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FIFTY-ONE FLOWERS: POST-PERPETUITIES WAR LAW AND ARKANSAS’S ADOPTION OF USRAP

Lynn Foster*

I. INTRODUCTION

"Let a hundred flowers bloom, let the hundred schools of thought contend."

As everyone knows, the fearsome Rule Against Perpetuities ("Rule") is in trouble. 2 This classic, common law rule, which voided future interests that

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1. Mao Zedong. This is the translation of a line from a poem quoted by Mao as an indication of the type of healthy intellectual debate and free exchange of diverse ideas he wanted to take place concerning governmental and social issues during the mid-1950s. Hundred Flowers Campaign, in WIKIPEDIA, THE FREE ENCYCLOPEDIA, available at http://www.wikipedia.org/wiki/Hundred_Flowers_Campaign (last visited Feb. 16, 2007). The variety of different types of flower blossoms here symbolizes the evolving variety and diversity of perpetuities law at the present time.

2. When I first told a colleague (not a property teacher) of my intention to write this article, she said, “That’s an article no one will ever read.” It may be that no one reads articles about the Rule, but it cannot be said that no one writes them. The reform and decline of the Rule are well-documented. Most of the recent scholarship concerning the Rule is cited hereinafter, but several recent articles are particularly notable. See generally David M. Becker, If You Think You No Longer Need to Know Anything About the Rule Against Perpetuities, Then Read This!, 74 WASH. U. L.Q. 713 (1996) (pointing out common drafting provisions that violate the Rule, and suggesting alternatives that work—“preventive perpetuities compliance”—under the common law Rule, and thus also under the Uniform Statutory Rule Against Perpetuities); Joel C. Dobris, The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay, 35 REAL PROP. PROB. & TR. J. 601 (2000) (tying the decline of the Rule to various current societal norms and attitudes); Note, Dynasty Trusts and the Rule Against Perpetuities, 116 HARV. L. REV. 2588 (2003) (arguing in favor of perpetual trusts and discussing the various ways in which states have changed or abolished the Rule); Robert H. Sitkoff & Max M. Schanzenbach, Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 YALE L.J. 356 (2005) (presenting the results of a study demonstrating that states that abolish the Rule and levy no income tax on trusts are attracting significant increases in out-of-state trust business); Stewart E. Sterk, Jurisdictional
remained nonvested past a certain period of time after their creation, exists pristine and unreformed in only one state today: Alabama. The Rule fell prey to several factors: its own shortcomings, changes in the nature of the property affected by the Rule, changes in tax law, and significant changes in the law of trusts, which have legitimized perpetual trusts and dynasty trusts. After decades of “perpetuities wars,” the unmodified Uniform Statutory Rule Against Perpetuities (USRAP) is currently the law in roughly one-third of the states. Arkansas is the most recent state to adopt USRAP. About half of the states have legalized dynasty or perpetual trusts. A few have completely abolished the Rule in any form. Although this unprecedented variation of perpetuities law from state to state presents risks and challenges for estate planners, Arkansas’s adoption of USRAP will provide a “safety net” for inadvertent violations of the Rule in this state.

Part II of this article will briefly trace the Rule’s history, from its creation until the present, and discuss the reasons both for its existence and its decline, along with the rise of perpetual trusts. It will provide the current status of the Rule in the states, which has continued to evolve. Although it hardly seems possible, the law of perpetuities is much more complicated than it was twenty years ago. The Rule is not dead, but there is more varia-

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3. In this article, the term “perpetual trust” will be used to refer to a trust that can legally last forever. The term “dynasty trust” will be used to refer to a trust that can legally last longer than the Rule period but not forever.


5. Representative Steve Harrelson originally sponsored House Bill 1130. Representative Chris Thyer was added as cosponsor, and House Bill 1130 was enacted as Act No. 240 on March 9, 2007 (to be codified as Ark. Code Ann. §§ 18-3-101–09). Included in the bill were three amendments to current statutes, exempting cemetery trusts from USRAP, and amending the Uniform Simultaneous Death Statute to refer to USRAP, rather than the common law Rule. These additions are not included in the text of Appendix A, which reproduces Act No. 240, and are outside the scope of this article.
tion in perpetuities law among the states than at any time previously in United States history.

Part III of the article will explain how the common law Rule works, and it will discuss pre-USRAP perpetuities law in Arkansas. Arkansas's constitution forbids perpetuities. The Arkansas Supreme Court has interpreted this constitutional provision to mean that the common law Rule is law in Arkansas. Nonetheless, six out of eight states with similar constitutional provisions have enacted the USRAP. Thus, the fourth and fifth parts of the article will discuss USRAP and the effect that its enactment will have on Arkansas law. Appendix A sets out the text of USRAP. Appendix B includes a state-by-state summary of current perpetuities law. Appendix C is a subject index of the examples illustrating how USRAP works.

Finally, many sweeping generalizations have been made about the decline, death, and doom of the Rule. Is the Rule really completely dead? The answer is "no" in the eighteen USRAP states, and essentially "no with respect to nontrust property" in almost all of the rest.

II. THE HISTORY OF THE RULE AGAINST PERPETUITIES

A. Its Creation

Unlike rules and doctrines such as the Rule in Shelley's Case and the Doctrine of Worthier Title that originated in medieval times, the Rule is relatively modern. It was first formulated by Lord Chancellor Nottingham in the Duke of Norfolk's Case in 1682, at a time when the landed nobility were attempting to extend their control over the disposition of their property as far as possible into the future. For a very complete account of the case and its background, see generally Herbert Barry, The Duke of Norfolk's Case, 23 Va. L. Rev. 538 (1937). For a revisionist account, see generally George L. Haskins, Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities, 126 U. Pa. L. Rev. 19 (1977).


7. Arizona, Montana, Nevada, North Carolina, Tennessee, and Wyoming. Ariz. Const. art. II, § 29; Mont. Const. art. XIII, § 6; Nev. Const. art. XV, § 4; N.C. Const. art. I, § 34; Tenn. Const. art. I, § 22; Wyo. Const. art. I, § 30. Arizona has amended USRAP to allow perpetual trusts, seemingly in violation of its constitution. Wyoming has the common law Rule but allows 1000-year trusts. Oklahoma and Texas have the common law Rule along with a cyt pres reform. For more information on each state, see Appendix B.

8. The Rule in Shelley's Case was recognized as early as the fourteenth century. The Doctrine of Worthier Title also arose under the feudal system. Lewis M. Simes, Handbook of the Law of Future Interests §§ 20, 26 (2d ed. 1966).

9. Modern for property law, that is.

to be indestructible, unlike contingent remainders. This opened up the possibility of land being held by one family indefinitely. The Duke of Norfolk wished to create a trust with a term of 200 years, to be paid first to himself and his widow for their lives, then to his second son Henry and his issue. If during Henry's life the Duke's first, mentally defective son Thomas died and Henry became the Earl, then the trust income was to be paid to the third son, Charles, and his issue. Few would dispute the subtleness of the chancellor's answer to the dilemma. Instead of a black letter rule stating a fixed number of years that a future interest could remain nonvested, in the Norfolk case, the chancellor tied it to the generation alive at the time the interest was created, and he declared that if the executory interest in the third son would either become possessory or fail during the life of the third son, it was valid.

Commentators differ as to whether the Rule was a victory for those who wished to alienate property, or a victory for those who wished to restrict its alienation. Subsequent cases have held that more than one life, or a class, can be the validating life that validates an interest; that the validating lives need not be beneficiaries; and that the gestation period can be added onto the twenty-one years, to produce the common law rule recognizable to us today.

B. The Rule Comes to America

The Rule became law in the United States by various legal routes and in various forms. To today's law students, who learn the Rule in a single common law form (if they learn it at all) and who are tested on that form on the multistate bar exam, it may come as a surprise to learn that the Rule has existed in different versions in different states. In some states, it was "received" into the common law by reception statutes. Other states enacted the Rule in statutory form. A few, like Arkansas, adopted the rule into their constitutions. At the time the Rule was being adopted in the states, all states prohibited perpetuities, but the details varied. As time went on, some

11. Pells v. Brown, Cro. Jac. 290 (1620); see also Simes, supra note 8, § 122 (briefly explaining the historic background from which the Rule arose).
13. Id. at 46.
of the states with statutes actually repealed them in favor of the common law rule. 17

During the 1880s, Harvard law professor John Chipman Gray, who perhaps little suspected the amount of misery he would cause in the lives of countless law students, 18 and who became the most noted nineteenth-century authority on the Rule in the United States, categorized American perpetuities legislation and constitutional law into three types: (1) general, nonspecific provisions that forbade perpetuities; (2) short statutes either declaring or modifying the Rule; and (3) elaborate statutory schemes. 19 Gray also constructed the most popular formulation of the Rule: "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." 20

C. Arguments in Favor of the Rule Against Perpetuities

At various times throughout its existence, modern commentators have identified several policy reasons supporting the Rule.

Promoting the Alienability of Land. The Rule promotes the alienability of land by preventing nonvested interests that are too remote, thereby allowing Blackacre to be sold advantageously earlier in time than it would be if nonvested interests in it existed. 21 The Rule itself is not a rule against direct restraints on alienation. 22 Instead, the Rule promotes the alienability of property by voiding future interests that vest too remotely, and thus it renders land more valuable and easier to sell in general. 23

Striking a Balance Between Generations. Lewis Simes stated this policy as a "fair balance" between the desires of members of the present generation and those of the future "to do as they wish with the property which they will enjoy." 24 The dead hand's grasp can reach out approximate-

17. SIMES, supra note 8, § 124.
18. Or then again, perhaps he did.
19. GRAY, supra note 14, § 729.
20. Id. § 201.
21. See id. § 121.
22. A restraint on alienation is a provision that prevents the owner of an interest in property from transferring it at all, transferring it in particular ways, or transferring it to particular persons. W. Barton Leach, Perpetuities in a Nutshell, 51 HARV. L. REV. 638, 640 (1937–1938); see also, e.g., Casey v. Casey, 287 Ark. 395, 700 S.W.2d 46 (1985) (striking down a devise that would forfeit the testator's son's land if the testator's granddaughter ever owned, possessed, or occupied the land, and that appeared to be imposed from spite or malice, as an unreasonable restraint on alienation).
24. SIMES, supra note 8, § 121; see also Sterk, supra note 2, at 2106.
ly two generations beyond death, but no farther; at that point, the Rule invalidates nonvested interests.25

Promoting Equality of Opportunity and Curbing the Concentration of Wealth. Allowing property to be held in trust forever arguably could facilitate the concentration of wealth, widening the growing gulf between the wealthy and the middle class and enabling beneficiaries to afford expensive opportunities that are beyond the means of most persons. Such inequality of opportunity is unfair.26 This criticism applies not just to perpetual trusts but also to taxation (or lack of taxation) of the wealthy. Recent statistics indicate increasing economic inequality in the United States, raising the question of whether economic inequality of opportunity is being stifled.27 Does wealth held in perpetual trusts further fuel economic inequality? Intuitively, the answer seems to be "yes." As one might expect, however, there is no real data regarding perpetual trust investments that can be examined to evaluate this argument.28 A similar argument is that the security of a trust income makes beneficiaries lazy because rather than becoming productive members of society, they simply live in leisure off of their trust income.29

Avoiding "Durational" Problems of Trusts. Professors Jesse Dukeminier and Richard Krier identified several durational problems that could arise as a result of allowing perpetual trusts.30 These problems include changes in circumstances, trustees, and multiplication of beneficiaries.31 However, as they noted, the Uniform Trust Code ameliorates, to some extent, many of these problems. Currently, the Uniform Trust Code has been adopted by eighteen states and the District of Columbia.32

25. I use this phrase, as does USRAP, as shorthand for contingent remainders, executory interests, and vested remainders subject to open.


28. One difficulty with the debate is that data does not exist. Trusts are not registered in most states. Their accounts are not in the public record. However, working with reports that banks make to federal regulatory authorities, Professors Robert Sitkoff and Max Schanzenbach have recently published the first ever empirical study of the domestic competition for trust funds. See generally Sitkoff & Schanzenbach, supra note 2. As trusts become more prevalent, legislatures may wish to require them to be recorded publicly, as are deeds and probated wills.


30. Id. at 1303.

31. Id. at 1327–39.

Curtailing Risk-Averse Investments by Trustees. Historically, trustees were limited to conservative investment venues for trust assets. The modern portfolio theory, proving the advantages of diverse investments, did not become widely accepted by lawmakers until the adoption of the Uniform Prudent Investor Act in 1994. Prior to that time, trustees had no clear duty to diversify, and clear direction from courts and legislature to avoid speculation. For decades, beginning around 1900, most states restricted the types of investment allowed by statutes that specified "legal lists," which limited trustees to low-risk, low-income-producing assets, like bonds and other debt instruments, as opposed to riskier investments like common stock. Thus, the Rule limits the amount of time during which trust assets would have to be used so conservatively.

Reducing Administrative Costs. Few trustees charge no fees. Costs connected with trust administration may also include services of attorneys, accountants, banks, investment brokers, and the like. The Rule limits the amount of time during which property is subject to these charges.

Limiting Duration of Spendthrift Restrictions on Creditors. Most trusts today contain spendthrift provisions that limit the rights of certain creditors to reach trust assets in the hands of the trustee. The beneficiary of such a trust has less of a stimulus to avoid undesirable behavior (carelessness in the case of a tort creditor, fiscal irresponsibility in the case of a lender) because the beneficiary knows that the creditor will have no recourse against the trustee. This last policy is the most recent, as spendthrift trusts were not invented until the late nineteenth century.


35. Id. at 644–46.

36. Id.; see also, e.g., King v. Talbot, 40 N.Y. 76 (1869) (restricting trustees to certain types of investments).

37. Sterk, supra note 2, at 2106; see also Vernor F. Chaffin, Georgia’s Proposed Dynasty Trust: Giving the Dead Too Much Control, 35 GA. L. REV. 1, 23–24 (2000).


39. Sterk, supra note 2, at 2106.

40. Id.
D. The Move for Reform

The modern move for reform, or the first cannon fire in the fifty-year "perpetuities wars," as some commentators have called them,41 began with two colorfully titled companion articles by Professor W. Barton Leach published in 1952.42 Leach criticized the Rule for its hypothetical nature, striking down interests because of events that might happen, even though some of the hypothetical events were impossible in the real world.43 He labeled some of the more extreme cases with names that we still use today: the Unborn Widow, the Magic Gravel Pit, the Fertile Octogenarian, and the Precocious Toddler.44 Other targets of his criticism were as follows: (1) the lack of reformation under the Rule,45 as it renders future interests invalid and does not reform them in order to adhere to the testator's intent as much as possible; (2) the extension of the scope of the Rule to options to purchase, since they arise in a commercial context and not as a part of attempts to establish dynastic arrangements;46 and (3) the historic exemption of reversionary interests from the Rule.47 He suggested reforms to correct these defects and recommended either the American Law Institute, the National Conference of Commissioners of Uniform State Laws, or the American Bar Association as the proper entity to draft an appropriate statute.48

41. The first to use the phrase was Professor Susan F. French in Perpetuities: Three Essays in Honor of My Father, 65 WASH. L. REV. 323, 323 (1990).
43. Leach, Reign of Terror, supra note 42, at 728–30.
44. Id. at 731–32. For an explanation of these hypotheticals, see infra text accompanying notes 170–82. Professor Mechem disagreed with Leach's criticisms, characterizing Leach's examples as "reiterated castigation of a few freak cases[,] which he has popularized by giving them cute names." Philip Mechem, Further Thoughts on the Pennsylvania Perpetuities Legislation, 107 U. PA. L. REV. 965, 967 (1959).
45. Leach, Reign of Terror, supra note 42, at 734–36.
46. Id. at 736–39. Reversionary interests are possibilities of reverter, rights of entry (also known as rights of re-entry and powers of termination), and reversions.
47. Id. at 739–45.
48. Id. at 747–49.
Although not everyone agreed with Leach, a few states began to amend the Rule, either by judicial decision or by statute. Pennsylvania was the first state to adopt the “wait-and-see” approach, actually doing so before Leach’s articles were published. In the late 1970s, Professor James A. Casner, Reporter for the Restatement (Second) of Property, Donative Transfers and Harvard colleague of Leach, proposed adding the wait-and-see reform to the new Restatement. The debate over whether to add the reform to the Restatement took place over two annual meetings. Professor Richard R. Powell, the reporter for the first property Restatement, now retired and eighty-eight years old, attended the meeting to speak against the proposal, but to no avail, for in 1983, the Restatement (Second) of Property adopted the wait-and-see approach, and by 1985, almost half of the states had done so as well. However, the wait-and-see approach was not without its problems. Waiting in abeyance for decades to see whether a future interest was void was not only atypical of property law, but it also left the state of title uncertain. Additionally, the states adopted differing approaches to determine who the permissible group of possible “lives in being” would be.

A few states also adopted another of Leach’s suggestions and allowed courts to reform instruments in order to carry out testators’ and settlors’ intents and still conform to the Rule. This approach is generally known as the “cy pres” doctrine, from the doctrine of trust law that enables courts to reform charitable gifts if the specific term of the trust is impossible, impracticable, or illegal to carry out. The “cy pres” doctrine was hard to criticize because it did enable courts to better effect the wishes of grantors, but most courts stuck to their centuries-old reluctance to reform wills and trusts.

50. See Becker, supra note 2, at 712–13 (presenting a more complete discussion of this type of statute).
51. Dukeminier & Krier, supra note 29, at 1307.
52. Id.
53. Id.
56. SIMES, supra note 8, § 129.
57. Id.
58. Id. § 130. Cy pres means “as nearly as possible.” Id.
handful of states enacted reforms that addressed specific fact patterns and were intended to correct some of the absurd results of the Magic Gravel Pit, the Unborn Widow, and the rest of Leach’s collection of absurdities.\(^6\)

In 1986, reform of the Rule culminated in the promulgation of the Uniform Statutory Rule Against Perpetuities. USRAP accomplishes several reforms of the common law Rule. First, it adopts the wait-and-see approach, but it avoids the confusion about validating lives by making the waiting period ninety years. Second, it also adopts the “\textit{cy pres}” approach in that, if the provision still violates the Rule at the end of ninety years, courts can reform nonvested interests that violate the common law Rule in order to best effectuate the intent of the grantor.\(^6\) Despite criticism from some quarters, more than half of the states have adopted USRAP.\(^6\)

E. The Decline and Fall of the Rule

\textbf{The GST Tax Exemption.} Ironically, the same year that USRAP was being promulgated, Congress was passing legislation that contained within it the seeds of the Rule’s demise. In 1986, Congress enacted a major revision to the estate-tax provisions of the Internal Revenue Code.\(^6\) One of the policies underlying the federal gift and estate tax, a transfer tax on the estates of decedents, is to tax estates as they pass from generation to generation.\(^6\) Prior to 1986, decedents were able to escape the transfer tax by transferring successive life estates across multiple generations. For example, if \(O\) devised in trust for the benefit of \(A\) for life, then to \(B\), \(A\)'s estate would pay no transfer taxes.\(^6\) In order to close this loophole, Congress enacted the generation-skipping transfer (GST) tax.\(^6\) Thus, in the above hypothetical, a GST tax would be payable on all trust assets at \(A\)'s death.

