

# **THE RULE AGAINST PERPETUITIES**

By [Stephen Saunders](#)

Perpetual trusts "...are contrary to the genius of a free government, and shall never be allowed...."

Texas Constitution of 1876

Article I, §26

## **Introduction**

Since 1876 Texas law has specifically prohibited the creation of perpetual, private, non-charitable trusts. Today, a small group seeks to change this fundamental tenet of Texas law by effectively repealing the Rule Against Perpetuities. Repealing the Rule would allow for essentially perpetual trusts and would have serious, if not disastrous, consequences for long-established tax, social, and economic policy and charitable giving in Texas.

## **Background**

The Rule Against Perpetuities ("the Rule") is a well-established principle of English and American law dating to the 1600's. In general terms, it provides that a private trust can last for some "life or lives in being, plus 21 years". With the life expectancy of a newborn child today being about 80 years, a trust can last for approximately 100 years (i.e. the 80 year life expectancy, plus 21 years).

A trust can provide for a beneficiary to be his or her own trustee from the time he or she is 18 or older. A beneficiary may receive distributions of income or principal from the trust for his or her health, support, maintenance, and education. Other people may be beneficiaries, including the descendants of the primary or first beneficiaries. The trust can be a "spendthrift" trust, which means that no beneficiary's creditors may reach the assets (except, under Texas law, for child support owed by a beneficiary). Once assets are placed in the trust they are generally not subject to the Texas inheritance tax or Federal transfer tax for the term of the trust.

Under current Federal tax law, a couple may put over \$2.0 million in a trust and have it out of the transfer tax system for the life of the trust. The effect of compounded growth is astounding. If \$2.0 million is doubled every ten years, at the end of 360 years the \$2.0 million becomes more than \$137,000,000,000,000. (See attached Exhibit A.)

## **Effect of Repeal**

### **Economic Policy**

Trustees invest differently from individuals owning their own property because trustees are in the business of wealth preservation and conservation. Where individuals often use their assets as collateral for loans to invest to try to make money, trustees rarely borrow money. The trillions of dollars that would eventually be in private trusts if the Rule were repealed would come out of the pool of assets used as collateral for loans. The economic engine of Texas would be severely adversely affected by taking those assets out of the normal stream of commerce forever.

Those assets would also be protected from the beneficiaries' legitimate creditors in perpetuity. Among other things, civil and criminal fines imposed on trust beneficiaries by the State of Texas would go unsatisfied from those trust assets. Also, the legitimate business creditors of the beneficiaries could not reach the trust assets to satisfy their claims. That fundamentally unreasonable and unfair result would be the case even though the beneficiaries would have virtual ownership of the trust assets.

### **Charitable Policy**

The trillions of dollars in wealth that would be locked up in a perpetual trust would also come out of the pool of assets available for charitable giving. Most perpetual trusts would not provide for the trustee to be able to make distributions to charity. Even in cases where a trust provided for charitable distributions, without unanimous consent of the beneficiaries (and minor and incapacitated beneficiaries cannot give consent) few trustees would risk the litigation that would almost certainly result from a large charitable distribution made without the unanimous consent of the beneficiaries. Even with unanimous consent of current beneficiaries, future generations of beneficiaries could sue trustees for making large charitable distributions.

Large-scale charitable giving by some of Texas' wealthiest families would come to a complete halt if the Rule is repealed, at least from the trillions of dollars in perpetual trusts. In an era when private, charitable giving is being asked to fund activities formerly funded by government, charitable giving should be encouraged, not impeded.

### **Social Policy**

The repeal of the Rule would produce countless trusts that would result in their beneficiaries being perpetually wealthy. Texas was settled and built by self-reliant, productive citizens. Our governmental policies have never sanctioned, much less encouraged, an idle class of perpetually wealthy citizens. Yet, repealing the Rule would put the State of Texas in the business of actively facilitating the creation of a permanent economic aristocracy. Few things could be more at odds with the principles on which this country, and the State of Texas, were founded.

### **Tax Policy**

The Texas inheritance tax currently produces approximately \$600 million each biennium. If the current tax is maintained that number is expected to increase dramatically in the next ten to fifteen years with the coming intergenerational transfer of wealth that is so widely discussed. Currently, estates under \$1.0 million (\$1.5 million beginning in 2004) are exempt from inheritance tax.

