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The Demise of Dynasty Trusts: Returning the Wealth to the Family

Lucy A Marsh, *University of Denver*

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RETURNING THE WEALTH TO THE FAMILY

INTRODUCTION

Recently, a flurry of state legislation[1] has made it possible for an individual to create a long-term private trust, called a Dynasty Trust[2], in close to one-half of the states of the United States. What is unusual about Dynasty Trusts is that they may be established to last for 150 years[3] – or 1,000 years[4] – or some other extremely long period of time,[5] - depending on the jurisdiction.

Many lawyers, banks, and tax advisors[6] are rushing to try to persuade their clients to set up such Dynasty Trusts, claiming that such trusts will provide a way of protecting the client's descendants for the next 1,000 years or so.

But who really is likely to derive the most benefit from the existence of Dynasty Trusts? Corporate fiduciaries – hereafter simply referred to as banks. Upon close inspection, it seems clear that in reality, the banks, rather than the descendants of the settlor, are likely to reap the major benefits from a Dynasty Trust. That may explain why the banks lobbied so hard[7] to try to get states to adopt the legislation which made Dynasty Trusts possible.

It is the purpose of this article to try to help speed the demise of Dynasty Trusts by bringing some common sense to the discussion of Dynasty Trusts. It is time for people to feel confident in leaving assets to their children and grandchildren – rather than to the banks.

After an introductory review of some of the fundamentals of a trust, Part I of this article will attempt to illustrate why banks have lobbied so strongly for Dynasty Trusts, and why the existence of such trust may cause serious problems. Part II will discuss the attractions of Dynasty Trusts. Part III will point out how little money would actually be available for remote descendants of the settlor of a Dynasty Trust at the end of 1,000 years. Part IV will discuss actual historical experience with fractionalization of beneficial ownership. Part V will suggest some clear, relatively simple solutions.

A. SOME FUNDAMENTALS

First, some fundamentals. A trust is basically a "box" into which assets are deposited. The assets then constitute the corpus, (also called principal), of the trust. The person who establishes a trust, who puts the assets into the "box," is usually called the settlor.[8] The people who are supposed to receive the benefit of the assets in the trust are called the beneficiaries, and are described within the trust instrument. The usual beneficiaries of a private trust are "my spouse", "my children", and "my grandchildren."

Every trust must have a trustee,[9] who is charged with managing, investing, and distributing the assets of the trust. Normally, the settlor of a trust names a trustee, and then several back-up trustees, who will serve if the first-named trustee is unable or unwilling to serve as trustee. The trustee, (and back-up trustees) are usually persons known to the settlor, and believed by the settlor to have the wisdom and judgment required of a trustee. When the corpus of a trust is particularly large, or the assets may require extensive management, the settlor may also appoint a corporate trustee, to help with investment decisions. The corporate trustee is usually an institution with which the settlor has had a long-term relationship – e.g. a bank known to the settlor.

A Dynasty Trust will be different. Because a Dynasty Trust may be designed to last for 1,000 years, the settlor no longer has the option of appointing a trusted friend or family member to serve as trustee. Clearly, no human being will live long enough to be the trustee for a long-term Dynasty Trust. Only a corporate trustee, (herein referred to simply as a bank), has any chance of being around for 1,000 years. So anyone who sets up a Dynasty Trust must ultimately give management of the included assets to a bank, not to an individual known to the settlor.

B. LONG-TERM CHARITABLE TRUSTS

For centuries the law has permitted some trusts to last "in perpetuity." These have been charitable trusts, designed to promote the good of the community through such things as: "(a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; and other purposes the accomplishment of which is beneficial to the community."[10]

It may be helpful to take a brief look at one interesting charitable trust. In 1789 Benjamin Franklin provided a charitable trust for Boston, Massachusetts, designed to last for 200 years.[11] The purpose of the trust was to allow Franklin "to be useful even after my death, if possible, in forming and advancing other young men that may be serviceable to their Country."[12] The trustees[13] were instructed to lend money, "Upon Interest at five percent per Annum for such young married artificers, under the Age of twenty-five years, as have served an Apprenticeship in the said Town; and faithfully fulfilled the Duties required in their Indentures, so as to obtain a good moral Character from at least two respectable Citizens, who are willing to become their sureties in a bond with the Applicants for the Repayment of the Monies so lent with Interest according to the Terms herein after prescribed."[14] Benjamin Franklin provided that the trust, although charitable, was to end after 200 years, "not presuming to carry my views farther."[15]

Even a person as brilliant as Benjamin Franklin did not presume to be able to foresee the future well enough to be able to design a trust that would last for more than 200 years. As it turned out, Franklin's trust was litigated at various times during the 200 years, over issues which could not have been anticipated – even by Franklin.[16]

In an entertaining recent case, Charles Walker attempted to put a small piece of land into a trust.

> "The trust is to be called the James Madison Fund to honor our fourth President, the Father of the Constitution. The ultimate purpose of this fund is to provide a million dollar trust fund for every American 18 years or older. At 6% compound interest and a starting figure of $1,000,000.00, it would take approximately 346 years to provide enough money to do this. My executor will head the Board of Trustees … When the fund reaches $15,000,000 my Executor's function will cease, and the money will be turned over to the Sec. of the Treasury for management by the federal government. The President of the U.S., the Vice President of the U.S., and the Speaker of the U.S. House of Representatives shall be permanent Trustees of the Fund. The Congress of the United States shall make the final rules and regulations as to how the money will be distributed. No one shall be denied their share because of race, religion, marital status, sexual preference, or the amount of their wealth or lack thereof …"[17]

In 2004 the courts held that the attempted trust was void, under the common law Rule Against Perpetuities, because the provisions did not comply with the traditional list of charitable purposes. Congress was thereby saved from the responsibility of making one more set of difficult financial decisions.

Today, in close to one-half of the states in the country, this attempted trust would be legal – as a Dynasty Trust.

C. SUPERVISION BY THE ATTORNEY GENERAL

For every charitable trust, in addition to the specific provisions of the trust itself, outside supervision is also provided. The Attorney General of each state is charged with monitoring the conduct of all charitable trusts within that state – to be sure that the trust is managed appropriately, and that the assets of the trust are used for charitable purposes.[18] Thus, there is a built-in "watch dog" for any charitable trust. That is one of the major reasons that charitable trusts have been allowed to continue "in perpetuity."

Dynasty Trusts, however, are intended to benefit only individuals, not the community as a whole. Therefore Dynasty Trusts are private trusts. The Attorney General has no responsibility to monitor private trusts and no authority to do so.[19] The intended beneficiaries of a private trust are expected to monitor the conduct of the trustee themselves, and to seek the assistance of a court whenever necessary. There is no agency established to ensure that the conduct of the trustee of a private trust is appropriate.[20]

D. HISTORIC LIMITS ON DURATION OF PRIVATE TRUSTS

Historically, private trusts have been limited to a relatively short period of time – during which the beneficiaries of the trust – usually the settlor's spouse, children, and grandchildren[21] – are expected to have the motivation to keep an eye on the trustee.

The time limit for private trusts was provided not by any specific statute, but by the application of the common law Rule Against Perpetuities (RAP). The basic statement of the Rule Against Perpetuities, is "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."[22] Without going into all of the fascinating details, this basically meant that any private trust was limited to last only for the lives of the settlor's spouse, children, and grandchildren.[23]

Even when the duration of private trusts was limited by the common law Rule Against Perpetuities, various cantankerous individuals still found ways to keep their wealth away from any family members known to them – without giving the money to charity.

E. EXAMPLES OF LONG-TERM PRIVATE TRUSTS

In 1786 Lady Denison's will was upheld, although she creatively directed that her estate was to be held in trust, with the income accumulated, until "the second son of [Lady Denison's niece, who was an infant, at the time], should first attain the age of 21."[24]

Peter Thellusson, who became somewhat famous in academic circles, [25]and evidently had little affection for any living member of his family, wrote a will in 1796 which directed that the vast majority of his very large estate, including all his "manors, messuages, tenements, and hereditaments at Brodsworth in the county of York"[26] be held, and the income accumulated and invested in the purchase of more land in England, until after the "death of my sons Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson and of my grandson John Peter Thellusson, and of any such other sons as my sons ...may have as shall be living at the time of my decease or born in due time afterwards."[27] Then the accumulated assets of the trust were to go to whoever was then the "eldest male lineal descendant of my son Peter." [28]Everyone, of course, was required to continue using the name Thellusson.[29]

The provisions of this trust were called "morally vicious"[30] at the time – but were upheld,[31] since the trust did not violate the common law Rule Against Perpetuities. However, when the trust finally ended, there had been very little increase in the assets of the trust, thanks, in part, to almost constant litigation during the term of the trust.[32]

More recently, in May 2011, a private trust established in 1919 finally ended.[33] The trust, as required in 1919, complied with the common law Rule Against Perpetuities.

At his death in 1919 the settlor of that trust, Wellington Burt, was one of the wealthiest Americans at that time[34] – and evidently did not much like any of his descendants who were known to him.[35] Burt provided that most of his estate was to be held in trust until 21 years after the death of the last to die of all of his grandchildren alive at Burt's death.[36] In 2011, about $100 million was scheduled to be distributed among twelve descendants – ranging in age from 19 to 94.[37] (Burt could have done better, by including whoever that 94 year old is as a “measuring life” in Burt's will, since anyone who is 94 years old in 2011 would have been roughly 2 years old when Burt died, and thus a “life in being.”)[38] So Burt's trust could easily have lasted for at least another 21 years – which would have gotten it to 2032 – 113 years after Burt's death.

