Summary of State Rule Against Perpetuities Laws

State	Rule Against Perpetuities	Statutory Citation
Alabama	Common-law Rule	Ala. St. §35-4-4
Alaska	Powers of alienation cannot be suspended for more than 30 years after the death of an individual alive at the time when the power was suspended. **However, a power of alienation is not considered "suspended" if the trustee has the power to sell the trust property.**	AK ST §34.27.100
	A general or nongeneral power of appointment not presently exercisable because of a condition precedent is invalid unless, within a period of 1,000 years after its creation, either the power is irrevocably exercised or the power terminates.	AK ST §34.27.051
Arizona	Common-law Rule generally applicable	ARS §33-261
	The common-law Rule does not apply to a non-vested interest under a trust whose trustee has the expressed or implied power to sell the trust assets and at one or more times after the creation of the interest one or more persons who are living when the trust is created have an unlimited power to terminate the interest.	ARS §14-2901(A)(3)
Arkansas	Uniform Statutory Rule Against Perpetuities	A.C.A. § 18-3-101
California	Uniform Statutory Rule Against Perpetuities	Cal. Prob. Code §21200
Colorado	A nonvested property interest is invalid unless it either vests or terminates within 1,000 years after its creation.	CRS §15-11-1102.5
Connecticut	Uniform Statutory Rule Against Perpetuities	Conn. Gen. Stat. §45a-491
Delaware	**Rule Against Perpetuities does not apply to personal property in trust.** Real property in trust must vest within 110 years; "real property" does not include any intangible personal property, such as an interest in a corporation, limited liability company, partnership, statutory trust, business trust, or other entity, regardless of whether such entity is the owner of real property or any interest in real property.	25 Del. C. §503
District of Columbia	Uniform Statutory Rule Against Perpetuities	DC ST §19-901
Florida	Uniform Statutory Rule Against Perpetuities	FL ST §689.225
Georgia	Uniform Statutory Rule Against Perpetuities	OCGA §44-6-200
Hawaii	Uniform Statutory Rule Against Perpetuities	HRS §525-1
Idaho	**Rule abolished as to personal property**; modified as to real property: The absolute power of alienation of real property cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of the persons in being at the creation of the limitation or condition, and 25 years thereafter; there shall be no Rule Against Perpetuities applicable to real or personal property, nor any rule prohibiting the placing of restraints on the alienation of personal property; no trust heretofore or hereafter created, either testamentary or inter vivos, shall be declared void, but shall be so construed as to eliminate parts violating the above provisions, and in such a way that the testators or trustors wishes are carried out to the greatest extent permitted by this act; that there shall be no presumption that a person is capable of having children at any stage of adult life.	ID Code §55-111
Illinois	**Rule does not apply to "qualified perpetual trusts" (any trust created on or after January 1, 1998, expressly states that the Rule doesn't apply, and the trustee has the unlimited power to sell assets).**	IL ST Ch. 765, §305/4

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State	Rule Against Perpetuities	Statutory Citation
Indiana	Uniform Statutory Rule Against Perpetuities	Ind. Code §§32-17-8-1
Iowa	Common-law Rule codified	Iowa Code §558.68
Kansas	Uniform Statutory Rule Against Perpetuities	KSA §59-3401
Kentucky	Common-law Rule codified	KRS §381.215
Louisiana	The Rule Against Perpetuities is not known to the laws of Louisiana; laws only provide that a beneficiary must be in being and ascertainable on the date of the creation of the trust.	LA RS §9:1803
Maine	**Rule does not apply to trusts created after September 18, 1999 if trust expressly states that the Rule doesn't apply, and the trustee has the power to sell, mortgage, or lease property for any period of time beyond the period that is required for an interest created under the governing instrument to vest in order to be valid under the Rule Against Perpetuities.**	33 ME RSA §101-A
Maryland	**Rule does not apply if trust expressly states that the Rule doesn't apply, and the trustee has the power to sell, mortgage, or lease property for any period of time beyond the period that is required for an interest created under the instrument to vest in order to be valid under the Rule Against Perpetuities.**	MD Est. & Trust §11-102(5)
Massachusetts	Common-law Rule codified	MGLA c. 184A §1
Michigan	Uniform Statutory Rule Against Perpetuities **(Legislation has been introduced to abolish the Rule with respect to personal property. 2007 MI H.B. 4602.)**	MCLA §554.71
Minnesota	Uniform Statutory Rule Against Perpetuities	Minn. Stat. §501A.01
Mississippi	Mississippi has not codified the Rule Against Perpetuities, but the common-law Rule is mentioned in other statutes and in case law	N/A