The families most likely to be paying inheritance tax are also those most likely to create perpetual trusts if the Rule is repealed. The inheritance tax has been part of the Texas system of taxation for many decades. The revenue the tax will produce in the future will be substantial and would be seriously jeopardized by repeal of the Rule.

### **Lawsuits**

As suggested above, trusts providing for charitable distributions will inevitably generate litigation over proposed charitable distributions. Any trusts and estates lawyer recognizes the difficulty trustees (and their lawyers) have interpreting trusts drafted even thirty or more years ago. The prospect of having to interpret trusts drafts hundreds or even thousands of years ago is laughable. (In Johanson's Annotated Probate Code--2002 Professor Stanley Johanson described the idea of extending the Rule to lives in being plus 1,000 years as "preposterous". He suggested that we "...look in the other direction and consider what the world was like in 2001 A.D.".) Repeal

of the Rule would eventually generate substantial amounts of litigation that would clog our courts and waste countless dollars.

**Public Policy**

It is often suggested by those who would repeal the Rule that people should "be able to do whatever they want with their property". The Rule has been part of the public policy of the State of Texas for over 126 years. It has historically been viewed as a reasonable compromise between those who would not allow trusts at all and those who would have them last forever. Certainly "people should be able to do whatever they want with their property", but always within the bounds of good public policy. The Rule is good public policy.

Good public policy is embodied in the Railroad Commission's regulation of the production of oil and gas in Texas, even though that regulation interferes with the right of people "to do whatever they want with their property". Good public policy is embodied in Texas community property rules and Texas homestead law, even though they interfere with the right of people "to do whatever they want with their property". Yet almost no one would suggest that regulation of mineral production by the Railroad Commission is not good public policy. Our system of community property and our special protection accorded to homestead property are virtually universally accepted and appreciated. Almost no one would suggest that they do not constitute good public policy. Good public policy benefits the citizens of Texas as a whole, even if it sometimes interferes with the right of people "to do whatever they want with their property".

**Conclusion**

A small group is seeking to change a long-established and fundamental principle of Texas law by effectively repealing the Rule Against Perpetuities. Repeal of the Rule would create a permanent economic aristocracy in Texas. Repeal would have disastrous effects on economic policy, tax policy, and social policy and would have catastrophic effects on large-scale charitable giving. For the same reasons that the framers of the Texas Constitution of 1876 described perpetual trusts as "contrary to the genius of a free government", efforts to repeal or substantially modify the Rule Against Perpetuities should be rejected.

EXHIBIT A

RAP Calculations

Money Doubles every 10 years  
Start w/ \$2,000,000

Assume each beneficiary has 2 children

And you start with 2; use 25 years per generation

	\$2,000,000.00	
10	\$4,000,000.00	25
20	\$8,000,000.00	50
30	\$16,000,000.00	75
40	\$32,000,000.00	100
50	\$64,000,000.00	125
60	\$128,000,000.00	150
70	\$256,000,000.00	175
80	\$512,000,000.00	200
90	\$1,024,000,000.00	225
100	\$2,048,000,000.00	250

1/14/2011

Stephen Saunders' Position Paper on R...

110	\$7,000,000,000.00	275	
120	\$8,192,000,000.00	300	2
130	\$16,384,000,000.00	325	4
140	\$32,768,000,000.00	350	
150	\$65,536,000,000.00	375	8
160	\$131,072,000,000.00	400	
170	\$262,144,000,000.00	425	16
180	\$524,288,000,000.00	450	32
190	\$1,048,576,000,000.00	475	
200	\$2,097,152,000,000.00	500	64
210	\$4,194,304,000,000.00	525	128
220	\$8,388,608,000,000.00	550	
230	\$16,777,216,000,000.00	575	256
240	\$33,554,432,000,000.00	600	
250	\$67,108,864,000,000.00	625	512
260	\$134,217,728,000,000.00	650	1,024
270	\$268,435,456,000,000.00	675	
280	\$536,870,912,000,000.00	700	2,048
290	\$1,073,741,824,000,000.00	725	
300	\$2,147,483,648,000,000.00	750	4,096
310	\$4,294,967,296,000,000.00	775	8,192
320	\$8,589,934,592,000,000.00	800	
330	\$17,179,869,184,000,000.00	825	16,384
340	\$34,359,738,368,000,000.00	850	
350	\$68,719,476,736,000,000.00	875	32,768
360	\$137,438,953,472,000,000.00	900	65,536