The GST tax rate is significant—it equals the highest rate of the estate tax, which as of 2007, is forty-five percent.\(^6\) Although Congress imposed the new GST tax with one hand, with the other hand it granted an exemption from the tax. Originally the exemption amount was \$1\) million. In 2007, it became \$2 million, and as the legislation stands, it will increase to \$3.5 million by 2009.\(^6\) Thus, under the exemption, if \(O\) established a testamentary

\(^{60}\) See id. § 131 (containing further discussion of these scenarios).
\(^{62}\) See infra app. B (stating the current status of USRAP in the states).
\(^{65}\) Sitkoff & Schanzenbach, supra note 2, at 370–71.
\(^{68}\) STAFF OF J. COMM. ON TAXATION, supra note 64, at 394.
trust whose corpus was worth $2 million for the benefit of A for life, then to B, A's estate will still pay no transfer taxes. When will transfer taxes ultimately be paid? Usually, when the trust terminates. Congress intended uniformity across the states with the GST tax and its exemption; the limit on the GST exemption was to be the Rule, which at that point in time was the law in all but three states. Without the Rule, a settlor could establish a trust that lasted for generations, paying no transfer taxes. Of course, such a trust would be subject to state and federal income taxes, but these are much less onerous than the GST tax. Indeed, some states charge no income tax on trusts. If the trust assets appreciate in value, the appreciation is exempt from the GST tax also.

Example 1: S establishes a trust in a state that allows perpetual trusts and does not charge state income tax. The corpus of the trust is $2 million. As current federal law stands, no federal transfer taxes will ever become due on this trust as it passes from generation to generation. The only costs of the trust will be federal income tax and the fees and charges paid to the trustees and their employees, e.g., attorneys and investment brokers.

69. Sitkoff & Schanzenbach, supra note 2, at 372.
70. STAFF OF J. COMM. ON TAXATION, supra note 64, at 394.
71. Together, federal and state income tax of a trust may amount to approximately half of the income; on the other hand, the GST tax is almost half of the principal.
72. One commentator estimates that with skillful drafting, in a common law Rule state a trust starting with a corpus of $1 M, the maximum allowed, could reach as much as $1.09 billion, assuming a period of 120 years, no distribution of principal, income distributed on the basis of need, and a six percent annual growth rate after taxes. Richard Oshins, Megatrusts\textsuperscript{TM}: Representation Without Taxation, 48 N.Y.U. ANN. INST. ON FED. TAX'N. 19-8, 9 (1990). Oshins estimates that the same amount, transferred outside of a GST exemption trust, as part of an estate, if taxed at the fifty percent rate every thirty years, would only reach $68 million at the end of 120 years. Id. Sitkoff and Schanzenbach cite another estimate of trust asset growth by Richard Nenno, who claims that with a "[five percent] after-tax growth and a GST tax that would be levied every twenty-five years, a transfer-tax-exempt, perpetual dynasty trust funded initially with $1 million would be worth $131,501,258 after 100 years. This compares with $10,376,082 for an initial $1 million investment, without perpetual transfer-tax-exempt status." Sitkoff & Schanzenbach, supra note 2, at 372 n.50 (citing RICHARD W. NENNO, DELAWARE DYNASTY TRUSTS, TOTAL RETURN TRUSTS, AND ASSET PROTECTION TRUSTS 176-77 (2005)).
73. Even if a state has abolished the Rule, another doctrine, the rule against accumulations, might come into play here to limit the accumulation of income. Some states have either common law or statutory rules against accumulations, which may operate independently of the Rule. See Robert H. Sitkoff, The Lurking Rule Against Accumulations of Income, 100 NW. U. L. REV. 501 (2006); Karen J. Sneddon, The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts, 76 TUL. L. REV. 189 (2001) (discussing this issue). Arkansas has neither statutes nor case law restricting accumulations. Further discussion of the rule against accumulations is outside the scope of this article.
In 1995, Dukeminier pointed out that in a USRAP state, the new tax laws would enable a settlor to establish a ninety-year, $1 million trust, free of GST taxes. That same year, Delaware became the first state to respond by abolishing the Rule as applied to interests in a trust. This development was followed by what Professor Stewart Sterk termed a “race” among the states, as a flurry of articles urged the abolition of the Rule or chronicled its demise, and as of this writing, half of the states have abolished the Rule or USRAP to a greater or lesser extent, most of them only with respect to trusts. The race to lengthen the permissible period of trusts was also accompanied by the adoption of asset protection trusts and/or the repeal of income tax in a significant number of states.

The GST tax exemption was not the only reason for the rush to dismantle the Rule; as Professor Mary Louise Fellows has phrased it, the GST tax exemption was the spark that set off the movement for perpetual trusts, but there was plentiful “dry tinder” in place before the spark. What were these tinders?

Societal Norms and Values. Fellows argues the existence of two norms: the control of property after death and the concomitant idea that there is nothing wrong with restricting a donee’s ownership of property. Professor Joel Dobris also argues that numerous attitudes regarding the ag-

76. See discussion infra app. B (explaining current state law).
79. Id. at 2512–13.
gregation of wealth have facilitated the creation of perpetuities and have weakened the Rule, such as "we do not mind rich people these days" and "we are well-disposed towards trusts." He argues that "[m]ost plain folks see no danger [in abolishing the Rule]." Perhaps the "plain folks" have not had the question squarely set before them. The story of Nevada is interesting in this regard. Nevada's constitution prohibits perpetuities, as do the constitutions of eight other states. In 2002, after the Nevada legislature passed legislation authorizing perpetual trusts, the issue of whether to amend the constitution was submitted to the voters. Several commentators predicted the passage of the initiative. A bar journal article by two attorneys who had worked on the legislation began as follows:

Imagine a world where there are no state income taxes. Imagine a world where there are no estate taxes. Imagine a world where your assets can't be taken in a divorce. Imagine a world where your assets can't be taken in a lawsuit. Now imagine this world can be created for your descendants forever.

Apparently, this world did not appeal to the voters, for they defeated the issue by a resounding sixty percent to forty percent vote. Perhaps it is the legislators and not so much the voters who do not mind rich people.

The Success of USRAP. Even though USRAP did not lengthen the perpetuities period more than a skilled estate planner could, and arguably not even as much, it made the Rule much more "user-friendly," in the words of one commentator. The fact that a complex, hard-to-understand

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80. Dobris, supra note 2, at 601.
81. Id. at 604.
82. The states are Arizona, Montana, Nevada, North Carolina, Oklahoma, Texas, and Wyoming. See discussion infra app. B (containing the constitutional provisions and citations).
83. Steven J. Oshins & Judith K. Ruud, Dynasty Trusts in Nevada: Countdown to 12/01/02, 9 NEV. LAW. 18, 18 (2001) (predicting the "expected voter approval" of the "ideal estate planning vehicle"); see also discussion infra app. B (further explaining the election in the Nevada section).
85. Another of Dobris's provocative observations is that "no one is guarding the chicken coop." Dobris, supra note 2, at 655. Arizona has a similar constitutional provision (see Appendix B), and yet Arizona allows perpetual trusts. Why has no one challenged its constitutionality? Perhaps a challenge is yet to come. Only a petitioner challenging a trust for violating the Rule would have standing to challenge the statute.
86. Oshins believes that a 120-year trust can be effected "through skillful compliance with the common-law [R]ule." Oshins, supra note 72, at 19-8 (1990).
87. Fellows, supra note 78, at 2519.
Rule could be fit into a ninety-year pigeonhole, with reform required, changed the perception of the Rule. "Once USRAP embraced a ninety-year period, policymakers could begin to digest the possibility that, if you could wait ninety years, you could wait 190 years or 380 years or forever."

**Expansion of Attorney Liability for Malpractice.** Yet another development that may have played a significant part in the Rule's downfall is the expansion of attorney liability to will and trust beneficiaries. This expansion has occurred in two areas: privity between the attorney and client and the statute of limitations for bringing malpractice claims. Under the common law, a lawyer who drafted a will or trust incompetently, causing injury, was liable only to the lawyer's client or the client's estate. However, beginning in 1961, with the notorious case of *Lucas v. Hamm*, states began to "relax" the privity requirement, allowing those who would have been beneficiaries but for the negligence of the attorney to sue in malpractice. As of this writing, most states have relaxed the privity requirement to some degree. Dukeminier prophesied in 1985 that this change in the law would cause reform of the Rule (he was foreseeing the adoption of wait-and-see and *cy pres* statutes).

Another trend has been a change in the act that begins the running of the statute of limitations for malpractice. The traditional, common law rule places the act at the commission of the act of negligence or breach of the contract. The modern trend places it later in time, either at the death of the testator or settlor or at the time the act is actually discovered. The most

88. *Id.*
89. Sterk, *supra* note 2, at 2100–01.
90. *See generally* Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), cert. denied, 368 U.S. 987 (1962). Ironically, even though the court extended attorney liability, it refused to find malpractice in the drafting of a trust that violated the Rule. *Id.* at 690–91; *see also infra* note 97 and accompanying text.
91. *See, eg.*, Lucas, 364 P.2d at 684.
92. *See* Martin D. Begleiter, *Attorney Malpractice in Estate Planning—You've Got to Know When to Hold Up, Know When to Fold Up*, 38 U. KAN. L. REV. 193, 196–207 (1990) (discussing state positions on this issue). Arkansas has not joined the modern trend in this area. It moved in the other direction in 1987, enacting a statute that relieves attorneys from liability for malpractice to persons "not in privity of contract" unless the attorney commits fraud or the attorney identifies her potential liability in a letter sent to the client and to the beneficiaries of the services. *ARK. CODE ANN.* § 16-22-310 (Supp. 2005). *But see* Spencer v. Regions Bank, 73 Ark. App. 55, 60, 40 S.W.3d 319, 323 (2001) (Griffen, J., concurring) (opinion of Judge Wendell Griffen concurring in the judgment but criticizing this statute for weakening clients' rights to confidentiality and the rights of intended devisees and beneficiaries to recover against attorneys for incompetent drafting).
95. *Id.* at 209.
96. *Id.* at 208–18. Arkansas remains with the probable minority, following the common law Rule. *See, e.g.*, Goldsby v. Fairley, 309 Ark. 380, 383, 831 S.W.2d 142, 143 (1992);
desirable outcome from the viewpoint of avoiding malpractice claims is to abolish the Rule entirely.

F. Arguments in Favor of Limitation or Abolition of the Rule Against Perpetuities

Commentators have made the following arguments to support the abolition of the Rule.

Complexity of the Rule. The limited imagination of trust and will drafters often fails to envision extreme “what if” scenarios that invalidate a future interest. Even though drafters commonly use savings clauses to rescue future interests from inadvertent violation of the Rule, inartful drafting of such clauses may also violate the Rule, or at the very least lead to litigation.

Unfairness and Harshness of the Rule. The Rule applies to future interests in a third party, but, illogically, not to reversionary interests. Apparently, since reversionary interests were well settled by the advent of the Rule, early English decisions exempted them from the Rule’s application, and American courts followed them. Further, when the Rule is applied to invalidate a future interest, its effect frustrates the intent of the testator or settlor. The common law Rule does not allow courts to reform provisions.

Free Alienation No Longer a Concern. Today, most property to which the Rule applies is personal property, held by trustees in trust, which may freely be sold to further the interests of the beneficiaries. In addition, the doctrine of reinvestment permits land to be sold and the proceeds invested—income can go to life beneficiaries and the principle to the remaindermen—if the land is unproductive. Thus, we no longer need the Rule to protect the alienation of land.

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97. In Lucas v. Hamm, even though the California Supreme Court extended the privity rule, nonetheless, it held that the attorney did not commit malpractice by drafting a trust whose provisions violated the Rule because “an attorney of ordinary skill acting under the same circumstances might well have ‘fallen into the net [that] the Rule spreads for the unwary.’” Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961) (quoting Gray, supra note 14, at xi).

98. See, e.g., Ludwig v. AmSouth Bank of Fla., 686 So. 2d 1373 (Fla. Dist. Ct. App. 1997); see also Becker, supra note 2, at 736-40 (discussing how savings clauses work and how a single, all purpose savings clause is impossible to draft).

99. Leach, Reign of Terror, supra note 42, at 740; see also Restatement (Second) of Prop.: Donative Transfers § 1.4, reporter’s note 3 (2000).

100. Leach, Reign of Terror, supra note 42, at 734–36.

Advantages of Trusts. The author of a Harvard law review note refutes the argument that trusts hinder donees by arguing persuasively that dynasty and perpetual trusts “actually increase control (or at least the ability to maintain control) by future generations.” In some states, it is possible for a trust beneficiary, who is a co-trustee with a power of appointment, to receive significant tax advantages, protection from unsecured and judgment creditors, possible protection from ex-spouses, and significant control over trust assets. Contrast this with O’s child A, who is O’s devisee. If O leaves an estate of $2 million to A in fee simple, A will have no spendthrift protection or protection from ex-spouses.

Interstate Competition. Estate and trust planning and administration is a major industry. It is estimated that $41 trillion will pass between generations between 1998 and 2052. Much if not most of this property will be administered by banks and trust companies. Sterk concludes that, faced with these “competitive pressures,” a “sensible and conscientious” legislature is acting reasonably if it abolishes the Rule. It should be noted, however, that a recent study has found that jurisdictions enacting laws allowing perpetual or long-term dynasty trusts seem to significantly benefit from the change only if they charge no income tax on out-of-state trusts. State income tax can be a significant expense. Richard Nenno calculates as follows:

[I]f a trust, which has a California trustee, incurs a $1,000,000 long-term capital gain, the trust must pay $240,829 of tax—$91,023 of California income tax, $136,137 of federal income tax, and $13,669 of federal AMT. If the trust has a Washington trustee, however, the trust must pay only $149,806 of tax—$0 of state tax, $149,791 of federal income tax, and $15 of federal AMT, a $91,023 savings.

102. Note, supra note 2, at 2603 (paraphrasing Oshins, who goes so far as to assert that ownership of a beneficial interest can transfer more benefits than if the property were owned outright).

103. Id. at 2606–07.


106. Sterk, supra note 2, at 2118.
Similarly, if a trust, which was created by a New York State resident and is subject to New York State tax, incurs a $1,000,000 long-term capital gain, it must pay $226,798 of tax—$76,992 of New York State tax, $138,242 of federal income tax, and $11,564 of federal AMT. If the trust had been structured to avoid New York State tax, however, it must pay only $149,806 of tax—$0 of state tax, $149,791 of federal income tax, and $15 of AMT, a $76,992 savings.107

Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming do not tax trust income.108 Of those states that do tax, differing factors determine whether particular trusts are subject to tax. For example, twenty states (including Arkansas) tax trusts created by a resident testator’s will.109 Fourteen states (including Arkansas) tax irrevocable trusts created by residents.110 Fifteen states (not including Arkansas) tax trusts administered in their states.111

Enacting laws favorable to domestic asset protection trusts has also been an arena for state competition. These trusts abrogate the common law rule that a beneficiary of a self-settled trust, who is both the settlor and the beneficiary, may not keep from her creditors assets that she herself can reach—in other words, these trusts will enforce a spendthrift provision in a self-settled trust.112 As of February 2007, nine states have legalized domestic asset protection trusts: Alaska, Colorado, Delaware, Missouri, Nevada, Oklahoma, Rhode Island, South Dakota, and Utah.113

G. The Status of Perpetuities Law in the States Today

Prior to the GST tax exemption, three states had in effect abolished the common law Rule with respect to trusts: Idaho, Wisconsin, and South Dakota.114 It does not appear that either Idaho or Wisconsin abolished the Rule in

108. Id. § 404.5(B)(1). Florida imposes a limited tax. Id.
109. Id. § 404.5(B)(3).
110. Id. § 404.5(B)(4).
111. Id. § 404.5(B)(5).
112. Arkansas still follows the common law rule, as codified in the Arkansas Trust Code. ARK. CODE ANN. § 28-73-505(a) (Supp. 2005). Some commentators use the term “asset protection trust” to refer to traditional, non-self-settled spendthrift trusts. In this article, it is used in the narrower context to refer to self-settled trusts with spendthrift provisions. If this more customary definition of “asset protection” is used, Arkansas is not an asset protection state. For more discussion of these issues and of Arkansas law, see Lynn Foster, The Arkansas Trust Code: Good Law for Arkansas, 27 U. ARK. LITTLE ROCK L. REV. 191, 234–36 (2005).
113. Nenno, supra note 107, § 411.
114. For a summary of their current laws, see discussion infra app. B.
order to entice investors.\textsuperscript{115} In fact, today they retain an income tax on trusts. Dukeminier states that perpetual trusts were "seldom created" before the advent of the GST tax in 1986.\textsuperscript{116} However, in 1983, South Dakota abolished the Rule as part of an "aggressive campaign to attract trust and banking positions to the State. Just a few years earlier, South Dakota had repealed its interest rate ceiling on consumer credit cards. . . . [It] has cemented its trust-friendly jurisdiction by rejecting a state income tax."\textsuperscript{117}

