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Wayne M. Gazur

*University of Colorado Law School*

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# Colorado Revisits the Rule Against Perpetuities

by Wayne M. Gazur

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**The 2006 Colorado General Assembly passed legislation adopting a 1,000-year limitation applicable to interests in trust, practically eliminating the Rule Against Perpetuities ("RAP"). This article discusses the legislation's impact on the RAP in trust and non-trust situations.**

In April 2006, Governor Bill Owens signed House Bill 06-1137<sup>1</sup> that included an extensive revision of Colorado's statutory treatment of the Rule Against Perpetuities ("RAP"). After grappling with the transitional provisions, Colorado attorneys in the longer term likely will welcome this release from the so-called "RAP Trap."<sup>2</sup>

Although the application of the RAP to trusts was the focus of the 2006 legislation, it also clarified the 1991 repeal of the RAP in "nondonative transfer[s]."<sup>3</sup> On the other hand, even after the 2006 amendments, so-called "domestic"<sup>4</sup> transactions and donative, non-trust interests created by will, deed, or otherwise, remain subject to the ninety-year wait-and-see regime of prior law, so the RAP cannot be entirely forgotten. This article primarily discusses the current status of the RAP as applied to Colorado trusts, but will touch on its application in other contexts, as well.

## The Rule Against Perpetuities Prior to the 2006 Amendments

For almost a century, the RAP in Colorado was principally a creation of the common law, subject to minimal statutory limitations. However, during the last two decades, the Colorado legislature repeatedly acted to significantly restrict its application.

## The Common Law Rule

A longstanding Colorado statute provides:

the common law of England so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament, made in aid or to supply the defects of the common law prior to the fourth year of James the First . . . shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.<sup>5</sup>

The Colorado Supreme Court confirmed 1607 as the fourth year of James the First.<sup>6</sup> The Duke of Norfolk's Case introduced the "modern" RAP in 1682.<sup>7</sup> Consequently, Colorado courts adopted the RAP as a matter of general common law, without the imperative of the English laws statute.<sup>8</sup>

Harvard law professor John Chipman Gray's statement of the common law RAP typically is found in modern judicial opinions, including those in Colorado: "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."<sup>9</sup> The rule was applied in a handful of Colorado cases and, until 1991, the statutory responses principally were confined to those adopted in 1943, creating exceptions for cemetery trusts,<sup>10</sup> and in 1951, for employee benefit trusts.<sup>11</sup>

## Article Editor:

David W. Kirch, of David W. Kirch, P.C., Aurora—(303) 671-7726, [dkirch@qwest.net](mailto:dkirch@qwest.net)

## About The Author:

Wayne M. Gazur is a Professor of Law at the University of Colorado School of Law. Thanks to Mark A. Kurtenbach for his research assistance and to John DeBruyn, Kevin Millard, and Frederick Skillern for their helpful comments on drafts of the article.

### ***The 1991 Colorado Statutory Rule Against Perpetuities Act***

In 1991, Colorado adopted the Colorado Statutory Rule Against Perpetuities Act ("CSRAP").<sup>12</sup> The CSRAP was modeled after the Uniform Statutory Rule Against Perpetuities ("USRAP"),<sup>13</sup> which adopted a ninety-year "wait-and-see" period for interests that violated the common law RAP.

The CSRAP superseded the common law RAP,<sup>14</sup> and it abolished application of the RAP to most "nondonative transfer[s]."<sup>15</sup> A "nondonative transfer" is not defined in the statute, but the official comments to the USRAP offer that the transactions are "commercial-type" and include:

options . . . preemptive rights in the nature of a right of first refusal, . . . leases to commence in the future, at a time certain or on the happening of a future event, such as the completion of a building . . . nonvested easements; top leases and top deeds with respect to interests in minerals.<sup>16</sup>

It seemed that the exemption for nondonative transfers rendered the RAP of no consequence to commercial transactions,<sup>17</sup> unless the transaction occurred prior to the May 31, 1991 effective date of the statute.<sup>18</sup> However, the contours of the nondonative transfer exemption were uncertain,<sup>19</sup> and an article by Denver University law professor Lucy Marsh raised additional questions.<sup>20</sup> Professor Marsh's

principal concern ultimately was addressed in the 2006 amendments discussed later in this article.

The nondonative transfer exemption left the RAP, as modified in the ninety-year wait-and-see fashion, principally applicable to donative contexts, such as wills and trusts, plus nonvested property interests or powers of appointment arising out of the following specified "domestic" situations:

- 1) a premarital or postmarital agreement;
- 2) a separation or divorce settlement;
- 3) a spouse's election;
- 4) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties;
- 5) a contract to make or not to revoke a will or trust;
- 6) a contract to exercise or not to exercise a power of appointment;
- 7) a transfer in satisfaction of a duty of support; or
- 8) a reciprocal transfer.<sup>21</sup>