State	Rule Against Perpetuities	Statutory Citation
Missouri	**The Rule Against Perpetuities will not apply to a trust created after August 28, 2001, if a trustee has the power pursuant to the terms of the trust or applicable law to sell the trust property during the period of time the trust continues beyond the period of the Rule Against Perpetuities that would apply to the trust but for this subsection**	V.A.M.S. §456.025(1)
Montana	Uniform Statutory Rule Against Perpetuities	Mont. Code Ann. §72-2-1001
Nebraska	Uniform Statutory Rule Against Perpetuities	Neb. Rev. Stat. §76-2001
Nevada	Uniform Statutory Rule Against Perpetuities	NRS §111.103
New Hampshire	The common law Rule Against Perpetuities shall not apply to any trust created after January 1, 2004 if: (1) the trust instrument contains a provision which expressly exempts the instrument from the application of the Rule Against Perpetuities; and (2) the trustee has the power under the governing instrument, applicable statute, or common law, to sell, mortgage, or lease property for any period of time beyond the period that is required for an interest created under the governing instrument to vest in order to be valid under the Rule Against Perpetuities	N.H. Rev. Stat. §564:24
New Jersey	**No interest created in real or personal property shall be void by reason of any Rule Against Perpetuities, whether the common law Rule or otherwise. The common law Rule Against Perpetuities shall not be in force in this State.**	NJSA §46:2F-9
New Mexico	Uniform Statutory Rule Against Perpetuities	NMSA §45-2-901
New York	Common-law Rule codified	NY Est. Pow. & Trust §9-1.1
North Carolina	Uniform Statutory Rule Against Perpetuities **(Legislation is currently pending that is similar to Alaska's statute, which provides that a power of alienation is not considered "suspended" if the trustee has the power to sell the trust property, or if there is an unlimited power to terminate in one or more persons in being. 2007 NC H.B. 1384.)**	NC Gen. Stat. §§41-15

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State	Rule Against Perpetuities	Statutory Citation
North Dakota	Uniform Statutory Rule Against Perpetuities	NDCC §47-02-27.1
Ohio	Common-law Rule codified	OH ST §2131.08
Oklahoma	Common-law Rule codified	OK Const. Art. 2, Sec. 32; 60 OS Sec. 175.47
Oregon	Uniform Statutory Rule Against Perpetuities	ORS §105.950
Pennsylvania	Common-law Rule codified	20 Pa.C.S. §6104
Rhode Island	**The common law rule against perpetuities shall no longer be deemed to be in force and/or of any effect in this state, provided, the provisions of this section shall not be construed to invalidate or modify the terms of any interest which would have been valid prior to the effective date of this act, and, provided further, that the provisions of this section shall apply to both legal and equitable interests.**	RI GL §34-11-38
South Carolina	Uniform Statutory Rule Against Perpetuities	SC ST §27-6-10
South Dakota	**The common-law Rule Against Perpetuities is not in force in this state**	SDCL §43-5-8
Tennessee	Common-law Rule generally applicable, but as to any trust created after June 30, 2007, or that becomes irrevocable after June 30, 2007, the terms of the trust may require that all beneficial interests in the trust vest or terminate or the power of appointment is exercised within three hundred sixty (360) years. Provided, however, this section (f) shall only apply to trusts that grant a power of appointment at death to at least one member of each generation of beneficiaries who are beneficiaries of the trust more than ninety (90) years after the creation of the interest. The permissible appointees of each such power of appointment must at least include all descendants of the beneficiary, yet may include other persons	TCA §66-1-202(f)
Texas	Common-law Rule codified	TX Prop. Code §112.036
Utah	A nonvested property interest is invalid unless within 1,000 years after the interest's creation the interest vests or terminates	UT ST §75-2-1203(1)

State	Rule Against Perpetuities	Statutory Citation
Vermont	Vermont has not codified the Rule Against Perpetuities, but the common-law Rule is mentioned in other statutes and in case law	N/A
Virginia	Uniform Statutory Rule Against Perpetuities	Va Code §55-12.1
Washington	No provision of an instrument creating a trust, including the provisions of any further trust created, and no other disposition of property made pursuant to exercise of a power of appointment granted in or created through authority under such instrument is invalid under the Rule Against Perpetuities, or any similar statute or common law, during the 150 years following the effective date of the instrument. Thereafter, unless the trust assets have previously become distributable or vested, the provision or other disposition of property is deemed to have been rendered invalid under the Rule Against Perpetuities.	RCW §11.98.130
West Virginia	Uniform Statutory Rule Against Perpetuities	W.Va. ST §36-1A-1
Wisconsin	A future interest or trust is void if it suspends the power of alienation for longer than lives in being plus 30 years. **However, an interest is not considered "suspended" if the trustee has power to sell the trust property, or if there is an unlimited power to terminate in one or more persons in being.**	Wis. Stat. §700.16(5) *No RAP problem as long as the trustee has the power to sell trust assets.
Wyoming	The Rule will not apply to a trust created after July 1, 2003 if: (1) the trust instrument states that the Rule Against Perpetuities shall not apply to the trust; (2) the trust instrument states that the trust shall terminate no later than 1,000 years after the trust's creation; and (3) the trust is governed by the laws of this state and the trustee maintains a place of business, administers the trust in this state, or is a resident of this state.	WY ST §34-1-139(b)

Note: This chart does not specify whether a state that has a Rule Against Perpetuities has adopted a "wait and see" approach.

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PERPETUITIES, TAXES, AND ASSET PROTECTION: AN EMPIRICAL ASSESSMENT OF THE JURISDICTIONAL COMPETITION FOR TRUST FUNDS

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¶ 1401 Trust Laws Studied

We examine the effect of abolishing the Rule Against Perpetuities on a state's trust business. To do so, we must also account for other state trust and tax laws that might influence a donor's choice of jurisdiction. Accordingly, we begin by reviewing: (1) the Rule Against Perpetuities; (2) the controversial authorization of self-settled asset protection trusts; and (3) the state income taxation of trust funds attracted from out of state.

¶ 1402 The Rule Against Perpetuities

The Rule Against Perpetuities prohibits remote vesting of property interests. The classic formulation is that of John Chipman Gray: "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."[12] The period of the Rule reflects a common law policy that a transferor should be allowed to tie up property only for so long as the life of anyone possibly known to the transferor plus the period of the next generation's minority (hence lives in being plus twenty-one years).