In 1995, Delaware was the first state after the enactment of the GST tax exemption to allow perpetual trusts, citing the need to entice investors away from South Dakota and Wisconsin.\textsuperscript{118} Since then, nineteen states plus the District of Columbia have enacted legislation that either (1) extends the allowable perpetuities wait-and-see period beyond USRAP's ninety years, (2) allows perpetual trusts, or (3) goes the full distance and simply repeals the Rule. This legislation is by no means uniform, although it can be grouped into several broad categories.\textsuperscript{119} Put most succinctly, the following is the status of the Rule as of this writing: one lone state, Alabama, still follows the common law Rule unmodified by any reform doctrines.\textsuperscript{120} One state, Kentucky, follows the common law Rule modified by the wait-and-see doctrine.\textsuperscript{121} New York, Oklahoma, and Texas follow the common law Rule modified by varying degrees of \textit{cy pres},\textsuperscript{122} while Iowa, Mississippi, and Vermont follow the common law Rule modified by both \textit{cy pres} and wait-and-see.\textsuperscript{123}

A total of seven states have modified the common law Rule to permit perpetual trusts. Of them, with respect to other interests in property, Delaware and New Hampshire follow the unreformed common law Rule;\textsuperscript{124} Maine and Maryland have adopted wait-and-see;\textsuperscript{125} Missouri has adopted \textit{cy

\textsuperscript{115} Dukeminier & Krier, \textit{supra} note 29, at 1315.
\textsuperscript{116} \textit{Id.} at 1315.
\textsuperscript{117} Sterk, \textit{supra} note 2, at 2101-02. In addition to loosening or abolishing the Rule, states have taken other actions to lure out-of-state investors. Some states have enacted statutes allowing nonresident grantors to establish in-state trusts.
\textsuperscript{118} Dukeminier, \textit{supra} note 74, at 208 n.54.
\textsuperscript{119} See \textit{infra} app. B (containing detailed summaries and citations).
\textsuperscript{120} ALA. CODE § 35-4-4 (LexisNexis 1991).
\textsuperscript{121} KY. REV. STAT. ANN. §§ 387.215 to .216 (LexisNexis 1991).
\textsuperscript{122} N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 to 9-1.3 (McKinney 2002); OKLA. STAT. ANN. tit. 60, §§ 75-77 (West 1994); TEX. PROP. CODE ANN. § 5.043 (Vernon 2004); \textit{In re} Estate of Crowl, 737 P.2d 911, 914 (Okla. 1987).
\textsuperscript{123} IOWA CODE ANN. § 558.68 (West 1992); VT. STAT. ANN. tit. 27, § 501 (1998); Murphy Exploration & Prod. Co. v. Sun Operating Ltd. P'ship, 747 So. 2d 260, 265 (Miss. 1999); \textit{In re} Estate of Anderson, 541 So. 2d 423, 429-30 (Miss. 1989).
\textsuperscript{124} DEL. CODE ANN. tit. 25, § 503(b) (Supp. 2006); N.H. REV. STAT. ANN. § 564:24 (LexisNexis 2006).
ARKANSAS'S ADOPTION OF USRAP

pres,126 and Ohio follows the common law Rule modified by both cy pres and wait-and-see.127 Illinois has reformed the common law Rule to prevent such excesses as the Unborn Widow and the Slothful Executor, among others.128 Delaware limits the perpetuities period for real property owned by a trust to 110 years.129 All of these states except for Missouri and Delaware require the trust to "opt out" of the Rule.

Wyoming, with a constitutional provision forbidding perpetuities and a "model" statutory rule that essentially codified the common law Rule, has extended the Rule's period to 1,000 years for trusts.130 However, any real property owned by a trust is still subject to the common law Rule's life in being plus twenty-one years.131

California, Connecticut, Georgia, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, and West Virginia have enacted USRAP with minor or no amendments.132 As of 2007, Arkansas has joined this group.

Eight states and the District of Columbia have enacted USRAP but have later repealed or amended it to allow for dynasty or perpetual trusts, either automatically or by opt-out provisions. Of these preceding states, Arizona, the District of Columbia, Nebraska, and Virginia allow perpetual trusts;133 Alaska, Colorado, and Utah 1000-year trusts;134 Nevada allows 365-year trusts,135 and Florida allows 360-year trusts.136

The remaining states basically do not have a rule against perpetuities. Idaho abolished the Rule in the 1950s and allows perpetual trusts.\textsuperscript{137} New Jersey has repealed USRAP and abolished the common law Rule to allow perpetual trusts.\textsuperscript{138} Pennsylvania, Rhode Island, South Dakota, and Wisconsin have abolished most or all of the common law Rule and allow perpetual trusts.\textsuperscript{139} These states have reached the far end of the spectrum. Louisiana is not on the spectrum at all because it does not recognize the common law future interests.\textsuperscript{140}

Some generalizations may be made with respect to current law. In most states, the Rule still exists with respect to non-trust property, and most states still limit restraints on alienation, even if they have liberalized the Rule. As of this writing, the uniform alternative followed by the largest number of the states (eighteen) is USRAP, either unamended or slightly amended. However, if one asks how many states allow dynasty or perpetual trusts, by whatever means, the answer is twenty-three states and the District of Columbia.

In virtually every state that has adopted USRAP or freed the way for perpetual trusts, there is a "before" and "after" date that will be in force for decades, since little of the legislation is retroactive. Indeed, some states that adopted USRAP and later switched to perpetual trusts have two before-and-after dates—one to mark the application of USRAP to trusts executed after the date and the second to mark the date after which perpetual trusts can be established.\textsuperscript{141} Some statutes are partially retroactive.

Some aspects of the legislation raise questions. Many of the state statutes exempt trusts from the coverage of the Rule if the trustee has the power to sell trust property beyond the period of the Rule. However, it is not uncommon for grantors to prohibit the trustee from selling real property in the corpus of the trust if it has been in the family for generations, no matter how unproductive it has become. Is such a trust still exempt from the Rule? Are only part of the assets, those that can be sold, exempt? The statutes are not clear on this point.

\textsuperscript{141} See, e.g., Colorado's statute, which applies USRAP to interests and powers created on or after May 31, 1991, except for powers of appointment created by the exercise of nongeneral powers of appointment. Those powers are created when the nongeneral power was created, unless the trust was irrevocable on Sept. 25, 1985. On the other hand, if the interest or power was created after May 31, 2001, the new 1000-year trust statute applies. Colo. Rev. Stat. § 15-11-1102.5 (2006).
Have all of the states that have extended or abolished the Rule achieved their goals? Probably not. Simply abolishing the Rule does not guarantee respite from federal GST taxes. States may still fall prey to the Delaware Tax Trap. The Delaware Tax Trap, now no longer a problem in Delaware, originated when Delaware amended the Rule to provide that whenever a nongeneral power of appointment was exercised, the Rule period did not "relate back" to the creation of the power (as is the case under common law), but instead, the Rule period began to run when the power was exercised. Thus, if a nongeneral power of appointment was exercised before the period of the Rule had run, the clock would start over. Delaware thus made it possible to create a perpetual trust, as long as successive powers were exercised again and again during each new period of the Rule.142

However, Delaware's law did not escape the eye of Congress, which responded by enacting section 2041(a)(3) of the Internal Revenue Code.143 This statute provided that if the donee of a power creates a new power of appointment that can be exercised to postpone the vesting of any interest or to suspend the absolute ownership or power of alienation of property for a period ascertainable without regard to the date of the creation of the first power, then the trust assets subject to the power are taxable.144 This section of the Code applies to all states, but it is not a problem in states that follow USRAP or the common law Rule. However, if a jurisdiction abolishes the Rule or extends its period, and it does not have a statute prohibiting the suspension of the power of alienation or does not require that a nongeneral power be exercised within a certain period of time, then if a nongeneral power is exercised after the perpetual trust is created and outside the period of the common law Rule, it will incur the imposition of the GST tax on the property subject to it.145

Thus, after examining perpetual trust statutes enacted before 2002, Dukeminier and Krier concluded that only in Alaska, Florida, Idaho, New Jersey, South Dakota, Washington, Wisconsin, and Wyoming could trusts be established that would allow nongeneral powers to be exercised beyond the Rule's period without falling into the Delaware Tax Trap and incurring the GST tax.146 Trusts in Arizona, Delaware, Illinois, Maine, Maryland, Missouri, Nebraska, Ohio, Rhode Island, and Virginia were still subject to the Delaware Tax Trap.147 Attorney Julia B. Fisher disagreed. The same year, she stated that trusts in Alaska, Illinois, Maryland, Maine, New Jersey, Ohio, South Dakota, and Wisconsin would not fall into the Delaware Tax

142. Dukeminier & Krier, supra note 29, at 1332.
144. Dukeminier & Krier, supra note 29, at 1333.
145. Id. at 1333–34.
146. Id. at 1333 n.127.
147. Id. at 1333 n.128.
Trap, but Arizona, Colorado, Delaware, Idaho, Rhode Island, and Virginia would.\textsuperscript{148} Reviewing statutes in 2006, Daniel G. Worthington placed Delaware, Idaho, Missouri, New Hampshire, New Jersey, South Dakota, and Wisconsin in the first group. His second group consisted of Alaska, Arizona, Colorado, District of Columbia, Florida, Illinois, Maine, Maryland, Nebraska, Nevada, Ohio, Rhode Island, Utah, Virginia, Washington, and Wyoming.\textsuperscript{149} Clearly, there is little agreement or certainty in this area of the law. Richard Nenno contends that if the IRS interprets section 2041(a)(3) to require an ending “period” to avoid the application of the Delaware Tax Trap, then the period will be no longer than the USRAP period of ninety years.\textsuperscript{150}

Assuming the state offers perpetual, GST tax-free, state income tax-free, asset protection trusts, may Arkansans freely take advantage of such trusts? With respect to income tax, an Arkansas resident must pay income tax on any trust established by will of a resident, or by an inter vivos trust created by a resident, even if the trust is located in another state.\textsuperscript{151} With respect to asset protection trusts, the answer is even more problematic. Domestic asset protection trusts (DAPTs) do not yet have any kind of track record in the courts,\textsuperscript{152} but they are vulnerable to attack on several grounds. First, if the settlor’s actions constitute “badges of fraud” under state fraudulent transfer statutes, the trust will not be able to withstand a creditor’s attack.\textsuperscript{153} Second, under the Full Faith and Credit provision of the United States Constitution,\textsuperscript{154} a court of a DAPT state must recognize the judgments of non-DAPT states.\textsuperscript{155} Third, if a settlor/beneficiary declares bankruptcy, the recent bankruptcy reforms\textsuperscript{156} expand the lookback period to ten years for DAPTs created with the intent to hinder, delay, or defraud creditors.\textsuperscript{157} Finally, creditors could argue that the Contracts Clause of the United States


\textsuperscript{149} Daniel G. Worthington, \emph{Perpetual Trust States—The Latest Rankings}, Tr. & Estates., Jan. 2007, at 59, 60.

\textsuperscript{150} Nenno, supra note 107, § 404.4(D)(6) (recounting informal discussions with the IRS).

\textsuperscript{151} ARK. CODE ANN. § 26-51-201 (Michie Rep. 1997).

\textsuperscript{152} A Westlaw search in Allstates and Allfeds for “asset protection trusts” revealed no cases involving DAPTs, and indeed only approximately ten cases involving offshore asset protection trusts.

\textsuperscript{153} Duncan E. Osborne, Jack E. Owen, Jr. & Arthur T. Catterall, \emph{Asset Protection: Trust Planning}, ALI-ABA Course of Study, Planning Techniques for Large Estates 213, 244 (Nov. 13–17, 2006).

\textsuperscript{154} \textsc{UNITED STATES CONST.} art. IV, § 1.

\textsuperscript{155} Osborne, Owen & Catterall, supra note 153, at 249–50.

\textsuperscript{156} 11 U.S.C.A. § 548(c) (West 2007).

\textsuperscript{157} Osborne, Owen & Catterall, supra note 153, at 254.
Constitution is violated by DAPT statutes because they render a debtor's obligation illusory since the debtor can evade his debts simply by creating a DAPT. This issue has not yet been tested with respect to Arkansas.

If the trust corpus is real estate located in Arkansas, a trust administered out of state most likely would not work either. Again, the state where the real estate is located is the state whose law applies under traditional choice of law rules. However, an Arkansan with a trust corpus of personal property wishing to take advantage of lower income tax rates and/or statutes that allow a trust to last hundreds of years should be able to shop among the growing number of states that are trying to lure investors to their banks and trust companies. In the words of two experts,

[t]here is no substantial experience or precedent that provides guidance to the lawyers and trustees involved in creating, administering and interpreting perpetual trusts, and many of the traditional practices that work well for trusts of relatively short duration may be, at best, inappropriate and ineffective or, at worst, detrimental and inconsistent with the trustee's fiduciary duties for trusts of unlimited duration.

H. Will the Pendulum Swing Back?

The estate and gift taxes and GST taxes are slated for abolition in 2010, but beginning in 2011, unless Congress adopts additional legislation, the pre-2001 Tax Act law will once again be in effect, and the three transfer taxes will be restored. Congress never intended to exempt the GST tax forever; when it enacted the exemption, all but three states enforced some version of the Rule. What if Congress removes the GST tax exemption or amends the estate tax to tax trust assets as they pass through each generation? Even if settlors stopped creating perpetual trusts, it is doubtful that states would re-enact the Rule. One commentator has proposed a federal
Although unlikely in today's political climate, this might be possible in a future in which the federal deficit worsens. Professor Dobris has offered a panoply of “termination tools,” such as “oppressive taxation,” a “bureau of trust enforcement,” and “a Sarbanes-Oxley for perpetual trusts.”

Dobris noted the break between practitioners and professors on the issue of the abolition of the Rule. It may be that professors, freed from the duty to do their best for their clients and from economic dependence on fees, can more easily sit back and view the larger picture. On the other hand, it may be that professors are reluctant to support the abolition of that which many of them have taught for so long.

Dukeminier and Krier proposed a state statutory solution: easing the termination of perpetual trusts by changing traditional trust law. They proposed several alternatives—giving a court the power to terminate a trust if it is advantageous to a remote generation of beneficiaries, terminating a trust after a given period of time, allowing remote beneficiaries to modify or terminate the trust, and giving the trustee power to terminate the trust. They announced a “great turning point” in trust law, stating that “Congress has come to be in charge of trust duration.”

III. THE COMMON LAW RULE AND CURRENT ARKANSAS LAW

A. The Scope of the Rule: Which Interests?

The common law Rule applies to contingent remainders, vested remainders subject to open, and executory interests. It applies to most types of powers of appointment and has been applied in a number of states, including Arkansas, to non-donative interests, such as rights of first refusal and options to purchase. The Rule does not apply to present interests or estates, reversionary interests (those retained in the grantor, including reversions, rights of entry, and possibilities of reverter), indefeasibly vested remainders, vested remainders subject to divestment, and presently exercisable general

164. Dobris, supra note 42, at 2541–43.
165. Id. at 2538 n.3.
166. For articles on teaching the Rule, see supra note 42.
167. Dukeminier & Krier, supra note 29, at 1339–42; see also generally Tate, supra note 26, at 605–611, 620–26 (evaluating Dukeminier's and Krier's proposals in light of indirect evidence of testators' intentions in establishing dynasty and perpetual trusts and concluding that they "effectively transfer the settlor's freedom to the beneficiaries.")
168. Dukeminier & Krier, supra note 29, at 1343.
169. See infra text accompanying notes 184–89 for more discussion of powers of appointment under the Rule.
powers of appointment not subject to a condition precedent. It applies to non-charitable trusts and trusts that are only partially charitable, but not at all to wholly charitable trusts. It is a rule of property, and not of construction, which means that courts may not choose not to apply it. Unlike most rules of construction, the Rule operates to defeat the intent of the testator or settlor.

B. How the Rule Works

The period of the Rule begins to run at the time the interest in question is created. In the case of a will, a testamentary trust, or a revocable trust, this is at the death of the testator or settlor. In the case of a deed, it is at the time of the delivery of the deed. In the case of an irrevocable inter vivos trust, it is the time the trust comes into existence. However, in the case of a future interest or power of appointment created by a power of appointment, in most cases the date of creation of such an interest or power "relates back" to the date of the creation of the original power of appointment. When applying the Rule, the court stands at that moment in time, looks at the future interests and powers of appointment created by the instrument, and determines whether there is even the remotest possibility that the interests will not vest indefeasibly (in the case of remainders), become possessory (in the case of executory interests), or be exercised (in the case of options or powers of appointment) within twenty-one years after the deaths of all lives in being at that moment in time. If the remotest possibility exists, the interest or power is invalidated.

Example 2: S devised property in trust, directing the trustee to pay income to A for life, then the corpus to A's children who reach the age of twenty-five. At S's death, A has two children ages five and ten. A's children have contingent remainders. They must reach the age of twenty-five in order for their interests to vest indefeasibly. In addition, A may have more children, thus adding more members to the class. Consequently, at A's death, the class of children will not be indefeasibly vested. The latest this could occur, if A had a child the day of his death, would be twenty-five years after A's death. Therefore, the remainder to A's children is void. What if at S's death A has two children ages five and twenty-five? Under the "all-or-nothing" rule, if the interest of any potential class member might vest too remotely, the entire

172. What if A's child was born posthumously? The common law Rule adds a gestation period to the twenty-one years if it is necessary.
class gift violates the Rule. Thus, the gift to both children is still invalid.\textsuperscript{173}

One difficulty law students have when they are learning how to apply the Rule is realizing that the point in time when the interest is created can render an interest valid or invalid.

**Example 3:** S established an irrevocable trust paying income to his children for life, then to divide the corpus among his grandchildren. S has two children and three grandchildren. The grandchildren have vested remainders subject to open because more grandchildren may be born—since S has living children—and thus, the grandchildren’s interest is subject to the Rule. Their interests will vest indefeasibly when the last of S’s children dies. Since S has not named the children in the trust, the children must be considered as a class. They cannot be used as validating lives because S could have another child after the trust is established. Thus, the grandchildren’s interest is invalidated under the Rule.

**Example 4:** S devised property in trust, directing the trustee to pay income to his children for life, then to divide the corpus among his grandchildren. At S’s death, he is survived by two children and three grandchildren. The grandchildren have, as above, vested remainders subject to open, and, as above, these are subject to the Rule. Their interest will vest indefeasibly when the last of S’s children dies, but here, since S is dead, he can have no more children. Therefore, the class of children is a valid validating life for the grandchildren, and the grandchildren’s interest is valid under the Rule.