The official comments to the USRAP concede that the domestic situations can be nondonative in some cases, but they nevertheless are not excluded from the rule: "Some types of transactions—although in some sense supported by consideration and hence arguably nondonative—arise out of a domestic situation, and should not be excluded from the Statutory Rule."<sup>22</sup> The upshot is that a spouse's right of first

refusal or purchase option, for example, granted in a marital agreement or separation agreement, would not automatically be excluded from the CSRAP, but would be subject to the ninety-year wait-and-see limit if Colorado law otherwise would apply the RAP to such interests.<sup>23</sup>

The CSRAP generally was effective only for interests created after May 30, 1991. However, it provided a reformation remedy for prior interests that were found to violate the RAP.<sup>24</sup>

### ***The 1991 Colorado Common Interest Ownership Act***

During the 1991 legislative session that produced the CSRAP, real property legislation was enacted (with a 1992 delayed effective date) that included an incidental provision excluding condominium, cooperative, and homeowner association rules and regulations from the application of the RAP. The Colorado Common Interest Ownership Act, effective July 1, 1992, expressly states that the RAP does not apply to "defeat any provision of the declaration, bylaws, or rules and regulations."<sup>25</sup>

### ***The 1995 Pet Trust Legislation***

In 1995, Colorado adopted, with several significant modifications, the substance of Uniform Probate Code ("UPC") § 2-907<sup>26</sup> that validates honorary and pet trusts.<sup>27</sup> With respect to pet trusts, the legislation overrides doctrine that typically found such trusts to violate the RAP for lack of a human measuring life.<sup>28</sup>

### ***The 2001 Trust Amendments***

The CSRAP was amended in 2001 by the addition of language exempting a nonvested property interest from being invalid if "[t]he interest is in a trust and all or part of the income or principal of the trust may be distributed, in the discretion of the trustee, to a person who is living when the trust is created."<sup>29</sup> This language was effective as of June 1, 2001, but the legislation is silent regarding its impact on existing trusts.<sup>30</sup> The language placed Colorado in the camp of states permitting perpetual trusts. Nevertheless, the language was troublesome in several respects. First, it suggested that a trust providing only for mandatory distributions would not qualify.<sup>31</sup> This did not aid a settlor's dynastic plans that would prefer a strict accumulations phase where no immediate discretionary distributions are permitted.<sup>32</sup> It also would disqualify a more common structure of an income-only

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qualified terminable interest property ("QTIP") interest<sup>33</sup> for the benefit of a spouse, with the remainder passing to a generation-skipping trust for descendants. Second, although a narrow reading of the statute would defeat its apparent purpose, it is not altogether evident that the exemption continued to apply in perpetuity, after the potential distributees living at the time the trust was created pass away. Third, it apparently left powers of appointment subject to the ninety-year limitation period, short of a perpetual result.<sup>34</sup>

Before the enactment of the 2006 RAP legislation, there consequently were at least three classes of trust future interests considered from a RAP perspective. The nature of these classes is helpful in understanding the 2006 legislation. First, trusts created prior to May 30, 1991 were subject to the common law RAP. However, a non-vested property interest or a power of appointment created after May 30, 1991 by the exercise of a power of appointment contained in such trusts would be subject to the CSRAP.<sup>35</sup> Second, trusts created after May 30, 1991 and before June 1, 2001 were subject to the ninety-year rule<sup>36</sup> of the CSRAP. Third, trusts created after May 31, 2001 would be subject to ninety-year CSRAP rule as a default, or might be perpetual if the discretionary distribution rule was observed.

## The 2006 Amendments

The 2006 amendments principally address interests in trusts, but some provisions further clarify the role of the RAP in nondonative transactions, such as commercial real estate. Although the application of the RAP to trusts created after the new statute's effective date is simplified, the application of the RAP to existing trusts remains a somewhat intricate puzzle.

### *The Nondonative Transfers Exclusion*

The 2006 legislation introduced in the Colorado House of Representatives focused on the RAP's application to trusts. The Senate revised the bill to add language more emphatically stating that the RAP, particularly as applied to nondonative transactions, is dead. First, the legislation removes the CSRAP domestic exception for "a reciprocal transfer"<sup>37</sup> that Professor Marsh earlier had questioned.<sup>38</sup> Second, language is added to the exclusions section expressly stating that the statutory RAP, as amended, does not ap-

ply to "invalidate" excluded transactions, such as nondonative transfers.<sup>39</sup> Third, the effective date section is embellished to note that the CSRAP not only "supercedes" the common law RAP, but also "abolishes" it "for nonvested interests created after May 31, 1991."<sup>40</sup>

The RAP consequently is no longer applicable to clearly nondonative transactions, as long as Colorado law applies to the transaction and the interest was created after May 31, 1991. Other claims of

invalidity, such as prohibitions on the *inter vivos* transfer of contingent remainders<sup>41</sup> and unreasonable restraints on alienation, should be expected.<sup>42</sup>

### *The Domestic Exceptions, Wills, and Donative Non-Trust Interests*

For transactions that are not otherwise excluded from the CSRAP and are not interests in trust or powers of appointment with respect to all or any part of a trust,

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the 2006 amendments restate the ninety-year wait-and-see rules, even for interests created after the June 30, 2006 effective date of the amendments.<sup>43</sup> The CSRAP already enumerated situations that were excluded from the CSRAP and for which the RAP was abolished.<sup>44</sup> However, there are some remaining areas of concern. Non-trust interests arising out of domestic situations are subject to the ninety-year rule. Non-trust interests created in a will, such as a testamentary power of appointment, executory devises of real estate, or concerns about the so-called "slothful executor,"<sup>45</sup> are subject to the ninety-year rule. Interests created by a donative deed or other instrument of transfer are subject to the ninety-year rule.