The Rule is said to have two purposes: (1) to keep property marketable, and (2) to limit "dead-hand" control. Preventing indefinite fracturing of property ownership implements the first purpose. The Rule ensures that land periodically will be reconstituted into fee simple because all contingent future interests in the property must vest or fail within the perpetuities period.

The dead-hand rationale for the Rule is best understood as a response to the disagreeable consequences that can arise from unanticipated circumstances. The Rule implements this anti-dead hand policy by curbing future interests that, after some period of time and change in circumstances, tie up the property in potentially disadvantageous arrangements. Forever is a long time.

Measured against its purposes, the Rule is both underinclusive and overinclusive. The Rule is underinclusive because it only applies to contingent interests, but vested interests that will not become possessory for a long time can also compromise the Rule's underlying policy objectives. It is overinclusive because if the trustee is given the power to sell the trust property and reinvest the proceeds, as is typical, there is no concern with marketability.[13] Nonetheless, the prevailing academic view is that the Rule "does, by and large, effectively prevent tying up property for an inordinate length of time."[14]

¶ 1402.1 Reform of the RAP

Under the orthodox what-might-happen possibilities test, even extremely remote

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[12] John Chipman Gray, The Rule Against Perpetuities § 201, at 191 (4th ed. 1942).

[13] Today, because almost all life estates and future interests are created in trust rather than as legal interests, the Rule's primary application is to interests in trusts funded with stocks, bonds, and other liquid financial assets.

[14] Jesse Dukeminier, Stanley M. Johanson, James Lindgren, & Robert H. Sitkoff, Wills, Trusts, and Estates 675 (7th ed. 2005).

possibilities can render a contingent future interest invalid. As a result, the law books are replete with improbable and bizarre occurrences such as childbearing octogenarians and toddlers, unborn widows, inexhaustible gravel pits, wars that never end, slothful executors, and explosive birthday presents.[15]

Eventually, dissatisfaction with the Rule's exasperating complexities, absurd assumptions, and booby traps led to reform to stay what Barton Leach famously called "the slaughter of the innocents" in the Rule's "reign of terror."[16] Some states enacted statutory fixes for specific fantasy scenarios, in particular the unborn widow and the fertile octogenarian. Other states authorized the courts to reform instruments that otherwise would have been void ab initio. Still other states adopted the so-called wait-and-see principle whereby courts wait to see if, in light of actual instead of possible events, the interest will in fact vest or fail within the allowable period.

The culmination of the twentieth-century perpetuities reform movement was the Uniform Statutory Rule Against Perpetuities (USRAP) of 1986. USRAP, some form of which is now in force in about half the states, provides for a wait-and-see period of ninety years and authorizes reformation of instruments that would otherwise violate the Rule.[17]

A related response to the Rule's dangers was the development of the perpetuities saving clause. Such a clause ensures that an overlooked violation of the Rule will not render the trust invalid. The use of a saving clause is standard good drafting practice.[18]

In sum, the unifying theme of the perpetuities reform movement through 1995—except in Idaho, South Dakota, and Wisconsin, which for reasons that are not entirely clear abolished their Rules by 1957, 1983, and 1969 respectively[19]—was continuing respect for the long-standing policy against remote vesting. Even in its reformed versions and buffered by saving clauses, the Rule required contingent interests to vest or fail within a specified period. For this reason, for most of the

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[15] See, e.g., id., at 678–86.

[16] W. Barton Leach, Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv. L. Rev. 721 (1952); W. Barton Leach, Perpetuities: Staying the Slaughter of the Innocents, 68 L.Q. Rev. 35 (1952).

[17] Both wait-and-see in general and USRAP in particular sparked heated debate in the law reviews that Susan French aptly dubbed the "Perpetuities Wars." Susan F. French, Perpetuities: Three Essays in Honor of My Father, 65 Wash. L. Rev. 323, 332–34 (1990); see also Sitkoff & Schanzenbach, Jurisdictional Competition, supra note *, at 366–69 (recounting the perpetuities wars and collecting citations).

[18] Hence, contrary to a pernicious leading case, see Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), it is almost certainly malpractice to draft an instrument that violates the Rule and lacks a saving clause. See Wright v. Williams, 121 Cal. Rptr. 194, 199 n.2 (Ct. App. 1975); Joseph William Singer, Introduction to Property § 7.7.4, at 333 (2d ed. 2005).

[19] Wisconsin may have abolished its Rule even earlier (indeed, Wisconsin may never have had the Rule). See W. Barton Leach, Perpetuities: The Nutshell Revisited, 78 Harv. L. Rev. 973, 974–75 (1965). We need not resolve the status of the Rule in Wisconsin prior to 1969, however, because our data does not begin until that year.

twentieth century the Rule limited the duration of trusts.[20]

¶ 1402.2 The Race to Abolish the RAP

Unlike prior reform efforts, which preserved the Rule's core prohibition against remote vesting, beginning in the mid-1990s a movement arose to repeal the Rule as applied to interests in trust. This movement appears to have originated in Delaware, which abolished its Rule in 1995.[21] The official synopsis of the Delaware legislation states its purpose plainly:

