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Looking Far (And Not So Far) Ahead: Texas's New Rule Against Perpetuities For Trusts

Catherine Bright Haws & R. Eric Viehman

A New Texas Rule Against Perpetuities for Trusts

By: Catherine Bright Haws and Ashley E. McMillan

Carrington, Coleman, Sloman & Blumenthal, L.L.P.
901 Main St., Suite 5500
Dallas, TX 75202
214-855-3000
cbrighthaws@ccsb.com
and amcmillan@CCSB.com

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I. INTRODUCTION

After nine prior failed attempts over two decades, a bill (HB 654) extending Texas's rule against perpetuities as it applies to trusts (but not in other contexts) was passed by both houses of the Texas Legislature and signed into law by Governor Abbott on June 16, 2021. HB 654 amends Tex. Prop. Code § 112.036 effective as of September 1, 2021. The new Tex. Prop. Code § 112.036 replaces the "lives in being plus 21 years" time limit for the vesting of interests in trusts with a fixed 300-year time limit for trusts that become irrevocable *on or after* September 1, 2021. The new statute also permits certain trusts that were irrevocable *before* that date to invoke the new 300-year time limit via the inclusion of certain provisions in the trust instrument (see Tex. Prop. Code § 112.036(d)). Trusts that were in existence on June 16, 2021, will be unlikely to properly invoke the new perpetuities period, and if they do not properly invoke it, the "lives in being plus 21 years" time limit for vesting will continue to apply.

II. THE RULE – WHAT IS THE RULE AGAINST PERPETUITIES?

The long-standing Texas rule against perpetuities ("Rule") that existed prior to the enactment of HB 654 generally required that an interest that was subject to the Rule must vest, if at all, not later than 21 years after the death of some life or lives in being (1) at the time of the creation of the interest plus a period of gestation, in the case of an interest in trust, or (2) at the time of the conveyance, in the case of a conveyance of real property. It may be stating the obvious, but the Rule will not serve to invalidate interests that are already vested, including vested remainder interests in trusts. If the only condition to an interest becoming possessory is the natural termination of the preceding estate (such as the death of a holder of a life estate) then the remainder interest is considered vested rather than contingent and is not subject to being voided by the Rule.¹ However, if there is some condition precedent that the interest is subject to, or if the recipient of the interest has not yet been born or cannot be ascertained, then the interest is contingent and must vest within the parameters established by the Rule in order to be valid. If there is any possibility that a contingent interest will remain contingent for longer than the Rule permits (more than 21 years after lives in being for beneficial interests governed by the prior Rule or more than 300 years after the trust creating the interest became irrevocable under the current Rule), the interest will be invalidated by the Rule. In other words, a contingent interest is valid if it is certain to vest (or fail) no later than the maximum period allowed under the Rule.²

III. EXCEPTIONS TO AND LIMITATIONS OF THE RULE

Some specific types of interests either do not fall within the scope of the Rule, are carved-out as exceptions, or have otherwise been held not to violate the Rule. For example, a reversionary

¹ Gray, Rule Against Perpetuities, §101 (4th ed. 1942).

² Frederic S. Schwartz, *A Student's Guide to the Rule Against Perpetuities* §3.02 (1988).

interest is not subject to the Rule. Similarly, an interest that is subject to a power in one person to make himself or herself the absolute owner of the property (e.g., a revocable trust or a general power of appointment exercisable in favor of oneself) is not subject to the rule. The Rule provides an exception for charitable trusts as well as direct gifts of future interests to charity. There also appear to be some statutory exceptions to the Rule in Texas, which include pension benefit trusts (see Tex. Prop. Code § 121.004), cemetery property (see Tex. Health & Safety Code § 711.035(c)), perpetual care trust funds (see Tex. Health & Safety Code § 712.023), and perhaps most notably, condominium association declarations/rules (see Tex. Prop. Code § 82.053). Another example (in the real property context) is an oil and gas lease granting the lessee the right to explore and develop for a fixed term and as long thereafter as minerals are produced, which creates a “fee simple determinable” in the minerals that does not violate the Rule. Executory interests were traditionally considered to vest only upon becoming possessory and were subject to the Rule; however, in *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858 (Tex. 2018), the Supreme Court of Texas upheld the validity of an executory interest that seemed to violate the traditional Rule, stating: “in this oil and gas context, where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, the Rule does not invalidate the grantee's future interest.” Thus, through the enactment of statutory exceptions and the development of court-created exceptions, the scope of the Rule has been narrowed over time.³

IV. REFORMATION

Despite these exceptions and limitations, some interests will still fail to vest within the requisite time-period. The Texas legislature has provided relief in those situations in the form of Tex. Prop. Code § 5.043(a), which states that courts are required to “reform or construe an interest in real or personal property that violates the Rule to effect the ascertainable general intent of the creator of the interest. A court shall liberally construe and apply this provision to validate an interest to the fullest extent consistent with the creator's intent.” By its terms, the obligation to reform interests applies to trusts taking effect on or after September 1, 1969, as well as to exercises of powers of appointment. If an interest is invalidated by the Rule (including an interest created via the exercise of a power of appointment), court reformation as provided by Tex. Prop. Code § 5.043(a) is required to validate the interest.

³ We note also that increased longevity results in a natural elongating of the acceptable period of time that trust or property interests may be held prior to vesting under the common law Rule because the time limitation is based upon “lives in being.” According to the UK Office of National Statistics, a male born in 1841 had a life expectancy of 40.2 years and a female had a life expectancy of 42.2 years. According to the Centers for Disease Control and Prevention, the average life expectancies for males and females in the United States in 2020 were 75.1 years and 80.5 years, respectively. Thus, the permissible duration of interests before vesting must occur has already increased from perhaps 61 years to 101 years on average (a 65% increase) in less than 200 years.

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