Another difficulty students have is in how to look for the “life in being”—called herein a validating life—that will make an interest valid. This difficulty has not been confined to students—two of the greatest of the Rule’s authorities, Professors Waggoner and Dukeminier disagreed over the issue of how to determine the appropriate pool of lives in which to look for a validating life. Dukeminier took issue with the *Restatement (Second) of Property*’s pool of lives\textsuperscript{174} and argued that possible validating lives could only be those that were “causally related” to the vesting of the future interests in question.\textsuperscript{175} Waggoner, who later championed the ninety-year waiting


\textsuperscript{174} Dukeminier, supra note 55, at 1648, 1674–1701.

\textsuperscript{175} Id. at 1709–13.
period of USRAP, thought that Dukeminier’s approach was too narrow and suggested that “[e]liminating people from the world at large, focusing attention on persons connected in some way to the transaction, and asking whether there is any person in this group who satisfies the real test” was the appropriate way to identify possible validating lives.176

Students often fail to grasp that a validating life need not be a beneficiary, need not even be named in the instrument, and may be a class instead of an individual. In addition, an instrument with more than one future interest may need more than one validating life for all interests to be valid.

Example 5: S devised property in trust, directing the trustee to pay income to S’s sister A for life, then to A’s children for life, and at the death of A’s children, to distribute the corpus to S’s surviving children. At S’s death, A is alive and has two children. S has two children. All future interests here are valid. The validating life for A’s children’s vested remainder subject to open is A. At her death her children’s life estate will vest indefeasibly and become possessive at the same moment. The validating life for S’s children’s contingent remainder is S’s children themselves. By the death of the last of S’s children, we will know whether their remainders have vested or failed. In this example, the two nonvested interests have two different validating lives—A and S’s children.

Another aspect of the Rule that is difficult for novices to see is its “what-if” nature. The Rule requires courts to examine future interests at the time of their creation and to declare their validity or invalidity at that time, not having to wait for future developments. The courts look for possible events that could delay vesting of future interests beyond the Rule’s time limit. If there is the slightest possibility that such an event might occur, it invalidates the future interest no matter how improbable the event is. Professor Leach assigned the names to the following events that, although improbable (to varying degrees) in real life, nonetheless have caused courts to invalidate future interests because of the possibility of their occurrence:

The Fertile Octogenarian: S’s testamentary trust directs income to his sister A, an eighty-five-year-old widow, for life, then to A’s son B for life, then to terminate the trust and pay the corpus to A’s surviving grandchildren. The gift to the grandchildren is invalid under the Rule because after S’s death A might have more children, who would die more than twenty-one

years after B. Thus, the grandchildren's interest might not indefeasibly vest within twenty-one years after B's death.\textsuperscript{177}

The USRAP Comments refer to the assumptions underlying this subsidiary doctrine of the Rule as the "conclusive presumption of lifetime fertility."\textsuperscript{178} It extends to both sexes and all ages.

**The Precocious Toddler:** S's testamentary trust directs income to B for life, remainder to such grandchildren of B who were living at S's death, or who were born within five years after S's death and reach the age of twenty-one. The contingent remainder to the grandchildren is invalid under the Rule because B could have a child after S's death, who then gave birth to a grandchild of B within five years of S's death, but the grandchild would not reach the age of twenty-one within twenty-one years of S's death. Obviously, in the world of the Rule, if one-hundred-year-old persons can give birth, why not three-year-olds?\textsuperscript{179}

**The Unborn Widow:** T directed by a testamentary trust, "To pay income to A for life, then to A's widow for life, then to terminate the trust and pay the assets to A's surviving children." The gift to the children is invalid under the Rule because after T's death A might remarry to someone born after T's death, who might not die until more than twenty-one years after A, and A might have children who are born after T's death.\textsuperscript{180}

**The Magic Gravel Pit:** T's testamentary trust directed that trustees administer the workings of gravel pits until they were exhausted (if worked at the then rate, they would have been exhausted four years after T's death), and then pay over all trust assets to T's issue. The gift is invalid under the Rule because there is no guarantee that the pits will be exhausted within twenty-one years of lives in being at T's death.\textsuperscript{181}

**The Slothful Executor:** T's will devises $1 million to A, "after my estate is probated." The probate of T's estate may not be complete more than


\textsuperscript{179} Leach, \textit{Reign of Terror}, supra note 42, at 732–33.

\textsuperscript{180} \textit{Id.} at 731.

\textsuperscript{181} \textit{Id.} at 731–32.
twenty-one years after the death of all people alive at T’s death, and therefore A’s springing executory interest is invalid.\textsuperscript{182}

The Rule’s logic does not come easy to some people.\textsuperscript{183} Some types of transfers, while not violating policy reasons underlying the Rule, nonetheless are invalidated: to A for life, then to A’s children who reach the age of twenty-two. A might have a child the day before her death, that is, after the creation of the future interest, and that child’s interest would not vest indefeasibly until more than twenty-one years after A’s death. This transfer neither restricts the alienability of property nor holds property in the control of the “dead hand” for too long—A’s children will either receive the property in fee simple absolute or their interests will fail within twenty-two years after A’s death, if the children themselves die. But, the Rule voids their interests.

The Rule becomes most complex when it applies to powers of appointment, which are utilized extensively in trusts. A power of appointment is not an interest in property, but the power to designate someone as the owner of an interest in property.\textsuperscript{184} Powers of appointment cannot be discussed without using special terminology, which is summarized herein. The holder of a power is a “donee.” A power of appointment is not a fiduciary interest, and a trustee with the power to administer a trust or to distribute trust assets or income is not a donee. However, the creator of a power, a “donor,” may create a trust out of her own property, make herself a beneficiary, and reserve for herself a power of appointment over the beneficial interests of the trust property. Powers of appointment fall into two categories: general powers and nongeneral, or special, powers.\textsuperscript{185} A general power is one that may be exercised in favor of either the donee, the donee’s estate, the donee’s creditors, or the donee’s estate’s creditors. A nongeneral power is one that cannot be exercised in favor of any of the preceding four entities.\textsuperscript{186} The property subject to the power is “appointive property.” Possible recipients of the appointive property are “objects of the power,” and those persons who will receive the appointive property if the power is never exercised are “takers in default.” Powers of appointment may of course be held

\textsuperscript{182} Dukeminier seems to have given this situation its name. Jesse Dukeminier, Jr., \textit{Kentucky Perpetuities Law Restated and Reformed}, 49 KY. L.J. 3, 3 (1960–61).

\textsuperscript{183} One of my former students would repeatedly visit my office while studying the Rule and declaim “White men can’t RAP.” Of course, it was white men who invented RAP.

\textsuperscript{184} \textit{Restatement (Third) of Prop.: Wills & Other Donative Transfers} § 17.1 (1998).

\textsuperscript{185} The \textit{Restatement (Third) of Property} uses the “nongeneral,” rather than the older, “special” form. This article will follow the Restatement convention.

\textsuperscript{186} \textit{Restatement (Third) of Prop.: Wills and Other Donative Transfers} § 17.3 (1998).
by trustees, in which case they are called fiduciary powers of appointment and are usually nongeneral.

**Example 6:** S creates a trust. S is a co-trustee and the beneficiary. The trust gives S a life income in the trust property, and the remainder of all trust assets to whomever S devises, otherwise the remainder will pass to S's son. S is both the donor and the donee of the power. It is a general power because S can exercise it in favor of himself or anyone else, and thus, the property subject to the power will be taxable to S's estate, unless S's power is subject to an ascertainable standard or the property covered by the power is comparatively small.\(^{187}\) It is a testamentary power because S can exercise it only by will. S's son is the taker in default.

**Example 7:** S creates a trust. The trust gives S's son A a life income in the trust property, with the power to appoint the trust assets to whoever of A's descendants A names in his will, otherwise the remainder will pass to S's issue. S is the donor of the power, and A is the donee. A has a nongeneral power because A cannot exercise it in favor of himself, his estate, or the creditors of either. It is testamentary because it can be exercised only by will. A's descendants are the appointees of the power. S's issue are the takers in default.

The Rule applies not only to powers of appointment, but also, in a second layer of analysis, to any future interests or powers of appointment created by the holder of a power. Thus, when analyzing powers of appointment, two questions must be asked: (1) is the power valid? and (2) is its exercise valid? In the case of presently exercisable, general powers of appointment, unless they are subject to a condition precedent, they simply do not fall under the Rule because they are the equivalent of a fee simple ownership. In the case of such powers that are subject to a condition precedent, the power is valid if the condition is either met or rendered impossible to be met within the period of the Rule. In the case of general testamentary powers and nongeneral powers, the powers themselves are valid if they are certain to be exercised or to terminate within the Rule's period.\(^{188}\)

What about the validity of the exercise of a power of appointment? When the Rule starts to run again depends on the type of power. In the case of a general, inter vivos power of appointment, because the donee can trans-

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187. See 26 U.S.C. § 2041(b)(1)-(2) (2006). Tax aspects of powers of appointment are outside the scope of this article.

fer the appointive property by deed or by will at any time, to whomever he wishes, he has the equivalent of a fee simple interest. Therefore, the Rule will start to run from the exercise of the power and not the time of its creation. For other types of powers, it “relates back” to the time of the creation of the power. Some states have adopted a “second-look” exception that takes into account facts at the time of the creation of the power in order to validate some exercises of powers that would otherwise be void.\textsuperscript{189}

Example 8: $S$ devised property in trust, directing the trustee to pay income to her daughter $A$ for life, with a general, inter vivos power of appointment over the corpus, otherwise to $X$. $A$ sets up an irrevocable trust, with the income from Blackacre to go after $A$’s death to her children for life, and then twenty-one years after $A$’s death, Blackacre is to be divided among all of her children. This disposition is valid under the Rule. $A$’s power is valid. Because it is a presently exercisable, general power, it does not fall under the Rule. As to the exercise of the power, here in the form of the creation of a trust, the period of the Rule will run from the date the trust is established (the exercise of the power), not from the date of $O$’s death (the creation of the power). All interests will have either vested or failed by twenty-one years after $A$’s death, and thus, the Rule is satisfied.

Example 9: $S$ created an irrevocable trust that paid income to her children for their lives, then at their deaths the assets to such appointees as the children may devise. These general testamentary powers of appointment are invalid under the Rule because $S$ could have another child, born after the interest is created (the time when the trust was created) who does not die until more than twenty-one years after $S$ and all of her children living at the time the trust was created have all died.

Example 10: $S$ devised property in trust, directing the trustee to pay income to her children for their lives, then at their deaths the principal to such appointees as they may devise. One of $S$’s children, $A$, created a testamentary trust with his power and devised his share of the trust principal so that its income would go to his children for life, with the remainder to his grandchildren. At $S$’s death, $A$ had one child, $B$. Here, $A$’s power of appointment is valid. $A$ himself is the validating life. He was alive at the creation of the power, and he must exercise the power by his death. However, his exercise of the power violates the Rule. The trust income to his children is a present interest and thus, valid, but the

remainder interest to the grandchildren is void. The Rule started to run at S's death. A's children and grandchildren cannot be validating lives because they can be born after S's death. The grandchildren's interest will not indefeasibly vest until the death of A's last surviving child.

Example 11: S devised property in trust, directing the trustee to pay income to A for life, and giving A a nongeneral power of appointment over the remainder, exercisable in favor of A's descendants. At S's death, A had two children, B and C. No further children were born to A. A exercised her power of appointment in her will, directing that trust income be paid to her children for their lives, and at their deaths, that corpus be paid to A's grandchildren. The common law second-look doctrine, in essence a wait-and-see doctrine, operates to make this exercise valid. If A had had another child after S's death who survived A, A's exercise would be invalid.

C. The Effect of the Rule

The common law Rule voids offending interests. Courts that follow the common law Rule do not reform wills, trusts, or deeds so that the intent of the grantor can be carried out as nearly as possible within the Rule's period. They simply strike the interest that violates the Rule.\textsuperscript{190}

Example 12: S devised property in trust, directing the trustee to pay income to A for life, and then to pay the principal to those of A's children who reach the age of twenty-five. At S's death none of A's children have reached the age of twenty-five. Their contingent remainders are void. At A's death, the trust would become a resulting trust\textsuperscript{191} and would be distributed to S's estate.

Indeed, under the doctrine of "infectious invalidity," a few courts have even voided interests that do not violate the Rule, if the invalid interest is so essential to the general dispositive scheme of the testator or settlor that a court will infer that she would not wish other interests to remain.\textsuperscript{192}

\textsuperscript{190} Leach, \textit{Reign of Terror}, supra note 42, at 722.
\textsuperscript{191} A resulting trust is a trust implied by law when an express trust has failed. The trust corpus is held for the benefit of the settlor or the settlor's estate. Joel C. Dobris, Stewart Sterk & Melanie B. Leslie, Cases and Materials: Estates and Trusts 502-03 (2d ed. 2003).
Example 13: T devised one-half of Blackacre to his daughter A for life, with a remainder to her children for their lives and then to her grandchildren. The other half of Blackacre T devised to his son. The contingent remainder to A's grandchildren is void because it could either vest indefeasibly or fail more than twenty-one years after A's death. Striking that remainder meant that one-fourth of Blackacre would go to the daughter in fee simple and three-fourths to the son. Applying the doctrine of infectious invalidity and reasoning that the testator wanted daughter and son to take equal shares, the court voided both devises, resulting in daughter A receiving one-half of Blackacre in fee simple and the son receiving the other half.193

One "subsidiary doctrine" of the Rule mitigates its harsh effect; that is the preference for validity. John Chipman Gray advocated that the Rule should be "remorselessly" applied.194 However, the Restatement of Property proposed that when an instrument is ambiguous and could be construed either to violate the Rule or to conform to it, the court should adopt the construction that validates the future interest or power of appointment.195

D. Arkansas Perpetuities Law

Article 2, section 19 of Arkansas's Constitution states as follows: "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments, privileges or honors ever be granted or conferred in this State." The Arkansas Supreme Court has interpreted this provision as applying the common law Rule.196 Arkansas cases involving the Rule are not plentiful; by this author's count, only approximately thirty-five published, appellate decisions exist in which the Rule was an issue.197

The Rule applies to contingent remainders. For example, two deeds that in effect conveyed land to trustees for the benefit of "lineal descendants," who would include future descendants not living at the time of the transfer, were ruled invalid in Hendriksen v. Cubage.198 In that case, the court held both deeds void. An executory interest was invalidated under the Rule in McCrory School District of Woodruff County v. Brogden.199 There,
the grantor and his widow deeded land to the school district for school purposes, to revert to the grantor’s and widow’s heirs if the property was used otherwise. The court held that the “reversion” to the heirs was really an executory interest and, therefore, was void under the Rule. Since the widow was still alive, she held sole title in fee simple.

The most famous Arkansas perpetuities case is that of Dickerson v. Union National Bank of Little Rock. In that case, a testator left a holographic will creating a testamentary trust that left income to both of the testator’s sons and to other purposes. At the death of both sons and “my son Martin’s widow and until the youngest child of either son has reached the age of twenty-five years,” the trust would terminate. This trust violated the Rule in two ways: first, because it was the fact situation of the Unborn Widow, and second (although the court did not discuss this latter ground) because the contingent remainder in the grandchildren might not vest indefeasibly until more than twenty-one years after the death of lives in being. At the time of the Supreme Court’s decision, the trust had already been in existence for thirteen years. The trust was void; thus, the estate would be distributed to the two sons under the laws of intestate succession.

With respect to nondonative future interests, Arkansas has considered cases involving options to purchase, options to repurchase, and rights of first refusal. The Supreme Court has held that an option to purchase, good for a year, with no limit on the number of years that it can be renewed, and binding on both parties, their heirs, successors, and assigns, is subject to the Rule and is invalid. One particularly harsh application of the Rule occurred in Otter Creek Development Co. v. Friesenhahn. The option was “negotiated at arms’ length between knowledgeable and experienced real estate developers.”

200. Id. at 665–67, 333 S.W.2d at 247–49.
201. Id. at 671, 333 S.W.2d at 251.
203. Dickerson, 268 Ark. at 293, 595 S.W.2d at 678.
204. Id. at 294, 595 S.W.2d at 678.
205. See supra text accompanying note 180 for an explanation of this scenario.
206. Arguing on the winning side on appeal, along with Sanford L. Beshear, was the late Robert Ross Wright III, the Donaghey Distinguished Professor of Law at this law school.
207. See generally Otter Creek Dev. Co. v. Friesenhahn, 295 Ark. 318, 750 S.W.2d 344 (1988) (option to purchase). But see Pults v. City of Springdale, 23 Ark. App. 182, 745 S.W.2d 144 (1988) (holding that the option to renew a lease “for successive terms of one year” that did not limit the number of times the option could be exercised was only good for one renewal).
208. 295 Ark. 318, 750 S.W.2d 344 (1988).
209. Id. at 323, 750 S.W.2d at 347 (Hays, J., dissenting).
acres, and it could be renewed indefinitely, but it would be terminated if not exercised within ninety days after the appellee received notice from the appellant that a building permit was available. The appellee had paid a total of $20,000 for the option over a period of five years, at which time the appellant made an about-face and argued that the Rule ought to void the option. The majority concluded that the grant of the permit might not occur until beyond the period of the Rule. In the dissent’s view, “these parties assumed the conditions of the option would occur within a reasonable time” and unsuccessfully argued for the application of estoppel.

In dictum, the Arkansas Supreme Court has stated that an option to repurchase, when an owner has conveyed to a buyer but reserves a right to initiate a purchase at a later date, may be subject to the Rule. In Broach v. Hampton, the City of Hampton acquired land from the Broaches for a sewer system. Three years later, the Broaches purchased some of the unused land back, but the city reserved a right of purchase, which the court characterized as a right of repurchase. Seventeen years later, after the death of the husband, the city sought to exercise its right. Ms. Broach refused to sell. The court discussed a Kentucky case holding that an option to repurchase violated the Rule, yet decided that the Rule did not apply to the case at bar because the option was personal and would not extend beyond the lives of the Broaches.

Some uncertainty may exist with respect to whether the Rule applies to rights of first refusal or pre-emptive options. The Supreme Court has stated in dictum that a right of first refusal does not fall under the Rule. In Estate of Johnson, one couple had sold land to another by means of an installment land contract. The sellers had contracted for a right of first refusal. The contract stated that in the event the purchasers decided to sell, the sellers would have an “option to purchase” at a price determined by appraisers.