So there have always been a few cantankerous individuals in the world who want to keep their money away from any family members actually known to them – but still not give the money to charity. Until recently, however, such aberrational distributions were limited to the time allowed by the Rule Against Perpetuities. Now it has become possible for people like Lady Denison,[39] Peter Thellusson,[40] Wellington Burt,[41] and Charles Walker[42] to establish trusts that may last for 1,000 years – because of the recent statutory changes in close to one-half of the states in the country.

PART I. WHY BANKS HAVE LOBBIED FOR DYNASTY TRUSTS

In 1969 Wisconsin abolished the Rule Against Perpetuities[43] – and no one particularly noticed.[44] That was followed in 1983 by South Dakota.[45] Still, no one paid much attention.[46]

The real excitement did not begin until 1986, when Congress enacted an exemption to the Generation Skipping Transfer Tax (GST).[47] Within a few years attorneys and bank trust departments realized that if the Rule Against Perpetuities were abolished, or greatly modified, then private trusts might be created to last for very long periods of time. And the rush began.

A. BANK LOBBYISTS

Bank lobbyists in each state pushed for modification or abolition of the Rule Against Perpetuities[48] – and sometimes also for abolition of income taxes that some states had been collecting on trust income.[49] (The federal government continues to collect income tax on trust income, in a rather complex way)[50] The announced goal of the bank lobbyists was to attract more trust business into the state – for the benefit of the banks.[51]

From the beginning, Dynasty Trusts were championed by lobbyists for <u>banks</u> – not by settlors who had suddenly developed a desire to hang onto control of their money for the next 1,000 years. Most people have always wanted their assets to go to close family members, such as children and grandchildren.[52] Some people of great wealth, such as Warren Buffett do not intend to leave all of their wealth to their descendants.[53] Instead, the very wealthy may make very large charitable gifts. In addition, many people have recognized the damage which may be caused to beneficiaries who become "trust fund babies."[54]

Nevertheless, it is now possible in close to one-half of the states in the country to establish a Dynasty Trust – which may last for a remarkably long time.

Once a Dynasty Trust is established, all of the property in the trust – both real and personal – will be subject to the control of the bank for as long as the trust continues.   What is wrong with that? Plenty.

B. BASIC PROBLEMS WITH BANK CONTROL OF ASSETS

There is a popular saying in the probate field - "How do you make a small fortune? Give a bank a large one to manage in trust."[55] Here is a summary of some of the major reasons that saying rings true. More details will be provided later, in Part III.

1. Banks charge fees.

Basic trustee fees normally include a set annual fee, plus a percentage of income and/or principal.[56] In addition, banks charge for an assortment of other expenses, such as the expenses of litigation, the use of special investment advisors,[57] and the like. These fees may become quite substantial. So unless it is clear that bank investments will be significantly more profitable than the investments which might have been made by the settlor's descendants (without all of the overhead expenses of the bank), then financially, it would be better for the settlor just to give the money directly to the descendants – and let them do their own investing – free from all of the administrative expenses incurred by a bank.[58]

2. Banks are usually very conservative investors.

Do bank trust departments have a record of consistently beating the market? Far from it. Banks, like nearly all trustees, normally stick to very conservative investments.[59] The law, in various ways, essentially requires that.[60] Trustees are normally more concerned with safety than with maximizing growth. Banks are conservators, not entrepreneurs. They attempt to avoid risks. Therefore, the returns from a bank managed trust are likely to be considerably below the market.

Banks do put a great deal of time, (and money), however, into investigation and analysis of investments. They have layers of investment committees[61] - who are paid. But the actual financial benefit from all of this effort seems to be minimal.

Of course banks are not the only ones who fail to beat the market. The growing popularity of index funds[62] reflects the realization that putting a great deal of time and money into analysis of investments, in most cases, does not actually result in significantly more profitable investments. It just provides salaries to those doing the analysis. So the detailed investment analysis engaged in by banks is not likely to increase returns. It is designed primarily to limit loss.

3. Banks make mistakes.

As clearly illustrated by the financial crisis which exploded in 2008, banks – lots of them – sometimes make resoundingly poor financial decisions. Sub-prime mortgages, derivatives, hedge funds and the like come readily to mind.

During the next 1,000 years, is there any reason to believe that banks will not make similar mistakes, or that some government will always be available and willing to bail out the banks? Unlikely.

To be a bit more specific, is there any reason to believe that no one like Bernie Madoff[63] will appear during the next 1,000 years to con banks into making bad investments? Or that no rogue investor will cause an unauthorized $2 billion,[64] or $6.7[65] billion loss for a bank?

Con men have been around throughout the ages. They do not limit their prey to the poor. Remember, Bernie Madoff fooled many sophisticated investors[66] – in addition to fooling the SEC.[67]

So banks, like individual investors, may make serious errors in investing, and may be seriously misled on investments. With control of great concentrations of wealth, banks certainly will be tempting targets for theft and embezzlement.

<u>4. Problems with concentration of wealth.</u>

Any large concentration of wealth in a small group of people or entities may cause problems for the entire economy. Examples are the "too big to fail" problem and the "economic bully" problem. Banks, controlling the assets of various Dynasty Trusts could easily become rather dangerous "economic bullies." At present there is no anti-trust-type of law regulating how large the assets of a private trust may be, or how those assets may be allocated within the trust. If a settlor directs that all of the assets in the trust shall be invested in land, for example, the trustee would be permitted to do so.

The U.S. Supreme Court, in Hawaii Housing Authority v. Midkiff,[68] has recognized that too much economic power in a small group of people or entities is dangerous – even when not in violation of any laws or regulations. In Midkiff, 72 private landowners[69] had acquired ownership of all but 3%[70] of the land in Hawaii that was not owned by some governmental entity. Acquisition and retention of the land had been legal.[71]

Buying and retaining land just turned out to be a very effective investment strategy. The owners involved intended to continue that strategy, and had no intention of selling the land.[72] Therefore, it became nearly impossible for the majority of people in Hawaii to buy any land.

So the U.S. Supreme court upheld a state statute which authorized the government of Hawaii to condemn land which renters of the land wished to purchase, and then require that the land be sold directly to the former renters.[73] The U.S. Supreme Court upheld the statute – based on the over-riding importance of preventing oligopoly[74] within the United States. So, the U.S. Supreme Court has recognized the serious dangers of too much concentration of private wealth – in this specific instance. But there is still no overall limit on the amount of wealth which may be held in a private trust.

If banks retain large amounts of property in trust for very long periods of time, there clearly may be real dangers of too much concentration of wealth.[75] If banks invest in land, for example, they may achieve almost a monopoly of the land available for investment or private use – with serious consequences.[76]

If banks invest primarily in such things as stocks and bonds, there may also be the problem of "economic bullies." As Fran Hawthorne has pointed out, "A giant fund ... cannot easily move its $237.5 billion around without causing financial tidal waves."[77]

5. Are banks better investors that the settlor's descendants?

What if the settlor's descendants simply do not have the wisdom, or self-restraint, to make wise investments? Certainly individuals, like banks, may make mistakes, and may be taken in by con men like Bernie Madoff. However, individuals have every reason to watch their own investments very closely. And individuals have the ability to act quickly when circumstances change. Nevertheless, it is true that some individuals simply are bad investors.

Would a bank then be safer? Good point. If the settlor is convinced that for some reason all of his or her descendants, for 1,000 years, will be incapable of handling money wisely, then a trust might be better. But what a depressing attitude toward one's own descendants!

In fact, it appears that most people are <u>not</u> that pessimistic about the capabilities of their own descendants.[78] Except in the case of minor children or grandchildren, or people with known disabilities for whom a special needs trust is appropriate, most testators have been content with leaving their assets to the people they actually know – spouse, children, and grandchildren.[79] Then most people, historically, have been willing to let go – and let the living control the property on earth. As Thomas Jefferson said, "[T]he earth belongs always to the living generations ... the dead have neither power nor rights over it."[80]

PART II. WHAT IS THE ATTRACTION OF DYNASTY TRUSTS?

Why would anyone put money into a Dynasty Trust? There are three primary reasons: Dreams of Glory;[81] Pressure from Banks and Attorneys;[82] and Potential Tax Savings.[83] Each will be discussed below. Throughout this discussion it is important to remember that any potential tax savings achieved by a Dynasty Trust are based on the quite remarkable premise that no changes will be made to the Internal Revenue Code during the next 1,000 years.[84]

A. DREAMS OF GLORY

Perhaps, at this point, it might be helpful to try to understand the time period we are talking about when we refer to 1,000 years – when the settlor's dreams of glory will finally be fulfilled. In the year 1012 King Aethelred, (Aethelred the Unready), paid tribute, (Danegled), to Viking Raiders, and Mael Morda started a rebellion against Brian Boru in Ireland.[85] The Anasazi were still living in the cliff dwellings in what has now become southwestern Colorado.[86]

But in case you missed hearing about some of these events in your history class, we all remember learning that in 1066 William the Conqueror came over to England.[87] That was only 946 years ago – but it gives an idea of how long 1,000 years actually is. Perhaps the US Tax Code, and various Revenue Rulings have changed a bit since 1066? But Dynasty Trusts are based on the assumption that nothing significant, including tax laws, and the structure of society, will change in the next 1,000 years.