Because the statute retains the USRAP alternatives of required vesting or termination "no later than twenty-one years after the death of an individual who is then alive; or . . . within ninety years after its creation"<sup>46</sup> the common law RAP remains relevant to these interests. Unlike the interests in trusts that are discussed next, for these interests, the common "twenty-one years" saving clause remains appropriate, because the statute repeats the

prior CSRAP prohibition on clauses that seek to extend the duration of the interest to a date that falls on the later of ninety years or the traditional twenty-one year perpetuity period.<sup>47</sup>

### **Interests in Trusts**

The 2006 amendments eliminate most remnants of the common law RAP as applied to interests in trust.<sup>48</sup> Unlike the CSRAP, which still referred to the common law RAP as an alternate method of validating a nonvested interest (even if the focus was on the ninety-year alternative), the 2006 amendments ignore the common law rules and prescribe only a single limitation period of 1,000 years "in gross." The 2006 amendments require close analysis in applying them to the different varieties of future interests dictated by their date of creation.

**Trust Interests Created after June 30, 2006:** If the trust interest is created after June 30, 2006, a nonvested property interest is invalid only if it fails to vest or terminate within 1,000 years after its creation.<sup>49</sup> Similarly, a general power of appointment not presently exercisable because of a condition precedent is invalid

unless the condition precedent is satisfied or becomes impossible to satisfy within 1,000 years after its creation.<sup>50</sup> A "nongeneral"<sup>51</sup> power of appointment or a general testamentary power of appointment is invalid unless the power is irrevocably exercised or otherwise terminates within 1,000 years after its creation.<sup>52</sup> The RAP was left dangling by the 1,000-year thread and not abolished completely, to avoid additional complexities necessary to avoid the so-called "Delaware Tax Trap" discussed briefly in the following paragraph.<sup>53</sup>

A nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised.<sup>54</sup> However, a power of appointment created by the exercise of a nongeneral power of appointment is considered created when the first power of appointment is created,<sup>55</sup> and that effectively limits the total term of all appointed interests to no more than 1,000 years, no matter how many successive nongeneral powers are created or exercised. This provision aims to avoid the "Delaware Tax Trap," which is a creation of Internal Revenue Code ("Code")

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§§ 2514(d) and 2041(a)(3).<sup>56</sup> Although the details are beyond the scope of this article, the Code will convert a nongeneral power of appointment that otherwise enjoys benign gift and estate tax treatment into a potentially taxable general power of appointment if the exercise of the power of appointment involves "creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate of interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power."<sup>57</sup> Limiting the total term to 1,000 years from the creation of the trust and its powers sidesteps this trap.

**Drafting Trusts after June 30, 2006:** For trusts created after June 30, 2006, there are no transitional rules or elections. However, Colorado lawyers who did not already grapple with the full impact of the 2001 perpetual trust amendments will need to reconsider how their trusts will operate in an almost perpetual context, particularly with respect to issues of choice of applicable law, early termination clauses, and saving clauses.

Although the 1,000-year period is generous and the practical equivalent of a perpetual trust, the RAP is not eliminated as a technical matter. If the trust is structured to continue forever, it technically may bump up against the 1,000-year limit. In that case, the statute will permit a court to reform the trust "in the manner that most closely approximates the transferor's manifested plan of distribution."<sup>58</sup> Consequently, the standard saving clause will need to be modified to serve as a controlled disposition of the trust assets when the trust term reaches 1,000 years. Even if a client does not want a dynasty trust in near perpetuity and the trust's fundamental distribution scheme will terminate it long before a millennium, it probably will be the case that the standard saving clause tied to "21 years after the death of the last survivor of the group composed of" will be supplanted in basic wills and trusts by one tied to "1,000 years after the date of the creation of this trust [or the testator's date of death]."<sup>59</sup>

That said, focusing on the 1,000-year limit could prove to be inadequate in more complex situations, if the trust becomes subject to the laws of a state that follows other approaches to this issue, such as the common law RAP, USRAP, or permitting entirely perpetual trusts.<sup>60</sup> Although it al-

ready was the case for many complex trusts prior to the 2006 amendments, it seems increasingly likely that saving clauses will evolve to become more flexible—and complex—provisions that attempt to provide for possible alternative multi-jurisdictional approaches to the RAP issue. In light of the difficulty of drafting such an all-inclusive clause, practitioners instead might see highly flexible provisions that simply limit the duration of the trust to "the longest period permitted by the law applicable to the trust."

