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Perpetual Trusts and the Settlor's Intent

Joshua C. Tate*

I. INTRODUCTION

Why do we care about what happens to our property after death? For the most part, the answer has to do with the passions that we feel in life: love for family and friends; love for the arts; love for education; love for bettering humanity. We want the people we care about to have the money they need after we are gone, and we want the causes or institutions about which we are passionate to continue in existence. But these are not the only reasons. We often fear that our property will be put to a use of which we do not approve, or that it will be wasted, and we want to ensure that does not happen. And, in many cases, we may want to dispose of our property so as to leave a mark on this world, so that those who come afterward will look back on our life and accomplishments and respect us and the values for which we stood.

One way of making sure that our property is used as we want it to be after death is by the creation of a trust. Until recently, noncharitable trusts were generally limited in duration by the Rule Against Perpetuities (the "Rule"), which imposed restrictions on settlors who wished to keep their property in the family.¹ Within the past few years, however, many

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1. See Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1304 (2003) (explaining the Rule). There is an exception to the Rule for an unconditional gift for charitable purposes. 4A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 401.9, at 610–11 (4th ed. 1989).

American states have abolished or drastically curtailed the Rule by legislation.² These statutes have given rise to a new American legal entity: the perpetual dynasty trust, a trust that has the potential to last forever, or for hundreds of years, but need not be limited to charitable purposes.³ The perpetual dynasty trust gives unprecedented freedom to the settlor, who can now extend a dead hand far into the future. The movement to abolish the Rule has met with controversy, but the trend seems unlikely to reverse.⁴ Because anyone can establish a perpetual dynasty trust in one of the states that have abolished the Rule, states that have not yet abolished the Rule are tempted to do so to prevent a loss of trust business to other states.⁵

In a recent article, James E. Krier and the late Jesse Dukeminier have offered a tonic purporting to remedy alleged negative consequences of perpetual dynasty trusts. Concluding that few settlors genuinely wish to bind the hands of their descendants forever, Dukeminier and Krier propose that those states that have abolished the Rule also enact legislation

2. Dukeminier & Krier, *supra* note 1, at 1313–14.

3. The term “dynasty trust” is sometimes used interchangeably with “perpetual trust,” but the former can refer more generally to any trust “set up primarily to perpetuate the trust estate for as long a period as possible.” Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 547 (1964). I use the term “perpetual dynasty trust” to specify those trusts that are both perpetual and noncharitable and would not be permissible under the common law Rule.

4. Dukeminier & Krier, *supra* note 1, at 1343 (arguing that, in the likely event that the generation-skipping-tax exemption is raised, “more states can be expected to provide for perpetual trusts”).

5. “Respectable authority suggests that the validity of a trust should be determined by the law of the situs of trust property, not the law of the trust settlor’s domicile.” Stewart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1082 (2000). Under the Restatement view, a trust will be valid if it is valid under the laws of the state “with which, as to the matter at issue, the trust has its most significant relationship.” RESTATEMENT (SECOND) OF CONFLICTS § 270 (1971). When the settlor manifests an intention that the trust be administered in a particular state, the laws of that state may determine the trust’s validity. See *id.* § 270 cmt. c (“Of the states having relationships with the trust, much the most important insofar as the validity of the trust is concerned is the state, if any, where the settlor manifested an intention that the trust be administered.”). Certain U.S. states, especially Alaska and Delaware, have begun to compete aggressively for trust business from other states by allowing settlors to shield their assets from creditors. Sterk, *supra*, at 1037. The theory is that, even though such trusts are not permitted in other states, the law of the state of trust administration will be applied. Some of the states that have abolished the Rule have likewise done so with the hope that other states will apply the law of the state of trust administration in deciding the validity of a perpetual trust. It is not clear, however, whether this strategy will be successful in the long run. The courts of the state where the settlor was domiciled at the creation of the trust may conclude that that state, and not the state of trust administration, has the “most significant relationship” with the trust, or that perpetuities violate a strong public policy of the domicile state. See Jeffrey A. Schoenblum, *Reaching for the Sky—Or Pie in the Sky: Is U.S. On-shore Trust Reform an Illusion?*, 4 TRUSTS E ATTIVITÀ FIDUCIARIE 340, 344–45 (2003). The question may ultimately turn on “whether the local court will be able to exercise jurisdiction over the out-of-state trust or the foreign trustee,” which depends on whether the trustee has had “minimum contacts” with the domicile state. *Id.* at 346. Until these issues are resolved, however, states that abolish the Rule may hope to see an increase in trust business, which means that the movement to abolish the Rule is unlikely to reverse in the near future.

enabling perpetual dynasty trusts to be easily undone after the beneficiaries known to the settlor have died. Dukeminier and Krier suggest that states that abolish the Rule also enact statutes that: (1) give the beneficiaries the power, when all the beneficiaries who were known to the settlor have died, to terminate or modify the trust without court approval (provided that they do not exercise the power in favor of themselves, their creditors, or their estates); (2) give the beneficiaries a power, limited by a statutory standard, to withdraw principal for their own benefit; (3) allow the trustee to terminate the trust at will; and (4) give the beneficiaries an unlimited power to replace a trustee without court approval.⁶ In the view of Dukeminier and Krier, these statutes could alleviate the "difficulties of duration" that perpetual dynasty trusts may engender. Although Dukeminier and Krier discuss these proposed statutes in their article under the heading "Default Rules,"⁷ the rules would in fact be mandatory and applicable to all trusts.⁸

The attitude of Dukeminier and Krier toward perpetual dynasty trusts may reflect the prevailing sentiment among American property scholars, many of whom are hostile to the abolition of the Rule.⁹ Moreover, Dukeminier and Krier are not alone in suggesting that more flexible modification and termination rules might be warranted in light of the Rule's abolition.¹⁰ The specific proposals made by Dukeminier and

6. Dukeminier & Krier, *supra* note 1, at 1338–39, 1341–42. Dukeminier and Krier also propose that courts be given a broad power to modify or terminate a trust if it would be to the advantage of the then-income beneficiaries. *Id.* at 1340.

7. *Id.* at 1339.

8. Dukeminier and Krier assert that their proposed statutes "should govern when the trust instrument is inexpertly drafted." *Id.* at 1340. Dukeminier and Krier do not explain, however, how a court is to determine whether a trust instrument is "inexpertly drafted," nor do they suggest any mechanism whereby a settlor could prevent the rules from being applied. This leads one to conclude that rules would in fact be mandatory and applicable to all trusts, a conclusion that was confirmed by Krier in e-mail correspondence with the author of this Article. See E-mail from James E. Krier, Earl Warren Delano Professor of Law, University of Michigan Law School, to Joshua C. Tate, Samuel I. Golieb Fellow, New York University School of Law (May 12, 2004) (on file with author).

9. See, e.g., Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 603 n.4 (2000). But see T.P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284, 286–92 (2000) (rejecting certain philosophical arguments often made in support of the Rule and concluding that the Rule must be evaluated according to its economic consequences). In general, law professors tend to regard issues of dead-hand control as important. Cf. Wayne M. Gazur, *Do They Practice What We Teach? A Survey of Practitioners and Estate Planning Professors*, 19 VA. TAX REV. 1, 46 (1999) (surveying views of law professors and estate planners on the importance of generation-skipping trusts).

10. E.g., Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 721–22 (2001); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2118 (2003) ("[L]egislatures (or courts) could alter rules affecting trust modification and termination to make it easier for trust beneficiaries to terminate trusts.").

Krier, however, are quite revolutionary. Dukeminier and Krier would limit the reach of the dead hand, but not in the same way as the traditional Rule: They would effectively leave the duration of the trust up to the beneficiaries. This is not the same as voiding interests automatically based on when they will vest, and thus the Dukeminier and Krier proposals differ in effect from the old Rule.

This Article seeks to offer state legislatures full disclosure as to what the proposals of Dukeminier and Krier really mean. The proposed statutes would not enable the settlor to do anything that cannot be accomplished under existing law, but would give considerable power to the beneficiaries to ignore or repudiate the settlor's wishes. Dukeminier and Krier would put the beneficiaries in the driver's seat, allowing the beneficiaries to decide, without court supervision, who should be the trustee and whether (and on what terms) the trust should continue beyond the traditional perpetuities period. No U.S. jurisdiction currently gives such power to the beneficiaries. Dukeminier and Krier are proposing a sea change in the American law of trusts.

This Article is a response to the proposals of Dukeminier and Krier and does not pretend to advance a new theory on the policy ramifications of perpetual dynasty trusts. Neither does the Article aim to decide whether courts should in general give less weight to the settlor's intent, a question that merits thorough and independent consideration.¹¹ It is not necessary to conclude that the settlor's intent should invariably be respected in order to find fault with the Dukeminier and Krier proposals. If perpetual dynasty trusts are harmful to society, as some might argue, then states should simply retain some version of the Rule: The Dukeminier and Krier statutes would allow perpetual dynasty trusts to continue as long as the beneficiaries are content with them. On the other hand, states that intend to give unlimited freedom to the settlor should not adopt the statutes proposed by Dukeminier and Krier, because the statutes, without modification, would give too much power to the beneficiaries to thwart the settlor's goals. The statutes envisioned by

Neither Chester nor Sterk proposes legislation as specific as that suggested by Dukeminier and Krier.

11. Jeffrey Sherman has argued that a settlor should not be allowed to impose conditions on access to trust funds that are designed to control the behavior of the beneficiaries. Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273. This Article will show that imposing such conditions appears to be a goal of many settlors. See *infra* notes 121-24 and accompanying text. Whether it is wise to allow settlors to extend a dead hand in this way does not depend on whether states have abolished the Rule.

Dukeminier and Krier would give unprecedented control to the beneficiaries without solving all the problems that a perpetual dynasty trust might create.