210. Id. at 319–20, 748 S.W.2d at 345.
211. Id. at 323, 748 S.W.2d at 347.
212. Id. at 321, 748 S.W.2d at 345.
213. Id. at 323–24, 748 S.W.2d at 347.
215. Id. at 497, 677 S.W.2d at 853.
216. Id. at 498, 677 S.W.2d at 853.
217. Id.; 677 S.W.2d at 853.
218. Campbell v. Campbell, 230 S.W.2d 918 (Ky. 1950).
219. See generally Broach, 283 Ark. at 499, 677 S.W.2d at 854.
220. “We have not heretofore considered whether the rule against perpetuities should apply to pre-emptive rights[,] but we think the generally held and better view is that such rights should not violate the rule.” Estate of Johnson v. Carr, 286 Ark. 369, 370, 691 S.W.2d 161, 161 (1985) (internal citations omitted).
221. Id., 691 S.W.2d at 161.
222. Id., 691 S.W.2d at 161.
223. Id., 691 S.W.2d at 161.
Six years after the conveyance of the deed, the new owners decided to sell.\textsuperscript{224} The original owners attempted to exercise the right of first refusal.\textsuperscript{225} Rather than hold that the Rule applied, however, the court concluded that the right of first refusal was personal and did not run with the land.\textsuperscript{226} Thus, the right would terminate at the death of the couple.\textsuperscript{227} The court characterized the interest that the plaintiffs held as both an option to repurchase and a right of first refusal.\textsuperscript{228} However, since it was expressly contingent first upon the owners deciding to sell, most authorities would regard it as a right of first refusal, and not an option to repurchase.

Although options and so-called rights of first refusal are sometimes confused, there is a clear and classic distinction: an option must be accepted and then performed within the time limit specified, or if none is mentioned, then within a reasonable time, whereas a right of first refusal has no binding effect unless the offeror decides to sell.\textsuperscript{229}

The Arkansas Court of Appeals first considered the application of the Rule to a right of first refusal in 1991 in Silvicraft, Inc. v. Southeast Timber Co., Inc.\textsuperscript{230} The court held that the right of first refusal was personal to the holder and would not extend beyond the holder’s life.\textsuperscript{231} In 1998, however, in Nash v. Scott, the court of appeals held that a “repurchase option containing the right of first refusal” that could be exercised by a party, or her heirs and assigns, with no time limitation, was subject to the Rule and thus invalid.\textsuperscript{232} The court of appeals did not cite Estate of Johnson (the right of first refusal case) but rather Broach v. City of Hampton (the option to repurchase case).\textsuperscript{233} From the information about the interest at issue in Nash, it is not clear from the opinion whether the interest was an option to repurchase or a right of first refusal.

One intriguing application of the Rule occurred when a couple entered into an installment contract to buy a house, but the monthly payment under the contract was actually less than the interest.\textsuperscript{234} Consequently the purchasers and their successors in interest might have made payments for scores or even hundreds of years without violating their contract or acquiring a right

\begin{itemize}
  \item \textsuperscript{224} Id., 691 S.W.2d at 161.
  \item \textsuperscript{225} Id., 691 S.W.2d at 161.
  \item \textsuperscript{226} Estate of Johnson, 286 Ark. at 371, 691 S.W.2d at 162.
  \item \textsuperscript{227} Id., 691 S.W.2d at 162.
  \item \textsuperscript{228} Id. at 370, 691 S.W.2d 161.
  \item \textsuperscript{230} 34 Ark. App. 17, 805 S.W.2d 84 (1991).
  \item \textsuperscript{231} Id. at 20, 805 S.W.2d at 86.
  \item \textsuperscript{232} 62 Ark. App. 8, 10, 966 S.W.2d 936, 937 (1998).
  \item \textsuperscript{233} Id. at 11, 966 S.W.2d at 937.
  \item \textsuperscript{234} Comstock v. Smith, 255 Ark. 564, 564–65, 501 S.W.2d 617, 617 (1973).
\end{itemize}
to a conveyance of the property. Thus, the alienability of the title might be fettered for a period far beyond that allowed by the Rule. The Supreme Court affirmed the trial court's cancellation of the contract.

A trust provision stating that income was to be used to keep up the grave of the testator and his wife was also held to violate the Rule. If Arkansas followed the *cy pres* doctrine with respect to the Rule, the court could have reformed the provision to establish a cemetery for the purpose of the perpetual care of those buried in it. However, the court was limited to merely making this suggestion in dictum. Under the common law Rule, if an entire trust is found to be void, a resulting trust in favor of the settlor results. This is one of the most striking differences from USRAP, which will allow the trust to exist for as long as ninety years, at which point, if interests have not either vested or failed, on petition, a court will reform the trust to conform to the Rule yet carry out the settlor's wishes as closely as possible.

Indeed, many if not most Arkansas cases discussing the Rule hold that the Rule does not apply, either because there was no future interest created, the future interest at issue is a reversionary interest, the remainder is indefeasibly vested, the trust property was distributed and not

235. *Id.* at 566, 501 S.W.2d at 618.
237. *Union Trust Co.*, 108 Ark. at 557, 22 S.W.2d at 372.
240. *See generally* Cross v. Manning, 211 Ark. 803, 202 S.W.2d 584 (1947) (holding that a will stating that the testator's "parental family and descendants inherit" twenty acres, to be used for reunion purposes, and that the testator's nieces act as a committee in charge of the property, devised the property in fee simple to the testator's relatives, and no trust was created).
241. *See generally* Collins v. Church of God Prophecy, 304 Ark. 37, 800 S.W.2d 418 (1990) (concerning a possibility of reverter); Fletcher v. Ferrill, 216 Ark. 583, 227 S.W.2d 448 (1950) (holding that a conveyance that reserved a life estate in the grantor, then to a Masonic Lodge as long as the property was used for certain purposes, and when it ceased to be so used, to revert to the grantor's heirs, created a reversion to the grantor's estate rather than an executory interest in the heirs).
242. *See generally* Cotham v. First Nat'l Bank, 287 Ark. 167, 697 S.W.2d 101 (1985) (holding that a testamentary trust that directed the trust assets to named descendants did not violate the Rule); Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1950) (holding that an inter vivos trust that directed the trust assets to named beneficiaries at the death of the settlor did not violate the Rule); Farr v. Henson, 79 Ark. App. 114, 84 S.W.3d 871 (2002) (holding that an inter vivos trust that directed the trust assets to the settlor's nephew at her death did not violate the Rule).
left in the trust perpetually, the gift was charitable and not subject to the Rule, or the contingent or executory interest would vest at or within twenty-one years after the death of the life beneficiary. The Arkansas Supreme Court has held that not only an oil and gas interest, but also a royalty interest in oil and gas, are present interests and thus, not subject to the Rule, even if no oil and gas are being produced at the time of the conveyance. A covenant running with the land does not violate the Rule. An agency contract to sell property does not fall under the Rule because it does not grant an interest in the property.

In a case falling into the "slothful executor" category, the Arkansas Supreme Court has declined to carry the Rule to an absurd extreme. In Myers v. Hardin, the testator appointed a trustee to distribute her estate as she had directed, "as soon as possible." Heirs of the testator argued that such trust violated the Rule because there was no guarantee that the distribution would take place within the period of the Rule. The court held that regardless of whether a trust was created, the will did not violate the Rule because "as soon as possible" means "with due diligence and without unnecessary

244. See generally Bakos v. Kryder, 260 Ark. 621, 543 S.W.2d 216 (1976); Garrett v. Mendenhall, 209 Ark. 898, 192 S.W.2d 972 (1946) (holding that a devise to the trustees of a church was a charitable devise, not subject to the Rule); Biscoe v. Thweatt, 74 Ark. 545, 86 S.W. 432 (1905); Grissom v. Hill, 17 Ark. 483 (1856).
245. See generally Dickson v. Renfro, 263 Ark. 718, 569 S.W.2d 66 (1978); Carroll v. Robinson, 248 Ark. 904, 454 S.W.2d 329 (1970); Lytle v. Zebold, 227 Ark. 431, 299 S.W.2d 74 (1957); Fleming v. Blount, 202 Ark. 507, 151 S.W.2d 88 (1941) (upholding a devise that forbade the division or sale until eleven years after the testator’s death); Cribbs v. Walker, 74 Ark. 104, 85 S.W. 244 (1905) (holding that a deed conveying property in trust to a life beneficiary and then to her children and her descendants would vest in her surviving descendants at her death); Moody v. Walker, 3 Ark. 147 (1840) (holding that a will devising two slaves, one each to A and B, but if either died without issue, then that slave to go to the survivor, was valid under the Rule because the interest would either become possessory or fail at the deaths of A and B).
246. See generally Schnitt v. McKellar, 244 Ark. 377, 427 S.W.2d 202 (1968); Hanson v. Ware, 224 Ark. 430, 274 S.W.2d 359 (1955); see also generally Bruce M. Kramer, Modern Applications of the Rule Against Perpetuities to Oil and Gas Transactions: What the Duke of Norfolk Didn’t Tell You, 37 NAT. RESOURCES J. 281 (1997) (discussing how courts have treated the Rule in the context of various types of oil and gas interests).
248. See generally Morning Star Mining Co. v. Bennett, 164 Ark. 244, 261 S.W. 639 (1924) (holding that a contract granting A the sole right to sell mining property, but not fixing a time limit for the performance, was not void under the Rule because A would have to proceed within a reasonable time, and her authority would end with her death).
249. 208 Ark. 505, 186 S.W.2d 925 (1945).
250. Id. at 511, 186 S.W.2d at 928.
delay in the circumstances, and certainly within the lifetime of the trustee."

No Arkansas case has considered the Rule with respect to powers of appointment. Arkansas has not considered the Rule as applied to the validity of powers themselves, the validity of the exercise of powers, or the second-look doctrine. Nor has any Arkansas case discussed infectious invalidity, separability, specific sum or subclass doctrines, which are all exceptions to the all-or-nothing rule. Although Arkansas has recognized and applied the common law Rule, it has not considered the Rule in its full depth or breadth.

IV. UNIFORM STATUTORY RULE AGAINST PERPETUITIES

The Uniform Statutory Rule Against Perpetuities was adopted by the National Conference of Commissioners on Uniform State Laws in 1986. It was unanimously endorsed by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers. The drafters of the USRAP sought to preserve the policy underlying the common law Rule, yet avoid its most egregious extremes. The USRAP keeps the common law Rule and reforms it in two ways: by adding a ninety-year wait-and-see element and a "deferred-reformation element." Thus, if an interest is invalid under the common law Rule, it is re-examined ninety years after its creation. At that time, if it is still invalid, a court must reform the instrument. The USRAP is short—only six sections long. It does not require lawyers to modify their current practices or to learn anything new in the way of perpetuities analysis. In 1990, USRAP was incorporated into sections 2-901 through 2-906 of the Uniform Probate Code. As a result, there are two different sets of official comments to

251. Id., 186 S.W.2d at 928.
252. See supra text accompanying note 165, 195. The separability doctrine states that when an interest is subject to alternative contingencies, the holder of the interest is treated as though there were two interests. Even if the interest is invalid under one contingency, if it is valid under the other, it is regarded as valid. The specific sum doctrine states that if a specific sum is to be paid to each member of a class, each member's interest will be treated separately—in other words, the usual "all or nothing" rule for a class will not apply. Finally, the subclass doctrine states that if a class can be divided into subclasses, (e.g., "the children of each of my children," rather than "my grandchildren"), each subclass can be considered separately to determine whether its interests are valid under the Rule. UNIF. STAT. RULE AGAINST PERPETUITIES § 1, cmt. H, Subsidiary Common-Law Doctrines: Whether Superseded by This Act, 8B U.L.A. 255–58 (2001).
254. The full text of USRAP as enacted in Arkansas is reproduced in Appendix A, infra. Arkansas made no changes to the uniform act's text.
255. Waggoner, supra note 253, at 592.
USRAP—the comments published with the stand-alone act in 1986 and those that accompany the act as a part of the Uniform Probate Code.\textsuperscript{256}

Arkansas Code section 18-3-101(a)(1) restates the common law Rule and invalidates a "nonvested property interest"\textsuperscript{257} unless it will be certain to vest or terminate no later than twenty-one years after the death of an individual alive at its creation (the common law Rule). But, section 18-3-101(a)(2) saves the interest if it will vest or terminate within ninety years after its creation.

**Example 14:** T devised Blackacre "to A for life, then to A's children who reach the age of twenty-five." At T's death, A has two children, ages five and ten. A's children have contingent remainders. They must reach the age of twenty-five in order for their interests to vest indefeasibly. In addition, A may have more children, thus adding more members to the class. Consequently, at A's death, the class of children will not be indefeasibly vested. The latest this could occur, if A had a child the day of his death, would be twenty-five years after A's death. Most likely, A will not live to exceed 100 years old and adopt a child the day before his death. Therefore, the remainder to A's children will almost certainly be valid under section 18-3-101(a)(2) because it will either vest or terminate within ninety years of T's death.

In the previous example, even if great advances in anti-aging medicine occur and it becomes likely that A not only will live to be 150 but will also have a child at such an advanced age, nonetheless, a petitioner challenging the will on the grounds that it violates USRAP will have to wait ninety years to bring a lawsuit. Some commentators believe that such suits will be "grand" lawsuits "from which the attorneys involved will profit more than

\textsuperscript{256} Both sets of comments are available on the Internet. The original comments, which are far more extensive and helpful, are available at http://www.law.upenn.edu/bll/ucl/fnact99/1990s/usrap90.htm (last visited Apr. 22, 2007). They are also printed with the text of USRAP in volume 8B of Uniform Laws Annotated. The more brief Uniform Probate Code comments are available at http://www.law.upenn.edu/bll/ucl/upc/final2005.htm (last visited Apr. 22, 2007).

\textsuperscript{257} ARK. CODE. ANN. § 18-3-101(a)(1) (2003). Vested and nonvested property interests under USRAP are identical to those under the common law Rule. Vested property interests are reversionary interests, indefeasibly vested remainders, and vested remainders subject to divestment. Nonvested property interests are contingent remainders, vested remainders subject to open, and executory interests.
any of the parties."\textsuperscript{258} The opposing argument is "who will challenge a gift at the end of ninety years?"\textsuperscript{259}

As gifts with age contingencies in excess of twenty-one years are no longer automatically invalidated by the Rule, donors may well begin to increase the age limits of such contingencies. After all, when we think of our own children, how many of us would not prefer them to reach the age of thirty, rather than of eighteen or twenty-one, before gaining control over property, especially if large amounts of property are at issue?

USRAP will also allow more gifts to generations further removed from donors, as seen in the following example.

\textbf{Example 15:} \textit{T} devised Blackacre to his wife \textit{W} for life, then to \textit{T}'s children for their lives, then to \textit{T}'s grandchildren for their lives, then the remainder to \textit{T}'s great-grandchildren. At \textit{T}'s death, he is survived by \textit{W}, age 80, two children \textit{A} and \textit{B}, ages fifty-five and fifty, three grandchildren \textit{C}, \textit{D}, and \textit{E}, ages thirty-five, thirty, and twenty, and two great-grandchildren \textit{F} and \textit{G}, ages ten and five. \textit{Under the common law Rule, the great-grandchild's vested remainder subject to open would be void. It cannot vest indefeasibly until the deaths of all of \textit{T}'s grandchildren, and more grandchildren could be born after \textit{T}'s death, so the class of grandchildren will not work as validating lives. The last grandchild could die more than twenty-one years after the death of the last survivor of \textit{T}'s children, so the children cannot be validating lives for the great-grandchildren either. \textit{Under the USRAP, however, the interest of the class of great-grandchildren cannot be declared invalid for ninety years after \textit{T}'s death, by which time they may well have vested indefeasibly. It is unlikely that \textit{A} and \textit{B} will have more children and that \textit{C} will live to exceed the age of 110. Even if the great-grandchildren's interest remains nonvested at that time, on petition a court can close the class and reform the instrument to say "the remainder to \textit{T}'s great-grandchildren born within ninety years of \textit{T}'s death."}

Section 18-3-101(a) validates almost all cases of the fertile octogenarian, unborn widow, precocious toddler, magic gravel pit, and slothful executor.\textsuperscript{260}


\textsuperscript{259}. \textit{Id.}; see also generally Jesse Dukeminier, \textit{supra} note 23, offering a scathing criticism of the ninety-year wait-and-see period.
Section 18-3-101(b) deals with general powers of appointment not presently exercisable because of a condition precedent.\textsuperscript{261} Such a power of appointment is invalid in the same types of circumstances, either because the condition precedent will be satisfied or not within twenty-one years of the death of an individual alive at the time of its creation, or because the condition precedent will be satisfied or not by the time ninety years have passed.

**Example 16:** \( T \) devised Blackacre "to my son \( A \) for life, then to \( A \)'s youngest daughter for life, then to such persons, including her or her estate, as she shall appoint after reaching the age of thirty." At \( T \)'s death, \( A \) has one son. Here, \( A \)'s youngest daughter, who is unborn when the power is created, has a general, nontestamentary power of appointment subject to the condition precedent of living to age thirty. The power fails the test of section 18-3-101(b)(1) because \( A \) could have a daughter the day before he died, who would not reach the age of 30 within the Rule's period—twenty-one years after \( A \)'s death. However, under 1(b)(2), the validity of the power is in abeyance for ninety years, during which time the daughter will either be born and reach the age of thirty, or not.

Section 1(c) deals with nongeneral powers and general, testamentary powers. They are invalid unless they are certain to either be exercised or to terminate within the common law Rule period, or unless they are exercised or terminate within ninety years of their creation.

**Example 17:** \( S \) created an irrevocable trust that pays income to her children for their lives, then at their deaths the assets to such appointees as they may devise. These general powers of appointment are invalid under section 18-3-101(c)(1) because \( S \) could have another child, born after the interest is created (the time when the trust was created) who does not die until more than twenty-one years after \( S \) and her children living at the time the trust was created have all died. However, under section 18-3-101(c)(2), their validity is held in abeyance until ninety years after the creation of the trust. If the deaths of all the children have occurred by then, then the gift is valid because either the powers will have been exercised or will have terminated.


\textsuperscript{261} Presently exercisable general powers of appointment that are not subject to a condition precedent are not subject to USRAP. They are the virtual equivalent of a fee simple. See Unif. Stat. Rule Against Perpetuities § 1 cmt. D, sections 1(b)(1) and 1(c)(1): Powers of Appointment that Are Initially Valid, 8B U.L.A. 246–48 (2001).
Section 18-3-101(c) also applies to fiduciary powers of appointment, those exercised by the trustee, as in the following example.  

