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

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Texas's New Rule Against Perpetuities: Explanation and Analysis

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TEXAS'S NEW RULE AGAINST PERPETUITIES: EXPLANATION AND ANALYSIS

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By: R. Eric Viehman

I. INTRODUCTION

On June 16, 2021, Governor Abbott signed into law HB 654, which modifies the rule against perpetuities (RAP) set out in § 112.036 of the Texas Trust Code. The resulting new Texas RAP generally applies to trusts created on or after September 1, 2021. Under the prior Texas RAP, the maximum term for holding assets in trust was determined under a lives in being plus 21 years rule, which produced a maximum permissible trust term of roughly 110 years. The new Texas RAP applies a 300-year rule, effectively tripling the maximum trust term in Texas for post-8/31/2021 trusts. HB 654 also added a special 100-year rule applicable in certain cases to a “real property asset” held in trust. Since many attributes of the prior Texas RAP are carried over and still apply under the new Texas RAP, operation of the prior Texas RAP is examined below before turning to an explanation and analysis of the new Texas RAP.

II. SOURCE OF PRIOR TEXAS RULE AGAINST PERPETUITIES

A. Texas Constitution. Article I, Section 26 of the Texas Constitution includes the following provision as part of its “Bill of Rights:”

“Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, . . .”

While the Texas Constitution clearly prohibits “perpetuities,” it fails to define that term.

B. Texas Cases Interpreting Constitutional Prohibition. The Texas Supreme Court interpreted the constitutional prohibition against perpetuities to mean that Texas trusts were subject to the traditional common law rule against perpetuities, which required all interests in a trust (other than a charitable trust) to vest within 21 years after the death of some lives in being at the trust’s inception (including a person then in gestation). *Singer v. Singer*, 150 Tex. 115, 237 S.W. 2d (1961); *Kettler v. Atkinson*, 383 S.W. 2d 557 (Tex. 1964). As expressed in an opinion issued by the Commission of Appeals and fully adopted by the Texas Supreme Court (thereby giving it the same effect as a decision by the Texas Supreme Court), the operative Texas rule was as follows:

“The rule against perpetuities is that no interest within its scope 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, to which is added in a case like this the period of gestation. [Citation omitted]” *Clarke v. Clarke*, 121 Tex. 165, 46 S.W.2d 658, 661 (Tex. 1932).

C. Codification of Texas Cases in Trust Code. The original Texas Trust Code (a component of the Texas Property Code) took effect on January 1, 1984, and it included a codification of the lives in being plus 21 years rule in § 112.036, which read as follows until it was amended this year by HB 654:

Sec. 112.036. RULE AGAINST PERPETUITIES

The rule against perpetuities applies to trusts other than charitable trusts. Accordingly, an interest is not good unless it must vest, if at all, not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation. Any interest in a trust may, however, be reformed or construed to the extent and as provided by Section 5.043.

III. KEY ATTRIBUTES OF PRIOR TEXAS RAP

A. Uses “Vesting” Rule. The prior Texas RAP (as well as the new one) is tied to the “vesting” of trust interests and not to the trustee’s ability to sell trust assets. Under the prior Texas RAP, the operative vesting rule was the *lives in being plus 21 years rule* set out above. All trust interests must vest no later than 21 years after the death of some person who was living (or in utero) on the date the trust was created. For these purposes, every trust interest that could possibly arise under a trust instrument – in the original trust and any future trust created under that trust instrument – must satisfy this lives in being plus 21 years rule. A trust’s validity is tested at the front end when the trust instrument originally became irrevocable, not on a wait-and-see basis as is the case under the Uniform Statutory Rule Against Perpetuities Act. To pass this front-end test, it must be demonstrated that in each possible instance every trust interest that could conceivably arise will vest no later than 21 years after the death of some person who was living (or in utero) at the date the trust instrument originally became irrevocable.

1. Sanction for Violating Vesting Rule. All transfers made to a trust that violates the vesting rule are void until such time, if any, the trust instrument is subjected to a judicial reformation. Absent such reformation, the settlor remains the actual owner of all property he or she transferred to the trust, with those retained property rights constituting assets that pass as part of the settlor’s estate.

a. Court Must Reform Trust. According to § 5.043 of the Texas Property Code, if a court cannot construe a trust instrument in a manner that prevents a violation of the Texas RAP, it must reform the trust instrument to eliminate any possible violation. In making such reformation, a court is required to effectuate the general intent of the settlor to the fullest extent possible, enforcing those trust provisions that do not violate the RAP and reforming only those that do not.

b. Amendment or Modification Insufficient. Since the Texas RAP does not utilize a wait-and-see approach, a “reformation” of the trust – which changes a trust’s terms retroactively from the trust’s inception – is required. Changes made by an “amendment” or “modification” of the trust instrument only apply from that date forward, so they cannot cure a RAP violation that was present when the original trust was created and funded, which means the original funding transfers remain void despite the subsequent amendment or modification of the trust instrument.

2. What it Means to “Vest”. Trusts are typically drafted so that interests therein are not fully vested. For example, a trust beneficiary’s discretionary or mandatory right to receive trust distributions normally terminates at his or death and is not an asset that passes as part of his or her estate. And a future trust beneficiary’s interest is normally conditional and not fully

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