Part II of this Article presents a brief summary of the history of the Rule and of the current movement to abolish it. Part III summarizes the argument and legislative proposals of Dukeminier and Krier. Reviewing some of the many websites and articles written and created by estate planners urging clients to set up trusts that last as long as the relevant jurisdiction permits, Part IV then considers the reasons that settlors may have for creating perpetual dynasty trusts. While the primary theme of these websites is that trusts that last more than one generation obtain tax advantages, the websites suggest other reasons why the settlor might find a perpetual or near-perpetual dynasty trust attractive. In light of these other possible motivations for creating perpetual dynasty trusts, Part V argues that the statutes proposed by Dukeminier and Krier would prevent some settlors from achieving their goals, and briefly discusses the policy implications of allowing the beneficiaries to override the settlor's intent. Part VI concludes.

II. THE RULE AGAINST PERPETUITIES AND ITS ABOLITION

A. *The Traditional Rule, "Wait-and-See," and the USRAP*

Across the centuries, the common law swung back and forth like a pendulum between allowing and restricting property interests of unlimited duration,¹² but it eventually came to rest with the doctrine we know as the Rule Against Perpetuities.¹³ For present purposes, it will suffice to

12. In 1285, the English statute *De Donis* imposed restrictions on the ability of a donee in fee tail to alienate the land, and the royal justices gradually extended the restraint to subsequent generations, allowing for the creation of perpetual entails. JOSEPH BIANCALANA, *THE FEE TAIL & THE COMMON RECOVERY IN MEDIEVAL ENGLAND 1176-1502*, 106-21 (2001). Shortly after the justices began to recognize perpetual entails, however, lawyers devised a fiction called the common recovery by which a tenant in tail could bar, or break, the entail and sell the land to a third party. *Id.* at 121, 250-51. But lawyers eventually found a way around the common recovery, and invented "strict settlements," in which a life estate was given to a prospective groom with a remainder to trustees during his life and then successive remainders to his unborn sons. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 293-94 (4th ed. 2002); LLOYD BONFIELD, *MARRIAGE SETTLEMENTS, 1601-1740: THE ADOPTION OF THE STRICT SETTLEMENT* 55-56 (1983). By the technique of resettling the land in each generation, conveyancers were able to keep land in the groom's family in perpetuity. BAKER, *supra*, at 294. This is the background to the development of the Rule.

13. The creation of the Rule is traditionally associated with *The Duke of Norfolk's Case*, 22 Eng. Rep. 931 (Ch. 1682), but one scholar has argued that it was not originally a rule "against" perpetuities but a rule "of" perpetuities. See George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 21-22

state Gray's classic formulation: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."¹⁴ The Rule invalidates interests that may vest too remotely in the future,¹⁵ and its effect is to impose a time limit on the ability of a person to make plans about the future ownership of his or her property.

The classical Rule paid no attention to whether a particular interest did, in fact, vest within the permissible period, and thus became a "trap to the draftsman."¹⁶ In applying the Rule, courts assumed that an eighty-year-old woman might still have more children (the "fertile octogenarian" assumption) and that a middle-aged married man might take a second wife who was not yet born at the time an instrument was created (the "unborn widow" possibility).¹⁷ Because strict application of the Rule involved such counterfactual assumptions, a movement began in the mid-twentieth century to amend the Rule so that courts would "wait and see" whether a particular interest actually did vest within the prescribed period.¹⁸ Pennsylvania enacted the first wait-and-see statute in 1947.¹⁹ This led to a series of debates among leading American property scholars that have been dubbed the "Perpetuities Wars."²⁰

The leading American proponent of the wait-and-see rule was W. Barton Leach, who argued in a famous article that the Rule should take into consideration what actually happened rather than what might conceivably happen.²¹ Leach's suggestion met with considerable opposition, most notably from Lewis M. Simes, who offered several objections to the wait-and-see rule.²² By Leach's death in 1971, however, six states had adopted the wait-and-see rule for the full perpetuities period, and six

(1977).

14. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201, at 191 (4th ed. 1942).

15. W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 639 (1938).

16. *Id.* at 643.

17. *Id.* at 643-44.

18. Dukeminier & Krier, *supra* note 1, at 1305-07.

19. Lewis M. Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179, 183 (1953).

20. Susan F. French, *Perpetuities: Three Essays in Honor of My Father*, 65 WASH. L. REV. 323, 333 n.24 (1990).

21. W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 747 (1952). Dukeminier supported Leach's view. See JESSE DUKEMINIER, JR., *PERPETUITIES LAW IN ACTION: KENTUCKY CASE LAW OF THE 1960 REFORM ACT* 70-75 (1962) (citing cases that "offer rather convincing support . . . for Professor Leach's recent attack on the remote possibilities test").

22. Simes, *supra* note 19, at 184-90.

other states had adopted a limited version of wait-and-see.²³ In 1979, after much debate, the drafter of the Restatement of Property adopted the wait-and-see rule,²⁴ giving Leach a posthumous victory.

In order to apply the "wait-and-see" doctrine, it was necessary to answer a difficult question: For whose lives were the courts to "wait and see" if the interest vested within the permissible period?²⁵ The Restatement offered a list of individuals who counted as measuring lives.²⁶ Dukeminier found this list unprincipled and arbitrary, and suggested that courts should instead follow the procedure under the old Rule and look to persons "causally connected to vesting."²⁷ Lawrence Waggoner doubted whether the common-law approach to measuring lives could be applied in the wait-and-see context, reasoning that the common law identified "measuring lives" only for valid interests, and that such measuring lives—which Waggoner termed "validating lives"—could not be used for purposes of a wait-and-see rule.²⁸ Waggoner proposed instead that courts mark the wait-and-see period by a fixed time limit somewhere between eighty and 100 years.²⁹ The Uniform Statutory Rule Against Perpetuities ("USRAP"), of which Waggoner was the principal architect, ultimately provided for a ninety-year time period.³⁰ Many states subsequently adopted the USRAP,³¹ and the ninety-year wait-and-see pe-

23. Dukeminier & Krier, *supra* note 1, at 1306–07.

24. *Id.* at 1307; RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.4 (1983).

25. Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1648 (1985).

26. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 63 (1983).

27. Dukeminier, *supra* note 25, at 1648, 1674–81.

28. Lawrence W. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714, 1714–15 (1985).

29. *Id.* at 1726–28. The debate continued in a series of rejoinders and rebuttals. See Jesse Dukeminier, *A Response by Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985); Lawrence W. Waggoner, *A Rejoinder by Professor Waggoner*, 85 COLUM. L. REV. 1739 (1985); Jesse Dukeminier, *A Final Comment by Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985).

30. Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 158–60 (1988).

31. Twenty-three states and the District of Columbia have adopted the USRAP and have not yet repealed it. See ARIZ. REV. STAT. ANN. §§ 14-2901 to -2906 (West Supp. 2004); CAL. PROB. CODE §§ 21200–231 (West 2004); COLO. REV. STAT. ANN. §§ 15-11-1101 to -1107 (West 2004); CONN. GEN. STAT. ANN. §§ 45a-490 to -496 (West 2004); D.C. CODE ANN. §§ 19-901 to -907 (2004); FLA. STAT. ANN. § 689.225 (West 2004); GA. CODE ANN. §§ 44-6-200 to -206 (West 2004); HAW. REV. STAT. ANN. §§ 525-1 to -6 (2004); IND. CODE ANN. §§ 32-17-8-1 to -6 (West 2004); KAN. STAT. ANN. §§ 59-3401 to -3408 (West 2004); MASS. GEN. LAWS ANN. ch. 184A, §§ 1–11 (West 2004); MICH. COMP. LAWS ANN. §§ 554.71 to .78 (West 2004); MINN. STAT. ANN. §§ 501A.01 to .07 (West 2004); MONT. CODE ANN. §§ 72-2-1001 to -1007 (West 2004); NEB. REV. STAT. §§ 76-2001 to -2008 (Supp. 2002); NEV. REV. STAT. ANN. §§ 111.103 to .1039 (West 2004); N.M. STAT. ANN. §§ 45-2-901 to -906 (West 2004); N.C. GEN. STAT. §§ 41-15 to -22 (West 2004); N.D. CENT. CODE §§ 47-02-27.1 to .5 (2004); OR. REV. STAT. §§ 105.950 to .975 (West 2004); S.C. CODE ANN. §§ 27-6-10 to -80 (2004); TENN. CODE ANN. §§ 66-1-201 to -208 (West 2004); VA. CODE ANN.

riod became the dominant variation on the Rule in the late twentieth century.

B. *The GST Tax Exemption*

USRAP was not the last word in perpetuities reform, but legal scholars are no longer spearheading the reform movement. In order to understand developments since USRAP, a brief discussion of federal estate and gift taxation is necessary.

In 1916, Congress enacted a federal estate tax.³² Taxpayers were initially able to avoid this tax by making lifetime gifts, but Congress severely limited that possibility in 1924 by enacting a gift tax.³³ However, neither the gift tax nor the estate tax applied to the termination of a life estate in a child; when a trust was used to transfer property first to one's children for life and then to one's grandchildren, the first transfer was subject to taxation but the second was not.³⁴ Wealthy people took advantage of this opportunity and created such generation-skipping trusts, which could last as long as the relevant Rule permitted.³⁵

Congress eventually decided to narrow the gap in the existing tax law through a tax on generation-skipping transfers, which was enacted in 1976 and substantially reconfigured in 1986.³⁶ In enacting the 1986 Generation-Skipping Transfer ("GST") Tax, however, Congress included

§§ 55-12.1 to .6 (Michie 2003); W. VA. CODE ANN. §§ 36-1A-1 to -8 (West 2004). Alaska, New Jersey, and Utah adopted USRAP but subsequently repealed it. *See* ALASKA STAT. § 34.27.050 (Michie 2004) (repealed 2000); N.J. STAT. ANN. § 46:2F-1 (West 2004) (repealed 1999); UTAH CODE ANN. §§ 75-2-1201 to -1209 (West 2004) (replacing USRAP with a scheme allowing for thousand-year dynasty trusts). Arizona, the District of Columbia, Florida, Nebraska, and Virginia have amended their statutes to permit perpetual or near-perpetual trusts under certain circumstances. *See* ARIZ. REV. STAT. ANN. § 14-2901(A)(3) (West 2004) (exempting interests from invalidation where "[t]he interest is under a trust whose trustee has the expressed or implied power to sell the trust assets and at one or more times after the creation of the interest one or more persons who are living when the trust is created have an unlimited power to terminate the interest"); D.C. CODE § 19-904(10) (2004) (exempting trusts where the trustee has the power of sale and the governing instrument provides that the Rule does not apply); FLA. STAT. ANN. § 689.225(2)(f) (West 2004) (substituting 360 years for ninety years for trusts created after December 31, 2000); NEB. REV. STAT. ANN. § 76-2005(9) (West 2004) (exempting trusts where the trustee has the power of sale and the governing instrument provides that the Rule does not apply); VA. CODE ANN. §55-13.3(C) (West 2004) (specifying that the Rule does not apply to a trust "when the trust instrument, by its terms, provides that the rule against perpetuities shall not apply to such trust").