> Several states, including Idaho, Wisconsin and South Dakota, have abolished altogether their rules against perpetuities, which has given those jurisdictions a competitive advantage over Delaware in attracting assets held in trusts created for estate planning purposes. . . .
>
> The multi-million dollar capital commitments to these irrevocable trusts, and the ensuing compound growth over decades, will result in the formation of a substantial capital base in the innovative jurisdictions that have abolished the rule against perpetuities. Several financial institutions have now organized or acquired trust companies, particularly in South Dakota, at least in part to take advantage of their favorable trust law.
>
> Delaware's repeal of the rule against perpetuities for personal property held in trust will demonstrate Delaware's continued vigilance in maintaining its role as a leading jurisdiction for the formation of capital and the conduct of trust business.[22]

In response, Alaska, Arizona, Illinois, Maine, Maryland, New Jersey, Ohio, and Rhode Island authorized perpetual trusts by year-end 2000. By late 2007, Colorado, Florida (360 years), Missouri, Nebraska, Nevada (360 years), New Hampshire, North Carolina, Pennsylvania, Utah (1,000 years), Virginia, and Wyoming (1,000 years) had followed suit. The legislative history and contemporaneous media coverage of these repeals indicate that their purpose was to compete for so-called dynasty trust funds, meaning perpetual transfer-tax-exempt trusts.

Figure 1 illustrates the extent of the Rule's abolition at year-end 2007.

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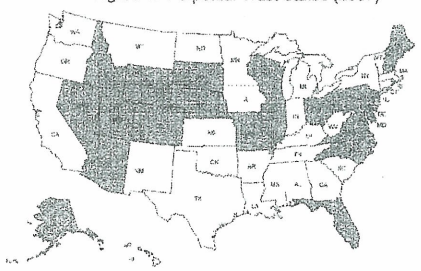
[20] Because the Rule prohibits vesting outside of the applicable perpetuities period, the identity of all persons with a claim to the underlying trust property will be ascertained within that period. Once all the beneficiaries are ascertained, they can terminate the trust when the perpetuities period ends. See Restatement (Second) of Property, Donative Transfers § 2.1 (1983). If the beneficiaries do not terminate the trust, the trust corpus will be distributed to the principal beneficiaries when the preceding life estates expire.

[21] See Act of July 7, 1995, 70 Del. Laws 428 (1995).

[22] H.R. 245, 138th Gen. Assemb. (Del. 1995) (bill synopsis).

Figure 1: Perpetual Trust States (2007)



¶ 1402.3 Defining Abolition

We must acknowledge some doctrinal nuances that we gloss over when we speak of the Rule's abolition. Some states have abolished the Rule entirely. Some states have abolished it as applied to interests in trust if the trustee has the power to sell the trust assets and then reinvest the proceeds (in the technical jargon, as applied to trusts that do not suspend the power of alienation). Some states have abolished the Rule as applied to interests in personal property. Some have established such lengthy perpetuities periods (360 or even 1,000 years) that in those states the Rule is barely recognizable. In still others, the Rule, which had always been construed as a mandatory rule to curtail the dead hand,[23] has been changed to a default rule that applies unless the settlor provides otherwise.

The distinctions between the foregoing approaches have been carefully parsed elsewhere.[24] For the purpose of our empirical analysis, all that matters is whether the

[23] Gray expressed this view in stronger language:

> The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied.

Gray, supra note 12, § 629.

[24] See Note, Dynasty Trusts and the Rule Against Perpetuities, 116 Harv. L. Rev. 2588, 2590–95 (2003). Readers familiar with the more arcane features of property law might wonder about the rule against accumulations of income. In Delaware, Illinois, and South Dakota, which are among the leading perpetual trust states, the legislatures have dealt with this question expressly. See Del. Code Ann., tit. 25, § 506 (Supp. 2004); 765 Ill. Comp. Stat. 315/1 (2001); 1998 S.D. Sess. Laws, ch. 282, § 27. In states without legislative action, the law is less clear. But the common law accumulations period is the same as the perpetuities period. Thus, if the perpetuities period with respect to a particular trust is extended by repeal of the Rule, then the permissible accumulations period should be likewise extended. See Robert H. Sitkoff, The Lurking Rule Against Accumulations of Income, 100 Nw. U. L. Rev. 501 (2006).

state's perpetuities law permits what is in effect a perpetual trust. If the answer is yes, we count the state as having abolished the Rule. Our coding is detailed in the Appendix.

¶ 1402.4 The Standard Story: The GST Tax

The dominant view among both scholars and policymakers is that the enactment of the generation skipping transfer (GST) tax in 1986 sparked the movement to abolish the Rule. Mass media outlets such as the *Wall Street Journal*, the *New York Times*, and *Forbes* magazine tell a similar story.[25]

Prior to 1986, the estate tax could be avoided via successive life interests, for example, by leaving property to one's child for life, then to one's grandchild. Because a life tenancy terminates at death and the estate tax is levied only on the decedent's transferable interests, in the foregoing example there would be no tax when, on the death of the transferor's child, the transferor's grandchild's interest became possessory.

The 1986 GST tax closed the successive-life-estates loophole by levying a tax equal to the highest rate of the estate tax on any generation-skipping transfer.[26] In rough terms, a transfer to a grandchild, great-grandchild, or any other person who is two or more generations below the transferor is a generation-skipping transfer.[27]

However, under the 1986 code (as amended) a transferor can pass $1 million during life, or $2 million at death, free from federal wealth transfer taxes, including the GST tax.[28] By funding a trust with the amount of the transferor's exemption, successive generations can benefit from the trust fund and any appreciation therein, free from federal wealth transfer taxes, for as long as state perpetuities law will allow the trust to endure.