Beyond saving clauses, the 2006 amendments do not increase the complexities of trusts for lawyers who already were drafting perpetual trusts under the 2001 amendments or the laws of other states. Such provisions are beyond the scope of this article, but they include greater attention to termination of the trust on the failure of descendants, termination for lack of sufficient trust assets, choice of applicable law, and the use of trust protectors.<sup>61</sup> The underlying point of these concerns is that it rarely is possible to draft for all circumstances for 100 years from now, let alone 1,000 years into the future. Indeed, it has been estimated that an average married couple with 2.1 children would have more than 100 descendants 150 years after the trust is created, producing approximately 2,500 beneficiaries 250 years after the trust is created, 45,000 beneficiaries 350 years after the trust is created, and 3.4 million beneficiaries 500 years after the trust is created.<sup>62</sup>

**Trusts Created After May 31, 2001 and Before July 1, 2006:** Trusts created after May 31, 2001 and before July 1, 2006 will be subject to the same rules as trusts created after June 30, 2006, unless the beneficiary of an affected interest or the holder of an affected power of appointment files an election to block the retroactive application of the statute.<sup>63</sup> Apart from offering greater choices of result, this elective procedure counters arguments that the statute has a retrospective impact prohibited by the Colorado constitution<sup>64</sup> or otherwise might violate constitutional prohibitions on impairments of contracts, substantive and procedural due process, and takings of private property.<sup>65</sup> This election applies to all interests in pre-July 1, 2006 trusts impacted by the 2006 legislation.

Colorado lawyers who represent such affected parties can file the statutorily prescribed notice of election with the trustee on or before July 1, 2008.<sup>66</sup> The statute expressly releases fiduciaries from

responsibility for not making the election.<sup>67</sup> This exculpation might discourage the trustee from notifying beneficiaries of this election, possibly raising procedural due process claims.<sup>68</sup>

Assuming that an affected party properly files the election notice with the trustee, the election apparently would be effective with nothing more. The statute provides no qualitative standard of review. It could be expected that few of these elections will be filed, because a post-May 31, 2001 trust otherwise could be perpetual under the old law, or subject to the ninety-year wait-and-see period of the CSRAP. It is hard to envision a current beneficiary who would obtain a significant advantage by making the election. If the trust included a saving clause tied to lives in being plus twenty-one years, the saving clause would control the duration of the trust and the 1,000-year limit would be largely irrelevant. Only if the saving clause already were expressed flexibly in terms such as "the longest period permitted by the law applicable to the trust" would the 1,000-year limit possibly extend the trust and deny a beneficiary his or her terminating distribution, assuming the trust was not drafted as a perpetual trust from the outset under CSRAP.<sup>69</sup>

There are a number of possible outcomes of the 2006 amendments, but in light of the long timelines, this discussion has a highly impractical quality. Nevertheless, the statute does raise interesting issues, such as the treatment of unborn beneficiaries.<sup>70</sup>

**Trusts Created After May 30, 1991 and Before June 1, 2001:** Trusts that were created after May 30, 1991 and before June 1, 2001 generally are subject to rules that restate those that were in place when the CSRAP first was adopted—notably the ninety-year wait-and-see period—so, at first blush little has changed for these trusts.<sup>71</sup> However, the amendments extend the clarifying language discussed earlier with respect to trusts created after June 30, 2006, addressing the timing of the creation and the term of interests created through the exercise of powers of appointment. As is the case with trusts created after May 31, 2001 and before July 1, 2006, the beneficiary of an affected interest or the holder of an affected power of appointment can elect on or before July 1, 2008 that these provisions not apply.<sup>72</sup>

**Trusts Created Before May 31, 1991:** Trusts created before May 31, 1991 would remain subject to the common law RAP, except that the reformation remedy of

current law is retained for property interests created prior to May 31, 1991 that violate the common law RAP.<sup>73</sup> However, as discussed below, the exercise of a power of appointment after June 30, 2006 usually would invoke the new rules, including the 1,000-year limitation, even for a pre-May 31, 1991 trust (with an exception for trusts irrevocable on September 25, 1985). Accordingly, the right of the beneficiary of an affected interest or the holder of an affected power of appointment to elect out of the provisions on or before July 1, 2008 would apply here, as well.

The application of the new rules to pre-May 31, 1991 trusts is somewhat intricate. The statute's effective date provides that it applies to a nonvested property interest or a power of appointment that is created on or after May 31, 1991.<sup>74</sup> However, the statute provides that a nonvested property interest or power of appointment created by the exercise of a power of appointment is created when the power is exercised.<sup>75</sup> That rule will make the post-June 30, 2006 exercise of a power of appointment created in a pre-May 31, 1991 instrument generally subject to the new rules.

The part of the statute prescribing the 1,000-year limitation applies to interests

in trust or powers of appointment created after May 31, 2001, which essentially would encompass all interests in trust and powers of appointment created through the exercise of a power of appointment after June 30, 2006.<sup>76</sup> This is buttressed by the language of the statute that addresses exercises of powers of appointment, where the rule is repeated that a nonvested property interest or power of appointment created by the exercise of a power of appointment is created when the power is exercised.<sup>77</sup> As discussed earlier in connection with trust interests created after June 30, 2006, the statute clarifies that a power of appointment created through the exercise of a nongeneral power of appointment is considered created when the first power of appointment was created.<sup>78</sup> Accordingly, that interest must vest within 1,000 years from the creation of the trust.