32. 5 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES & GIFTS* ¶ 120.1, at 120-1 to -2 (2d ed. 1993).

33. *Id.* ¶ 120.1, at 120-2.

34. *Id.* ¶ 120.2.3, at 120-11 to -12.

35. Dukeminier & Krier, *supra* note 1, at 1312-13.

36. *See* BITTKER & LOKKEN, *supra* note 32, ¶ 120.2.3, at 120-12 to -13.

an exemption of \$1 million for each transferor.³⁷ This exemption has been increased to \$1.5 million for decedents dying in 2004, and will continue to increase in stages until it reaches \$3.5 million in 2009.³⁸ Accordingly, it is now possible to create a generation-skipping trust worth up to \$1.5 million that will not be subject to the GST tax.³⁹ Unless and until it runs afoul of the Rule, such a trust can continue to pass down income or principal free of federal transfer taxes to an infinite number of generations, assuming Congress does not in the future repeal, reduce, or limit the GST exemption.

C. Abolition of the Rule

Before Congress enacted the GST tax, only two states, Idaho and Wisconsin, had abolished the Rule Against Perpetuities, with the proviso that restraints on alienation beyond the common-law perpetuities period were not permitted.⁴⁰ In 1983, after the original version of the GST tax was enacted but before the substantial 1986 revisions, South Dakota became the third state to abolish the Rule, again subject to a limitation on restraints on alienation.⁴¹ At the time it abolished the Rule, South Dakota was engaged in "an aggressive campaign to attract trust and banking [business] to the State."⁴²

Since South Dakota abolished the rule, legislatures in a number of American states, hoping to attract trust business to their state,⁴³ have abolished or drastically limited the scope of the Rule. Such legislation has been enacted in sixteen states, not counting the three that abolished it before 1986, and the District of Columbia.⁴⁴ Other states are considering

37. *Id.* ¶ 120.2.3, at 120-13.

38. See 26 U.S.C. §§ 2010(c), 2631(c) (West 2004) (providing the credit amount against estate tax and the inflation formula for the GST exemption).

39. See Dukeminier & Krier, *supra* note 1, at 1313 (stating that the GST tax will be adjusted for inflation to \$1.5 million in 2004). If the trust is created inter vivos, however, the initial transfer will be subject to gift tax to the extent it exceeds the \$1 million gift tax exemption. Sterk, *supra* note 10, at 2100-01.

40. IDAHO CODE § 55-111 (Michie 2004); WIS. STAT. ANN. § 700.16 (West 2004); Sterk, *supra* note 10, at 2101.

41. S.D. CODIFIED LAWS §§ 43-5-1, -8 (Michie 2004).

42. Sterk, *supra* note 10, at 2101-02.

43. *Id.* at 2103.

44. The statutes vary in their operation. Alaska and New Jersey have abolished the common law Rule and replaced it with a restriction on the settlor's ability to suspend the power of alienation. See ALASKA STAT. § 34.27.100 (Michie 2004); N.J. STAT. ANN. §§ 46:2F-9, :2F-10 (West 2003). Delaware has retained a version of the Rule, but only for interests of real property. See DEL. CODE. ANN. tit. 25, § 503(a)-(e) (Supp. 2004). Rhode Island has abolished the Rule outright. See R.I. GEN. LAWS § 34-11-38 (Supp. 2004). Virginia exempts a trust from the Rule when the governing

proposals to abolish the Rule, and the list of states that allow the creation of perpetual dynasty trusts is likely to grow.⁴⁵

Because the movement to abolish the Rule is closely related to the GST tax exemption,⁴⁶ Congress has considerable power over the future of the Rule.⁴⁷ If Congress decides to abolish the estate tax completely by 2010, there will be no special transfer tax advantage in generation-skipping trusts, relieving the pressure to abolish the Rule for those states that have not already done so.⁴⁸ But a settlor from any state can establish a perpetual dynasty trust in a jurisdiction that has abolished the Rule,⁴⁹ and the list of states that have done so is already long. In any event, it is doubtful whether Congress will really do away with the estate tax altogether.

If Congress suddenly became strangely passionate about perpetuities, it could take measures to make them less attractive, perhaps by amending the GST exemption so that it would not apply to perpetual trusts, which

instrument specifies that the Rule does not apply. See VA. CODE ANN. § 55-13.3(C) (Michie 2003). Illinois, Maine, Maryland, Nebraska, New Hampshire, Ohio, and the District of Columbia do so as well, provided that the trust gives the trustee a qualifying power of sale. D.C. CODE ANN. § 19-904(10) (Supp. 2004); 765 ILL. COMP. STAT. ANN. §§ 305/3(a-5), 305/4(a)(8) (West 2001); ME. REV. STAT. ANN. tit. 33, § 101-A (West Supp. 2004); MD. CODE ANN., EST. & TRUSTS § 11-102(e) (2001); NEB. REV. STAT. § 76-2005(9) (Supp. 2002); N.H. REV. STAT. § 564:24(I) (Supp. 2004); OHIO REV. CODE ANN. § 2131.09(B)(1) (Anderson 2002). Missouri specifies that the Rule does not apply whenever the trustee has a qualifying power of sale. MO. ANN. STAT. § 456.236(1) (West Supp. 2004). Arizona exempts trusts where the trustee has the power of sale and "at one or more times after the creation of the interest one or more persons who are living when the trust is created have an unlimited power to terminate the interest." See ARIZ. REV. STAT. § 14-2901(A)(3) (West Supp. 2004). Utah and Wyoming have adopted a perpetuities period of 1,000 years. See UTAH CODE ANN. §§ 75-2-1201 to -1209 (Supp. 2004); WYO. STAT. ANN. § 34-1-139 (West 2004) (stating that the 1,000-year period applies where the trust instrument states that the Rule does not apply and where the trust will terminate no later than 1,000 years after its creation). Florida has amended its USRAP to provide for a 360-year wait-and-see period. FLA. STAT. ANN. § 689.225(2)(f) (West Supp. 2004).

45. As of this writing, legislation is pending in Connecticut, New York, and Texas, and may be reintroduced in Kentucky. See H.R. 6935, 2005 Gen. Assem. (Conn. 2005); A. 4924, 228th Annual Leg. Sess. (N.Y. 2005); H.R. 2561, 79th Leg. (Tex. 2005); E-mail from the Hon. Brent Yonts, Kentucky State House Representative, to Joshua C. Tate, Samuel I. Golieb Fellow, New York University School of Law (March 21, 2005) (on file with author). The Montana legislature has passed a joint resolution authorizing the appointment of a committee to study the issue. H.R. Joint Res. 27, 59th Reg. Sess. (Mont. 2005).

46. As discussed below, however, tax benefits are far from the only motivation for creating dynasty trusts. See *infra* Part IV. While the GST tax exemption has no doubt accelerated the abolition of the Rule, it is possible that the Rule would eventually have been eliminated even without the exemption.

47. Dukeminier & Krier, *supra* note 1, at 1342-43.

48. *Id.*

49. See *supra* note 5 ("Respectable authority suggests that the validity of a trust should be determined by the law of the situs of trust property, not the law of the trust settlor's domicile." (citation omitted)).

would negate the incentive to repeal the Rule.⁵⁰ Under the most likely scenario, however, Congress will continue to increase the GST exemption, multiplying the tax advantages of perpetual dynasty trusts and increasing the incentive for states to abolish the Rule.⁵¹ If the Rule continues to be abrogated, the question arises of what additional changes to the law of trusts might be appropriate. In their recent article, Dukeminier and Krier attempt to answer this question.

III. DUKEMINIER AND KRIER ON PERPETUAL TRUSTS

Dukeminier, who devoted much of his scholarly career to questions of perpetuities reform, saw merit in the traditional common law approach toward choosing measuring lives.⁵² He was not pleased to see the Rule abolished in state after state with little regard for a half-century's worth of legal scholarship and debate on the subject.⁵³ In his last article, completed by Krier after his death,⁵⁴ Dukeminier tried to assess what settlors really hoped to accomplish by means of perpetual dynasty trusts, suggested some difficulties that might arise from such trusts, and made proposals regarding how those difficulties could be remedied.⁵⁵

Dukeminier and Krier identify three sorts of problems that might arise from perpetual trusts, which they refer to as the problems of inalienability, first-generation monopoly, and duration.⁵⁶ The first problem, inalienability, arises from the fact that, historically, perpetuities interfered with the free alienability of property.⁵⁷ Dukeminier and Krier conclude that this problem has been largely solved, as the vast majority of trusts give the trustee the power to sell the trust property and invest in other assets, and almost all the states that have abolished the Rule give this power to the trustees by statute if it is not included in the trust instrument.⁵⁸

50. Dukeminier & Krier, *supra* note 1, at 1343.

51. *Id.*

52. See *supra* note 25 and accompanying text.

53. See Dukeminier & Krier, *supra* note 1, at 1317 (referring to the "troubling likelihood that the Rule against Perpetuities is being abolished with little if any reflection upon the merits of the Rule on its own, without regard to tax considerations").

54. *Id.* at 1303 n.**.

55. *Id.* at 1303.

56. *Id.* at 1319.

57. *Id.* at 1319-20.