The Pilgrims landed at Plymouth Rock in 1620[88]- a mere 392 years ago. The Internal Revenue Service itself is a young whipper-snapper, historically speaking, the concept having been introduced by President Lincoln in 1862, with the current organization dating from the 1950's, roughly 70 years ago.[89]

But if there are no changes in tax laws, or the value of a dollar, for the next 1,000 years, and very few distributions, if any, are made to the settlor's descendants, then a Dynasty Trust established today might be worth a great deal of money at the end of 1,000 years. And the settlor will have finally achieved his or her dreams of glory. What enticing dreams!

A quicker way of achieving glory, of course, would be just to donate enough money to have one's name put on a building, or set up a scholarship fund, or establish a charitable foundation.[90] But for some reason those routes to glory are not being rigorously promoted by banks or attorneys.

B. PRESSURE FROM BANKS AND ATTORNEYS

With truly remarkable innocence (at best), banks and attorneys are vigorously promoting the concept of Dynasty Trusts.[91] Dynasty Trusts, if all tax laws stay exactly the same, will allow very impressive tax savings, and increase the corpus of the trust dramatically, over the next 1,000 years. Who could resist?

C. PROMISED TAX SAVINGS

What is the pitch being used for tax savings? First, it is important to note that only about 2% of the people in the United States are currently subject to any sort of estate tax,[92] or generation skipping transfer tax. So we are dealing here not with “everyone who has $500,000 or more”[93] but only with the very few people who might actually incur some estate tax.

Here is an example of how a Dynasty Trust is intended to work. Since 1986 Congress has allowed an exemption to the Generation Skipping Transfer Tax – in amounts that have changed frequently since 1986. Rather than trying to specify here how much the exemption will be in any given year, I will use the illustration of a Generation Skipping Transfer Tax, (GST), exemption of $1.3 million. Under this exemption Adam may give up to $1.3 million,[94] to his grandchild, Clara, avoiding the estate tax which might have been incurred if Adam had given the money instead to Adam's son, Bob, and then Bob had given the money to Clara. The GST was enacted to tax money (at the highest marginal rate, in the estate of the donor) if the money was given in such a way as to skip a generation,[95] that is, if Adam had given the money directly to Clara, and had skipped Bob's generation. But the 1986 exemption to the GST allows Adam to transfer up to $1.3 million to Clara, without incurring the Generation Skipping Transfer tax.[96]

The tax savings may get even better. If Adam puts the $ 1.3 million allowed as a GST exemption into a Dynasty Trust, tax planners assume[97] that Adam will be able to pass the benefit of the money down to his descendants - for the next 1,000 years – without ever incurring any GST tax. Remarkable.

Remember, however, that if Adam turned out not to have been in the top 2% at his death, or did not give the money to Clara, no GST would have been due, anyway. All of the impressive tax savings depend on the assumption that Adam, Bob, Clara, and everyone in succeeding generations, would have died with assets exceeding \$3.5 million,[98] (putting them in the top 2% of the people in the country and thus subject to estate tax), and that neither the tax laws nor the value of money would have changed since the moment the trust was first established.

Remember, this whole scheme is based on current tax laws staying exactly the same as they are today - for the next 1,000 years.

Anyway, the role played by the Dynasty Trust is that Adam, instead of giving the money directly to Bob, or to Clara, puts it into a magical Dynasty Trust – set up to last for the next 1,000 years. In theory, the Dynasty Trust will then provide some sort of support for Adam's descendants, (and many happy bankers and lawyers who will act as trustees, advisors, litigators, "trust protectors"[99] and the like), for the next 1,000 years. However, if, as suggested by some promoters of Dynasty Trusts, all of the money remains in trust for 1,000 years, (not actually being distributed to the settlor's descendants),[100] the tax savings and growth of corpus will be even more impressive. How could anyone pass up such a good deal?

Remember, impressive tax savings are promised based on the expected occurrence of two highly unlikely events. (1) The tax laws will not change, and (2) Each of Adam's descendants, for the next 1,000 years, will be so financially successful that the descendant would have ended up in the top 2% of the population, and therefore would have had a taxable estate.

If the assets are held by the Dynasty Trust, rather than being in the hands of the remarkably successful descendants of Adam, and the tax laws do not change, the assets in the Dynasty Trust will escape taxation at each generation.

So, the last of an unbroken line of remarkably successful descendants – not one of whom, of course, could be trusted to handle the trust assets himself or herself – will be able to enjoy the benefits from the trust – if any - after 1,000 years. Rather than letting any of these remarkably successful descendants handle the assets for himself or herself, the assets will instead be entrusted to good, sturdy financial institutions, such as Lehman Brothers[101], Goldman Sachs,[102] Merrill Lynch,[103] or Bank of America[104] for the next 1,000 years.

But of course there will be some administrative expenses.

D. A CLOSER LOOK AT EXPENSES WHICH ARE LIKELY TO OFFSET TAX SAVINGS.

1. Bank Fees - More Details.

As indicated above, banks charge fees.[105] The interesting thing is that banks usually do not make a list of those fees available to the public. So shopping among possible banks to act as the trustee may be difficult. However, it has been estimated that the usual bank fee, at this time, would be about _____________. [106] (And of course the magic of the Dynasty Trust assumes that the banks would never raise the fees, once they had secured the account.)

So roughly ----% of income, and ___% of principal will go to the bank trustee every year.

There may well be additional fees, for annual accountings, for example. Since no public entity such as the Attorney General will be supervising the conduct of the trust, it is important that someone be charged with the responsibility of making sure that everything is being properly managed. Normally the major responsibility for this monitoring falls on the beneficiaries. In some, but not all of the states the trustee is required to present an annual accounting to a court. In any case, at least once a year an accounting should be made by the bank.[107]

To whom should the accounting be sent? To the court? To each of the increasingly numerous beneficiaries? How much money should be spent keeping track of all of the beneficiaries – and checking to see whether each beneficiary still has sufficient mental capacity, has had financial matters turned over to a conservator or agent acting under a durable power of attorney – or has died?

The safest practice for the bank is to be sure to give very good notice to each of the living beneficiaries, and also to give notice to at least one person or entity that may serve as a representative of unborn future beneficiaries. Then the bank should have a formal accounting approved by the court each year.[108]

2. Additional Administrative Fees.

Serious estate planners now frequently recommend the use of Trust Protectors,[109] Investment Advisory

Committees[110] and the like to keep an eye on the trustee. Lawyers will make fine Trust Protectors, and various investment specialists will make fine Investment Advisors. And all of them, of course will charge for their time, presumably at fairly high rates.[111]

3. Litigation.

Every so often there is likely to be some dispute as to the quality of particular investments,[112] or the size of distributions[113] – if any – being made to the various beneficiaries. Such disputes may well end up being settled by litigation. For any such litigation the trustee is entitled to take all expenses, including attorneys fees, from the assets of the trust. Because litigation fees are chargeable to the trust, there is not much motivation for the trustee to avoid litigation – about anything.[114] The trustee's cost of litigation will come out of the corpus of the trust – not from the pocket of the trustee.

Normally, however, the beneficiaries have to pay their own litigation expenses, and cannot recover their attorneys fees from the trust – even if the beneficiaries win. So the beneficiaries are likely to think twice about spending their own money on litigation designed to keep the trustees in line. Any beneficiary contemplating litigation against the trustee must weigh the likely expenses involved, compared to what the potential benefit might be to the individual beneficiary. As the share of an individual beneficiary decreases, because of the exponential increase in the number of people who are descendants of the settlor, the likelihood of any beneficiary stepping forward to question the conduct of the trustee thus decreases significantly.

If the trustee is given discretion[115] as to how much money, if any, should be paid to any particular beneficiary, the likelihood of anyone trying to hold the trustee accountable becomes even more remote. So as a practical matter there may be no one to question the conduct or decisions of the trustee. No wonder that banks are so enthralled by the concept of Dynasty Trusts.

4. Dilution by Trustees

The excellent book, BROKEN TRUST, by Judge Samuel P. King and Prof. Randall W. Roth,[116] provides a fascinating description of how the assets of the Bishop Trust, a charitable trust with assets greater than the combined endowments of Harvard and Yale, was shockingly mismanaged by the trustees for many years – despite the fact that the trustees were appointed by the Hawaii Supreme Court, and theoretically subject to the supervision of the Attorney General. Other than paying themselves annual fees of $1million dollars each, the trustees did remarkably little for the benefit of the trust.

For any trust, there must be someone with the motivation and the power to supervise the trustee.

PART III. MONEY LIKELY TO BE AVAILABLE FOR DESCENDANTS.

A. RATE OF RETURN

After payment of all of these expenses, will there be any money remaining for the benefit of the settlor's descendants? No worries. Dynasty Trusts are expected, magically, to increase in value by 12% per year[117] for the next 1,000 years – even though the Dow Jones Industrial Average, for example, closed at 7,422 on October 31, 1997,[118] and closed at 7,400 on March 19, 2009,[119] roughly twelve years later, after many exciting ups and downs between these two dates. But with the unflinching optimism required of one trying to sell any new product to the public – trying to "create a demand" for a product the public has not yet realized that it needs or wants - all current global financial difficulties are dismissed as a mere blip in an assumed future rate of growth of 12% per year for Dynasty Trusts.

Proponents of Dynasty Trusts confidently predict a rate of growth of 12% per year, because that was the average rate of growth for the most recent 50 years.[120] The rate of growth for the 50 years before that was only _____. [121]But no worries.