There is another tax-driven exception to the power of appointment rules. A nonvested property interest or power of appointment created by the exercise of a nongeneral power of appointment over any part of a trust that was irrevocable on September 25, 1985 is not made subject to the 1,000-year limitation, defaulting instead to the ninety-year limitation of the new stat-

ute that resembles the CSRAP.<sup>79</sup> This provision was included so that trusts (or portions of trusts) created prior to the effective date of the federal generation-skipping transfer tax do not lose that exemption on account of a constructive addition to the trust stemming from the exercise of a nongeneral power of appointment.<sup>80</sup>

## Conclusion

The 2006 amendments promise to almost eliminate the application of the RAP to Colorado trusts as a practical matter, in light of the new 1,000-year limit. The amendments also confirm that the RAP no longer will apply to most Colorado commercial transactions. Nevertheless, in light of complications such as effective dates, exceptions for domestic transactions and non-trust interests, and questions of whether Colorado law applies to a given transaction, the RAP cannot yet be forgotten.

## NOTES

1. See <http://www.leg.state.co.us>; House Bill ("H.B.") 06-1137 (2006 Colo. Legis. Serv. Ch. 114). Unless stated otherwise, all citations to the Colorado Revised Statutes are to the codification that will reflect the 2006 legislative session.

2. This phrase is not original with the author. See, e.g., Hess, "Freeing Property Owners from the RAP Trap: Tennessee Adopts the Uniform Statutory Rule Against Perpetuities," 62 *Tenn. L.Rev.* 267 (1995).

3. CRS § 15-11-1105(1)(a).

4. See CRS § 15-11-1105(1)(a)(I)-(VII).

5. CRS § 2-4-211.

6. See *Chilcott v. Hart*, 45 P. 391 (Colo. 1896) (discussing the history of the statute and identifying 1607 as the applicable year).

7. See, e.g., Dukeminier *et al.*, *Wills, Trusts, and Estates* (New York, NY: Aspen Publishers, 2005) at 671-74.

8. See *Chilcott*, *supra* note 6 at 398 ("We think that what is known as the modern rule against perpetuities, viz. that a future estate may be limited to take effect after the termination of one or more lives in being and 21 years and a fraction thereafter, is in force in this state.").

9. *Perry v. Brundage*, 614 P.2d 362, 366 (Colo. 1980).

10. See CRS § 38-30-110.

11. See CRS § 38-30-111.

12. See CRS §§ 15-11-1101 through -1107.

13. See 8 U.L.A. 226 (1998) (comprising UPC §§ 2-901-906). See also 8B U.L.A. 236 (2001) (freestanding version).

14. See CRS § 15-11-1107(2).

15. See CRS § 15-11-1105(1)(a). The official comment to § 4 of the Uniform Statutory Rule Against Perpetuities ("USRAP") states:

### Summary of the RAP in Colorado

#### **Nondonative (commercial-type) Transfers**

- Transfers prior to May 31, 1991 are subject to the common law RAP, but a statutory reformation remedy applies.
- The RAP does not apply to transfers after May 30, 1991.

#### **Domestic Situation Transfers and Donative, Non-Trust Transfers**

- Transfers prior to May 31, 1991 are subject to the common law RAP, but a statutory reformation remedy applies.
- Transfers after May 30, 1991 are subject to a ninety-year wait-and-see limitation.

#### **Transfers in Trust (including powers of appointment in trusts)**

- Trusts created prior to May 31, 1991 are subject to the common law RAP, but a statutory reformation remedy applies.
- For trusts created prior to May 31, 1991 but after September 25, 1985, an exercise after June 30, 2006 of a power of appointment created under the trust is subject to a 1,000-year limitation. The exercise of a power of appointment created in a trust that was irrevocable as of September 25, 1985 is subject to a ninety-year wait-and-see limitation. Beneficiaries have an opt-out election until July 1, 2008.
- Trusts created after May 30, 1991 but before June 1, 2001 are subject to a ninety-year wait-and-see limitation. Beneficiaries have an opt-out election until July 1, 2008.
- Trusts created after May 31, 2001 but before July 1, 2006 are subject to a 1,000-year limitation. Beneficiaries have an opt-out election until July 1, 2008.
- Trusts created after June 30, 2006 are subject to a 1,000-year limitation.

#### **Honorary Trusts and Pet Trusts**

- Honorary trusts are subject to a twenty-one-year limitation.
- Pet trusts are limited to the life of the pet(s), plus the lives of any offspring in gestation at the time the pet(s) become present beneficiaries.



Since the Common-law Rule Against Perpetuities is superseded by this Act . . . a non-vested property interest, power of appointment, or other arrangement excluded from the Statutory Rule by this section is not subject to any rule against perpetuities, statutory or otherwise.