58. *Id.* at 1321. This argument may, however, continue to have persuasive force. A trustee can be sued for making irresponsible investments, and is therefore likely to be a more conservative investor than an outright owner. Thus, tying up property in a perpetual trust may discourage risk, and thereby have an effect on the market even if the trustee has the power to sell. Whether this effect is

The second problem, first-generation monopoly, refers to the ability of the settlor (the first generation) to make all the decisions regarding the use of the trust property, leaving future generations no control over how the property is used.⁵⁹ Dukeminier and Krier devote somewhat more attention to this problem, which implicates philosophical concerns about fairness and equality of opportunity, but they do not find the philosophical and sociological arguments against perpetuities especially persuasive, and do not suggest any ways to ameliorate these concerns.⁶⁰

In the view of Dukeminier and Krier, the most serious objection to the creation of perpetual trusts is what they call the problem of duration.⁶¹ This problem could be more aptly characterized as a problem of inflexibility. Because the settlor cannot foresee the future, Dukeminier and Krier explain, the settlor will not be able to anticipate changes in the number, needs, and abilities of the trust's beneficiaries; in the tax law and the law of trusts; in opportunities for investment; in the inflation rate and the value of the dollar; and in the persons who serve as trustees and the quality of their performance.⁶² Changes in circumstances may lead to economic inefficiency or harm the beneficiaries.⁶³ As a consequence, Dukeminier and Krier want to make it easier to modify or terminate a trust after circumstances have changed, and to replace the trustee if the beneficiaries become dissatisfied with the trustee's fees or performance.⁶⁴ Finally, Dukeminier and Krier are concerned about the possibility that multiplication of beneficiaries will eventually make the trust unmanageable.⁶⁵

Under current law, it is difficult for a trust to be modified or terminated after the settlor has died. In *Claflin v. Claflin*,⁶⁶ a case decided in the late nineteenth century, the Massachusetts Supreme Judicial Court held that a trust, if otherwise legally valid and in accordance with public policy, cannot be terminated early if doing so would contravene a material purpose of the settlor.⁶⁷ This rule, which came to be known as the *Claflin* doctrine, was subsequently adopted in most American jurisdic-

negative or positive is beyond the scope of this Article.

59. *Id.* at 1321. This supposed problem could equally be termed "owner monopoly," since the first generation is the owner of the property.

60. *Id.* at 1321-27.

61. *Id.* at 1327.

62. *Id.*

63. *Id.*

64. *Id.* at 1335-37.

65. *Id.* at 1339.

66. 20 N.E. 454 (Mass. 1889).

67. *Id.* at 456.

tions.⁶⁸ The *Clafin* rule is also applied to modifications of a trust. A court may direct a trustee to deviate from the trust's terms when "owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust," but not "merely because such deviation would be more advantageous to the beneficiaries."⁶⁹ Thus, for well over a century, implementing the settlor's intent has been the dominant paradigm of American trust law when questions of modification and termination are concerned.

The trend of recent years has been to give beneficiaries and courts more power to terminate or modify trusts, but the settlor's intent remains a key factor. The Restatement (Third) of Trusts provides that, if all the beneficiaries of an irrevocable trust agree, they can "compel the modification or termination of the trust," providing that this would not be "inconsistent with a material purpose of the trust."⁷⁰ A comment notes that "[m]aterial purposes are not readily to be inferred" and that a "finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to a beneficiary's management skills, judgment, or level of maturity."⁷¹ A similar provision is contained in the Uniform Trust Code ("UTC"),⁷² and both the UTC and the Third Restatement specify that a spendthrift clause does not necessarily constitute a material purpose of the trust.⁷³ The Third Restatement, but not the UTC, allows a court to modify or terminate a trust even when doing so would contravene a material purpose of the settlor, provided that the court determines that the reasons advanced by the beneficiaries in favor of modification or termination outweigh the material purpose.⁷⁴ Both the UTC and the Third Restatement also adopt

68. Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1204 (1985).

69. RESTATEMENT (SECOND) OF TRUSTS § 167 & cmt. b (1959).

70. RESTATEMENT (THIRD) OF TRUSTS § 65 (2003). A comment explains that, while all beneficiaries must consent, "[t]he consent of potential beneficiaries who cannot consent for themselves . . . may be provided by guardians ad litem, by court appointed or other legally authorized representatives, or through representation by other beneficiaries under the doctrine of virtual representation." *Id.* § 65 cmt. b.

71. *Id.* § 65 cmt. d.

72. UNIF. TRUST CODE § 411(b) (2004) [hereinafter UTC]. The California Probate Code has also moved away from the strict *Clafin* doctrine and allows for easier modification of trust terms. See Chester, *supra* note 10, at 701–06.

73. U.T.C., *supra* note 71, § 411(c); RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. e (2003).

74. RESTATEMENT (THIRD) OF TRUSTS § 65(2). This provision is absent in the UTC, possibly because it has little chance of being adopted by state legislatures, which are reluctant to thwart the settlor's intent. The spirit of section 65(2) is embraced by Dukeminier and Krier, although they would grant broader powers of modification and termination to courts. See *infra* text accompanying

an expanded "equitable deviation" doctrine, allowing the court to modify the dispositive provisions of a trust in order to further the settlor's purposes when the settlor has failed to anticipate a change in circumstances.⁷⁵

The reforms of the UTC and the Third Restatement, if adopted, will make it somewhat easier for the beneficiaries to compel the termination or modification of a trust due to a change in circumstances. The idea is that the settlor, if he or she were still living, would or should approve of termination or modification when no material purpose of the trust is impaired or (in the case of the Third Restatement) the material purpose is outweighed by the reasons in favor of termination.⁷⁶ Thus, the UTC and Third Restatement claim to further the settlor's purposes.⁷⁷

The UTC has also made it easier to remove a trustee. Under the traditional rule, it was difficult to remove a trustee except in cases of serious unfitness, commission of a crime, or breach of trust.⁷⁸ The UTC permits removal when the trustee is unwilling or persistently fails to administer the trust effectively, or when the beneficiaries all request removal, provided that the court determines that removal serves the interests of the beneficiaries.⁷⁹ These provisions are mandatory law and cannot be avoided through drafting of the trust instrument.⁸⁰ The Third Restatement also allows the court, in its discretion, to remove a "trustee whose continuation in that role would be detrimental to the interests of the beneficiaries."⁸¹ The basic idea is that the settlor, were he or she still living, would consent to removal of the trustee when removal serves the beneficiaries' interests.⁸²

note 89.

75. UTC, *supra* note 71, § 412; RESTATEMENT (THIRD) OF TRUSTS § 66.

76. See Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 661–62 (2004). See also Chester, *supra* note 10, at 728 ("Flexibility in changed circumstances undoubtedly would appeal to many dead settlors if they could be brought back to life."); John H. Langbein, *The Uniform Trust Code: Codification of the Law of Trusts in the United States*, 15 TR. L. INT'L 66, 69 (2001) (explaining that the reforms of the UTC are "[c]onsistent with the rationale of the 'material purpose' doctrine, which is to defer to the interests and intention of the settlor").

77. Whether the reforms of the UTC and Third Restatement are in fact intent-implementing is beyond the scope of this Article.

78. RESTATEMENT (SECOND) OF TRUSTS § 107 cmt. b (1959) (listing as grounds for removal of a trustee: "lack of capacity to administer the trust . . . ; the commission of a serious breach of trust; refusal to give a bond, if a bond is required; refusal to account; the commission of a crime, particularly one involving dishonesty; unfitness, whether due to old age, habitual drunkenness, want of ability or other cause; permanent or long-continued absence from the State; the showing of favoritism to one or more beneficiaries; [and] unreasonable or corrupt failure to co-operate with his co-trustees").

79. UTC, *supra* note 71, § 706(b).

80. *Id.* § 105(b).

81. RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. d.

82. See Sitkoff, *supra* note 76, at 665 (noting that the more liberal removal standards of the

While Dukeminier and Krier endorse the approach of the UTC and the Third Restatement, they do not think these provisions go far enough to prevent the anticipated problems of inflexibility associated with dynasty trusts.⁸³ Under the UTC and Third Restatement, modification and termination of trusts and removal of trustees generally involve court participation.⁸⁴ Dukeminier and Krier are concerned that involving the courts will be too costly for the beneficiaries.⁸⁵ Dukeminier and Krier acknowledge that any problems of inflexibility could be solved through apt drafting, including special powers of appointment in beneficiaries, discretionary powers in trustees, and provisions allowing beneficiaries to replace the trustee.⁸⁶ But Dukeminier and Krier are concerned that some of the new perpetual trusts will be "inexpertly drafted," and propose that statutes be enacted to give trustees and beneficiaries those powers that would supposedly be included in a well-drafted trust.⁸⁷

Dukeminier and Krier propose several legislative "alternatives" that states could follow to resolve problems of inflexibility, four of which they endorse.⁸⁸ First, Dukeminier and Krier suggest that legislation could give courts broad power to terminate a trust after the beneficiaries who were alive at the trust's creation are dead, if termination would be to the advantage of the then income beneficiaries.⁸⁹ Unlike the equivalent provision in the Third Restatement,⁹⁰ the statute envisioned by Dukeminier and Krier does not require the court to balance the interest of the beneficiaries against the material purposes of the settlor: the court need not consider the settlor's intent. Second, Dukeminier and Krier suggest "a statute giving the power of modification or termination to the income beneficiaries in succession, but only after the income beneficiaries known to the settlor die."⁹¹ To avoid adverse tax consequences, Dukeminier and Krier suggest that this be a special power that cannot be exer-

UTC can be justified in part by the fact that modern settlors regularly provide for easier substitution of trustees).

83. Dukeminier & Krier, *supra* note 1, at 1330-31.

84. UTC, *supra* note 71, §§ 411(b), 706(b); RESTATEMENT (THIRD) OF TRUSTS §§ 37, 65. While the Restatement allows, in principle, for a trust to be terminated without a court decree, "[a]s a practical matter . . . the trustee is under a duty to assure that all requirements of the rule are satisfied before acting on a beneficiary plan for termination or modification." *Id.* § 65, cmt. a.

85. Dukeminier & Krier, *supra* note 1, at 1331, 1338.

86. *Id.* at 1339-40.

87. *Id.* at 1340-41.