B. RATE OF INFLATION

C. PAYMENTS TO THE INTENDED BENEFICIARIES – THE DESCENDANTS OF THE SETTLOR

1. Payments during the term of the trust.

It might be nice if some payments were made to beneficiaries over the years. Any such payments, of course, would significantly reduce the magic of a Dynasty Trust.[122] One commentator has stated that "Typically, there will be no payments during the first fifty years of the trust."[123] So much for the settlor's own spouse, children and grandchildren, who normally would have been considered to be the "natural objects of the settlor's bounty."

2. Payments at Termination of the Trust.

If the trustee resists making payments during the early years of the trust to the settlor's spouse, children and grandchildren – people the settlor actually knew – and the money is instead accumulated in the trust, in order to make a really big “splash” at the termination of the trust, how much will each beneficiary actually get after that 1,000 year waiting period? That, of course, will depend on how many beneficiaries are then in existence, and what the actual rate of growth, if any, turned out to be.

Professor Waggoner has calculated the numbers for likely beneficiaries of the trust for trusts which are of much shorter duration than 1,000 years.[124]

“If, for simplicity, we assume that two children and four grandchildren are living at the transferor's death, that the average interval between generations is 25 years, that at least three generations of descendants are living in any particular time frame, and that the transferor and each member of the senior descendant generation dies at the age of 75, the following projections can be made: On average, a transferor will have about 450 descendants (who are beneficiaries of the trust) 150 years after the trust is created, over 7,000 beneficiaries 250 years after the trust is created, and about 114,500 beneficiaries 350 years after the trust is created. Although the beneficiaries would share a common ancestor, they would not likely consider themselves members of the same family. To get a visual image of the scale of the problem, it would be like attending a college football game in Michigan Stadium, (capacity around 110,000) and everyone in the stadium plus a few thousand tailgaters in the parking lots outside are beneficiaries of the same trust. Four hundred and fifty years after the trust is created, the number of living beneficiaries could rise to 1.8 million."[125]

And how close would be the genetic relationship between these happy beneficiaries and the settlor? Again, Professor Waggoner has provided some numbers.

"On average, and disregarding nongenetic descendants such as adoptees, a transferor's genetic overlap with his or her genetic descendants is cut in half at each succeeding generation. Specifically, a transferor's genetic overlap with his or her children is 50 percent, with grandchildren 25 percent, with great-grandchildren 12.5 percent. ... Great-grandchildren of the transferor's great-great-great-great-grandchildren – are six generations removed from the transferor. They will be born about 100 years after the transferor's death and have a genetic overlap with the transferor of a mere 1.5625 percent. At the 14th generation below the transferor, the genetic overlap is about 0.0066%, which – due to our common origins – is about the same overlap that one has to any randomly selected member of the population."[126]

In fact, with the possibilities of adoptions, and the recent complex statutory definitions of "child" in some states, setting forth the legal family relationships created by such things as sperm donors, surrogate mothers, and the like,[127] someone who is legally considered to be a descendant of the settlor might have no DNA in common with the settlor at all.[128]

Doesn't that, in itself, demonstrate the foolishness of Dynasty Trusts? Not to a true believer. What if each of the settlor's descendants were also the beneficiary of a Dynasty Trust set up by each of his or her other very numerous ancestors, then everything would work out fine. What fascinating dreams...

PART IV. HISTORICAL EXPERIENCE WITH FRACTIONALIZATION OF BENEFICIAL OWNERSHIP.

Financial planning need not be based on dreams. There have been some real-life demonstrations of what happens when trust assets are retained for several generations. Perhaps the best demonstration comes from the fairly recent U.S. Supreme Court case of Hodel v. Irving.[129] That case involved tribal lands which were being held in trust for tribal members by the Bureau of Indian Affairs.[130] True, this was not the usual private trust. But the fractionalization of ownership in successive generations was almost exactly the same as it would be with a private Dynasty Trust after the same number of years, because in both situations all descendants, or heirs, of a person who died intestate were included in the distributions to be made. So there were a great many people who were expected to share in the wealth, thus creating the problem of fractionalization.

There was a reason that the British aristocracy used a system of primogeniture[131] to keep land in the family. Similarly, Peter Thellusson, in attempting to make a big "splash" left his property only to the <u>one</u> eldest male descendant of each of his sons – not to <u>all</u> of his descendants.[132] Centuries ago, people who wanted to keep land in the family, or wanted to make a big "splash" financially, realized that that goal could be achieved only if most of the descendants were excluded from sharing in the wealth.

So it might be helpful to learn from the problems created for tribal members, as described in Hodel v.

Irving, when ownership of land was passed down to all, or nearly all, of the descendants of the original owners. It was a disaster.

In 1887 the General Allotment Act permitted portions of tribal land to be allocated to individual tribal members. However, the Bureau of Indian Affairs still acted as trustee for all of the land. This was basically like having the BIA as the trustee of a Dynasty Trust, with the heirs and devisees of particular tribal members being in the same position as the descendants of the settlor of a Dynasty Trust. So how did it work out in reality?

By 1928, only 41 years after passage of the General Allotment Act, "[A] report commissioned by the Congress found the situation administratively unworkable and economically wasteful"[133] because of the difficulties of fractionalization of ownership.

"Ownership continued to fragment as succeeding generations came to hold the property, since, in the order of things, each property owner was apt to have more than one heir."[134] Exactly the same thing, of course, would happen with the descendants of the settlor of a Dynasty Trust.

In Hodel, by 1984, only 97 years after passage of the General Allotment Act, the problem of fractionalization among the heirs had become so bad that testimony was presented to Congress that one 40 acre parcel of land "produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually."[135]

True, a Dynasty Trust would be likely to start with assets of more than $8,000. And it might be hoped that, unlike the trustees of Thellusson trust, for example, the trustees would gradually increase the value of the corpus. Still, after the beneficial ownership gets divided into 439 pieces, the expenses of administration may far outweigh the actual benefits to the descendants of the settlor.

PART V. PROPOSED SOLUTIONS FOR THE FUTURE

In 1641 Lord Nottingham stated that, "Whenever the bounds of reason or convenience are exceeded, the law will quickly be known."[136] ______ years later it was argued that, "Whenever ... it is evident, that accumulation, and not a family purpose, is the object of the trust, the bounds of ... reason and convenience ...are exceeded."[137] Now that the banks have successfully lobbied for legislation to allow the establishment of private trust which may last for 1,000 years, the bounds of reason and convenience have clearly been exceeded.[138] Lord Nottingham and _______ promised that judicial action would be taken. That would be one solution.

Legislative action, however, may be a swifter and more certain route. The legislatures, under pressure from the banks, created the conditions under which Dynasty Trusts became possible. The legislatures should now take responsibility for the quick demise of Dynasty Trusts.[139] Legislative action should be taken to put an end to this abuse.

A. HELP FROM CONGRESS?

Congress might easily destroy the attractiveness of Dynasty Trusts – simply by amending the tax code to deny use of the GST beyond one generation.[140] That would be a quick, national solution which would be immediately applicable in every state in the U.S.[141]

But if what is currently being called "the Circus in Washington"[142] continues, not much hope can be put in the U.S. Congress at the present time.

B. HELP FROM THE STATES?

Instead, it is time for budget-strapped states to decide that schools, police, hospitals, fire protection, and roads are more important than giving more financial breaks to banks[143] via Dynasty Trusts. Several steps are possible.

First, states could begin to tax trust income.[144]

Second, states could enact relatively short, clear termination dates for all Dynasty Trusts. True, the banks would be expected to lobby strongly against this. But as it has turned out, the states have not derived added income because of the existence of Dynasty Trusts.[145] Only the banks profit from Dynasty Trusts. Generally speaking, banks currently are not especially popular with voters.[146]

C. SIMPLE, CLEAR MODIFICATION OF THE RULE AGAINST PERPETUITIES.

The common law Rule Against Perpetuities has always been complex, and difficult for many law students and laymen to understand. The USRAP was designed to bring uniformity within the U.S. on issues as to the time during which the dead would be allowed to control the assets of the country. The hope was that individual state legislatures would adopt USRAP so that the law would become essentially the same in a large number of states. That desired uniformity has not been achieved.

Nevertheless, the process has the potential to work. The Uniform Commercial Code is an outstanding example in the commercial field.[147]

An easy, logical solution should be simply amending USRAP, or better yet adopting a new uniform act, which would simply provide that no document – will, trust, option contract, or the like, shall be legally binding more than 100 years after the date that the document went into effect.[148] Options, for example, would no longer be subject to litigation on the issue of whether or not the particular words used caused an unintended violation of the Rule Against Perpetuities.[149] They would simply expire at the end of 100 years, and the complexities of the Rule Against Perpetuities would no longer threaten the validity of commercial transactions.[150] Lady Denison, Peter Thellusson, Wellington Burt, and the like, might still play games with keeping their money away from their families. But the games would end at the end of 100 years.

Dynasty Trusts could no longer be used to lock up the assets of the nation – under the control of the banks – for extremely long periods of time.

Applying the clear-cut test of 100 years would be simple. A great deal of unproductive, complex litigation could be avoided[151] [fn on current Colo RAP case], and the assets of the community could be put to far more beneficial uses for the benefit of the community.

100 years of dead hand control should be enough! It is time for families to reclaim their wealth from the banks.