8B U.L.A. 280 (2001). Section 12 of the 2006 amendments eliminates an exclusion from the Colorado Statutory Rule Against Perpetuities Act ("CSRAP"), CRS § 15-11-1105(1)(a)(VIII) (2005), referring to "a reciprocal transfer" that had raised questions as to whether the language included commercial transactions.

16. 8B U.L.A. 280 (2001) (official comment to USRAP § 4). The comment also notes that the presence of consideration in a transaction that is "essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration." *Id.* at 281.

17. *See, e.g.,* Hendrix, "Death of the Rule Against Perpetuities in Commercial Transactions," 21 *The Colorado Lawyer* 475 (March 1992).

18. *See, e.g., Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604 (Colo. 2005) (transaction that occurred prior to the effective date of the CSRAP was subject to the common law RAP; *res judicata* precluded party from raising a claim under the reformation rule of the CSRAP in a subsequent proceeding).

19. For example, the official comment to USRAP § 4 notes that the presence of consideration in a transaction that is "essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration." 8B U.L.A. 281 (2001) (official comment to USRAP § 4).

20. *See* Marsh, "Shouldn't We Just Simplify the RAP?" 30 *The Colorado Lawyer* 57, 58 n.1 (July 2001).

21. CRS § 15-11-1105(1)(a)(I-VIII) (2005). The "reciprocal transfer" category was the concern of Professor Marsh, as she believed it might swallow up the commercial transaction exemption.

22. 8B U.L.A. 281 (2001) (official comment to USRAP § 4).

23. It is beyond the scope of this article to discuss the uncertain state of Colorado law applicable to purchase options and rights of first refusal. *See, e.g., Perry, supra* note 9 (purchase options and first rights of refusal can violate the RAP); *Atchison v. City of Englewood*, 463 P.2d 297 (Colo. 1970) (right of first refusal unlimited in time can violate the RAP). *But see Cambridge Co. v. E. Slope Investment Corp.*, 700 P.2d 537 (Colo. 1985) (perpetual first right of refusal may not be subject to RAP).

24. *See* CRS § 15-11-1106(1) and (2) (2005). Also, interests such as rights of reverter, which were considered vested and not subject to RAP, may be excluded under the general exclusion of "[a] property interest, power of appointment,

or arrangement that was not subject to the common-law rule against perpetuities." CRS § 15-11-1106(1)(g) (2005).

25. CRS § 38-33.3-203(2). *See* Skillern, "Rule Against Perpetuities" § 72.29, in Krendl, *Colorado Methods of Practice* (St. Paul, MN: West Group, 1998).

26. 8 U.L.A. 239 (1998).

27. *See* CRS § 15-11-901.

28. For a discussion of the common law treatment of pet trusts and the Colorado statute see Heller, "Trusts for Pets," 26 *The Colorado Lawyer* 71 (March 1997). At least one Colorado case involved a trust with a canine beneficiary, but the court avoided the larger issue of the validity of pet trusts by finding the beneficiary language to be precatory in nature. *See In re Forrester's Estate*, 279 P. 721 (Colo. 1929).

29. CRS § 15-11-1102(1)(c) (2005).

30. One might assume that the 2001 amendment was to apply only to trusts settled after the effective date, to avoid arguments that the statute had a retrospective impact on a beneficiary, which would violate Article II, § 11, of the Colorado Constitution's proscription of a law "retrospective in its operation." *Compare Lake of the Woods Assn. v. McHugh*, 380 S.E.2d 872 (Va. 1989) (barring a retroactive application of the USRAP to save a first right of refusal that otherwise was invalid under the RAP). Even if it might be argued that the statute could have retroactive effect, it might not be of practical importance if the trust had a standard saving clause that terminated the trust on the same period as the common law RAP. Indeed, the CSRAP prohibition on saving clauses that would use the longer of the common law RAP period or ninety years would ensure that result. *See* CRS § 15-11-1102(5) (2005).

31. *See, e.g.,* Stover, "Why Not Repeal the Rule Against Perpetuities?" 30 *The Colorado Lawyer* 58, 60 n. 7 (July 2001) ("apparently . . . a nondiscretionary simple trust would still be subject to the [RAP]"). A discussion of the Alaskan RAP provisions from which the 2001 amendments were drawn raised the issue of whether so-called "Crummey" withdrawal rights might render a trust nondiscretionary and invalid. *See* Greer, "The Alaska Dynasty Trust," 18 *Alaska L. Rev.* 253, 278 (2001).

32. Several states have adopted statutes or follow common law doctrine that restrict the period over which income can be accumulated in trust. *See, e.g.,* Sitkoff, "The Lurking Rule Against Accumulations of Income," 100 *Nw. U. L. Rev.* 501 (2006). The 2001 amendments to the CSRAP did not permit the creation of a perpetual trust unless distributions could be made to a beneficiary living at the time of the creation of the trust. That aspect now is absent from the Colorado RAP statute after the 2006 amendments, and it does not appear that Colorado law otherwise has adopted a prohibition on the long-term accumulation of income in trust.


