Texas Legislature Extends The Rule Against Perpetuities To 300 Years For Trusts

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Thursday, May 27, 2021

The Texas Legislatures recently passed a bill that takes effect on September 1, 2021 that extends the rule against perpetuities to 300 years for trusts. The Legislature forwarded the bill (HB 654) to the governor on May 20, 2021, but he has not yet signed the bill into law. But unless he vetoes the bill, it will become law after ten days.

The Texas Constitution prohibits perpetuities: “Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . . .” Tex. Const. art. I, § 26. A perpetuity is a restriction on the power of alienation that lasts longer than a prescribed period. ConocoPhillips Co. v. Koopmann, 547 S.W.3d 858, 866-67 (Tex. 2018). The rule against perpetuities “should be a check on vain, capricious action by wealthy empire builders. But it should not be a constantly present threat to reasonable dispositions which slightly overstep a technical line.” Rekdahl v. Long, Tex., 417 S.W.2d 387 (1967) (Steakley, J., dissenting) (citing W. B. Leach & O. Tudor, The Rule Against Perpetuities § 24.11 at 43 (1957)).

Historically, the rule against perpetuities renders invalid any will or trust that “attempts to create any estate or future interest which by any possibility may not become vested within a life or lives in being at the time of the testator’s death and twenty-one years thereafter, and when necessary the period of gestation.” Foshee v. Republic Nat’l Bank of Dallas, 617 S.W.2d 675, 677 (Tex. 1981) (citing Kettler v.
Atkinson, 383 S.W.2d 557, 560 (Tex.1964)). The rule against perpetuities also applies to non-charitable trusts, and a perpetual trust of indefinite duration is void. See Tex. Prop. Code § 112.036.

The Texas Legislature recently amended Texas Trust Code Section 112.036, and that section now provides that an interest in a trust must vest, if at all: (1) not later than 300 years after the effective date of the trust, if the effective date of the trust is on or after September 1, 2021; or (2) except as provided by Subsection (d), not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation, if the effective date of the trust is before September 1, 2021. Tex. Prop. Code 112.036(c). The effective date of the trust is the date that the trust becomes irrevocable. Id. at 112.036(b).

A trust that has an effective date before September 1, 2021 may still have the 300 year period apply to it if the trust instrument provides that an interest in the trust vests under the provisions of Section 112.036 applicable to trusts on the date that the interest vests. Tex. Prop. Code 112.036(d). The new Section 112.036 does not address its interplay with Texas Trust Code Section 112.054(b-1), which was added in 2017. Acts 2017, 85th Leg., ch. 62 (S.B. 617), §§ 4, 5, effective September 1, 2017. Texas Trust Code Section 112.054(b-1) states:

On the petition of a trustee or a beneficiary, a court may order that the terms of the trust be reformed if: (1) reformation of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust’s administration; (2) reformation is necessary or appropriate to achieve the settlor’s tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor’s intentions; or (3) reformation is necessary to correct a scrivener’s error in the governing document, even if unambiguous, to conform the terms to the settlor’s intent.

Tex. Prop. Code 112.054(b-1). Further, “the reformation of a trust under an order described by Subsection (b-1) is effective as of the creation of the trust.” Id. at 112.054(c). A trustee or beneficiary who wants to continue a trust that predates September 1, 2021 and is about to terminate due to the rule against perpetuities could seek to reform the trust instrument to state that an interest in the trust vests under the provisions of Section 112.036. If a court were to grant that relief, then the trust would be reformed to its creation to comply with Section 112.036(d)’s exception that allows trusts that predate September 1, 2021 to have a 300 year rule against perpetuities period. Courts in other jurisdictions have reformed trusts to alleviate a rule against perpetuities violation. See, e.g., In re Estate of Chun Quan Yee Hop, 52 Haw. 40, 469 P.2d 183 (1970) (reformation of will to comply with common law rule against perpetuities by using equitable approximation); In re Foster’s Estate, 190 Kan. 498, 376 P.2d 784 (Kan. 1962) (excision of part of will which would invalidate gift); Carter v. Berry, 243 Miss. 356, 140 So.2d 843 (Miss. 1962) (reduction of the age contingency); Estate of Grove (1977), 70 Cal.App.3d 355, 138 Cal. Rptr. 684; In Re Ghiglia’s Estate (1974), 42 Cal.App.3d 433, 116 Cal.Rptr. 827; Scott v. South Trust Asset Management Co., 274 Ga. 523, 555 SE2d 732 (2001) (use of statute to reform trust to comply with rule against perpetuities); May v. Hunt (1981), Miss., 404 So.2d 1373; Estate of Sophie D. Githens, 1991 NYLJ LEXIS
7347 (N.Y. Sur. Ct. April 11, 1991) (reformed will under statute to comply with rule against perpetuities); Edgerly v. Barker (1891), 66 N.H. 434, 31 A. 900; Berry v. Union National Bank (1980), 164 W. Va. 258, 262 S.E.2d 766. Hoover v. Jolley, 45 Va. Cir. 309, 1998 Va. Cir. LEXIS 83 (Va. C.C. April 7, 1998) (used statute to reform will to comply with rule against perpetuities). These cases deal with courts reforming trusts to comply with the rule against perpetuities so that they do not fail. They do not deal with trusts that are in compliance with the rule and where the parties wish to reform trusts to extend them after a change in the rule against perpetuities. There are good arguments both for and against allowing such a reformation (certainly, the statutory change would not be anticipated by most settlors at the time that they created their trusts). However, there should be thought given to whether such a reformation, even if possible, may have negative tax implications.

Further, Section 112.036(e) provides that a trust may be reformed or construed to the extent and as provided by Section 5.043. Tex. Prop. Code 112.036(e). Section 5.043 deals with real and personal property interests and provides:

(a) Within the limits of the rule against perpetuities, a court shall 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.

(b) The court may reform or construe an interest under Subsection (a) of this section according to the doctrine of cy pres by giving effect to the general intent and specific directives of the creator within the limits of the rule against perpetuities.

(c) If an instrument that violates the rule against perpetuities may be reformed or construed under this section, a court shall enforce the provisions of the instrument that do not violate the rule and shall reform or construe under this section a provision that violates or might violate the rule.

(d) This section applies to legal and equitable interests, including noncharitable gifts and trusts, conveyed by an inter vivos instrument or a will that takes effect on or after September 1, 1969, and this section applies to an appointment made on or after that date regardless of when the power was created.


The statute does clarify that a settlor of a trust may not direct that a real property
asset be retained or refuse that a real property asset may be sold for a period of longer than 100 years. Tex. Prop. Code 112.036(f). Accordingly, a party cannot use a trust to tie up real property for longer than 100 years.

Accordingly, this statutory change will have a drastic effect on the operation and termination of trusts in Texas as it changes Texas’s historical treatment of trusts and the rule against perpetuities. Attorneys who draft wills and trusts need to be aware of this statutory change and discuss with settlors how long the settlors want a trust to last and when it should terminate. For those settlors that want long-term trusts, they now have the power to have them last 300 years after the effective date of the trust. Though not perpetual, 300 years is still a very long time.

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National Law Review, Volume XI, Number 147

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