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1 For example: **1983** – South Dakota (S.D. Codified Laws 43-5-8).**1995** – Delaware (Del. Code 25-503(a). **1998**: Illinois (765 Ill. Comp. Stat. 305/3(a-5), Maryland (Md. Code, Est. & Trusts 11-103). **1999**: Maine (Me. Rev. Stat. tit.33, 101-A), New Jersey (N.J. Stat. 46:2F-9), Rhode Island (R.I. Gen. Laws 34-11-38). **2000** - Alaska (Alaska Stat. 34.27.051). **2001**- Florida (Fla. Stat. 689.225), Washington (Wash. Rev. Code 11.98.140). **2003**-New Hampshire (N.H. Rev. Stat. 564:24), Utah (Utah Code 75-2-1201), Wyoming (Wyo. Stat. 34-1-139(b)(ii)). **2005** Nevada, extended to 360 years Nev. Rev. Stat. 111-1031(b)). **2006** – Colorado (Colo. Rev. Stat. 15-11-1102.5(b), Pennsylvania (20 Pa. Cons. Stat. 6107.1(b)). **2007** – Tennessee (Tenn. Code Ann 66-1-202(f)). **2008** – Idaho (Idaho Code Ann. 55-111). **2009** – Arizona.(Ariz. Rev. Stat. 14-2901A(2), **2010**- Kentucky (Ky. Rev. Stat. 381.215). **2012** – Alabama (Ala. Code 35-4-4).

2 "Under the Internal Revenue Code (Code), individuals are allowed to place an amount equal to the estate tax exemption in a trust, and all distributions from that trust will be free of all transfer taxes as long as the trust endures. This has led a number of states to repeal the Rule Against Perpetuities (RAP) to accommodate wealthy individuals who hope to establish trusts that will provide support for their descendants well into the future. Providers of trust services have seized upon the opportunity to promote such trusts with the promise of the accumulation of dynastic wealth for the eventual benefit of the settlor's descendants. As part of a clever marketing strategy, these trusts have been called 'dynasty trusts' by their promoters." WILLIAM J. TURNIER & JEFFERY L. HARRISON, *A Malthusian Analysis of the So-Called Dynasty Trust,* 28 VA. TAX REV. 779 (2009), at 780.

3 Washington, Wash. Rev. Code 11.98.140 11.98.130

4 Alaska, Alaska Stat. 34.27.051; Colorado, Colo. Rev. Stat. 15-11-1102.5(b); Utah, Utah Code 75-2-1201; Wyoming, Wyo. Stat. 34-1-138.

5 Florida and Tennessee 360 years, Nevada 365 years, Arizona 500 years, Idaho, Illinois, Kentucky, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, South Dakota, and Rhode Island forever. *Supra.*

6 "Imagine a world where there are no state income taxes. Imagine a world where there are no estate taxes. Imagine a world where you assets can't

be taken in a divorce. Imagine a world where your assets can't be taken in a lawsuit. Now imagine this world can be created for your descendants forever!" STEVEN J. OSHINS & JUDITH K. RUUD, *Dynasty Trusts in Nevada: Countdown to 12/01/02,* OCT Nev. Law 18 (2001).

[7] "Abolishing the Rule against Perpetuities may be in par attributable to a 'rush to the bottom' in trust law ...in order to attract new and more investment. Thus, in the mad frenzy to attract such business, all the policy concerns and the ramifications of abolishing the Rule have not been carefully thought out prior to its abandonment. It appears, as of yet, no state ...has adequately considered the negative implications of permitting perpetual trusts." KAREN J. SNEDDON, *The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts,* 76 Tul. L. Rev. 189 (2001). "Ever since the perpetuities loophole in the GST tax was understood, abolition of the RAP has been 'pushed by banking associations ... [[that] wish to remain competitive with banks where perpetual trusts are permitted.' Joel Dobris put it more bluntly: 'When the bankers want something, they get it'" Robert H. SITKOFF & MAX M. SCHANZENBACH, *Jurisdictional Competition for Trust Funds: an Empirical Analysis of Perpetuities and Taxes,* 115 Yale L.J. 356 (2005), at 374.

[8] Sometimes also called a Trustor. If the trust is set up in a will, the trust will be called a testamentary trust, and the person who signs the will is called the testator.

[9] The necessity of a trustee is so strong that the rule is that no trust will fail for lack of a trustee. If the settlor neglects to appoint a trustee, or if no named trustee is available to serve as trustee, the court will simply appoint a trustee.

[10] SHENANDOAH VALLEY NATIONAL BANK V. TAYLOR, 63 S.E. 2D 786, (1951) at ______. Currently Uniform Trust Code Sec. 405, ___ S.S.C. ______ (date) states: "A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community."

[11] See Benjamin Franklin's 1789 codicil to his 1788 will, reprinted at LUCY A. MARSH, 129-132, PRACTICAL APPLICATIONS OF THE LAW: WILLS, TRUSTS, & ESTATES (1998).

[12] *Id.,* at 130.

[13] *Id.* at 130-131.

[14] *Id*
.

[15] *Id.* at 132.

[16] Probably the most entertaining of the litigation revolved around various theological questions, which the court ultimately decided to dodge. In his will Franklin had provided that the trust was to be managed, without any payment to the trustees, by the Boston "Select Men, united with the Ministers of the oldest

Episcopalian, Congregational and Presbyterian Churches in that Town." *Id.* At 130. "Sometime during the first hundred years of the trust the Episcopalian church which had been the oldest Episcopalian church ceased being Episcopalian; later the Court had to decide whether or not the oldest Congregational church was still Congregational, or had become Unitarian because of changing religious views with regard to the trinity." *Id.* At 133. The court decided to go with the buildings, thus avoiding having to make rulings on theological matters.

17 Marsh v. The Frost National Bank, 129 S.W. 3d 174, (Tex. 2004).

18 BOGERT, THE LAW OF TRUSTS AND TRUSTEES, SEC. 411.

19 Except for criminal prosecutions, of course. But the day to day operations of private trusts are simply not subject to review by the Attorney General. Joel Dobris has suggested that "[w]e could have a Sarbanes-Oxley for perpetual trusts. If these trusts are going to be around forever we'll need a bureau of trust enforcement." JOEL DOBRIS, *undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts,* Symposium, Trust Law in the 21st Century, Yeshiva University, 2006, at 2543.

20 The probate court has jurisdiction over litigation involving the trust. But normally the beneficiaries – or the trustees – must specifically initiate that litigation at the court.

21 Because of the Rule Against Perpetuities, discussed later, most private trusts could not continue much beyond the lives of the settlor's spouse, children, and grandchildren. As Robert H. Sitkoff and Max M. Schanzenbach have pointed out, "The Rule is said to have two purposes: to keep property marketable and to limit 'dead hand' control. Preventing indefinite fracturing of property ownership implements the first policy. The idea is that ownership of land periodically will be reconstituted into fee simple because all contingent future interest in the property must vest or fail within the perpetuities period." ROBERT H. SITKOFF & MAX M. SCHANZENBACH, *supra,* at 365.

22 JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES SEC. 201, at 191 (4th ed. 1942).

23 At the death of the settlor of a testamentary trust, the testator's spouse and children will be known – the common law having always allowed for relation back to include a child who was in gestation, although not yet born, at the death of his father. There are no "unborn widow" problems with the spouse of the testator, since no matter how much younger she may be than the testator, she was the testator's spouse at the death of the testator – and therefore a life in being at the creation of the interest – which was when the will went into effect – at the death of the testator. So the testator's spouse and children will all be good measuring lives, in existence at the creation of the interest. So the trust may easily continue until the death of the testator's spouse and all of the testator's children. It is likely that some – but not all – of the testator's grandchildren will have been born before the testator's death. With proper drafting, they may be used as measuring lives. But the unborn grandchildren cannot be used as measuring lives. So that means that under the common law Rule Against

Perpetuities, any private trust must end not later than 21 years after the death of all the "measuring lives" in being at the death of the testator. Normally, that would be around 100 years.

[24] Thellusson v. Woodford, 11 *Ves. Jun. 148.*

[25] HERBERT BARRY, *Mr. Thellusson's Will,* 22 Va. L. Rev. 416 (1935-1936). See also the Accumulations Act, 55-56 Vict. ch. 58, which is generally referred to as The Thellusson Act, and was enacted in 1800, specifically to put an end to accumulations like those which were directed by Peter Thellusson in his will. According to the April 12, 1887 New York Times, another person in England, had given "instructions for a will which should postpone all enjoyment of his property until the death of the last survivor of all the members of the peerage living at his death." *Peter Thellusson's Will*, N.Y. Times, April 12, 1887. Such provisions were considered absurd, at that time.

[26] THELLUSSON V. WOODFORD, supra at 132.

[27] THELLUSSON V. WOODFORD, supra at 132.

[28] *Id.*

[29] Thellusson v. Woodford, *4 Ves. 227.*

[30] THELLUSSON V. WOODFORD, *supra* at 114.

[31] *Id.*

[32] PATRICK POLDEN, PETER THELLUSSON'S WILL OF 1797 AND ITS CONSEQUENCES ON CHANCERY LAW, (2002).

[33] ROBERT FRANK, *Shutting Out the Kids from the Family Fortune,* The Wall Street Journal, May 10, 2011.

[34] Id. According to Wikipedia on September 21, 2011 he was "one of the eight wealthiest men in American" at his death, with a fortune "estimated to be between $40 and $90 million."