**Example 18:** S devised property in trust, directing the trustee to accumulate the income or to pay all or a part of it to S's only child A during her lifetime, then after A's death, to accumulate the income or to pay all or a part of it in equal or unequal shares among A's children until the death of the last survivor, and then to pay the principal and remaining income to A's grandchildren and their heirs per stirpes. Under the common law Rule set out in section 18-3-101(c)(1), the trustee's power would become invalid twenty-one years after the death of the last to survive of A and any of her descendants alive at S's death. However, under section 18-3-101(c)(2), we must wait until ninety years have passed from S's death before declaring the trustee's power invalid. Then, according to the Official Comment, they become invalid only if exercised beyond the end of ninety years. There is no retroactive invalidity. In addition, if the powers do become invalid at the end of the ninety years, a court must reform the instrument.

Another aspect of powers of appointment under USRAP is the validity of the exercise of a power of appointment. As the Official Comment points out, just because a power of appointment itself is valid does not mean that its exercise in a particular case is valid. If the power is a presently exercisable power, the time of creation of any interests or powers created by the power is when the power is exercised. USRAP follows the common law Rule here, as seen in the following example.

**Example 19:** S devised property in trust, directing the trustee to pay income to A for life. A also had a presently exercisable power of appointment over the remainder interest. A, by deed, directed the trustee after A's death to pay income to A's children for their lives, and at the death of A's last surviving child, to pay the principal to A's grandchildren. As the comment points out, the validity of A's power of appointment is clear. A's presently exercisable, general power of appointment is not even subject to USRAP. However, what about A's exercise of the

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263. *Id.*


power? In the case of the creation of future interests or powers of appointment by one holding a presently exercisable power of appointment, the period of the Rule runs from the exercise of the power. Here, that is when the deed was delivered to the trustee. Since the deed was irrevocable, the future interests created by it must vest or fail within twenty-one years after the death of the last of A and his issue alive when the deed was delivered. A was alive, thus A could have more children afterward. And, the vesting date (the death of A's last child) could occur out past the common law Rule's time limit. However, under section 18-3-101(a)(2), the validity of A's exercise of the power will be indeterminable for ninety years, and at the end of the time, a court may reform the disposition.\(^{266}\)

If, however, the power of appointment creating a future interest or power of appointment is a general, testamentary or nongeneral power of appointment, to determine the validity of the interest or power that has been created by its exercise, under USRAP, just as under the common law Rule, the time period starts to run when the initial power of appointment was created.\(^{267}\) However, USRAP gives us an additional ninety years in which to see whether the interest will vest or fail, or the power will have to be exercised or will terminate.\(^{268}\)

**Example 20:** S devised property in trust, directing the trustee to pay income to her children for their lives, then at their deaths the principal to such appointees as the children may devise. One of S's children, A, creates a testamentary trust with his power and devises his share of the trust principal so that its income goes to his children for life, with the remainder to his grandchildren. At S's death, A had one child, B. Here, A's power of appointment is valid. A himself is the validating life. He was alive at the creation of the power, and he must exercise the power by his death. His exercise of the power violates the common law Rule, however, because the remainder interest in the trust created by A “relates back” to the date of the creation of A's power of appointment, under section 18-3-102. However, the wait-and-see provision in section 18-3-101(a)(2) holds off on the determination of validity for ninety years after S's death to see whether all of A's children have died by then, and the class of grandchildren has become indefeasibly vested.\(^{269}\)


\(^{267}\) Id. at 249.

\(^{268}\) See id. at 250, 251.

\(^{269}\) Id. at 250.
There are three certainties in the world of the Rule: everyone dies; everyone can have children while alive; and no one can have children after one’s death (other than the normal period of gestation, which the Rule includes). Section 1(d)’s purpose is to preserve the third certainty. Section 1(d) curbs the effect that modern medical science has on the Rule by declaring that the possibility that a child can be born to an individual more than the normal gestation period after the individual’s death is to be disregarded. Section 18-3-101(d) can be illustrated by the following example.

Example 21: T devised Blackacre to A for life, then to A’s children. In the world of the common law Rule, no children can be born to A more than the normal gestation time after A’s death. But, what about today’s world, where the possibilities of frozen sperm and frozen embryos make it entirely possible that A’s child could be born thirty years after A’s death? This could destroy one of the essential components of the Rule. Section 18-3-101(d) allows the law to disregard the possibility of afterborn children when applying the Rule. Under section 18-3-101(d), A can continue to be a validating life for his children’s interests.

Note that USRAP does not address the legal status of children conceived after death. Nor does USRAP affect the common law Rule that a child in gestation, or en ventre sa mere, who is born alive, is regarded as legally alive at the commencement of gestation. 270

Section 18-3-101(e) applies to certain types of savings clauses. Savings clauses are used to avoid the inadvertent violation of the Rule. Though they are standard inclusions in wills and trusts, the drafting of them is not without risk. 271 Section 18-3-101(e) was added in 1990, four years after the adoption of USRAP, to solve problems that certain types of savings clauses would create if used in USRAP jurisdictions with certain types of trusts. Simply put, the IRS was not happy with the possibility that savings clauses could use alternate time periods, either the common law period or the ninety-year period of USRAP. The solution was section 18-3-101(e), which limits a two-pronged savings clause that seeks to use either the common law Rule period or the ninety-year period to the common law Rule period. 272 The draf-

271. See infra text accompanying notes 316–17 for more discussion of savings clauses.
272. Briefly, when USRAP was adopted, even though it was not retroactive in general, it allowed grandfathered trusts to take advantage of USRAP if the trusts authorized holders of nongeneral powers of appointment to exercise the powers after the effective date of USRAP. Dukeminier referred to this as the “tax trap” of USRAP. For a more detailed explanation, see Unif. Stat. Rule Against Perpetuities § 1 cmt.G, Section 1(e): Effect of Certain “Later-
ters of USRAP intended that attorneys would continue to use their already-existing savings clauses. For those attorneys who modify them, seeking to maximize the benefit of the ninety-year period under USRAP, section 1(e) is intended to save their clients from unintended tax consequences.

**Example 22:** S devised property in trust. The savings clause stated that "notwithstanding any other provision in this instrument, this trust shall terminate, if it has not previously terminated, twenty-one years after the death of my last surviving child, or ninety years after my death, whichever is later." *This savings clause is subject to section 18-3-101(e) and thus, the ninety-year clause will be inoperative. S could use either provision by itself, but not the later of the two.*

Section 18-3-102 states that the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law. These are not stated in section 18-3-102, but some of them are in the official comment. Interests and powers created by a will, testamentary trust, or revocable trust become effective at the death of the testator and not at the execution of the will or trust. Interests and powers created by a deed or inter vivos, irrevocable trust are created when the transfer becomes effective, either at the delivery of the deed or the funding of the trust. Interests and powers created by a presently exercisable, general power of appointment are deemed created at the exercise of the power. However, interests and powers created by a general, testamentary power or a nongeneral power are deemed created when the general, testamentary power or nongeneral power was created, not when it was exercised.  

Section 2(b) provides that if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest or interest subject to a power of appointment (e.g., a settlor of a revocable inter vivos trust), then the time of creation of the interest or power is postponed until the power to become the unqualified, beneficial owner ceases to exist (e.g., when the trust becomes irrevocable), as demonstrated by the following example.

**Example 23:** T created a revocable, inter vivos trust, directing the trustee (T) to pay income to himself, T, for life, then to T's son A for life, then to A's children until the death of the last surviving child who was living at T's death, then the corpus to be distributed to A's then-living...
descendants per stirpes. A's children's vested remainder subject to open and the contingent remainder in A's descendants are not created until T's death, when the trust becomes irrevocable.

Other examples involving such situations as powers in unborn children, partial powers, and incapacity in the donee of the power are set out in the comment.\textsuperscript{274}

Section 2(c) sets the creation of a nonvested interest or power of appointment that arises from a transfer of property to a previously funded trust or other existing property arrangement at the point when the original contribution was made. The following example illustrates its operation.

**Example 24:** In 1995, S created an irrevocable, inter vivos trust with life income to S, remainder to his daughter, A, for life, then to A's children, funding it with $1 million. In 2000, when the value of the corpus had risen to $1.5 million, S added $500,000 to the trust. S died in 2005. S's pour-over will distributed the residue of his estate (worth $500,000) into the trust. Section 18-3-102(c) makes 1995 the date that A's and A's children's interests were created with respect to the entire $2.5 million.

Section 18-3-103 is the reformation, or "cy pres," provision of USRAP. This section provides that if an interested person petitions a court, it "shall" reform a disposition so that it vests within ninety years and as nearly as possible carries out the intent of the donor. A court has the power of reformation in three situations. First, a court will reform a disposition if a property interest or power of appointment subject to USRAP becomes invalid.

**Example 25:** S devised property in trust and directed the trustee to pay the income "to A for life, then to A's children until the death of the last surviving child, then to A's grandchildren until the death of the last surviving grandchild, and on the death of that grandchild, the corpus of the trust is to be divided among A's surviving descendants per stirpes, otherwise to the Humane Society." At S's death, she was survived by one child, A, and by A's child, B. After S's death, A had another child, C. At A's death, A was survived by B, C, and two grandchildren, D and E. Four interests are subject to USRAP: the vested remainder subject to open in A's children, the contingent remainder in A's grandchildren, the alternate, contingent remainder in A's surviving descendants, and the alternate, contingent remainder in the Humane Society. A's children's nonvested interest is valid under section 1(a)(1) of USRAP,

as it would be under the common law Rule. If A and all of A's children have died by the ninetieth anniversary of S's death, then A's grandchildren's nonvested interest will be valid under section 1(a)(2), the ninety-year wait-and-see period. If, however, some of A's grandchildren are still alive at the ninetieth anniversary of S's death, then the two alternate, contingent remainders are invalid under USRAP. The Official Comment suggests that a court would reform the disposition by closing the class of A's descendants as of the ninetieth anniversary of S's death, changing the disposition to "then to S's grandchildren for life, and at the death of S's last surviving grandchild, to the descendants of S alive at the ninetieth anniversary of S's death, per stirpes." There is no need for the alternate, contingent remainder to the Humane Society because we already know that S has living descendants at the ninetieth anniversary of her death. Their interests vested indefeasibly at that time. Even if no one survives the deaths of the grandchildren, their estates will receive the corpus, per stirpes.\textsuperscript{275}

Second, a court will reform a disposition if a class gift is not yet invalid but might become so, and the time has come when the share of one member of the class is to take effect in possession or enjoyment. This situation will probably arise most often in an age-contingency situation.

Example 26: S devised property in trust, directing the trustee to pay income "to A for life, then to A's children, the corpus of the trust to be equally divided among A's children who reach the age of thirty-five." S was survived by A, age twenty-five, and by A's child B, who was five years old when S died. Here, A's child B and any yet-to-be-born children of A have contingent remainders. The official comment reminds us that at common law, and so also under USRAP, the interests of every class member must be valid or the class gift is totally invalid. Suppose that sixty years after S's death, A was still alive and feeling spry enough to adopt the newborn C. The child, C, would not reach the age of thirty-five until ninety-five years after S's death. A died 5 years later, sixty-five years after S's death. B is now seventy. C is only 5. C may die before reaching the age of 35, or may still be alive but not yet thirty-five, on the ninetieth anniversary of S's death, in which case under section 18-3-101(a) the class gift is invalid. Under section 3, a court may reform S's disposition so that it reads "to A's children who reach the age of thirty." This reformation validates the class gift. B may take

one-half of the corpus. If C reaches the age of thirty, C will take the other half; if not, B will get it.\textsuperscript{276}

Note that in the preceding example, the court would not wait out the ninety-year period to reform the trust.

Third, a court will reform a disposition if a property interest that is invalid under section 18-3-101(a)(1) can vest but not within the ninety-year period. In this situation, a court is also required to reform the disposition before the end of the ninety-year period.

**Example 27:** In a holographic will, S devised property in trust, directing the trustee to divide the income, per stirpes, among S's descendants, on an annual basis, for 100 years. At the end of that time, the trustee is to distribute the corpus to S's then-living descendants per stirpes, otherwise to the Nature Conservancy. Here, S's descendants have an alternate, contingent remainder that cannot vest for 100 years after S's death. (Note that it could fail earlier than 100 years, if S's descendants died out.) This remainder is invalid under USRAP. Section 18-3-103 allows the court to reform the instrument. The comment suggests changing the 100-year period after S's death to ninety years.\textsuperscript{277}

Section 18-3-104 excludes certain interests from its coverage, including the following:

**Nonvested property interests or powers of appointment arising out of a nondonative transfer.** For decades scholars criticized the majority rule that the Rule applied to options to purchase, options to repurchase, and rights of first refusal in commercial contexts. These are not subject to USRAP. However, if they arise in a familial context, in the context of divorce, spousal election, or a contract to make a will, then that brings them under USRAP. Also, the comment points out that the presence of consideration does not necessarily make a transfer nondonative.\textsuperscript{278}

**Fiduciaries' powers relating to the administration or management of assets.** The official comment distinguishes between purely administrative powers, such as the power to sell and reinvest trust assets, which are excluded from USRAP coverage, and distributive fiduciary powers, such as


the power to invade the corpus, which is a nongeneral power of appointment and is covered by USRAP.\textsuperscript{279}

\textbf{Power to appoint a fiduciary.} Such a power is not subject to USRAP.\textsuperscript{280}

Trustee's Discretionary Power to Distribute Principal to an Indefeasibly Vested Beneficiary Before Trust Termination. This is an exception to the general rule that discretionary power of the trustee to distribute trust property falls under USRAP.\textsuperscript{281}

Charitable or Governmental Interests Preceded by Charitable or Governmental Interests. This exception preserves the common law Rule's exclusion of charitable interests.

However, note that a charitable interest in conjunction with a noncharitable interest is still subject to the Rule.\textsuperscript{282}

\textbf{Example 28:} \textit{S} devised property in trust "to \textit{A} for life, then to \textit{A}'s children for life, then to the UALR Bowen School of Law." At \textit{S}'s death, \textit{A} is alive. \textit{The School of Law's interest is subject to USRAP. Since it is not valid under the common law Rule, it will be subject to the ninety-year wait-and-see period.}

\textbf{Example 29:} \textit{S} devised property in trust "to the Red Cross, but when the Cubs win the World Series, then to the UALR Bowen School of Law." \textit{Here the executory interest of the law school follows a charitable interest. It is not subject to USRAP.}

\textbf{Trusts for Employees and Self-Employed Individuals.} These are excluded from USRAP, but the exclusion does not extend to "a nonvested property interest or a power of appointment created by an election of a participant or beneficiary or spouse."\textsuperscript{283}

\textbf{All of Those Reversionary Interests You Had to Memorize in Law School.} Just as under the common law Rule, reversions, rights of entry, and possibilities of reverter are excluded from coverage of USRAP.\textsuperscript{284}

Section 5 makes USRAP prospective, but with two important exceptions. First, if an already-existing trust gives a power of appointment to a donee, and the donee exercises it by creating a nonvested interest or power of appointment after the effective date of USRAP, the new interest or power is covered by USRAP.

\begin{itemize}
  \item \textsuperscript{279} Id. at 281–82.
  \item \textsuperscript{280} Id. at 282.
  \item \textsuperscript{281} Id.
  \item \textsuperscript{282} Id. at 282–83.
  \item \textsuperscript{283} Id. at 283.
  \item \textsuperscript{284} UNIF. STAT. RULE AGAINST PERPETUITIES § 4 cmt. 8B U.L.A. 283 (2001).
\end{itemize}
Example 30: S devised property in trust, "to A for life, then the corpus as A may appoint by will, otherwise to Greenpeace." S died in 1990. S's state enacted USRAP in 2000. In 2005, A died, exercising the power of appointment to devise the corpus in trust, paying "income to B for life, then at B's death, the corpus to be distributed to B's children." The exercise of A's power is covered by USRAP. USRAP will apply as to whether A's power is valid and whether the exercise of A's power is valid.285

Second, if in a judicial proceeding commenced after the effective date of USRAP, an interest or power created before the effective date of USRAP is determined to violate prior state perpetuities law (in Arkansas, the common law Rule), then if an interested person petitions a court, it "may" reform the disposition to make it conform with the common law Rule.286

Although sections 18-3-106 and -107 are not important to this discussion, section 18-3-109 notes that USRAP supersedes the common law.287 USRAP restates the common law Rule, provides a "safety net" in the form of wait-and-see and mandatory cy pres, and exempts interests that are not connected with donative transfers. It preserves the advantages of the Rule while attempting to cure its deficiencies.

V. THE EFFECT OF THE USRAP ON CURRENT ARKANSAS LAW

The Constitutionality of USRAP. Possibly the first issue to be decided with respect to what effect USRAP will have on Arkansas law is whether it is constitutional. Article 2, section 19 of the Arkansas Constitution states that "[p]erpetuities and monopolies are contrary to the genius of a republic and shall not be allowed; nor shall any hereditary emoluments, privileges[,] and honors ever be granted or conferred in this [s]tate." The Supreme Court has stated that the Constitution prohibits perpetuities "but does not describe them."288 The Arkansas Supreme Court has interpreted this constitutional provision to mean that the common law Rule applies in Arkansas.289 Can the legislature validly enact a statutory version of the Rule? Al-

285. Id. at 286–87.
286. Id. at 287–89.
289. Id., 750 S.W.2d at 345.
most certainly, yes. Arkansas statutes are presumed to be constitutional. Before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear. The "heavy burden" as to the constitutionality of a statute is on the party attacking it. In fact, if it is possible to construe a statute as constitutional, the Supreme Court must do so. If the constitutionality of the statute were challenged, the Supreme Court has stated that it will consider whether there is "any rational basis" that demonstrates the "possibility of a deliberate nexus" with state goals proving that the legislation is not a product of "arbitrary and capricious government purposes." If the Supreme Court determines that such a rational basis exists, then USRAP would withstand a constitutional challenge. Arkansas certainly has a rational basis in enacting a statute that will cure deficiencies of the common law Rule and allow courts to better carry out the intent of donors.