Crucially, Congress put no limit on the duration of a transfer-tax-exempt trust, leaving that question to state perpetuities law.[29] Enactment of the GST tax therefore gave state perpetuities law renewed salience among estate planners. The longer a transfer-tax-exempt trust could be extended, the more generations could benefit from the trust fund free from transfer taxes. In a state that has abolished the Rule, successive generations can benefit from the trust fund, free from subsequent federal wealth transfer taxation, forever.

On this view, the movement to abolish the Rule is perhaps more precisely described

[25] See sources cited in supra note 4.

[26] The maximum rates are as follows: 49% in 2003; 48% in 2004; 47% in 2005; 46% in 2006; and 45% in 2007-09. I.R.C. §§ 2641, 2001.

[27] See I.R.C. § 2651 (defining generational assignments); id. § 2613 (defining skip and non-skip persons); id. § 2611 (defining generation-skipping transfer); id. § 2612 (defining taxable events).

[28] The exemption schedule is as follows: through 2003, $1,000,000; in 2004 and 2005, $1,500,000; in 2006 through 2008, $2,000,000; and in 2009, $3,500,000. I.R.C. §§ 2631(c), 2010(c).

[29] "When Congress originally enacted a tax on generation-skipping transfers, it noted that '[m]ost States have a rule against perpetuities which limits the duration of a trust.' " JCT Report, supra note 10, at 394.

as a race between the states to allow donors to exploit a loophole in the federal transfer taxes.

¶ 1402.5 An Alternative Story: Perpetual Control

In spite of the intuitive appeal of the foregoing tax-avoidance story, there are good reasons to suppose that perpetual trusts had (and continue to have) appeal independent of the influence of the GST tax.

First, the legislative record of South Dakota's 1983 repeal, although scanty, implies that the purpose of repeal was to attract trust business to the state[30]—and South Dakota's repeal occurred three years prior to the enactment of the GST tax. Hence it appears that, prior to the GST tax, lawyers and bankers in South Dakota concluded that offering perpetual trusts would attract trust business to the state.

Second, in a recent study of donor preferences, Joshua Tate examined the online promotion of perpetual trusts. Tate concluded that "while tax concerns are very important," perpetual trust settlors also "want to make sure that their money is put to good use" and is protected "from beneficiaries' bad judgment or misfortune."[31]

Finally, history is replete with efforts by one generation to control subsequent generations' disposition of the family patrimony.[32] On this view, the perpetual trust might be reckoned the modern counterpart to the fee tail and strict settlement.

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[30] South Dakota's Legislative Research Council (LRC) maintains the legislative history for bills introduced prior to 1997. See How to Compile Legislative History Using the Legislative Research Council Website, http://legis.state.sd.us/general/leghist.htm (last visited April 21, 2008). In response to a request by the law library of Northwestern University for copies of the records pertaining to South Dakota's repeal of the RAP, the LRC sent the following: (1) a one-page chronology of the steps leading up to the bill's passage copied from the 1983 House Bills Index; (2) the bill's language; and (3) the voting records of the House and Senate Judiciary Committees copied from the House and Senate Journals. None of these materials contains a reference to the reason for repealing the RAP. However, a voting record sheet of the House Judiciary Committee indicates that Tom Shelby, a Vice President at the Sioux Falls branch of the First Bank of South Dakota, and Dick Bogue, an attorney from Canton, testified in favor of repeal on February 23, 1983. Hearing Before the H. Judiciary Comm., 58th Leg. (S.D. Feb. 2, 1983) (statements of Tom Shelby and Dick Bogue).

[31] See Joshua C. Tate, Perpetual Trusts and the Settlor's Intent, 53 U. Kan. L. Rev. 595, 620–25 (2005). Tate explained:

> While most settlors certainly want to pass tax savings down to their descendants, that is not the only apparent goal: settlors also wish to protect their wealth from being wasted and to encourage their descendants to be productive members of society. Moreover, although it may be true that most settlors do not care about their unborn descendants, some of them might, and those who do probably want their spendthrift provisions and restrictions on the use of funds to continue indefinitely.

Id. at 620.

[32] Perhaps the most notorious is that of Peter Thellusson, who died in 1797. See Leach, Terror, supra note 16, at 726 (stating that the "family-dynasty mentality flourished in the eighteenth century and reached a fine fruition in the will of Peter Thellusson"). Thellusson's will provided that the bulk of his considerable estate, plus all the income it would earn during the lives of the nine male descendants who survived him, should be accumulated for the ultimate benefit of his oldest male descendant at the end of that period. See Patrick Polden, Peter Thellusson's Will of 1797 and Its Consequences on Chancery Law (2002); Sitkoff, supra note 24.

¶ 1403 Self-Settled Asset Protection Trusts

A longstanding principle of trust law holds that the settlor cannot shield assets from his or her creditors by placing them in a trust for his or her own benefit. Even if the trust is discretionary, spendthrift, or both, the settlor's creditors can reach the maximum amount that the trustee can pay the settlor or apply for the settlor's benefit.[33] Thus:

> Suppose O, a surgeon, transfers property to X in trust to pay so much of the income and principal to O as X determines in X's sole and absolute discretion. Five years later, O botches a routine surgery, causing grievous injury to the patient, A. A may enforce an award of damages against the entire corpus of the trust, because X could, in X's discretion, pay the entire corpus to O. This result obtains even if the trust instrument provides that O's interest may not be reached by O's creditors (a spendthrift clause). Nor does it matter that O's right to the trust assets is subject to X's discretion.