[35] He directed that his private secretary should be paid $4,000 per year for as long as he worked with the trustees, (Par. 13, while each of his four daughters was to receive $5,000 per year (Par. 5), until he cut his daughter Marion out entirely by a codicil executed on Sept. 25, 1917, a little over a month after the signing of the will. His housekeeper got $3,000 for life, (Par. 8), as did someone named Flora Fallas, (codicil #2). that was the same amount he gave to his sister. (Par. 8). Both his cook and his chauffeur were to get $1,000 per year for life, (Par. 9). The trustee was to be paid $3,500 per year, or one-half of one percent of the income each year, whichever was larger, and was to invest only in U.S. government bonds, and the bonds of New York, Chicago, and Detroit – as long as those bonds were paying at least 3% a year. (Par. 21).

[36] Will of Wellington Burt, Par. 20.

[37] Wikipedia, *supra*, at note 32.

[38] For example, if Burt had simply said that the money was not be distributed until 21 years after the death of the last to die "of all my descendants alive at my death" that would have allowed him to use the life of the 94 years old, whoever that might be, as one of the measuring lives.

[39] *Supra* note _____

[40] *Supra* note ____

[41] *Supra* note ______

[42] SUPRA.

[43] Wis. Stat. Ann Sec. 700.16.

[44] "For reasons unrelated to the GST tax, Idaho, South Dakota, and Wisconsin had already abolished the Rule Against Perpetuities before 1986. But ... these states experienced little to no resulting advantage in the jurisdictional competition for trust funds prior to 1986."ROBERT H. SITKOFF & MAX M. SCHANZENBACH, *supra,* at 373.

[45] S.D. Codified Laws Sec. 43-5-1-8

[46] In their excellent empirical study, Max M. Schanzenbach and Robert H. Sitkoff stated, "We find no evidence that, in the years prior to the GST tax, states that abolished the Rule Against Perpetuities garnered more trust business relative to states that retained the Rule. On the contrary, prior to the GST tax, the abolishing states had the same or lower trust assets than similar neighboring states, and were no match for leading trust jurisdictions that retained the Rule such as Delaware." MAX M. SCHANZENBACH & ROBERT H. SITKOFF, *PERPETUITIES OR TAXES? EXPLAINING THE RISE OF THE PERPETUAL TRUST,* 27 CARDOZO L. REV. 2465 (2006), AT 2494.

[47] "Congress first levied an inheritance tax to help fund the civil War and did so again in the 1890s to fund the war with Spain. During world War I, congress turned to an estate tax, which it has continued to levy ever since. Prior to 1986, however, the estate tax could be avoided by using successive life interests. Because a life tenancy terminates at death and the state tax applies only to the decedent's transferable interests, there is no tax on the death of a life tenant, [so there was a loophole for successive life estates.] Congress sought to close the successive-life-estates loophole with the generation skipping transfer tax under the Tax Reform Act of 1986. In rough terms, a transfer to a grandchild, great-grandchild, or any other person who is two or more generations below the transferor ... would be taxed [in the estate of the transferor, at the highest marginal tax rate]"ROBERT H. SITKOFF & MAX M. SCHANZENBACH, *supra*, at 371.

[48] *Id.*, at 373.

[49] "Although grantors may go out of their way to avoid the Rule Against

Perpetuities for long-term family welfare planning purposes, the primary modern motivator is tax planning." JOHN A. WARNICK, SELECTING *a Trust Situs in the 21st Century,* 16-APR Prob. & Prop. 53. "We find that the only states that experienced an increase in trust business after abolishing the Rule were those that did not levy an income tax on trust funds attracted from out of state." ROBERT H. SITKOFF & MAX M. SCHANZENBACH, *supra,* at 362. "[A]bolishing the RAP attracted trust funds, but only if those funds would not be subject to a state fiduciary income tax." MAX M. SCHANZENBACH & ROBERT H. SITKOFF, PERPETUITIES OR TAXES? *Explaining the Rise of the Perpetual Trust,* 27 Cardozo L. Rev. 2465 (2006), at 2487.

50 Under federal law, in some situations trust income is subject to federal income tax, and in other situations it is not subject to federal income tax. Under federal law, "Income distributed to a beneficiary in the year it is received is taxable to the beneficiary, not to the trust; income that is not so distributed is taxable to the trust, not the beneficiary. Hence, from the perspective of minimizing federal income taxes, trust income should be distributed or accumulated depending on the relative applicable tax rates. ...As Jeffrey Powell has remarked, the rates applicable to trusts 'by far are the most onerous applicable to any taxpayer under the Code.' The Internal Revenue code thus creates an incentive for trust income to be distributed to the beneficiary in the year it is received." ROBERT H. SITKOFF & MAX M. SCHANZENBACH, *supra,* at 385.

51 In fact, as Chris Stevenson has pointed out, having money locked up in Dynasty Trusts may actually hurt the local economy. "Although the ability to accumulate wealth in Dynasty Trusts is astonishing, the accumulation may have significant detrimental effects on Maine's economy because funds held in Dynasty Trusts have effectively been removed from the local marketplace for most goods and services and instead largely placed in conservative bank investments, and to a lesser extent, in publicly traded corporations which ten to be located out of state. Maine's economy would be better served if RAP operated to terminate these trusts at a certain point to make these resources available to the local marketplace." CHRIS STEVENSON, *Maine's Dynasty Trust Statute: The Product of Informed Judgment?* 23 Me. B.J. 224 (2008), at 229, 230.

52 "In my personal experience, settlors of dynasty trusts have always provided for the possibility of discretionary distributions to their descendants, and they never have had a goal of building vast wealth simply for the sake of building vast wealth, or to fund a lottery of sorts that would produce a jackpot for some lucky descendant(s) many, many, many years into the distant future. The clients who wanted badly to have a perpetual impact on the earth – other than by having transferred rock-solid values to their descendants – generally tried to have that impact through a charitable trust or foundation of their own creation. The vast majority of wealthy clients have liked the idea of leaving a substantial portion of their wealth to their descendants in trust, rather than outright, for a host of reasons that included creditor-protection and tax minimization. Sometimes the also wanted professional management, but at least as often they liked the idea of having one or more descendants serve as a trustee, using non-general powers of appointment to maintain flexibility without necessarily losing the benefit of tax minimization or asset protection. As each

trustee would die or become disabled, someone from the next generation of that trustee's branch of the family would typically step into the trustee's shoes. Of course the details of these dynasty trusts varied considerably from family to family, but I don't recall a single client expressing significant concerns about descendants distant generations down the road." Interview with Prof. Randall W. Roth, __________Professor of Law _________, Honolulu, Hawaii, November 6, 2011.

[53] "Billionaire Warren Buffett, who has recently announced plans to give the bulk of his vast fortune to the charitable Bill and Melinda Gates Foundation, was famously quoted in *Fortune* magazine as saying that 'the perfect amount to leave to [one's] children is 'enough money so that they would feel they could do anything, but not so much that they could do nothing.'" JOSHUA C. TATE, *Conditional Love: Incentive Trusts and the Inflexibility Problem,* 41 Real Prop. Prob. & Tr. J. 445 (2006), at 447.

Attorney Henry Christensen III has stated, "Many clients have asked us over the years to design trusts which will be a safety net for their descendants, but which won't remove all incentive for them to take care of themselves. The problem can be acute when both parents die at an early age, and children's shares are vested, and known to them, when they are young. ... While a number of donors prefer that beneficiaries not know that they are beneficiaries of a trust until they have matured, the Uniform Trust Code now requires, in those states that have adopted the UTC and in particular section 813 thereof, making it mandatory that beneficiaries over the age of 25 be told of their interest in a trust." Henry Christensen III, *Encouraging Accomplishment and Discouraging Sloth in Trust Beneficiaries,* ______________________ Sept. 24, 1998.[Packet 32, middle]

John J. Scroggin has stated, "During the 1990s wealthy clients have tended to increase their charitable bequests more than their family inheritances. According to Paul Schervish of the social Welfare Research Institute at Boston College: 'A growing number of wealthy Americans are shifting their financial legacies from heirs to charity.' According to Mr. Schervish, from 1992 to 1997 the value of charitable bequests went up 110%, but bequests to heirs only grew 57%; for estates above $20 million, charitable bequests went up 246%, yet heirs received only 75% more. "JOHN J. SCROGGIN, *Protecting and Preserving the Family – the True Goal of Estate Planning, Part I: Reasons and Philosophy,* 16-JUNE Prob. & Prop. (2002), at ______

[54] "The dynasty trust creates an inevitable issue: What will be its effect on future generations? Assume a great-grandson has a right to ... annual income for the rest of his life ... of $240,000. When his father tries to convince him to go to college, the son's response is: 'Dad, I have a quarter-million a year coming to me – why do I need to go to college? Why do I need to work?" JOHN J. SCROGGIN, *supra,* at 31. "A 1992 study showed that almost 20% of the people who inherited as little as $150,000 quit working." *Id.*

There are pattern clauses to try to prevent trust money from being distributed to beneficiaries who have a substance abuse problem. See "Sample Substance Abuse Clause for Testamentary Trust, HENRY CHRISTENSEN III, *supra*, at _________" "A number of organizations have been established in the last several years to deal with the negative effects of inherited wealth." JOHN J. SCROGGIN, *Protecting and Preserving the Family: The True goal of Estate Planning, Part II – Some of the Tools" 16-AUG Prob. & Prop. 34* (2002) at 41. "Giving an heir an unearned healthy annual income often takes away ambition and self worth." *Id.,* at 34.

"Too much unearned income can have a negative impact on productivity. Some studies suggest that individuals who inherit large sums of money are more likely to leave the labor force. Psychological costs, such as substance abuse, anxiety, and depression, also are associated with being a child of wealthy parents. Receiving large unconditional bequests could compound these psychological costs. 'Affluenza,' a term 'coined to describe an epidemic of over-consumption and its often negative effects on children – alienation, laziness, arrogance and low self esteem,' is not merely a hypothetical problem." JOSHUA C. TATE, *supra,* at 488.