The same constitutional provision that forbids perpetuities also forbids monopolies. However, the legislature enacts statutes regulating monopolies. For example, one of the Arkansas Unfair Trade Practices Act's purposes is to "safeguard the public against the creation or perpetuation of monopolies." This purpose has been cited with approval; the legislature's right to regulate monopolies has been upheld and held constitutional by the Arkansas Supreme Court. In fact, the legislature is allowed to create and regulate monopolies to a limited extent, most notably in the arena of public utilities. There would seem to be no logical reason to allow statutory regulation of monopolies but not of perpetuities.

If we examine the experience of sister states, eight states other than Arkansas—Arizona, Montana, Nevada, North Carolina, Oklahoma, Tennessee, Texas, and Wyoming—have constitutional provisions prohibiting perpetuities. All but those of Arizona, Montana, and Nevada are virtually identical to that of Arkansas. Every one of these states except for Oklahoma and Texas (which both have modified the common law Rule with cy

291. Id., 214 S.W.3d at 230.
292. Id., 214 S.W.3d at 230.
295. Id., 208 S.W.3d at 169.
300. See discussion infra app. B (presenting the texts of these statutes).
pres provisions) and Wyoming (which has the common law Rule with the exception of 1000-year trusts) has enacted the Uniform Statutory Rule Against Perpetuities.301 In none of these states has the constitutionality of USRAP been raised. In all of them, USRAP is on the books and functioning.302

Another question concerns "nondonative, nonvested interests" excluded from the Rule—such as options to purchase and options to repurchase—some of which Arkansas has clearly ruled are subject to the common law Rule.303 Will these interests continue to be measured against the common law Rule? Can it be successfully argued that the common law Rule still exists as to them? The correct decision is no. USRAP expressly excludes these interests from its coverage, and USRAP supersedes the common law Rule. Thus, with the enactment of USRAP, no part of the common law Rule will exist, and options to purchase, options to repurchase, and rights of first refusal will no longer fall prey to the common law Rule, nor will they be affected by USRAP, unless they are part of a donative transfer. The official comment to section 4 states as follows: "Since the Common-law Rule Against Perpetuities is superseded by this Act . . . , a nonvested property interest, power of appointment, or other arrangement excluded from the Statutory Rule by this section is not subject to any rule against perpetuities, statutory or otherwise."304 This is the result reached by other states that have considered the issue post-USRAP adoption.305 It can be argued that, since Arkansas's constitution prohibits perpetuities, any interest not covered by USRAP is still covered by the constitutional provision. This question has not been decided by the courts in USRAP states whose constitutional provisions forbid perpetuities. However, in addition to the clear intent behind USRAP, statutory rules of construction also argue for such a result. General legislation in which exceptions are "minutely described," as they are here,306 indicates a legislative intent that the statute should replace the whole of the common law.307

What law would then apply to the duration of options, rights of first refusal, and the like? If they are personal, they terminate at the death of the holder. If they are not personal but can be assigned, the modern trend is that

301. See discussion infra app. B (containing information on each state).
302. USRAP was originally enacted in Arizona but heavily amended later to allow perpetual trusts. See discussion infra app. B (detailing Arizona's actions).
303. See supra text accompanying notes 220–32.
305. See supra text accompanying notes 220–32.
rights of first refusal are subject to the rule of unreasonable restraints on alienation.\textsuperscript{308} Options to purchase, like terms in a contract for sale, would be construed to be performed within a reasonable time, based on the intent of the parties.\textsuperscript{309}

Another question involves the petition by "interested parties" to reform a disposition under USRAP. "Interested persons" is not defined in USRAP but is instead in the Uniform Probate Code, section 1-201(23), which is not law in Arkansas. The UPC definition includes "heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against [the] estate," as well as "persons having priority for appointment as personal representative, and other fiduciaries representing interested persons."\textsuperscript{310} Arkansas's probate statutes contain a definition of "interested persons." It is narrower than that of the UPC, including only heirs, devisees, spouses, creditors, or others having a property right, interest in, or claim against the estate being administered, and fiduciaries.\textsuperscript{311}

USRAP's greatest benefit is that it relieves the harshness of the Rule in two ways: by providing a mandatory, ninety-year wait-and-see period, and at the end of the period, or before if necessary, by requiring courts to reform provisions that violate the Rule. USRAP will bring a kinder, gentler Rule to Arkansas. It offers more certainty to the drafter, providing her with a "safety net," and it will help to effectuate, rather than hinder, the intent of testators and settlors. It should also reduce litigation over possible Rule violations. As Appendix B indicates, in those states that have enacted USRAP, considering all of them together, there have been only a handful of perpetuities cases in the succeeding years.

One of the criticisms of the wait-and-see aspect of USRAP is that it "puts property interests in abeyance—no one [can] determine whether an interest [is] valid or not."\textsuperscript{312} As Waggoner points out, however, USRAP merely adds an additional contingency to already-contingent interests, but then specifies a time limit within which they must vest.\textsuperscript{313} "[O]nly the status of the affected future interest in the trust or other property arrangement is deferred. In the interim, the other interests, such as the interests of current income beneficiaries, are carried out in the normal course without obstruction."\textsuperscript{314}

\textsuperscript{308} Jesse Dukeminier, \textit{A Modern Guide to Perpetuities}, 74 CAL. L. REV. 1867, 1908 (1986).
\textsuperscript{309} \textit{Id.} at 1909–10.
\textsuperscript{310} UNIF. PROB. CODE § 1-201(23) (1990).
\textsuperscript{311} ARK. CODE ANN. § 28-1-102 (a)(11) (LEXIS Repl. 2004).
\textsuperscript{312} Waggoner, \textit{supra} note 253, at 573.
\textsuperscript{313} \textit{Id.}
\textsuperscript{314} \textit{Id.}
Possibly the greatest benefit to estate planners already skilled in the Rule is that USRAP requires no new learning.315 However, drafters should be aware that their savings clauses should not contain the "later-of" provisions forbidden by section 1(e).316 Examples of simple savings clauses, any of which will work under USRAP, are the following: (1) "notwithstanding any provision to the contrary, this trust shall terminate, if it has not already terminated, twenty-one years after the death of the survivor of the beneficiaries of the trust living at the date this instrument becomes effective,"317 (2) "twenty-one years after the death of my last surviving child," or (3) "ninety years after my death." To avoid litigation outside of USRAP, drafters should also specify termination dates for options to purchase and rights of first refusal.

VI. CONCLUSION

"The wheel's still in spin,"318 but what changes in tax law and other factors have wrought so far is basically the withdrawal of trusts from the coverage of the Rule in about half of the states. How far will this trend go? Can we expect unanimous abolition of the Rule at some point in the not-so-distant future? Probably not. First, Congress may do away with the GST tax exemption, which would remove the major incentive to establish perpetual trusts. Second, nine states have constitutional provisions prohibiting perpetuities, although Arizona has nonetheless allowed perpetual trusts, and Wyoming has allowed 1000-year trusts.319 What is the opinion of the average citizen? The only answer to this was stated in Nevada, where the populace voted strongly against repeal of the Rule.320

This trend has greatly complicated the area of perpetuities law, which has veered away from the uniformity sought by reformers in the form of USRAP. Arkansas has chosen to enact USRAP, joining the company of one-third of the states and benefiting from a twenty-year-old statute that retains the benefits of the common law Rule while ameliorating its defects. USRAP will improve Arkansas law. Even so, given the liquidity of most trust assets,
the increasing trend of settlers to "shop around," and the variation in perpetuities law among the states, estate planners must tread warily and make sure they stay informed of the latest developments in other states when advising trust settlors.
Appendix A: An Act to Adopt the Uniform Statutory Rule Against Perpetuities

[Note: Arkansas Code section numbers are those from the session law. Conforming amendments to existing law are omitted. (These concern perpetual care trusts and the Uniform Simultaneous Death Act.) Arkansas has made no changes to USRAP.]

§ 18-3-101. Statutory rule against perpetuities.

(a) A nonvested property interest is valid unless:

(1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

(2) the interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(1) when the power is created, the condition precedent is certain to be satisfied or becomes impossible to satisfy no later than 21 years after the death of an individual then alive; or

(2) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

(2) the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subdivision (a)(1), (b)(1), or (c)(1) of this section, the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of
the survivor of specified lives in being at the creation of the trust or other property arrangement or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

§ 18-3-102. When nonvested property interest or power of appointment created.

(a) Except as provided in subsections (b) and (c) and in § 5(a) of this section, the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this chapter, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in § 18-3-101(b) or § 18-3-101(c), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(c) For purposes of this chapter, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

§ 18-3-103. Reformation.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by § 18-3-101(a)(2), § 18-3-101(b)(2), or § 18-3-101(c)(2) if:

(1) a nonvested property interest or a power of appointment becomes invalid under § 18-3-101;

(2) a class gift is not but might become invalid under § 18-3-101 and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) a nonvested property interest that is not validated by § 18-3-101(a)(1) can vest but not within 90 years after its creation.

§ 18-3-104. Exclusions From Statutory Rule Against Perpetuities.

Section 18-3-101 does not apply to:
(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse’s election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

(2) a fiduciary’s power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

§ 18-3-105. Prospective Application.

(a) Except as extended by subsection (b) of this section, this chapter applies to a nonvested property interest or a power of appointment that is
created on or after the effective date of this chapter. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before the effective date of this chapter and is determined in a judicial proceeding, commenced on or after the effective date of this chapter, to violate this State's rule against perpetuities as that rule existed before the effective date of this chapter, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan to distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

§18-3-106. Short Title.

This chapter may be cited as the Uniform Statutory Rule Against Perpetuities.

§ 18-3-107. Uniformity of Application and Construction.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

§ 18-3-108. [Reserved.]

§ 18-3-109. Supersession of common law.

This chapter supersedes the rule of the common law known as the rule against perpetuities.
Appendix B: Perpetuities Among the States

This list briefly summarizes perpetuities law in the states. For non-USRAP states, it briefly describes any dynasty or perpetual trust legislation. For USRAP states, it notes any major amendments to USRAP and also includes published decisions in the state, if any, that have construed USRAP. If a statute regarding alienation is combined with a perpetuities statute, it is included here; otherwise it is not included. Also, this list does not include statutes regarding accumulations.

ALABAMA

Alabama’s statutory code states that "[t]he common-law rule against perpetuities as to land shall be in full force and effect in this state so that the rule against perpetuities applicable to personal property and to land shall be the same." 322

ALASKA

Alaska adopted the Uniform Statutory Rule Against Perpetuities effective in 1996, but it amended USRAP in 1997 to allow perpetual trusts. 323 Dissatisfied with perceived ineffectiveness of the statute, in 2000 and 2001 the existing statutes were partially repealed and amended. 324 Currently, the statutes are in two parts. The first part, concerning restrictions on alienability, voids future interests that suspend the power of alienation of property for more than thirty years after lives in being, but not if the future interest is part of a trust, and the trustee has the power to sell the property, or if a person alive when the trust is created has the power to terminate it. 325 The second part extends the wait-and-see period of the Rule out to 1000 years for powers of appointment and interests subject to those powers. 326 Alaska’s statute

321. A more detailed, historical state-by-state treatment can be found in JOHN A. BORRON, JR., SIMES & SMITH: THE LAW OF FUTURE INTERESTS §§ 1412–61 (3d ed. 2004). See also BOGERT & BOGERT, supra note 161, § 214; RICHARD R. POWELL, 10 POWELL ON REAL PROPERTY §§ 71.01–75A.08 (Michael Allan Wolf ed. 2005).
323. Stephen E. Greer, The Alaska Dynasty Trust, 18 ALASKA L. REV. 253, 256 (2001). This article has an excellent discussion of the problems of the 1997 statute, problems that statutes in other states arguably have at the present time.
324. Id.; see also ALASKA STAT. §§ 34.27.051 to 34.27.100 (2004).
325. ALASKA STAT. § 34.27.100 (2004). For more discussion of Alaska’s law see Sterk, supra note 2, at 2102.
326. ALASKA STAT. § 34.27.051 (2004).
was carefully crafted to avoid the Delaware Tax Trap.\textsuperscript{327} One commentator describes Alaska’s law as “a model to emulate.”\textsuperscript{328}

**ARIZONA**

Article II, section 29 of Arizona’s Constitution declares that “[n]o hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting any perpetuity or entailment in this State.” Arizona enacted USRAP, slightly amended, effective in 1995.\textsuperscript{329} The statute states that it applies “notwithstanding” the common law rule against perpetuities.\textsuperscript{330} Despite Arizona’s constitution, in 1998, the legislature amended USRAP so that an interest in a trust whose trustee has the power to sell the trust property is removed from the scope of any perpetuities rule.\textsuperscript{331} Thus, if the trustee has an express or implied power to sell trust assets, and if at least one person living when the trust was created has an unlimited power to terminate the trust, it is not subject to the Rule and can conceivably last forever.\textsuperscript{332}

**CALIFORNIA**

California enacted USRAP in 1991 with minor amendments\textsuperscript{333} and the addition of two sections. The first states that the lives of individuals selected to govern the time of vesting may not be so numerous that the evidence of their deaths is likely to be unreasonably difficult to obtain.\textsuperscript{334} This section attempts to remedy one of the criticisms of wait-and-see provisions. The second seeks to remedy the “unborn widow” problem caused by the Rule by requiring that an unnamed spouse is deemed to be alive when the interest is created.\textsuperscript{335}

In 1994, the California Court of Appeals held that perpetual options to renew in commercial leases were property interests arising out of a non-donative transfer, and thus not subject to USRAP.\textsuperscript{336}

\textsuperscript{327} Greer, supra note 323, at 278–82 (discussing how Alaska’s prior law was amended to avoid federal transfer taxation).
\textsuperscript{328} Id. at 285.
\textsuperscript{330} Id. § 14-2906.
\textsuperscript{331} Id. § 14-2901(A)(3).
\textsuperscript{332} Id.
\textsuperscript{334} Id. § 21230.
\textsuperscript{335} Id. § 21231.
Colorado

Colorado adopted USRAP in 1991. In 2001, it amended USRAP to validate nonvested property interests in trust if the trustee had discretion to distribute at least part of the income or principal to a living person at the time of the trust's creation. In 2002, the Colorado Court of Appeals struck down what it characterized as a contingent interest in real property that violated the common law Rule. The opinion did not discuss USRAP, even though the transaction was nondonative, because it was not raised at the trial level. In 2005, after the losing party filed a new lawsuit to reform the transaction under USRAP, the Colorado Supreme Court applied the doctrine of res judicata to prevent the deed from being reformed, stating that the party should have raised the issue in the first suit.

In 2006, the Colorado legislature again amended USRAP to extend the perpetuities period to 1000 years. This amendment is partially retroactive, applying to trust interests and powers created after May 31, 2001, unless a person holding such an interest or power opts out of retroactivity. The addition to valid interests added in 2001 was effectively repealed, effective in 2008. In addition, the new amendments specified when future interests or powers of appointment created by powers of appointment are created for purposes of USRAP and the federal tax laws, in an attempt to avoid the Delaware Tax Trap. The legislators also reinstated a nonvested property interest or power of appointment arising out of a reciprocal transfer under the Rule's coverage. This exclusion had been criticized by Colorado commentators as unclear. Effective July 1, 2008, sections 1 and 4 of USRAP will

338. Id. § 15-11-1102.
340. Id. at 485.
343. Id. § 15-11-1106.5.
344. Id. § 15-11-1102(6).
345. Id. § 15-11-1103.
346. Id. § 15-11-1105.
347. Lucy Marsh, Shouldn't We Just Simplify the RAP?, COLO. LAW., July 2001, at 57. After the 2001 enactment of USRAP, a trust officer stated how glad he was that he would not be the person tracking down heirs 100 years from now. Donald R. Thompson II, A Banker's Perspective on the Repeal of the RAP in Colorado, COLO. LAW., July 2001, at 61. He should be even more relieved after the passage of the 2006 amendments, which have pushed that point in time forward another 900 years.
be repealed.\textsuperscript{348} These changes will amend USRAP so as to make it unrecognizable.

**CONNECTICUT**

Connecticut adopted USRAP in 1989.\textsuperscript{349} In 2000, in a case in which a developer had an option to purchase land condemned by eminent domain, the Connecticut Superior Court held that the Rule did not apply to purchase options.\textsuperscript{350} Connecticut has a statute regulating the length of time of purchase options, which terminates them well within the period of the Rule.\textsuperscript{351}

**DELAWARE**

Delaware was the first state to enact legislation that allowed the establishment of perpetual trusts after the GST tax exemption was established in 1986.\textsuperscript{352} It did this by a statute providing that "[n]o interest created in real property held in trust shall be void by reason of the common law rule against perpetuities and no interest created in personal property held in trust shall be void by reason of any rule against perpetuities, whether the common law rule or otherwise."\textsuperscript{353} The statute requires real property owned by a trust to be distributed after 110 years.\textsuperscript{354}

**DISTRICT OF COLUMBIA**

The District of Columbia adopted USRAP in 2001,\textsuperscript{355} amending it in 2006 to exclude from its coverage a trust that expressly opts out of the Rule and in which the trustee has a power of sale, lease, or mortgage for any period of time beyond the period that is required for an interest created under the trust to vest.\textsuperscript{356}

\textsuperscript{348} COLO. REV. STAT. §§ 15-11-1102, 1104 (2006).
\textsuperscript{349} CONN. GEN. STAT. ANN. §§ 45a-490 to 45a-496 (2004).
\textsuperscript{351} CONN. GEN. STAT. ANN. § 47-33a(a) (2004).
\textsuperscript{352} Dukeminier, supra note 74, at 208, n.54.
\textsuperscript{353} DEL. CODE ANN. tit. 25, § 503(a) (Supp. 2006).
\textsuperscript{354} Id. § 503(b).
\textsuperscript{355} D.C. CODE §§ 19-901–07 (2005).
\textsuperscript{356} Id. § 19-904(10) (Supp. 2006).
FLORIDA

Florida adopted USRAP in 1988. In 2000, the legislature amended it to change the ninety-year wait-and-see period to 360 years, with respect to any trust created beginning in 2001. Also in 2000, another amendment changed the language of USRAP that provides that it supersedes or repeals the Rule. Florida’s new language states that “[t]his section is the sole expression of any rule against perpetuities or remoteness of vesting in this state. No common-law rule against perpetuities or remoteness in vesting shall exist with respect to any interest or power regardless of whether such interest or power is governed by this section.” In 2001, the Florida Court of Appeals considered whether an option to purchase for an unlimited period violated the Rule. The court noted that, even though the legislature had intended to abolish the common law Rule, there might be doubt as to whether enactment of USRAP had actually accomplished that goal. However, the court declined to decide that question, and instead held the option void because it was an unreasonable restraint on alienation.