In the latter part of the twentieth century, however, several offshore and domestic jurisdictions enacted statutes that reverse the traditional rule, thereby giving rise to the self-settled asset protection trust (APT). If such a statute were applicable in the foregoing example, then A would have no recourse against the trust assets even if O admitted to botching A's surgery and put up no defense in the malpractice suit.

¶ 1403.1 Validation of APTs

The story of the recognition of APTs begins in the sunny Caribbean, South Pacific, and other exotic offshore locales. In the 1980s, a host of such jurisdictions—including the Bahamas, Barbados, Belize, Bermuda, Cayman Islands, Cook Islands, Cyprus, Gibraltar, Grenada, Liechtenstein, Mauritius, Nevis, Samoa, St. Lucia, and Turks and Caicos—amended their trust laws to allow the creation of a self-settled trust against which the settlor's creditors have no recourse.[34] Although it has been conjectured that the value of offshore APTs exceeds $1 trillion,[35] no reliable estimate exists.

The APT migrated onshore in 1997 in the form of an innovative Alaska statute. This statute was drafted by a prominent New York trust lawyer, his brother (who is now the

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[33] See Restatement (Second) of Trusts § 156 (1959). These rules are carried forward in Restatement (Third) of Trusts §§ 58(2), 60 cmt. f (2003); and Unif. Tr. Code § 505 (2000).

[34] See Denis Kleinfeld, Choosing an Offshore Jurisdiction, in Asset Protection Strategies: Planning with Domestic and Offshore Entities 73 (Alexander A. Bove, Jr. ed., 2002); Elena Marty-Nelson, Offshore Asset Protection Trusts: Having Your Cake and Eating It Too, 47 Rutgers L. Rev. 11, 62 (1994). The Cook Islands' International Trusts Act of 1984, which is representative, validates self-settled spendthrift trusts, provided that the beneficiary is not a resident of the Cook Islands. International Trusts Act 1984 (No. 14) §§ 2, 5(1) (Cook Islands), reprinted as amended in 2 International Trust Laws, at DS-3, D8-3, D8-6 (1999). As Sterk has observed, this qualification is "a sure sign that the purpose of the statute was to attract foreign capital." Stewart E. Sterk, Asset Protection Trusts: Trust Law's Race to the Bottom?, 85 Cornell L. Rev. 1035, 1048 (2000).

[35] See Walter H. Diamond, Foreword to 1 International Trust Laws and Analysis (Walter H. Diamond et al. eds., 2004); see also Sterk, supra note 34, at 1036 (stating that "conservative estimates exceed one trillion dollars").

head of the Alaska Trust Company), and an Alaska lawyer. The three had the idea while on a fishing trip in Alaska.[36] Under the Alaska statute, the settlor's creditors have no recourse against the settlor's interest in a self-settled discretionary trust provided that the initial transfer was not fraudulent.[37] To ensure a local payoff, Alaska statutory law provides for both jurisdiction in the Alaska courts and the applicability of Alaska law if an Alaska resident or banking institution is designated as trustee and some of the trust assets are deposited with an Alaska institution.[38]

In 1997 Delaware likewise validated APTs.[39] The official synopsis of the Delaware bill states that it "is similar to legislation recently enacted in Alaska. It is intended to maintain Delaware's role as the most favored domestic jurisdiction for the establishment of trusts."[40] Since then, Nevada (1999), Rhode Island (1999), Oklahoma (2004), Utah (2004), probably Missouri (2005), South Dakota (2005), Tennessee (2007), and Wyoming (2007) have also passed statutes that authorize some form of APT.

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[36] See Douglas J. Blattmachr & Jonathan G. Blattmachr, A New Direction in Estate Planning: North to Alaska, Tr. & Est., Sept. 1997, at 48; James L. Dam, New Trusts Will Offer Estate Tax Breaks, Protection from Creditors, Law. Wkly., Apr. 21, 1997, at 1 (including a photograph of one of the fish caught); Brigid McMenamin, Flimsy Shelters, Forbes, Sept. 8, 1997, at 94; Alaska Trust Co., The Genesis of the Alaska Trust Company, the Alaska Trust Act, and Other Unique Trust Legislation, http://www.alaskatrust.com/www/thegen.html. Representative Al Vezey sponsored the legislation. See Hearing on H.B. 101 Before the H. Comm. on Labor & Commerce, 20th Leg. (Alaska 1997) (statement of Rep. Vezey); Rose Ragsdale, Opposing Parties Join Forces To Attract Family Trust Industry to Alaska, Alaska J. Com., Apr. 14, 1997, at 6. On passage of the Act the local media and Alaska lawyers and bankers predicted a substantial inflow of trust business. See Katharine Fraser, With New Law, Alaska Aiming To Be Trust Capital, Am. Banker, Apr. 21, 1997, at 1; Carrie Lehman, Legislation Changes Alaska Tax, Trust Laws, Attracts New Investors to State, Alaska J. Com., Aug. 18, 1997, at 6; Deanna Thomas, Trust Bill Could Mean Boon, Alaska Star, Mar. 20, 1997, at 1.

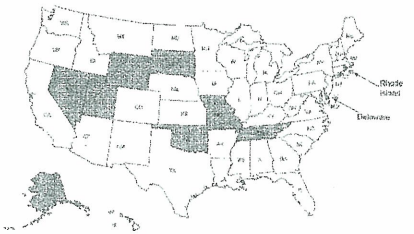
[37] Alaska Stat. § 34.40.110 (2004).

[38] Id. § 13.36.035. Another provision authorizes the transfer of existing trusts to Alaska. Id. § 13.36.043.