88. Dukeminier and Krier suggest the possibility of a rule terminating trusts after a given period, but then reject this option on the ground that termination might not always be in the beneficiaries' interest. *Id.* at 1341.

89. *Id.* at 1340-41.

90. RESTATEMENT (THIRD) OF TRUSTS § 65(2).

91. Dukeminier & Krier, *supra* note 1, at 1341.

cised in favor of the holders of the power or their creditors or estates,⁹² but there would be nothing to prevent it being exercised in favor of the beneficiaries' spouses or children. Dukeminier and Krier also propose that each beneficiary have the power to withdraw principal for his or her own benefit, "limited by an ascertainable standard relating to the beneficiary's health, education, support, or maintenance."⁹³

Third, Dukeminier and Krier propose that the trustee be given a statutory power to terminate the trust without a lawsuit.⁹⁴ Finally, Dukeminier and Krier propose that a statute "give the beneficiaries power to remove or replace a trustee at will," which would give them powerful leverage to ensure that the trustee does what the beneficiaries want.⁹⁵ Dukeminier and Krier give no indication that these last two statutes would apply only after the beneficiaries known to the settlor have died. Dukeminier and Krier intend all these rules to be mandatory in nature, meaning that the settlor could not avoid them through language in the trust instrument.⁹⁶

The statutes proposed by Dukeminier and Krier would make it impossible, as a practical matter, for a settlor to impose permanent, binding conditions on the beneficiaries' access to trust funds.⁹⁷ As Dukeminier and Krier note, there are many reasons why a settlor might wish to impose restrictions on access to trust funds: For example, the settlor might fear that the beneficiaries could prove to be prone to making bad financial decisions, and might want to make those decisions in advance on the beneficiaries' behalf.⁹⁸ By the use of spendthrift clauses and other provisions, estate planners can draft a trust so as to protect the beneficiaries from misfortune and prevent the beneficiaries from squandering trust funds.

In their analysis of the movement to abolish the Rule, Dukeminier and Krier do not emphasize the protective possibilities of trusts. Instead, Dukeminier and Krier state that the movement to abolish the Rule "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 descen-

92. *Id.* This is designed to avoid triggering I.R.C. § 2041(a)(3) (1994). See Treas. Reg. § 20.2041-1 (defining powers of appointment).

93. Dukeminier & Krier, *supra* note 1, at 1341.

94. *Id.*

95. *Id.* at 1342.

96. See *supra* note 8 and accompanying text.

97. See *infra* Part V.

98. Dukeminier & Krier, *supra* note 1, at 1322 (discussing the arguments of Thomas Gallanis).

dants' deaths, and on competition among the states to cater to that interest."⁹⁹ For this reason, Dukeminier and Krier conclude that "settlers would rather hold to the beneficial purposes of their trust than to precise terms that have come to be inconsistent with those purposes, given subsequent events."¹⁰⁰ In other words, Dukeminier and Krier contend that their proposals would merely implement the settlor's presumed intent.

How states should evaluate the statutes proposed by Dukeminier and Krier depends in part on what settlers are trying to accomplish with perpetual dynasty trusts. A settlor who does not wish to control access to trust funds by unborn descendants would not object to statutes giving beneficiaries and courts the power to modify or terminate the trust after all the beneficiaries known to the settlor have died. By the same token, a settlor who wants only to pass tax savings down from one generation to another might not mind if the trustee was given a statutory power to terminate the trust, or if the beneficiaries had the power to replace the trustee.¹⁰¹ The proposals of Dukeminier and Krier would implement the intent of such settlers.

On the other hand, the statutes proposed by Dukeminier and Krier would defeat the intent of a settlor who does want to impose perpetual, binding conditions on access to trust funds, conditions that will apply to unborn beneficiaries as well as beneficiaries known to the settlor. Dukeminier and Krier offer courts, trustees, and beneficiaries a powerful statutory arsenal with which to wage war on that settlor's intent, if indeed such a person exists.

Thus, whether the Dukeminier and Krier reforms are intent-implementing or intent-defeating depends on what goals settlers actually have. To answer that question, we must look to empirical evidence.

IV. THE ONLINE PROMOTION OF DYNASTY TRUSTS

The creation of a family trust is a private matter, and few settlers make public their needs and intentions when executing a trust. Lawyers and accountants, on the other hand, are very forthcoming about the benefits a dynasty trust can offer. Because it is now possible to solicit clients

99. *Id.* at 1314–15.

100. *Id.* at 1328–29.

101. Even a settlor who is concerned solely with passing down tax benefits, however, might object if the trustee had a statutory power to terminate the trust or if the beneficiaries had a statutory power to replace the trustee. Such statutes could interfere with the settlor's desire to prevent his or her property from being eroded by estate taxation. I am grateful to Lawrence Waggoner for this observation.

over the Internet, estate planners have created scores of websites and written dozens of promotional articles encouraging wealthy individuals to create dynasty trusts. The websites and articles are meant to introduce the concept of a dynasty trust to wealthy individuals who either are unaware that such a tool exists or do not understand its purpose; the goal is to attract more business by bringing in new clients or informing existing clients about the potential benefits of a dynasty trust. Persons interested in creating a dynasty trust are generally urged to contact the firm, lawyer, or accountant whose name appears on the website or article.

The websites and promotional articles that estate planners post on the Internet are not direct evidence of the intentions of settlors. In many cases, an estate planner may be advertising benefits of which a typical client would otherwise be ignorant. For example, many people may be unaware that a dynasty trust can be drafted using a spendthrift clause to protect the trust assets from creditors of the beneficiaries.¹⁰² Simply because a typical client would not be aware of a particular advantage of dynasty trusts, however, does not mean that he or she does not find that advantage attractive once its purpose is explained. Lawyers and accountants would not tout a particular advantage of dynasty trusts if they had no reason to think it would appeal to prospective clients,¹⁰³ and it is likely that each advantage mentioned in the websites speaks to the fears and desires of at least a few settlors.

It is the rare settlor who would establish a perpetual dynasty trust worth \$1 million or more without first consulting with an estate planner and learning what can be accomplished with such a trust. Thus, while the websites do not tell us what uses people might find for dynasty trusts in a hypothetical world without lawyers, they do give some indication as to what a settlor might want when he or she, having listened to the advice of an attorney, signs the trust instrument. That is the relevant question for purposes of divining the settlor's intent. The websites and articles therefore provide some empirical evidence, albeit derivative, as to what a settlor might expect to gain by a perpetual dynasty trust.¹⁰⁴

102. However, given the explosion of interest in self-settled spendthrift trusts, see Sterk, *supra* note 5, at 1037, it is possible that a substantial number of settlors are in fact aware of the possibilities of spendthrift clauses before they contemplate setting up a perpetual dynasty trust.

103. On the other hand, the amount of attention that lawyers devote to particular advantages may not reflect their importance to the settlor. The purpose of the websites is to show why the assistance of an estate planner is necessary, and the more complicated a particular benefit sounds, the more the client arguably needs the advice of a lawyer. This does not mean, however, that estate planners are promoting benefits that would be of no interest to their clients; that would be a wholly unprofitable exercise.

104. The websites discussed here may not represent the full spectrum of the estate planning bar. It may be that only a small fraction of estate planning attorneys aggressively solicit business via the

A. Reasons for Establishing Multigenerational Trusts¹⁰⁵

Dukeminier and Krier emphasize that the primary motivation for setting up dynasty trusts is the possibility of passing tax savings down from one generation to the next.¹⁰⁶ Virtually every website or article promoting dynasty trusts gives prominent attention to the tax benefits they offer, often mentioning them in the first sentence.¹⁰⁷ But this is far from the only advantage to dynasty trusts mentioned by the estate planners.

One advantage of dynasty trusts that is heavily promoted in the websites is the ability to protect family wealth from beneficiaries' bad judgment or misfortune. Prospective settlors are frequently advised that they

Internet, and that the sample of websites discussed here may be skewed toward one end (the less elite end) of the estate planning spectrum. I found these websites by running simple searches for "dynasty trusts" and similar phrases on the Google search engine.

105. In this section I consider websites from all jurisdictions regardless of whether they have abolished the Rule. Some of the "dynasty trusts" mentioned in these websites are not in fact perpetual trusts, but the websites still shed light on why settlors, in general, want to establish multigenerational trusts.

106. Dukeminier & Krier, *supra* note 1, at 1314–15.

107. See, e.g., Mark Albertson, *Dynasty Trusts*, at <http://www.albertsonlaw.com/news.asp?action=detail&article=65&category=> (last visited Feb. 14, 2005) ("using the proper planning, your family can save a check to the IRS every other generation and multiply family wealth at the same time."); Gottlieb & Gottlieb, *Dynasty Trust*, at <http://www.gottliebblaw.com/showdoc.php?docid=3> (last visited Jan. 24, 2005) ("when considering how best to pass on future generations, there is one exemption in the transfer tax law that merits close attention."); James M. Griesser & Dennis Suckstorf, *There's More to Learn About Dynasty Trusts*, at http://www.bizmonthly.com/10_2000/page11.html (last visited Jan. 24, 2005) ("with a dynasty trust, a generation skipping transfer trust, estate tax savings can be enormous."); Joel A. Mender, *Dynasty Trusts*, at <http://www.baldwinhaspel.com/publications-33.html> (last visited Jan. 24, 2005) ("one of the most distressing facts about death taxes for wealthy clients is that each time property passes from one generation to the next, the IRS collects over 45% in death taxes."); National Network of Estate Planning Attorneys, *What is a "Dynasty Trust"?*, at <http://www.netplanning.com/consumer/cda/0,1692,1356-996,00.html> (last visited Jan. 24, 2005) ("a Dynasty Trust is a sophisticated estate planning technique that allows affluent persons to avoid multiple estate taxes on property passing to different generations of their descendants."); Pioneer Bank & Trust, *Dynasty Trust*, at <http://www.pioneerbankandtrust.com/dynastytrust.htm> (last visited Jan. 24, 2005) ("South Dakota allows the use of Dynasty Trusts, which may continue over many generations, or forever, without the imposition of additional estate tax."); John J. Scroggin, *Dynasty Trusts*, at http://www.scrogginlaw.com/pdf/advxtops/dyn_trust.PDF (last visited Jan. 24, 2005) (directing the reader to "[t]ake a look at the generational confiscation of wealth which occurs"); Steven W. Tarta, *Dynasty Trusts*, at <http://primarylaw.com/primarylaw/content/articles/readarticle?read=1012> (last modified May 1, 2002) ("Dynasty Trusts are specialized irrevocable trusts designed to shelter assets from transfer taxes over multiple generations, while at the same time allowing your heirs to enjoy the fruits of those assets."); Missy Vaselaney, *Dynasty Trusts: Too Good To Be Ignored*, at <https://www.cpa2biz.com/News/Selected+Features/Dynasty+Trusts+Too+Good+to+Be+Ignored.htm> (last modified June 2003) ("tremendous tax and non-tax benefits may be derived from Dynasty Trust Planning (DTP)."); Wachovia, *Dynasty Trusts: Securing Your Wealth for Generations*, at http://www.wachovia.com/wealth/page/printer/0,,31_37_63,00.html (last visited Feb. 14, 2005) ("estate taxes are likely to be the most burdensome taxes your family will ever have to face.").