33. Qualified terminable interest property ("QTIP") is described in IRC § 2056(b)(7).

34. As discussed later, this limitation was wise in terms of avoiding creating a so-called "Delaware Tax Trap" effect. *See infra* notes 54-57 and accompanying text.

35. *See* CRS § 15-11-1106(1)(2005).

36. The CSRAP validates a nonvested interest if it either meets the common law rule or vests or terminates within ninety years after its creation. *See* CRS § 15-11-1102(1)(a) and (b) (2005).


37. *See* H.B. 06-1137, § 12 (amending CRS § 15-11-1105).



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38. See *supra* note 20 and accompanying text.

39. See H.B. 06-1137, § 12 (amending CRS § 15-11-1105(1)).

40. *Id.* at § 14 (amending CRS § 15-11-1107(2)). A technical amendment is being considered to add the italicized words below to CRS § 15-11-1107(2):

This part 11 supersedes and abolishes the rule of the common law known as the rule against perpetuities for nonvested interests and powers of appointment created on or after May 31, 1991.

An explanation is beyond the scope of this article.

41. A recent commentary identified Colorado as one of a few states where contingent remainders still are inalienable *inter vivos*, but it is fair to say that Colorado law in this area is not clear. See Gallanis, "The Future of Future Interests," 60 *Wash. & Lee L.Rev.* 513, 517-19 (2003), citing *Barry v. Newton*, 273 P.2d 735 (1954); *E-470 Pub. Highway Auth. v. Argus Real Estate Partners, Inc.*, 70 P.3d 481 (Colo.App. 2002), citing with approval the position in *Barry v. Newton*. For a discussion of the Colorado law dealing with the transmissibility of future interests such as reversions, vested remainders, possibilities of reverter, rights of entry for condition broken, contingent remainders and executory interests, see Skillern, *supra* note 25, "Future Interests," §§ 72.21-26. Colorado law, for example, does not permit the assignment of rights of reverter. See, e.g., *Denver & S.F. Ry. Co. v. School Dist. No. 22 in Arapahoe County*, 23 P.978 (Colo. 1890); *Union Colony Co. v. Gallie*, 88 P.2d 120 (Colo. 1939).

42. See, e.g., *Perry*, *supra* note 9 (purchase option not unreasonable restraint on alienation under the facts).

43. See CRS § 15-11-1102.5(2).

44. See CRS § 15-11-1105(1)(a)-(g) (2005).

45. The RAP doctrine had its cast of improbable characters, such as the fertile octogenarian and the unborn widow. A Colorado case applied the rule of the "slothful executor" to invalidate a bequest that was postponed until "the admission of this will to probate." *Miller v. Weston*, 189 P.610, 611 (Colo. 1920).

46. CRS § 15-11-1102.5(2)(b)(I).

47. See CRS § 15-11-1102.5(2)(b)(V).

48. The influence of the common law RAP remains in the honorary trust provisions that still refer to a twenty-one-year term of the trust. See CRS § 15-11-901. This article does not evaluate the wisdom of eliminating the RAP. See, e.g., Marsh, *supra* note 20; Thompson, "A Banker's Perspective on the Repeal of the RAP in Colorado," 30 *The Colorado Lawyer* 61 (July 2001); Stover, *supra* note 31; Dobris, "The Death of the Rule of Perpetuities, or the RAP Has No Friends—An Essay," 35 *Real Prop. Prob. & Tr. J.* 601 (Fall 2000).

49. See CRS § 15-11-1102.5(1)(b)(I).

50. See CRS § 15-11-1102.5(1)(b)(II).

51. This language is used for tax purposes in connection with IRC §§ 2041 and 2514, but it

departs from the Colorado powers of appointment definitions that classify these powers as "special" powers. See CRS § 15-2-103(2). However, "nongeneral" powers are used in at least two probate code sections without defining the term. See CRS §§ 15-11-803(3)(a)(ii) and 15-11-804(2)(a)(ii).

52. See CRS § 15-11-1102.5(1)(b)(III).

53. Colorado has parted ways with other states, notably Alaska, that apply a 1,000-year limit to powers of appointment, but otherwise permit a perpetual trust provided that the power of alienation is not suspended, which is accomplished by giving the trustee a power to sell trust assets. See, e.g., Alaska Stat. §§ 34.27.051, 34.27.053, and 34.27.100. The Wisconsin RAP statute permits a perpetual trust if the power of alienation is not suspended, and in a case of first impression, the U.S. Tax Court held that this did not produce an adverse result in terms of the so-called "Delaware Tax Trap" discussed later. See *Estate of Murphy v. Comm'r*, 71 T.C. 671 (1979).

54. See CRS § 15-11-1102.5(3)(a). The exercise of a power of appointment in a trust created prior to June 1, 2006 consequently could invoke the new rules with respect to the affected property, if it were not for some additional special rules discussed later.

55. See CRS § 15-11-1102.5(3)(b).

56. See Dukeminier and Krier, "The Rise of the Perpetual Trust," 50 *UCLA L.Rev.* 1303, 1332-35 (2003); Greer, "The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities," 28 *Est. Plan.* 68 (Feb. 2001).