[55] JESSE DUKEMINIER & JAMES E. KRIER, The Rise of the Perpetual Trust, 50 UCLA L. REV. 1303, AT 1335.

[56]

[57] JOSHUA C. TATE, *supra,* at 462.

[58] William J. Turnier and Jeffery L. Harrison point out that, "Professor Burton Malkiel has, in a fairly conclusive fashion, established that the net return on professionally managed portfolios does not, over the long haul, exceed that on portfolios of randomly selected stocks. This has given rise to the extensive interest in index funds that have become the rage in the last twenty-five years." William J. Turnier & Jeffery L. HARRISON, *A Malthusian Analysis of the So-Called Dynasty Trust,* 28 Va. Tax Rev. 779 (2009), at 802,803.

[59] "Because of potential liability for imprudent investments, the trustee is likely to invest more conservatively than the beneficiaries would." JOSHUA C. TATE, *Perpetual Trusts and the Settlor's Intent,* 53 U. Kan. L. Rev. 595 (2005), at 622. Or banks may decide not to invest at all. The New York Times for October 25, 2011 reported that banks are now flush with cash, but still are not making loans. For example, Donald Sturm, owner of American National Bank and Premier Bank, is quoted as saying, that "he had pared his banks' portfolios of loans by more than two-thirds … over the last few years because of concerns that the loans could go bad....He said fewer businesses in Denver and Colorado Springs were seeking financing. Yet his banks remain flush with over $1.55 billion of deposits. He would like to make more loans so that he could earn more money, he said, but there are too few of what he calls 'quality borrowers,' whose credit record, income and assets suggest they would reliably pay him back....As a result, Mr. Sturm is keeping savings rates below 0.15 percent and setting C.D. rates below those of nearby competitors. "I don't want to take deposits in and lose money,' he said." NY Times, Business Section, Oct 25, 2011, at B. 11.

[60] *Id.*

[61] TURNIER & HARRISON, *supra* note 54.

62 Id. at 802.

63 Now serving a 150 year sentence for the frauds involved with a huge Ponzzi scheme.

64 JULIA WERDIGIER & BEN PROTESS, ARREST OF USB TRADER RATTLES BANKS IN EUROPE, N.Y. Times, September 16, 2011, at A1.

65 *Id*
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66 LOUISE STORY & ERIC DASH, LAWYER DEFENDS ROLE IN S.E.C. MADOFF CASE, N.Y. Times, September 23, 2011, Business Section, at B3.

67 *Id.*

68 Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.,* at 235.

73 *Id.,* at 233, 234

74 "[W]e have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted, much as the settlers of the original 13 colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." Id., at 242.

75 As Rebecca Love Kourlis and Dirk Olin have pointed out in REBUILDING JUSTICE, Fulcrum Publishing, 2011, there may be serious dangers to the judicial system when groups or entities have the ability to make excessive contributions to the campaigns of people running for election to a judgeship – or to any legislative position.

76 See note ______, SUPRA.

77 FRAN HAWTHORNE, THE RISKS OF INVESTING LIKE THE BIG PENSION FUNDS, N.Y. Times, September 16, 2011, at F5.

78 ROTH, SUPRA.

79 "[T] movement to abolish the Rule and the corresponding rise of the

perpetual trust reflect strategies to minimize taxes, not a burgeoning desire among donors for perpetual control." MAX M. SCHANZENBACH & ROBERT H. SITKOFF, *PERPETUITIES OR TAXES? EXPLAINING THE RISE OF THE PERPETUAL TRUST,* 27 Cardozo L. Rev. 2465 (2006), at 2497.

80 Thomas Jefferson letter to James Madison, (1789), 5 PAUL LEICESTER FORD, WRITINGS OF THOMAS JEFFERSON 115 (1895).

Or as Blackstone stated, "[N]aturally speaking, the instant a man ceases to be, he ceases to have any dominion." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 10 (Univ. of Chi. Press 1979) (1766.

81 "Several articles and websites make reference to the great industrial dynasties of the early twentieth century, such as the Carnegies, Rockefellers, and Fords, apparently with the implication that the settlor of a dynasty trust can help make sure his or her family name is similarly honored." JOSHUA C. TATE, *supra* at note ______, at 619. "'Your heirs, for unlimited generations to come, will be grateful to you, their great, great ad infinitm, grandparent.'" *Id.* "Who knows – if you take advantage of Nevada's 365-year dynasty trust laws, your average Joe client could be the next great American tycoon." CATHERINE COLOMBO, *supra* at note ___________, at 13.

82 See text at

83 "The reason [for setting up a Dynasty Trust] has little if anything to do with some wish on the part of wealthy people to control the lives of their unknown descendants; rather, it has to do with their interest in saving on federal transfer taxes imposed at the descendant's deaths, and on competition among the states to cater to that interest." ASHLEY VAUGHAN, *supra* at note _________, at 629.

84 Of course even the strongest supporters of Dynasty Trusts do not actually expect this to happen. "Undoubtedly, the tax environment will continue to experience change. ... estate plans must remain flexible to meet future needs of the beneficiaries and to avoid unintended and unforeseen tax consequences." STEPHEN E. GREER, *The Alaska Dynasty Trust,* ALASKA L. REV. (2001), at 285.

85 Wikipedia.

86 Encyclopedia Britannica, 2011.

87 *Id.*

88 Encyclopedia Britannica, 2011.

89 IRS website.

90 "One way for a decedent to be remembered by future generations is through charitable giving. As two noted psychologists wrote, 'That $2,000,000 Chair in Psychosocial Gerontology which you have just been kind enough to endow at your local university ... bestows social immortality; your name will be linked forevermore to the professor who holds that enviable title.'" RONALD

CHESTER, *The Psychology of Dead Hand Control,* 43 Real Prop. Tr. & Est. L.J. 505 (2008).

[91] "[I]t is probably malpractice *per se* not to suggest a perpetual dynasty trust to any client who can afford to fund one." MARTHA W. JORDAN, *Requiem for Pennsylvania's Rule Against Perpetuities,* 46 Duq. L. Rev. 555, at 572.

[92] "Estate Tax" IRS.gov. March 25, 2011.

[93] Catherine Colombo, Build Your Dynasty in Nevada, 18-May Nev. Law. 6 (2010). Others are not quite so aggressive. For example, attorney Edward V. Atnally suggests that, "In the largest estates, especially those exceeding $5-10 million, consideration should be given, among other things, to the creation of a dynasty trust." EDWARD V. ATNALLY, ESTATE *planning and Retirement Benefits – An Approach toward Simplification, Part 2, PROBATE* & PROPERTY (2009) at 59. He also goes on to pint out why retirement plan benefits should not be used to fund Dynasty Trusts. *Id.*

[94] The actual amount of the exemption has varied over the years, as have the estate tax rates. For 2011 the exclusion for estate tax purposes is $5 million. For 2013 it will be $1 million, and the maximum tax rate will return to 55%. IRS.gov, SUPRA. This illustrates how significantly tax law has changes in a period of only two years.

[95] *Id.*

[96] *Id.*

[97] There has not yet been any determination as to whether or not this will actually be permitted.

[98] Or whatever the specific amount is in any given years.

[99] "A trust protector is a person other than the trustee selected by the settlor to stand in the shoes of the settlor after the settlor's death and make decisions regarding the trust. An obvious problem with giving an individual trust protector the power to amend the trust is that such a person eventually will die, as will any individual chosen as trustee...A corporate trustee does not have this drawback, but the settlor may have less confidence that a corporate trustee will share her ethical framework." JOSHUA C. TATE, *supra,* note_____, at 464.

[100] "A trust can grow to remarkable size ... in 90 years ... [T]hese simple examples assume no consumption of the assets or their income." JULIA B. *FISHER, Dynasty Trusts: Problems and Drafting* Considerations, ALI-ABA 53 (February 2002).

[101] Failed in 2008.

[102] Received $10 billion in TARP money, plus $69 billion in federal loans in the 2007-2010 bank bailout by the federal government. Bloomberg News, as quoted by BOB IVRY, BRADLEY KEOUN & PHIL KUNTZ, "Banks and Fed kept scope of bailout under wraps", The Denver Post, Nove. 29, 2011, at 1.

103 Purchased by Bank of America to avoid total failure.

104 Received $45 billion in TARP money, plus $91.4 bilion in federal loans. *Id.*

105 SUPRA, at note ______

106

107 This gives some protection to the bank against future litigation by the beneficiaries, in that beneficiaries are expected to read, and act up on the accountings as received.

108 See In Re Orpheus Trust, 179 P.3rd 562 (Nev. 2008) for an illustration of how a technical accounting issue may be litigated to the state supreme court.

109 "The Problem: Most grantors do not 'trust' a trustee, in particular a corporate trustee, to exercise discretion over time. Naming a trusted friend as a protector will be responsive to these concerns. But what happens 50 years out?" HENRY CHRISTENSEN III, *The Use of Trust Protectors or Boards of Advisors in Long-Term Irrevocable Trusts* _______; "Instead of giving a discretionary beneficiary an unrestricted power to remove and replace the independent trustee, the trust instrument could name a trust protector who has an unrestricted power to remove and replace the independent trustee. The trust protector would need to be independent of the beneficiary within the meaning of I.R.C. Section 672(c). The difficulty with using a trust protector is that dynasty trusts can extend beyond the lifetime of anyone in existence at the time the trust is established ...One solution is to give the initial trust protector the ability to appoint a successor trust protector who in turn has the power to appoint a successor trust protector. How does one remove an unwanted trust protector? It would appear dangerous for both tax and creditor protection reasons to give a discretionary beneficiary the unrestricted power to remove and replace a trust protector with another trust protector ...If a trust protector is named, a discretionary beneficiary should not have the power to remove the trust protector but only the power to appoint a successor trust protector should the original trust protector resign." STEPHEN E. GREER, *supra* note _____, at 267.