can prevent the trust assets from going to creditors of the beneficiaries,¹⁰⁸ or former spouses following a divorce.¹⁰⁹ The possibility of money being

108. See, e.g., Albertson, *supra* note 107 (noting that protection from creditors is particularly important “where children or grandchildren are in high risk occupations, such as physicians, civil engineers or entrepreneurs”); Scott Butera, *Keeping the Family Dynasty Alive*, at <http://www.hawaiibusiness.cc/hb72000/default.cfm?articleid=19> (last visited Feb. 14, 2005) (“executed properly, a Dynasty Trust can forever exempt its assets and the appreciation on those assets from . . . judgment creditors.”); Cleveland, Waters & Bass, P.A., *Creating a “Family Bank” with an Irrevocable “Dynasty” Trust and a Survivorship Life Insurance Policy*, at <http://www.cwbpa.com/dynasty.htm> (last visited Feb. 14, 2005) (describing the trust estate as “creditor-safe”); Carol H. Gonnella & Clay D. Geittmann, *Dynasty Trusts: Protecting Your Wealth for Generations*, at <http://www.jhstatelaw.com/PDF/DTP.pdf> (last visited Feb. 14, 2005) (referring to wealth kept in a dynasty trust as “creditor-protected”); Carol H. Gonnella & Clay D. Geittmann, *Wyoming Dynasty Trusts: The Multigenerational Family Bank*, at http://jhstatelaw.com/PDF/Wy_Dynasty_Trusts.pdf (last visited Feb. 14, 2005) (noting how a dynasty trust can protect “the assets of the trust against the claims of a descendant beneficiary’s creditors”); Griesser & Suckstorf, *supra* note 107 (explaining how spendthrift clauses can “prevent creditors of a beneficiary from attacking trust assets for indebtedness”); J. Kenneth Harris, *Planning Advantages of a Dynasty Trust*, at <http://www.kenharrislaw.com/dynasty.html> (last visited Feb. 14, 2005) (stating that “creditors of the beneficiaries cannot reach the trust assets, preserving them against the beneficiary’s bad decisions”); Law Office of William Edy, *Multigenerational Planning with Dynasty Trusts*, at <http://www.web.archive.org/web/20090203213727/http://edy-law.lawoffice.com/dynasty.htm> (last visited Feb. 14, 2005) (asking rhetorically if the reader wants “the funds inherited by your children to be lost to their judgment creditors if they get sued or have to file bankruptcy”); Eric Linger, *The Savvy Investor*, at <http://www.sherwoodinv.com/newsletter/Dynasty%20Trust.pdf> (last visited Feb. 14, 2005) (warning that an outright gift leaves the heir’s inheritance “subject to claims of creditors”); Merrill Lynch, *What is a Dynasty Trust?*, at http://askmerrill.ml.com/Publish/marketing_centers/products/eps015_DYNASTY_TRUST/ (last visited Feb. 14, 2005) (stating that trust can provide “a line of defense against . . . creditors”); Mallah, Furman & Co., P.A., *What You Need to Know if You Reside in More than One State*, at <http://mallahfurman.com/downloads/204086IEPam03.pdf> (last visited Feb. 14, 2005) (noting creditor protection); Gayle Tejada Pate, *Taking Advantage of the Tax Relief Act: Estate Planning*, at <http://www.lajollaplayhouse.com/fanfare/tax.htm> (last visited Feb. 14, 2005) (same); Mark D. Perkins & Dean Zayed, *Dynasty Trusts: Multi-Generational Planning*, at <http://www.dcba.org/brief/aprissue/1999/art30499.htm> (last visited Feb. 14, 2005) (noting that wealth preserved in a dynasty trust is “creditor-protected”); SaveWealth, LLC, *Dynasty Trusts*, at <http://www.savewealth.com/planning/estate/dynasty/> (last visited Feb. 14, 2005) (noting how spendthrift clauses can protect trust assets from creditors); Milton Berry Scott, *Dynasty Trusts*, at <http://www.mbscott.com/dynasty.htm> (last visited Feb. 14, 2005) (same); Tarta, *supra* note 107 (noting how the principal is “protected from attachment by creditors of your heirs”); John Terakedis, Jr., *Taxpayers Repeal Estate Tax By Creating a Dynasty Trust*, at <http://www.bizjournals.com/columbus/stories/2001/01/22/focus3.html?Page=3> (last visited Feb. 14, 2005) (noting the creditor-protection advantages of spendthrift provisions); Mark S. Weissman, *Dynasty Trust*, at <http://www.wwlaw.com/dynasty.htm> (last visited Feb. 14, 2005) (“If [the beneficiary] is sued for any reason, the assets in the Trust do not belong to [her], and cannot be seized by her creditors.”); Kirk Wilson, *A Trust out of State is Worth Considering*, at <http://www.hatchparent.com/h+p/hpnews/articles/H&P-wilson62.pdf> (last visited Feb. 14, 2005) (stating that a long-term trust “can keep assets out of the hands of the creditors”).

109. See, e.g., Albertson, *supra* note 107 (“If assets are kept in the Dynasty Trust, a divorcing spouse will have no ability to receive trust assets in a divorce action, thereby protecting your heirs.”); Butera, *supra* note 108 (noting protection from “divorce settlements”); Gonnella & Geittmann, *Dynasty Trusts: Protecting Your Wealth*, *supra* note 108, at 1 (noting protection on divorce); Gonnella & Geittmann, *Wyoming Dynasty Trusts*, *supra* note 108, at 6 (same); Griesser & Suckstorf, *supra* note 107 (showing how a spendthrift clause can “prevent the divorcing spouse of a beneficiary from laying claim to trust assets”); Harris, *supra* note 108 (noting the “high incidence of divorce

depleted by lawsuits is often mentioned,¹¹⁰ and one website mentions the possibility of doctors getting the money if the beneficiary has no health insurance.¹¹¹ The central theme is that these “eroding influences” can be avoided through a properly drafted dynasty trust.¹¹²

One website tells prospective clients that a trust that protects the beneficiaries from their creditors “evidences greater love than giving an outright gift.”¹¹³ But it is not simply a question of love: the same website warns of the ominous possibility that one’s assets could end up in the hands of someone else’s grandchildren if a dynasty trust is not used.¹¹⁴ Another benefit that is often mentioned is the ability to prevent imprudent spenders, or those who are not financially responsible, from wasting their inheritance.¹¹⁵ Professional asset management is cited as an

during the last 10 or more years” and highlighting protection offered by dynasty trusts); Law Office of William Edy, *supra* note 108 (asking if the reader wants “the divorce court to award your child’s ex-spouse a portion or one-half of the funds your child inherits from you if your child’s spouse files for a divorce”); Linger, *supra* note 108, at 1 (referring to the possibility that the heirs could “lose all or part of their inheritance” following a divorce); Mallah, Furman & Co., P.A., *supra* note 108, at 3 (discussing protection from ex-spouses); Merrill Lynch, *supra* note 108 (noting that trust can protect beneficiaries in the event of divorce); Pate, *supra* note 108 (same); Pension Professionals of Florida, *The Incentive Dynasty Trust*, at <http://www.taxstrategy.com/ap-in-dynasty.htm> (last visited Feb. 14, 2005) (“With your legal counsel, [the] Trust can be written . . . to protect the assets from bad marriages”); Save Wealth, *supra* note 108 (same); Scott, *supra* note 108 (same); Tarta, *supra* note 107 (same); Wealth Preservation Advisors, Inc., *The Family Dynasty Trust*, at <http://www.wealthadvisors.net/dynasty.htm> (last visited Feb. 14, 2005) (same); Weissman, *supra* note 108 (“If [the beneficiary] gets divorced, her husband cannot claim community property rights over the Trust.”); Wilson, *supra* note 108, at 1 (describing protection from “the avaricious spouses of children, grandchildren, and their children”).

110. See, e.g., Merrill Lynch, *supra* note 108 (“A trust can establish a line of defense against . . . lawsuits”); Tarta, *supra* note 107 (noting that creditor protection “can be particularly useful in the event of a lawsuit”); Wealth Preservation Advisors, *supra* note 109 (noting that trust can preserve property from lawsuits); Weissman, *supra* note 108 (noting protection if the beneficiary or her spouse “is sued for any reason”).

111. Law Office of William Edy, *supra* note 108.

112. Linger, *supra* note 108 (“By making a small change to your living trust, you can avoid these eroding influences.”).