GEORGIA

Georgia adopted USRAP in 1990. In 2001, the Georgia Supreme Court affirmed a trial court’s use of the reformation power granted by USRAP to reform a trust created before 1990 that “all parties agree violates the rule against perpetuities.” In 2002, the Georgia Court of Appeals ruled that a right of repurchase in a noncommercial transaction was personal to the holder, and thus did not violate USRAP.

HAWAII

Hawaii adopted USRAP in 1992, amending section 4 by omitting several of USRAP’s exclusions from the Rule, and also omitting section 9 that states that USRAP supersedes the common law Rule. No published Hawaiian cases have dealt with USRAP at this time.

358. Id. § 689.225(2)(f) (West Supp. 2007).
359. Id. § 689.225(7) (West Supp. 2007).
360. Id.
362. Id. at 528.
363. Id. at 530–31.
IDAHO

Idaho’s statute, enacted in 1957, is captioned “suspension of [the] power of alienation,” and it limits the suspension of the power of alienation of real property to lives in being plus twenty-five years. It abolishes the rule against perpetuities with respect to both real and personal property. It requires the reformation of any trusts violating its provisions and abolishes the presumption that adults can have children at any age. Idaho’s statute is the oldest one existing that allows perpetual trusts.

ILLINOIS

In 1969, Illinois adopted a lengthy “statute concerning perpetuities.” As amended in 1997, it allows “qualified perpetual trusts” to be created beginning in 1998, either by new instruments or by amendment to existing trusts and exercise of a power of appointment granted by an instrument executed or amended beginning in 1998. The trust must state that the Rule does not apply, and the power of the trustee to transfer trust property must not be limited to the period of the Rule. The statute also exempts some interests from the Rule’s coverage, such as leases, options, and rights of first refusal, but it limits their terms. Otherwise, the common law Rule applies, but with some reforms remedying some of the excesses of the Rule, such as the unborn widow and the slothful executor, among others.

INDIANA

Indiana adopted USRAP in 1991, with minor amendments. In 2006, the Indiana Court of Appeals ruled that a right of first refusal arising out of a donative transfer was subject to USRAP, but that the right of first refusal in the instant case did not violate USRAP because it was personal to the holders and would terminate at their deaths.

369. Id.
370. Id.
371. 765 ILL. COMP. STAT. ANN. 305/1 to 305/6 (West 2001).
372. Id. 305/3.
373. Id.
374. Id. 305/4.
375. Id.
376. IND. CODE ANN. §§ 32-17-8-1-6 (LexisNexis 2002).
IOWA

Iowa has a statutory Rule that combines the common law Rule with both wait-and-see and *cy pres* provisions.\(^{378}\) When applying the Rule, Iowa’s statute requires courts to measure the period of the Rule by actual events, rather than possible events.\(^{379}\) The statute sets out a default pool of possible validating lives if no others can be found.\(^{380}\)

KANSAS

Kansas adopted USRAP in 1992.\(^{381}\) In 2004, the Kansas Court of Appeals decided that because USRAP does not apply the Rule to nonvested interests created in a commercial, nondonative transfer, a preferential rights provision was not invalid.\(^{382}\) The losing party argued that USRAP was unconstitutionally enacted in Kansas because it was part of a uniform laws bill that was not accurately labeled.\(^{383}\) The court held USRAP’s enactment to be constitutional.\(^{384}\)

KENTUCKY

Kentucky follows the common law version of the Rule, as codified.\(^{385}\) In addition, Kentucky has both wait-and-see and *cy pres* provisions.\(^{386}\) The former measures the period of the Rule by actual, rather than possible, events and limits possible validating lives to those that have a causal relationship to the vesting or failure of the interest.\(^{387}\) The latter requires that interests that violate the Rule be judicially reformed to bring them within the Rule’s limits.\(^{388}\) However, a 1987 court of appeals decision stated that despite the *cy pres* provision, “it does not follow that all violations of the rule against perpetuities . . . will be cured or remedied by the application of it.”\(^{389}\)

\(^{379}\) *Id.*
\(^{380}\) *Id.*
\(^{383}\) *Id.*
\(^{384}\) *Id.* at 634.
\(^{386}\) *Id.* § 381.216.
\(^{387}\) *Id.*
\(^{388}\) *Id.*
\(^{389}\) Univ. of Louisville v. Isert, 742 S.W.2d 571, 575 (Ky. Ct. App. 1987).
LOUISIANA

Louisiana has never recognized the Rule, although it does have a kind of trust law and a rule prohibiting "substitutions," which seems to require immediate vesting of remainders, which one commentator says advances some of the same policies as the Rule.

MAINE

Maine applies the common law Rule, but has statutorily modified it by adding a wait-and-see provision. Maine has also added a statutory provision allowing courts to change age contingencies to twenty-one years if that will allow them to validate future interests. In 1999, Maine once again amended the Rule so that it did not apply to a trust if the trust contained an opt out provision and the trustee had the power to transfer property beyond the period of the Rule.

MARYLAND

Maryland also applies the common law Rule, along with statutory provisions adopting wait-and-see and cy pres for age contingencies to twenty-one years. In 1998, the legislature amended the statute to remove from the coverage of the Rule a trust that opts out and in which the trustee has the power to transfer property beyond the period of the Rule.

MASSACHUSETTS

Massachusetts adopted USRAP in 1989, with minor amendments. The legislature also added sections concerning options, preemptive rights, leases, easements, and defeasible fees, limiting most of them to thirty years' duration. In 1997, in a case concerning a trust, the trust provided that in case the settlors' children did not survive them, but left issue, then the deceased children's shares should go to their issue when they reached the age

393. Id. § 102.
394. Id. § 101-A (Supp. 2006).
396. Id. § 11-102.
398. Id. §§ 5, 7.
of thirty. The trustee asked for reformation of this provision, arguing that it violated the Rule. The Supreme Judicial Court held that no reformation should be granted at that time because of the wait-and-see provision of USRAP.

MICHIGAN

Michigan adopted USRAP in 1988. It amended USRAP slightly, leaving out section 1(e) and omitting some of USRAP’s exclusions from the Rule.

MINNESOTA


MISSISSIPPI

Mississippi case law applies the common law Rule, along with judicially adopted wait-and-see and reform, implying savings clauses into instruments that would otherwise violate the Rule.

MISSOURI

Missouri follows the common law Rule, as modified by statutory reformation. However, in 2001, the legislature removed trusts from the scope of the Rule if the trustee has the power to transfer trust property beyond the Rule period.

400. Id. at 1323.
401. Id. at 1324.
402. MICH. COMP. LAWS ANN. §§ 554.71 to 554.78 (West 2005).
403. Id.
404. MINN. STAT. ANN. §§ 501A.01 to .07 (West 2002).
408. Id. § 456.025.
MONTANA


NEBRASKA

Nebraska enacted USRAP in 1989. In 2002, the legislature amended USRAP to exclude from its coverage a trust that expressly opts out and in which the trustee has the power to transfer property for a period of time beyond the Rule. In 2005, the Nebraska Court of Appeals refused to address the question of whether a right of first refusal, which was subject to the common law Rule but expressly excluded from coverage under USRAP, could still be invalidated by the operation of the common law Rule. Instead, the court ruled that the right of first refusal was limited to a period of only seven months, and thus did not violate the common law Rule, even assuming it applied.

NEVADA

Article 15, section 4 of the Nevada Constitution states that "[n]o perpetuities shall be allowed except for eleemosynary purposes." Nevada adopted USRAP in 1987. In 1999 and 2001, the Nevada legislature approved a joint resolution to amend the constitution, since such a resolution must pass two consecutive sessions, and in December of 2002, the amendment repealing the constitutional prohibition of noncharitable perpetuities was submitted to the voters. During the 2005 legislative session, the legis-

409. MONT. CONST. art. XIII, § 6.
412. Id. § 76-2005.
414. Id. at 559-60.
415. NEV. CONST. art. XV, § 4.
416. NEV. REV. STAT. ANN. §§ 111.103 to .1039 (West 2000).
417. The ballot contained an explanation of the question and "pro" and "con" arguments for the repeal. The "pro" argument was longer in length and cited the Rule's age, its difficulty of application, and the fact that trustee powers allow transferability of property. The "pro" argument also contrasted Nevada with other states that had already changed their laws and claimed that enactment would be "economically beneficial" to Nevada. The "con" argument mentioned the Rule's usefulness against dead-hand control over land and cautioned that enactment of the repeal would mean that in the future the legislature might restrict transferability of real property. Nevada Secretary of State, available at
lature amended USRAP twice, first substituting 150 years for the ninety-year wait-and-see period, then replacing 150 years with 365 years.418

NEW HAMPSHIRE

New Hampshire follows the common law Rule. In 2003, legislators excepted trusts that expressly opt out from the Rule’s coverage if they give the trustee the power to transfer property beyond the period of the Rule.419

NEW JERSEY

New Jersey enacted USRAP in 1991.420 In the same year, the New Jersey Superior Court ruled that, even though USRAP was not retroactive, nonetheless, a right of first refusal that had been executed before the enactment of USRAP and would have fallen under the common law Rule in force at the time, was not invalid because USRAP abrogated the common law.421 In 1999, New Jersey repealed USRAP, with the result that there is no rule against perpetuities of any type in that state applying to interests created after 1999.422 Future interests may be void if they suspend the power of alienation for longer than the permissible period, which is the period of the common law Rule.423 However, the power of alienation is not suspended by a trust if the trustee has the power to sell, or if living persons have the unlimited power to terminate the trust.424

NEW MEXICO

New Mexico adopted USRAP in 1992.425


418. 2005 NEV. STAT. 163; § 2; NEV. REV. STAT. ANN. §§ 111.1031, 111.1035 (West Supp. 2007).
423. Id. § 46:2F-10.
424. Id.
NEW YORK

The New York perpetuities statute expressly couples remoteness in vesting with suspension of the power of alienation, stating that a future interest is void if it "suspend[s] the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years." New York also reforms age contingencies to twenty-one years if they will otherwise violate the Rule. New York's statutes also abrogate the doctrines of the "unborn widow," "slothful executor," "precocious toddler," and "fertile octogenarian," and create the presumption that the creator of an interest intends it to vest or fail within the period of the Rule. Currently, New York is considering adoption of USRAP.

NORTH CAROLINA

Article I, section 34 of North Carolina's Constitution declares that "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." In 1995, North Carolina adopted USRAP with minor amendments. In 2002, the North Carolina Supreme Court held that a restrictive covenant that a purchaser pay an "availability fee" to a vendor did not fall under either USRAP or the common law Rule.

NORTH DAKOTA

North Dakota adopted USRAP in 1991 with minor amendments.

OHIO

Ohio statutes adopt the common law Rule, as reformed by cy pres and wait-and-see. The statute gives no guidance as to which lives should be used. Effective in 1999, the legislature amended perpetuities law to exempt from the Rule property held in trust if the instrument opts out of the

426. N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 (McKinney 2002).
427. Id. § 9-1.2.
428. Id. § 9-1.3.
430. N.C. CONST. art. I, § 34.
434. OHIO REV. CODE ANN. § 2131.08 (LexisNexis 2002).
Rule, and if either the trustee has unlimited power to sell, or at least one person has the power to terminate the trust. 435

OKLAHOMA

Article II, section 32 of Oklahoma’s Constitution declares that “[p]erpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.” Although Oklahoma has not codified the common law Rule, its statutes require reformation of any interest that violates the Rule. 436 Oklahoma courts apply the common law Rule. 437

OREGON

Oregon adopted USRAP, effective in 1990. 438

PENNSYLVANIA

Historically, Pennsylvania was the first state to adopt the wait-and-see doctrine. 439 In 2006, the Pennsylvania legislature amended statutory law so that no future interests created beginning in 2007 could be void as perpetuities. 440 Neither could any “direction or authorization to accumulated income” be void. 441 This legislation abolishes the Rule.

RHODE ISLAND

Rhode Island applied the common law Rule, as modified by wait-and-see and cy pres, but in 1999, the legislature amended the statutes to abolish the Rule. 442

SOUTH CAROLINA

In 1987, South Carolina became the first state to adopt USRAP. 443 In 1997, the South Carolina Court of Appeals ruled that a perpetual right of

435.  Id. § 2131.09(B).
437.  In re Estate of Crowl, 737 P.2d 911, 914 (Okla. 1987); Producers Oil Co. v. Gore, 610 P.2d 772, 774 (Okla. 1980).
438.  OR. REV. STAT. ANN. §§ 105.950 to .975 (West 2005).
439.  See supra text accompanying note 49.
441.  Id.
first refusal in a deed executed in 1955 was void under the common law Rule.\textsuperscript{444} No mention of USRAP was made except for a citation to its reform provision, with no discussion.\textsuperscript{445}

**SOUTH DAKOTA**

South Dakota statutes enacted in 1983 provide that the Rule is not in force in that state, but it has retained statutes restricting the suspension of the absolute power of alienation for more than lives in being plus thirty years.\textsuperscript{446} However, trusts in which either the trustee has the power to sell or there is a living person who can terminate the trust do not suspend the power of alienation.\textsuperscript{447}

**TENNESSEE**

Article I, section 22 of Tennessee’s Constitution declares that “[p]erpetuities and monopolies are contrary to the genius of a free State and shall not be allowed.”\textsuperscript{448} Tennessee adopted USRAP in 1994.\textsuperscript{449}

**TEXAS**

Article I, section 26 of Texas’s Constitution declares that “[p]erpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.”\textsuperscript{450} Texas applies the common law Rule, as modified statutorily by the *cy pres* doctrine.\textsuperscript{451}

**UTAH**

Utah adopted USRAP in 1998.\textsuperscript{452} In 2003, the legislature deleted “Uniform” from the title of the statute and amended it to extend the period of the Rule to 1000 years.\textsuperscript{453}

\textsuperscript{445} Id.
\textsuperscript{446} S.D. CODIFIED LAWS §§ 43-5-1-8 (1999).
\textsuperscript{447} Id. § 43-5-4 (1999).
\textsuperscript{448} TENN. CONST. art. I, § 22.
\textsuperscript{449} TENN. CODE ANN. §§ 66-1-201–08 (2004).
\textsuperscript{450} TEX. CONST. art. I, § 26.
\textsuperscript{451} TEX. PROP. CODE ANN. § 5.043 (Vernon 2004).
\textsuperscript{452} UTAH CODE ANN. §§ 75-2-1201–08 (Supp. 2006).
\textsuperscript{453} Id. § 1203.
VERMONT

Vermont applies the common law Rule, as statutorily modified by both the _cy pres_ and wait-and-see doctrines. The statute contains no guidance as to which lives may be used as possible validating lives.454

VIRGINIA

Virginia adopted USRAP in 2000.455 During the same year, Virginia also enacted an “opt-out” statute that allows trusts, personal property held in trusts, or powers of appointment over personal property held in trust to escape the coverage of the Rule as long as the trust instrument expressly so provides.456

WEST VIRGINIA

In 1992, West Virginia adopted USRAP.457 In 2005, the West Virginia Supreme Court held that USRAP did not apply to a charitable trust.458

WASHINGTON

Prior to 1991, Washington had the common law Rule, but with statutory opportunities for _cy pres_ and wait-and-see in the case of trusts. In 2001, the legislature enacted a statute moving the perpetuities period to 150 years from the effective date of the instrument.459 For testamentary trusts and revocable inter vivos trusts, this is the death of the settlor.460 For irrevocable trusts, it is the date of the execution of the trust.461 This perpetuities statute applies only to trusts.462

WISCONSIN

Wisconsin statutes state that the common law Rule is not in force, but they invalidate future interests or trusts that suspend the power of alienation for lives in being plus thirty years. However, the statute also provides that if

455. VA. CODE ANN. §§ 55-12.1 to -12.6 (2003).
456. Id. § 55-13.3.
459. WASH. REV. CODE ANN. § 11.98.140 (West 2006).
460. Id. § 11.98.160.
461. Id.
462. Id. §§ 11.98.130 to .160.
the trustee has the power to sell, or if persons in being have an unlimited power to terminate the trust, the power of alienation is not suspended.\footnote{Wyoming's Constitution declares that "perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."\footnote{In 1949, Wyoming enacted the common law Rule into statutory law, in an act titled the "Model Rule Against Perpetuities Act."\footnote{However, in 2003, new legislation exempted trusts from the coverage of the Rule if the trust contains express opt-out language, terminates within 1000 years, and does not own real property.\footnote{The trust must be governed by Wyoming law and have other connections to Wyoming.\footnote{Also, any real property owned by the trust is still subject to the Rule.}}}}

\textbf{Wyoming}

Article I, section 30 of Wyoming's Constitution declares that "perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."\footnote{Wyoming's Constitution declares that "perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."\footnote{In 1949, Wyoming enacted the common law Rule into statutory law, in an act titled the "Model Rule Against Perpetuities Act."\footnote{However, in 2003, new legislation exempted trusts from the coverage of the Rule if the trust contains express opt-out language, terminates within 1000 years, and does not own real property.\footnote{The trust must be governed by Wyoming law and have other connections to Wyoming.\footnote{Also, any real property owned by the trust is still subject to the Rule.}}}} In 1949, Wyoming enacted the common law Rule into statutory law, in an act titled the "Model Rule Against Perpetuities Act."\footnote{Wyoming's Constitution declares that "perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."\footnote{In 1949, Wyoming enacted the common law Rule into statutory law, in an act titled the "Model Rule Against Perpetuities Act."\footnote{However, in 2003, new legislation exempted trusts from the coverage of the Rule if the trust contains express opt-out language, terminates within 1000 years, and does not own real property.\footnote{The trust must be governed by Wyoming law and have other connections to Wyoming.\footnote{Also, any real property owned by the trust is still subject to the Rule.}}}} However, in 2003, new legislation exempted trusts from the coverage of the Rule if the trust contains express opt-out language, terminates within 1000 years, and does not own real property.\footnote{The trust must be governed by Wyoming law and have other connections to Wyoming.\footnote{Also, any real property owned by the trust is still subject to the Rule.}} The trust must be governed by Wyoming law and have other connections to Wyoming.\footnote{Also, any real property owned by the trust is still subject to the Rule.}
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