110 This may get quite complex. For example, Madeline J. Rivlin has suggested, "Consider dividing the functions between an Investment, Independent and (if necessary to secure perpetual status) Administrative Trustee. ...Further division, e.g. Dividing the Investment Trustee function, so that there is a special voting trustee ...Oversight mechanisms may also be included if appropriate, e.g. Requiring the Independent Trustees to approve certain investment decisions ...Minimum and maximum numbers of Trustees for each function and/or unanimity requirements for certain decisions may be considered." MADELINE J. RIVLIN, *Dynasty Trusts, Practicing* LAW INSTITUTE, 34TH ANNUAL ESTATE PLANNING INSTITUTE, (Sept-Oct 2003), at 957.

111 A sample "Protector Reimbursement clause" for example, provides: "Any Protector of any trust held hereunder shall be entitled to reimbursement for all ordinary and necessary out-of-pocket costs and expenses (including

attorneys', accountants', consultants' and other expert fees and charges) incurred by such Protector in the performance of his or her duties under this Trust agreement. ... Each of the Protectors shall be indemnified for his or her reasonable legal expenses incurred in defending himself or herself in any action or actions brought against him or her in which it is finally determined that his or her conduct did not constitute gross negligence, willful misconduct, or a crime, and further, such reasonable legal expenses may be advanced to a Protector provided that he or she executes an undertaking, with a supporting promissory note, to repay such advanced amounts in the event that the conduct of such Protector is finally determined to have constituted gross negligence, willful misconduct, or a crime." HENRY CHRISTENSEN III, *supra at* ____

112 "Four hundred fifty years after a ... perpetual trust is created, the number of living beneficiaries of that one trust could rise to 1.8 million – yes, 1.8 million beneficiaries of a single trust, each with standing to bring a lawsuit against the trustee for violation of any of the trustee's fiduciary duties, including the duty of impartiality. The *Restatement of Trusts* states that the duty of impartiality may require the trustee 'to consult with beneficiaries and obtain information from them concerning their financial needs and circumstances.' How can the trustee of a 1.8 million beneficiary trust hope to fulfill that duty?" LAWRENCE W. WAGGONER, M*essage to Congress: Halt the Tax Exemption for Perpetual Trusts,* 109 Mich. L. Rev. First Impressions 23 (2010), at 25.

113 "As the trust corpus grows, so, too, can the desire to litigate over the growing pot of gold – especially when the warring factions are distant relatives who may have never met before litigation. Dynasty trusts have the significant potential of bringing extended families together in new and possibly destructive ways. " EDWARD J. MCCAFFREY, ALAN T. YOSHITAKE, & KEITH A. *DAVIDSON, The Advantages of Creating Out-Of-State* Trusts, 28-SEP L>A> Law. 19 (2005), at 21.

114 Whenever a trustee does anything which might subject the trustee to litigation, it is safest for the trustee to seek court approval in advance. U.T.C. Sec. 201(c) provides that "A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights."42- at 302

115 As Michael L. Graham has pointed out, "The settlor should be advised that a broad discretionary trust shifts the balance of power substantially away from the beneficiary and toward the trustee." MICHAEL L. GRAHAM, *Divining the Intent of the Trust Settlor,* ______________________________32- at 2228

116 SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST, (2006).

117 "Assuming that $1 million is invested for 85 years at a 12% annual return ...the $1 million will have appreciated to $1.9 billion (assuming no distributions and no state income tax) by the end of the 85 year period. This is made possible by the fact that no transfer taxes have been paid for approximately three generations." GIDEON ROTHSCHILD, *Understanding the Generation-Skipping Transfer Tax,* PLI – Nov 2004, at 457.

118 Dow Jones Historical Prices, Yahoo! News Network.

119 *Id.*

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122 "As soon as we start accessing the trust income, the rate at which trust assets are increasing will decline. Even modest access to a portion of the income can have a significant effect. Suppose that, in our example, we decided to use only three percent of trust assets each year to support the extended family. If we assume an annual net rate of return after all expenses and taxes of 8%, this would result in close to a static rate of return adjusted for inflation and rising standard of living, because as has been developed above, given the experience of the last 50 years, we need a return of approximately 4.9% per year just to keep pace with the average national wages. Given that the family is likely to continue to grow geometrically whereas the trust will remain virtually static when adjusted for inflation and rising expectations generated by a rising standard of living, succeeding generations will see their relative share shrinking dramatically as the years slip by." JEFFERY L. HARRISON, *supra* note _______, at 800,801.

123

124 LAWRENCE W. WAGGONER, *THE CASE FOR CURTAILING DEAD-HAND CONTROL: THE AMERICAN LAW INSTITUTE DECLARES THE PERPETUAL-TRUST MOVEMENT ILL-ADVISED,* ___________________

125 *Id.*, at _____

126 *Id.,* at ____________

127 C.R.S. 15-11-120

128 "Usually, the trust is created for the benefit of the descendants of the grantor. In some cases others, such as spouses of descendants ... may also be beneficiaries." MADELINE J. *RIVLIN,* supra note _______, at 949.

129 481 U.S. 704 (1987).

130 Id., at 713.

131 Various rules of primogenitor, and fee tail male, for example, usually selected just one person in each generation to have ownership rights to the land, so the problems of fractionalization were avoided. Dynasty Trusts, however, like the system imposed on the tribal members, includes ALL descendants. Therefore, the fractionalization problems that were avoided by primogenitor will NOT be avoided with Dynasty Trusts. And it is to be expected that Dynasty Trusts will turn out to have exactly the same fractionalization problems we have a already seen in Hodel v. Irving! Ashley Vaughan has pointed out that one of the benefits of the common law Rule Against Perpetuities is that "it avoids the 'administrative difficulty of dealing with overly fractionalized interests in trust

assets, as the group of descendant-beneficiaries grows exponentially.'" ASHLEY VAUGHAN, supra note ___________, at 639.

132 SUPRA.

133 HODEL V. IRVING, *supra* at 707.

134 *Id*., at 708.

135 *Id.*,, at 713.

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138 The American Law Institute now agrees. "A rule that curbs excessive dead-hand control is deeply rooted in this nation's history and tradition. At the 2010 annual meeting of the American Law Institute ('ALI' or 'Institute'), the Institute honored that tradition by taking the position that the perpetual-trust movement is ill advised. The Institute also proposed a new approach to perpetuities, one that would impose a two-generation limit on dead-hand control. Under the ALI's perpetuity rule, a trust would be required to terminate no later than the death of the youngest beneficiary who is no more than two generations younger than the trust settlor." LAWRENCE W. WAGGONER, *supra* at note _______, at 26,

139 "It is good public policy to allow each person to dispose of his property as he pleases. The policy extends not only to the present generation but to future generations. If we are to permit the present generation to tie up all existing capital for an indefinitely long period of time, then future generations will have nothing to dispose of by will except what they have saved from their own income, and the property which each generation enjoys will already have been disposed of by ancestors long dead." ASHLEY VAUGHAN, *supra* at note _________, at 639.

140 "A principal tax policy underlying the 1986 code, the relevant features of which remain in effect today, is to prevent the 'enjoyment of property followed by its movement down the generations without being subjected to estate or gift tax.' If Congress wants to put this policy into practice, it will need to close the loophole opened by the states that have abolished the Rule Against Perpetuities.. Successful implementation of federal tax policy necessarily requires attention to its interaction with state property law." ROBERT H. SITKOFF & MAX M. SCHANZENBACH,, *Jurisdictional competition for trust funds: An empirical Analysis of Perpetuities and Taxes,* 115 Yale L.J. 356 (2005), at 363.

141 "Amending the federal tax code would probably be simpler than rewriting the law of trusts in every state that has abolished the Rule." JOSHUA C. TATE, *supra* note ________, at 625.

142 As noted in the Harvard Law Review, "Unfortunately, Congress seems unlikely to concern itself with such a complicated and long-term issue, since dynasty trusts will deprive federal coffers of revenue too far off in the future for

even a senator to take note. Elected politicians do not think in terms of centuries, let alone decades, and it seems unlikely that they will spend political capital on this issue." Note, *Dynasty Trusts and the Rule Against Perpetuities,* 116 Harv. L. Rev. 2588 (2003), at 2609.

[143] See ___________text above.

[144]

[145] States which have attracted out-of-state trust funds have done so only by abolishing any state income tax on trust assets. In addition, as Chris Stevenson has pointed out, accumulating funds in a trust removes those funds from the local economy, thus depriving the state of sales tax revenues and the like. See fn. 47 above.

[146]

[147]

[148] A will goes into effect at the death of the testator. A deed goes into effect when it is signed and delivered.

[149]

[150]

[151] It is easy to calculate the passage of 100 years. It will be clear from the face of the document whether it is still in effect or not. There will be none of the cumbersome investigation into "lives in being at the creation of the interest," and no complexity in ascertaining whether one or two generations have died since the instrument went into effect.