113. Law Office of William Edy, *supra* note 108.

114. *Id.*

115. See Griesser & Suckstorf, *supra* note 107 (“For beneficiaries who are not as financially responsible, certain provisions restricting their access to trust income or principal can be incorporated into the trust.”); Mallah, Furman & Co., P.A., *supra* note 108 (explaining that a settlor “can also include ‘spendthrift provisions’ that restrict the discretionary use of trust assets by irresponsible or dissolute beneficiaries, as determined by the trustee”); Merrill Lynch, *supra* note 108 (noting protection against “imprudent spenders”); SaveWealth, *supra* note 108 (offering protection when beneficiaries are not financially responsible); Scott, *supra* note 108 (same); Wilson, *supra* note 108 (noting that a dynasty trust can “keep members of younger generations from squandering their inheritance”).

advantage.¹¹⁶ One website emphasizes that a dynasty trust can be structured so that “the Senior Family Members keep their hands on the financial wheel.”¹¹⁷

None of these concerns are related to the GST tax exemption, but instead reflect broader fears about what will happen to one’s money. As one website puts it, dynasty trusts avoid the concern “that a 50 year old son will leave the assets to his 26 year old fourth wife, that a grandchild will use the money to drink, spend and have a good time (spending \$500,000 in six months), or that a daughter will convert her inheritance to community property and lose half of it when her husband divorces her.”¹¹⁸ A dynasty trust can provide comfort that one’s hard-earned fortune will not be squandered by one’s descendants or end up in the hands of strangers.

Another common concern of wealthy individuals is that their descendants will, in the words of one website, become “lazy bums.”¹¹⁹ Settlers want their descendants to have what they need, but they also want them to be productive and hardworking members of society, and they do not want their inheritance to provide disincentives in this regard.¹²⁰ Articles and websites speak to this concern by emphasizing that distributions of trust funds can be made conditional on college graduation, income level, employment, or other indicators of success,¹²¹ and

116. Wilson, *supra* note 108.

117. Wealth Preservation Advisors, *supra* note 109.

118. Scott, *supra* note 108.

119. Ralph M. Engel & Al W. King III, *The Dynasty Trust—The Ultimate Estate Planning Vehicle*, at http://www.sonnenschein.com/pubs/publications/Pub_07_31_2001025204PM.html (last visited Jan. 26, 2005).

120. See Gonnella & Geittmann, *Wyoming Dynasty Trusts*, *supra* note 108, at 6 (explaining that the grantor can “leave desired guidance and instructions to the Trustee so that the descendant beneficiaries receive supplemental income from the trust without there being any disincentives to earn their own way” and “so that the descendant beneficiaries are encouraged to be productive and viable members of their communities”); Al W. King III, *Despite Pending War, Possible Estate Tax Repeal or Reform and an Uncertain Economy, Should Estate Planning Be a Priority?*, at <http://www.lockeygroup.com/corner.php> (last visited Jan. 26, 2005) (“These people want to ensure that their families inherit enough money to do something, but not enough so that they do nothing.”); U.S. Trust, *Advanced Estate Planning Techniques*, at <http://web.archive.org/web/20040220055545/http://www.ustrust.com/ustrust/html/individual/TrustsandEstates/advancedestateplanning.html> (last visited Feb. 14, 2005) (stating that “individuals with large estates . . . often are concerned that the promise of inherited wealth might erode their beneficiaries’ desire to build their own productive lives and careers”).

121. See A.J. Cook, *Dynasty Trust*, at http://www.taxfables.com/Columns/Estate/Dynasty_Trust.html (last visited Jan. 26, 2005) (explaining that an amount “can be distributed on special occasions such as graduating from college, entering the missionary field or becoming an artist”); Engel & King, *supra* note 119 (noting that provisions may be included “that require that, for an adult descendant to share in the income of the trust (except due to illness, etc.), he must first accomplish certain goals, such as graduating from college or obtaining full-time employment”); Northern Trust

that the trust funds can be used to provide incentives for positive behavior¹²² or to promote family philosophies and values.¹²³ Some estate planners also explain that distributions can be limited to the actual needs of the beneficiaries.¹²⁴

The overriding theme of these websites and articles is that a dynasty trust can allow a person to make sure that his or her wishes are carried out after death.¹²⁵ One article enjoins readers to “[p]lan carefully and choose wisely, and your intentions will last forever.”¹²⁶ If the way estate planners promote dynasty trusts gives any indication as to why settlors find them attractive, then it is evident that they are being used for a variety of reasons that have nothing to do with taxation. Settlors may not want to control the lives of their descendants in every respect, but they certainly want to make sure that their money is put to good use. Thus, while tax concerns are very important, there are many other reasons why a settlor might want to set up a dynasty trust.

B. The Time Horizon of Settlors

The estate planners' websites also offer evidence as to the extent to which a settlor might be concerned about individuals who are not yet born at the time a trust is created. One indication that some settlors may

Corp., *Personal Finance: Dynasty Trusts*, at http://northerntrust.com/pns/jsp?xml=0402/44669347_3748.xml (last visited Jan. 26, 2005) (stating that the trust can provide that “[d]escendants must accomplish certain goals—such as college or a particular earned income level—before receiving benefits”).

122. See Scroggin, *supra* note 107 (noting that a trust can provide “‘Incentives’ which Encourage Positive Behavior by Family Members”); Vaseaney, *supra* note 107 (“[Dynasty Trust Planning] can be used as a ‘carrot or a stick,’ for the heirs. This can be accomplished by including provisions that encourage such things as education, marriage or occupational success. (Example: The trust can match a beneficiary’s earnings.) The trust also can discourage certain actions, such as divorce, or alcohol and/or drug use.”).

123. See Al W. King III, *How to Play the Current Downturn . . . and Plan for a Decade of Evolving Estate-Tax Rules*, at http://redbook.registeredrep.com/featured_story/ (last visited Feb. 14, 2005) (stating that “most families want to maintain social and fiscal responsibility in their families forever (i.e. allowing family values to pass down with their inheritance)”); Terakedis, *supra* note 108, at <http://www.bizjournals.com/columbus/stories/2001/01/22/focus3.html?page=2> (explaining that generational planning typically includes “imparting family philosophies and values”).

124. See Albertson, *supra* note 107 (“The Dynasty Trust can provide that only such income and principal as the beneficiaries genuinely need will be distributed. If you have a desire to provide only for certain needs, such as education, you have the ability to do so within the trust instrument.”); Scroggin, *supra* note 107 (“Unless truly destitute, **NO FAMILY MEMBER CAN LIVE OFF THE TRUST INCOME!**”).

125. Merrill Lynch, *supra* note 108 (“A trust can . . . ensure that your wishes are carried out after your death.”); Wachovia, *supra* note 107 (“Each subsequent generation, while benefiting from [the trust] assets, has restricted access to principal, ensuring that your wishes are met.”).

126. Butera, *supra* note 108.

be interested in their unborn descendants may be found in the frequent references to great-grandchildren or the descendants of grandchildren.¹²⁷ Since most people do not live to see the births of all their great-grandchildren, such references suggest that at least some people are thinking about unknown as well as known descendants. While some of these websites, especially those promoting dynasty trusts in jurisdictions that have not yet abolished the Rule, use qualifying language suggesting that it might be unusual to think of great-grandchildren,¹²⁸ most do not.¹²⁹

Another indication of the likely time horizon of these trusts may be found in the language that is used to refer to their possible duration. Websites and articles note that dynasty trusts can last for “many,”¹³⁰ “unlimited,”¹³¹ “multiple,”¹³² or “several”¹³³ generations; for 100,¹³⁴

127. See, e.g., Brown Bros. Harriman Trust Cos., *Generation Skipping Trusts*, at http://www.bbhm.com/docs/Trusts/ClientHandout_GenerationSkippingTax.pdf (last visited Jan. 21, 2005) (grandchildren and “more remote descendants”); Engel & King, *supra* note 119 (“grandchildren and their descendants”); Gonnella & Geittmann, *Dynasty Trusts: Protecting Your Wealth*, *supra* note 108 (great-grandchildren); Mallah, Furman & Co., P.A., *supra* note 108 (generations beyond great-grandchildren); Mendler, *supra* note 107 (grandchildren and future generations); Gregory T. Peacock, *Generation-Sharing: Tax Planning that Benefits the Entire Family*, at http://www.wardandsmith.com/Pages/pub/article.php?article=Tax_Planning_That_Benefits (last visited Jan. 21, 2005) (“grandchildren [] and successive generations”); Perkins & Zayed, *supra* note 108 (“great-grandchildren and so on through the generations”); Rome Associates, *The Dynasty Trust as a Planning Tool*, at http://www.romeassoc.com/html/resource_center/library/articles/wealthmanagement/dynasty_trust.html (last visited Jan. 21, 2005) (great-grandchildren); SaveWealth, *supra* note 108 (great-grandchildren); Daniel A. Shapiro, *Family Business Owners: Skip the Tax with a Dynasty Trust*, at <http://www.retailernews.com/499/dberdon499.html> (last visited Jan. 21, 2005) (“a great-grandchild, and beyond”); Tarta, *supra* note 107 (great-grandchildren); Wachovia, *supra* note 106, at 107 (great-grandchildren); Wilson, *supra* note 108 (“grandchildren and their children”).

128. See Mendler, *supra* note 107 (promoting dynasty trusts in a state that has not abolished the Rule and stating that “grandchildren, and even future generations” can benefit); Rome Associates, *supra* note 127 (“grandchildren or perhaps even your great-grandchildren”); SaveWealth, *supra* note 108 (explaining that “even great-grandchildren” can benefit from a trust within the context of the traditional Rule); Tarta, *supra* note 107 (noting that “perhaps even your great-grandchildren” can benefit).

129. Brown Bros. Harriman Trust Cos., *supra* note 127; Engel & King, *supra* note 119; Gonnella & Geittmann, *Dynasty Trusts: Protecting Your Wealth*, *supra* note 108; Mallah, Furman & Co., P.A., *supra* note 108 (“great-grandchildren and possibly generations beyond”); Peacock, *supra* note 127; Perkins & Zayed, *supra* note 108; Shapiro, *supra* note 127; Wachovia, *supra* note 107; Wilson, *supra* note 108.

130. UMB Bank, *Dynasty Trust*, at <http://www.umb.com/personal/trust/sddynasty.html> (last visited Jan. 21, 2005).

131. Cook, *supra* note 120; Merrill Lynch, *supra* note 108.

132. First Am. Bank & Trust, *Trust Services*, at <http://www.firstambanktrust.com/Trust/Services.cfm> (last visited Jan. 21, 2005).