[39] Del. Code Ann. tit. 12, §§ 3570-3576 (2001). The Delaware statute carves out an exception for support claims by children and former spouses and for claims arising from death, personal injury, or property damage that occurred before the trust was settled. Id. § 3573.

[40] H.R. 356, 139th Gen. Assemb., 71 Del. Laws 159 (1997); see Douglas J. Blattmachr & Richard W. Hompesch, II, Alaska vs. Delaware: Heavyweight Competition in New Trust Laws, Prob. & Prop., Jan./Feb. 1998, at 32; Todd Spangler, Delaware Again 1st in Trusts, Anchorage Daily News, July 29, 1997, at F1.

Figure 2: Self-Settled Asset Protection Trust States (2007)



¶ 1403.2 Political Dynamic

The political dynamic driving the validation of APTs is similar to that which drives the movement to abolish the Rule Against Perpetuities. Local bankers and lawyers, who stand to benefit from an influx of trust assets, are the principal supporters of APTs. However, the motivation for use of a perpetual trust is different from the motivation for the use of an APT. The desire to provide a transfer-tax-exempt trust for future generations motivates use of the former. The desire to limit personal liability exposure motivates use of the latter.

For example, there is anecdotal evidence that, in the face of rising premiums, some doctors have opted to drop their malpractice insurance in favor of moving their assets into an APT (this is the motivation for the hypothetical in ¶ 1403 above).[41] Indeed, the validation of APTs is sometimes defended on the ground that tort liability is "out of control."[42] On this account, APTs "might be reckoned as the revenge of the trust lawyers against the tort lawyers."[43]

¶ 1403.3 Value of APTs

It remains to be seen whether the courts of states that adhere to the traditional rule will respect domestic APTs.[44] In spite of this uncertainty, however, validation of APTs

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[41] See Rachel Emma Silverman, Litigation Boom Spurs Efforts To Shield Assets, Wall St. J., Oct. 14, 2003, at D1; Rachel Emma Silverman, So Sue Me: Doctors Without Insurance, Wall St. J., Jan. 28, 2004, at D1.

[42] Roundtable Discussion, 32 Vand. J. Transnat'l L. 779, 792–93 (1999) (statement of Eric Henzy).

[43] Dukeminier et al., supra note 14, at 558.

[44] Although there are not yet any definitive appellate decisions involving domestic APTs, there is a cautionary scholarly literature that explores bankruptcy law, fraudulent conveyance law, choice-of-law rules, federal constitutional considerations (such as the Full Faith and Credit Clause), and other doctrinal bases for refusing enforcement. This literature also takes on the normative policy question. See, e.g., Karen E. Boxx, Gray's Ghost—A Conversation About the Onshore Trust, 85 Iowa L. Rev. 1195 (2000); John K. Eason, Developing the Asset Protection Dynamic: A Legacy of Federal Concern, 31 Hofstra L. Rev. 23 (2002); Randall J. Gingiss, Putting a Stop to "Asset Protection" Trusts, 51 Baylor L. Rev. 987

financial assets to escape the Rule's reach. As such, the federal wealth transfer taxes have mortally wounded the once-mighty Rule by reducing it to a mere transaction cost. Trust duration has become an issue of federal tax law.

¶ 1414 Appendix: Dating of Trust Law Changes During the Period Under Study[65]

State	RAP Abolished[66]	Self-Settled Asset Protection Trust	Fiduciary Income Tax[67]
Alabama	—	—	YES
Alaska	1997[68]	1997	NO
Arizona	1998	—	YES
Arkansas	—	—	NO
California	—	—	YES
Colorado	2001	—[69]	YES
Connecticut	—	—	NO
Delaware	1995[70]	1997	NO

[65] This table is exhaustive through the end of the period under study (that is, through year-end 2003). For the sake of completeness, however, the table also notes major perpetuities and asset protection legislation enacted since then.

[66] Unless noted otherwise, we define abolition to include any reform that would allow a settlor to create a perpetual trust of intangible personal property. Accordingly, our definition of abolition includes: (1) outright repeal of the Rule Against Perpetuities with respect to an interest in a trust funded with intangible personal property; (2) reconfiguration of the Rule with respect to such trusts as a default that applies unless the settlor provides otherwise in the trust instrument; and (3) an exemption from the Rule for interests in a trust funded with intangible personal property over which the trustee has the power to sell (i.e., a trust that does not suspend the power of alienation).

[67] A YES in this column indicates that the state might levy a fiduciary income tax on the basis of an in-state trustee, in-state trust administration, or an in-state situs, even if the trust was settled by a nonresident for the benefit of nonresident beneficiaries and the trust consists entirely of intangible personal property. A NO indicates that state law clearly excludes such a trust from income taxation. We resolved ambiguity in favor of YES.

[68] In 2000 Alaska established a 1,000-year limitation on the duration of powers of appointment, enacted new language that more clearly abolished the Rule Against Perpetuities, and repealed its enactment of USRAP.

[69] Some commentators have read an older statute in Colorado as authorizing APTs as to future creditors, see Colo. Rev. Stat. Ann. § 38-10-111, but in dicta the Colorado Supreme Court has rejected that interpretation. In re Cohen, 8 P.3d 429, 432–34 (Colo. 1999).

