

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

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Introduction

- New Texas Rule Against Perpetuities (RAP)
 - HB 654 signed on 6/16/2021 by Gov. Abbott
 - Effective 9/1/2021
 - Modifies Texas Trust Code §112.036
- Key Changes Under New Rule
 - Maximum term for trust “vesting” is now **300 years**
 - New limit for restricting sale of trust-owned “real property asset” of **100 years**
- Many Attributes of Prior Texas RAP Carryover

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Prior Texas RAP

- Source of prior Texas RAP
 - Texas Constitution prohibits “perpetuities”
 - Texas case law adopted traditional common law RAP
 - Case law codified in Texas Trust Code on 1/1/1984
- Texas Trust Code §112.036 (prior version)
 - Applies a **lives in being plus 21 years** rule
 - “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.”

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Prior Texas RAP – Key Attributes

- Created “vesting” rule not “alienation” one
 - Power to sell trust assets irrelevant
 - Trust’s validity tested at inception, not by “wait and see” approach
 - Front-end determination whether in each possible instance every trust interest must vest no later than 21 years after the death of some live in being at inception
- Sanction for trust violating RAP vesting rule
 - All transfers of property to the trust are void
 - Transferor still owns transferred property
 - Retained property is an asset passing as part of decedent’s estate
 - Texas Property Code §5.043 requires court to reform trust to cure voidness

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Prior Texas RAP – Key Attributes

- What it means to “vest”
 - Typically, beneficial interests in a trust are not fully vested
 - For a trust without fully vested interests (i.e. almost every trust), vesting occurs when the trust terminates if its assets pass free of trust
 - If such a termination must occur within allowable RAP term, no violation of RAP
 - If assets of original trust pass in further trust (other than to a vested trust), an interest in the original trust remains unvested until the recipient trust terminates
 - Assets passing at trust’s termination to a “vested trust” are fully vested
 - Meaning of “vested trust”
 - A trust exclusively for a designated individual
 - If he or she dies before trust terminates, trust assets pass to his or her estate

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Prior Texas RAP – Key Attributes

- Measuring term permitted by RAP
 - Begins once trust becomes irrevocable
 - Ends 21 years after the death of the last to die of the individuals alive at the trust’s beginning who are included in the group of measuring lives
- Exercising power of appointment over original trust in further trust
 - RAP term of recipient trust has same beginning date as original trust, unless
 - Power exercised in favor of powerholder’s estate or
 - A beneficiary of the recipient trust is granted a presently exercisable general power of appointment (“PEG power”)
 - Sometimes possible to add additional individuals to group of measuring lives used to determine recipient trust’s maximum term

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