57. I.R.C. § 2041(a)(3) (emphasis added).

58. CRS § 15-11-1104.5(1).

59. In drafting basic trusts subject to Colorado law, it probably is the case that attorneys no longer routinely should use the "21 years after the death . . ." saving clause, and that should be conformed to the 1,000-year limit. However, in the context of wills, that saving clause would not address nonvested, non-trust interests created under a will that would be governed by the ninety-year limitation period of the CSRAP discussed in the previous section. Therefore, practitioners might expect greater use of flexible clauses described in the next paragraph of the text.

60. Some of the states that permit perpetual trusts (for example, South Dakota, Wisconsin, and Alaska) require that the power of alienation not be suspended indefinitely, which often is satisfied by granting the trustee a power to sell trust assets. Although it is difficult to draft for all of these possible outcomes, the inclusion of such a power of sale could be helpful in case the trust situs migrates to that type of jurisdiction.

61. See generally Nenno, "Planning With Perpetual Dynasty Trusts," SLO30 ALI-ABA 1195 (Nov. 2005).

62. See News Release, National Conference of Commissioners on Uniform State Laws, "Uniform Statutory Rule Against Perpetuities Is Law in 26 States—Move of a Few States to Abolish the Rule In Order to Facilitate Perpet-

ual (Dynasty) Trusts is Ill-Advised," (Jan. 2000). See generally Dukeminier and Krier, *supra* note 56 (discussing potential problems arising from perpetual trusts).

63. See CRS § 15-11-1106.5.

64. See *supra* note 30.

65. Although these issues are beyond the scope of this article, the U.S. Supreme Court's decisions dealing with title clearing legislation might provide some guidance. See, e.g., *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (title clearing statute that caused mineral interests to revert to the surface owner unless a claim was filed within two years after the enactment of the statute was upheld against claims of violation of substantive due process, procedural due process, equal protection, impairment of contracts, and takings); *United States v. Locke*, 471 U.S. 84 (1985) (statute providing for extinguishment of an unpatented mineral claim upon a failure to register within three years after the statute's enactment held not a taking or a violation of substantive or procedural due process); *Gerner v. Sullivan*, 768 P.2d 701 (Colo. 1989) (statute rendering eighteen years as conclusive evidence of ownership for adverse possession was not a taking under state or federal constitutions). However, this line of cases must be reconciled with the Court's decisions invalidating a title clearing statute impacting Indian lands. See *Hodel v. Irving*, 481 U.S. 704 (1987); *Babbitt v. Youpee*, 519 U.S. 234 (1997). Thanks to Professor Howard Klemme for his insights collected in his forthcoming book, *Takings, Substantive Due Process, and the Regulatory Roles of Government*.

66. See CRS § 15-11-1106.5(2)(b).

67. See CRS § 15-11-1106.5(3).

68. Again, this is beyond the scope of this article, but trust and estate lawyers will recall the U.S. Supreme Court's determination that a probate claim statute violated procedural due process for inadequate notice. See *Tulsa Prof. Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

69. However, if the saving clause does not extend to exercises of powers of appointment, the 2006 amendments could permit the creation of new interests by the exercise of a power of appointment that would extend for 1,000 years from the date of the creation of the trust, beyond the period permitted by the CSRAP.

70. Apparently the statute aims to preclude all opt-out elections after July 1, 2008. Although Colorado has codified the equitable doctrine of "virtual representation," a living beneficiary's election apparently would not represent the interests of an unborn beneficiary, because the election procedure is not a judicial proceeding and without more would not result in an "order." It is beyond the scope of this article to compare the common law requirements of virtual representation to those applied by the statute and to conclude whether the Colorado statute has fully supplanted the common law doctrine that otherwise might require less formal actions. See CRS § 15-10-403(3)(d) and (5):

An unborn, unascertained, minor or incapacitated person who is not otherwise represented is bound by an order to the extent his or her interest is adequately represented by another party having a substantially identical interest in the proceeding. . . . At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, or unascertained person, or a person whose identity is unknown. . . .

See also Wade, "Trust Termination and Modification," 15 *The Colorado Lawyer* 389, 391 (March 1986).

71. See CRS § 15-11-1102.5(2).

72. The statute completely repeals CRS §§ 15-11-1102 and 1104 (2005) as of July 1, 2008, arguably even for affected interests that might opt out of the replacement sections, CRS §§ 15-11-1102.5 and 1104.5.

73. See CRS § 15-11-1106(2).

74. See CRS § 15-11-1106(1).

75. *Id.*

76. See CRS § 15-11-1102.5(1)(a).

77. See CRS § 15-11-1102.5(3)(a).

78. See CRS § 15-11-1102.5(3)(b).

79. See CRS § 15-11-1102.5(3)(c)(I) and (II).

80. See Treas. Reg. § 26.2601-1(b)(1)(v)(B) (the exercise of the power cannot suspend or postpone vesting beyond ninety years from the date of creation of the trust). ■

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