the trust...; the commission of a serious breach of trust; refusal to give a bond...; refusal to account; the commission of a crime, particularly one involving dishonesty; unfitness, whether due to old age, habitual drunkenness, want of ability or other cause; permanent or long-continued absence from the State; the showing of favoritism to one or

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more beneficiaries; (and) unreasonable or corrupt failure to cooperate with his co-trustees” as grounds for trustee dismissal.)

<sup>62</sup> Unif. Trust Code § 411(b) (2005).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See Tate, *supra* note 11, at 608.

<sup>66</sup> Unif. Trust Code § 706 (2005).

<sup>67</sup> See Tate, *supra* note 11, at 608.

<sup>68</sup> See Chester, *supra* Note 45, at 703.

<sup>69</sup> See Tate, *supra* note 11, at FN 74.

<sup>70</sup> See Tate, *supra* note 11, at 609.

<sup>71</sup> The National Conference of Commissioners on Uniform State Laws available at <http://www.utcproject.org/> last accessed on April 16, 2010. (The Uniform Trust Code has been adopted in the following jurisdictions: Kansas, Nebraska, Wyoming, New Mexico, The District of Columbia, Utah, Maine, Tennessee, New Hampshire, Missouri, Arkansas, Virginia, South Carolina, Oregon, North Carolina, Alabama, Florida, Ohio, Pennsylvania, North Dakota, and Arizona.)

<sup>72</sup> Michael A. Heller and Rebecca S. Eisenburg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 Science 698 (1998); See e.g. Wikipedia, The Free Encyclopedia, Tragedy of the Anticommons, [http://en.wikipedia.org/wiki/Tragedy\\_of\\_the\\_anticommons](http://en.wikipedia.org/wiki/Tragedy_of_the_anticommons) (last visited April 25, 2010).

<sup>73</sup> John G. Shively, Note, *The Death of the Life in Being – The Required Federal Response to State Abolition of the Rule Against Perpetuities*, 78 Wash. U. L. Q. 371 (2000).

<sup>74</sup> Joel C. Dobris, *Undoing the Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 Cardozo L. Rev. 2537 at Note 24.

<sup>75</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>76</sup> See Staff of Joint Committee on Taxation, 108<sup>th</sup> Cong., Options to Improve Tax Compliance and Reform Tax Expenditures at 392-95.

<sup>77</sup> See Shively, *supra* at note 73, 372.

<sup>78</sup> Pierce H. McDowell, III, *The Dynasty Trust: Protective Armor for Generations to Come*, Tr. & Est., Oct. 1993 at 47, 53 (noting that it “is often desirable to give at least some of the beneficiaries special testamentary powers of appointment that will enable them to change the dispositive terms of the trust” in light of changed circumstances).

<sup>79</sup> Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 Haw. L. Rev. 353, 355-56 (1999).

<sup>80</sup> See Tate, *supra* note 11, at 608.

<sup>81</sup> *Id.* at 609.

<sup>82</sup> Jesse Dukeminier and James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. Rev. 1303, 1340-41 (2003).

<sup>83</sup> *Id.*

<sup>84</sup> See Tate, *supra* note 11, at 610; See also 50 UCLA L. Rev. 1303 at 1341 (Dukeminier and Krier suggest that this is designed to avoid triggering I.R.C. § 2041(a)(3) (1994) and Treas. Reg. § 20.2041-1 defining powers of appointment).