[70] In 1986 Delaware reconfigured the Rule as applied to interests in trust into a 110-year limitation on trust duration. Act of July 3, 1986, ch. 422, 65 Del. Laws 831. Prior to 1986, Delaware had enacted legislation providing that a new perpetuities period would begin on the exercise of a power of appointment, which remains good law in Delaware today. See Act of Apr. 6, 1933, ch. 198, 38 Del. Laws 678 (codified at Del. Code Ann. tit. 25, § 501 (1989)). Hence Delaware made possible a perpetual trust long before 1995. However, Congress effectively foreclosed this option with I.R.C. § 2041(a)(3) (2000), which makes the extension of the perpetuities period under section 501 a taxable event for all trusts

State	RAP Abolished[66]	Self-Settled Asset Protection Trust	Fiduciary Income Tax[67]
Florida	2001[71]	—	YES,[72] NO beginning 2001
Georgia	—	—	NO
Hawaii	—	—	NO
Idaho	1957	—	YES
Illinois	1998	—	NO
Indiana	—	—	YES
Iowa	—	—	YES
Kansas	—	—	YES
Kentucky	—	—	YES
Louisiana	—	—	YES
Maine	1999	—	YES
Maryland	1998	—	NO, YES beginning 1988
Massachusetts	—	—	YES
Michigan	—	—	NO
Minnesota	—	—	NO
Mississippi	—	—	YES
Missouri	2001	2005[73]	NO
Montana	—	—	YES
Nebraska	2002	—	NO
Nevada	2005[74]	1999	NO
New Hampshire	2004	—	NO

created in or after 1942. See Dukeminier, et al., supra note 14, at 694–95 (7th ed. 2005); Jonathan G. Blattmachr & Jeffrey N. Pennell, Adventures in Generation-Skipping, or How We Learned To Love the "Delaware Tax Trap," 24 Real Prop. Prob. & Tr. J. 75 (1989).

[71] In 2001 Florida amended its enactment of USRAP to provide for a 360-year perpetuities period for interests in trust. Because 360 years is significantly longer than is possible through the use of a saving clause, we count Florida as having abolished the Rule.

[72] Although Florida does not have a fiduciary income tax, it does have an intangible personal property tax, and before 2001 trustees of Florida situs trusts were required to pay this tax.

[73] In 1986 Missouri amended its statutory rules on spendthrift trusts in a manner that could be read to authorize APTs, see Mo. Ann. Stat. § 456.080 (repealed 2004), but there is some contrary case law and the literature tends not to regard Missouri as an APT jurisdiction. See Mackmueller v. Case, 51 F.3d 775 (8th Cir. 1995); John K. Eason, Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy, 61 Wash. & Lee L. Rev. 159, 174 n.54 (2004). In 2004 Missouri adopted a nonuniform version of Uniform Trust Code § 505 that took effect on January 1, 2005, see Mo. Ann. Stat. §§ 456.5 to 505.3, and its drafters intended specifically to authorize APTs. See James G. Blase, The Missouri Asset Protection Trust, J. Mo. B., Mar.-Apr. 2005, at 72. Whether the new Missouri statute in fact authorizes APTs does not bear on our empirical analysis because the new statute took effect after the timeframe of our data.

[74] In 2005 Nevada modified its enactment of USRAP to provide for a perpetuities period of 365 years.

State	RAP Abolished[66]	Self-Settled Asset Protection Trust	Fiduciary Income Tax[67]
New Jersey	1999	—	NO
New Mexico	—	—	YES
New York	—	—	NO
North Carolina	2007	—	NO
North Dakota	—	—	YES
Ohio	1999	—	NO, YES beginning 2003
Oklahoma	—	2004[75]	NO, YES beginning 1994
Oregon	—	—	YES
Pennsylvania	2007	—	NO
Rhode Island	1999	1999	NO
South Carolina	—	—	YES
South Dakota	1983	2005	NO
Tennessee	—	2007	NO
Texas	—	—	NO
Utah	2004[76]	2004	YES, NO beginning 2004[77]
Vermont	—	—	NO
Virginia	2000	—	YES
Washington	—[78]	—	NO
West Virginia	—	—	NO
Wisconsin	1969[79]	—	YES, NO after 1999

Because 365 years is significantly longer than is possible through the use of a saving clause, we count Nevada as having abolished the Rule.

[75] Oklahoma's statute limits settlors to a single asset protection trust and caps the permissible initial funding at $1 million. We need not resolve whether to code Oklahoma differently from the other APT states, however, because the Oklahoma statute was enacted after the period of our study.

[76] Utah's statute appears to establish a 1,000-year perpetuities period effective December 31, 2003. Given the length of this period, we treat Utah as having abolished the Rule.

[77] Only trusts that "first became" Utah trusts "on or after January 1, 2004" qualify for exemption from the income tax.

[78] Washington extended its perpetuities period to 150 years effective January 1, 2002. Because 150 years is not significantly longer than is possible through the use of a saving clause, we do not count Washington as having abolished the Rule.

[79] Wisconsin may have abolished its Rule even earlier (indeed, Wisconsin may never have had the Rule). See Lawrence M. Friedman, The Dynastic Trust, 73 Yale L.J. 547, 550 (1964); Leach, supra note

State	RAP Abolished[66]	Self-Settled Asset Protection Trust	Fiduciary Income Tax[67]
Wyoming	2003[80]	2007	NO

19, at 974–75. We need not resolve the status of the Rule in Wisconsin prior to 1969, however, because our data do not begin until that year.

[80] Wyoming conditions the nonapplicability of the Rule on a provision in the trust instrument providing for the termination of the trust not later than 1,000 years after its creation. Given the length of this period, we treat Wyoming as having abolished the Rule.