133. Sec. Nat’l Bank, *Trust Services*, at <http://www.snbonline.com/invest/trust.html> (last visited Jan. 21, 2005).

134. Griesser & Suckstorf, *supra* note 107; SaveWealth, *supra* note 108.

120,¹³⁵ 360,¹³⁶ or 1,000 years to come;¹³⁷ or “forever.”¹³⁸ One website tells readers, “Your heirs, for unlimited generations to come, will be grateful to you, their great, great ad infinitum, grandparent.”¹³⁹ More pointedly, an attorney in California advises in one article that “there are situations where it would be nice to have a trust last longer” than ninety to one-hundred years, and therefore California residents should consider setting up an out-of-state dynasty trust.¹⁴⁰

There are other signs that some settlors may have truly dynastic intentions. Several articles and websites make reference to the great industrial dynasties of the early twentieth century, such as the Carnegies, Rockefellers, and Fords,¹⁴¹ apparently with the implication that the settlor of a dynasty trust can help make sure his or her family name is similarly honored. Some websites challenge the reader to “build” or “create” his or her “own dynasty.”¹⁴² One website asks, “How regal—and rewarding—can a dynasty trust be?”¹⁴³ These statements seem designed to appeal to prospective customers who are interested in the long-term continuity of their family “dynasty.”

On balance, the evidence of the articles and websites suggests that at least some settlors may be interested in the fact that a perpetual trust can last forever and take care of their unborn descendants. These settlors

135. Cleveland, Waters & Bass, *supra* note 108.

136. Law Office of William Edy, *supra* note 108.

137. Gonnella & Geittmann, *Wyoming Dynasty Trusts*, *supra* note 108.

138. Engel & King, *supra* note 119; First Am. Bank & Trust, *supra* note 132; UMB Bank, *supra* note 130.

139. Cook, *supra* note 120.

140. Wilson, *supra* note 107.

141. See Cleveland, Waters & Bass, *supra* note 107 (explaining that the dynasty trust “takes its name from the trusts historically established by wealthy families (such as the Carnegies and Rockefellers) to preserve and protect their ‘dynastic’ wealth for the support, use and benefit of succeeding generations of the family”); Engel & King, *supra* note 119 (referring to “the trusts created by the well-known industrialists of the late 19th and early 20th centuries”); Manulife Financial, *Dynasty Trust*, at http://www.victorson.com/life/Estate_Planning/Dynasty%20Trust%20ConPro%201018.pdf (last visited Jan. 25, 2005) (“People often think of the Rockefellers or the Kennedy family when they think of family dynasties.”); Robert T. Napier & Assocs., *Return of the Dynasty Trust*, at <http://www.napier.com/winter98nwltr.html> (last visited Jan. 25, 2005) (“It’s not exactly the same trust that the Rockefellers and Carnegies had earlier in the century, but a form of dynasty trust is back.”); SaveWealth, *supra* note 108 (referring to Rockefeller, Ford, and Carnegie as “visionaries” because they created dynasty trusts to preserve their estates); Wealth Preservation Advisors, *supra* note 109 (quoting Rockefeller on the importance of control).

142. Alexander A. Bove, Jr., *The Family Money: You Can Create Own Dynasty with Multigenerational Trust*, at <http://www.bovelaw.com/archive/Article%20You%20can%20create%20own%20dynasty%20with%20multigenerational%20trust.pdf> (last visited Jan. 25, 2005); Mallah, Furman & Co., P.A., *supra* note 108; Wyoming Banker’s Ass’n, *Build Your Dynasty in Wyoming*, at <http://www.wyomingbankers.com/pdfs/BrochureDraft4.pdf> (last visited Jan. 25, 2005).

143. Cook, *supra* note 120.

may well be a minority, but they are an important minority, insofar as they would be likely to shop for a jurisdiction that permits the creation of perpetual trusts, as suggested by one California attorney.¹⁴⁴ It is not safe to assume that the typical settlor does not care what happens to his or her money after all the beneficiaries who were living at the time the trust was created have died: in fact, if settlors cared only about their known descendants, there would be no need to abolish the Rule.

V. REFORM LEGISLATION AND THE SETTLOR'S INTENT

A. *Impact of the Dukeminier and Krier Proposals*

The websites and articles discussed above offer a glimpse at what many settlors may be looking for when they set up dynasty trusts. While most settlors certainly want to pass tax savings down to their descendants, that is not the only apparent goal: settlors also wish to protect their wealth from being wasted and to encourage their descendants to be productive members of society. Moreover, although it may be true that most settlors do not care about their unborn descendants, some of them might, and those who do probably want their spendthrift provisions and restrictions on the use of funds to continue indefinitely.

As discussed above,¹⁴⁵ Dukeminier and Krier want states to give courts broad power to terminate a trust after the beneficiaries who were alive at the trust's creation are dead, if termination would be to the advantage of the then income beneficiaries.¹⁴⁶ Dukeminier and Krier further suggest that states enact statutes giving each income beneficiary a special power of modification or termination after the income beneficiaries known to the settlor die.¹⁴⁷ Dukeminier and Krier also suggest that each beneficiary have a limited power to withdraw principal from the trust.¹⁴⁸ Finally, Dukeminier and Krier propose that the trustee be given a statutory power to terminate the trust without a lawsuit, and that the beneficiaries have the power to replace the trustee at will.¹⁴⁹ The rules would be mandatory in nature and applicable to all trusts.¹⁵⁰

To the extent that, as the websites suggest, some settlors do want to

144. Wilson, *supra* note 108.

145. See *supra* text accompanying notes 89–95.

146. Dukeminier & Krier, *supra* note 1, at 1340.

147. *Id.* at 1341.

148. *Id.*

149. *Id.*

150. See *supra* note 8.

control the way their unborn descendants use trust funds, these proposals will have the effect of frustrating this goal. If the trustee is too zealous about enforcing the conditions imposed by the settlor, the beneficiaries can substitute a more sympathetic trustee. Beneficiaries will be able to shop for a trustee who is willing to do whatever the beneficiaries want and who will overlook the express intentions of the settlor. The beneficiaries will also be able to withdraw principal according to a standard fixed by statute and applied by the courts, rather than according to the settlor's wishes. Moreover, after all the beneficiaries known to the settlor have died, the beneficiaries would be able to terminate the trust or modify its terms and distribute the principal to anyone they please, as long as they do not keep too much of it for themselves. This means that the beneficiaries could give the money outright to their spouses or children, or even to their friends, who could spend it on whatever they wanted without regard to the intentions of the settlor. If the settlor imposed conditions on access to trust funds, such as that distributions be conditional on graduation from college or income level, the beneficiaries could modify the trust so that the conditions would not apply to subsequent generations. If some of the beneficiaries did not want to modify or terminate the trust, those who did could turn to the courts, which would have unlimited power to do so.

As Dukeminier and Krier acknowledge, their proposals would not allow the settlor to solve any problems that could not be dealt with by language in the trust document.¹⁵¹ Any competent estate planner could draft a trust that allows for the flexibility that would be required by the Dukeminier and Krier statutes. A settlor who receives competent legal advice and knows what he or she wants to accomplish with a trust would not benefit from the proposed rules. On the other hand, because the rules would be mandatory, they would have the effect of frustrating the intent of any settlor who truly wanted to control the use of the trust funds in perpetuity. As applied to such a settlor, the proposed rules would be intent-defeating.

One approach that state legislatures might wish to consider would be to adopt some of the Dukeminier and Krier proposals but make them default rules rather than mandatory rules, allowing the settlor to specify in the trust instrument that the rules do not apply. This possibility is suggested by the heading under which Dukeminier and Krier present their proposals,¹⁵² but Dukeminier and Krier do not develop the idea.¹⁵³ Creat-

151. *Id.* at 1339–40.

152. *Id.* at 1339 (entitled "Default Rules").

ing default rules would avoid hindering the settlor who has made a conscious decision not to allow the beneficiaries or the trustee to modify or terminate the trust, while protecting the ill-advised settlor who fails to include modification or termination provisions out of ignorance. Dukeminier and Krier do not intimate that the powers that the proposed statutes would grant to beneficiaries, trustees, and courts could be limited by the terms of a particular trust.

B. Policy Considerations

The proposals of Dukeminier and Krier raise difficult and troubling policy questions. Whether the settlor's intent should be respected is a central problem, perhaps *the* central problem, of the law of trusts. This Section does not attempt to resolve the issue—probably an impossible task—but merely to note that there are valid arguments that can be made in defense of respecting the settlor's wishes and that the proposals of Dukeminier and Krier are far from a panacea in any event.

Dukeminier and Krier argue that the inflexibility of perpetual dynasty trusts could lead to "economic waste."¹⁵⁴ This point is developed more fully by Stewart Sterk, who argues that "the supposed efficiency gains of the trust form become more speculative" when trusts are allowed to continue indefinitely.¹⁵⁵ Sterk expresses his argument in terms of agency costs. Because of potential liability for imprudent investments, the trustee is likely to invest more conservatively than the beneficiaries would.¹⁵⁶ The trustee also has an incentive to keep property in trust even when doing so does not serve the beneficiaries' best interests, so that the trustee can continue to collect fees for managing the trust.¹⁵⁷ While the settlor is likely to take these agency costs into account when planning a short-term trust, perpetual trusts offer significant tax advantages that the settlor may decide outweigh the agency costs.¹⁵⁸ These tax advantages, Sterk concludes, might lead settlors to create trusts that are economically inefficient.¹⁵⁹

153. Nor is the idea fully explored here.

154. Dukeminier & Krier, *supra* note 1, at 1327.

155. Sterk, *supra* note 10, at 2114.

156. *Id.* at 2112.

157. *Id.* at 2111–12.

158. *Id.* at 2113.

159. *Id.* at 2114. Sterk also calls attention to the negative externalities created by spendthrift provisions. *Id.* at 2114–17. These problems, however, are not limited to dynasty trusts and would best be solved by legislation limiting the use of spendthrift clauses.

It is true that each generation of beneficiaries has better information than the settlor about the needs and propensities of that generation and those that immediately follow. Allowing for easy modification and termination of trusts, it might be argued, gives the beneficiaries the power to act on their superior information and decide whether the benefits of trust management continue to outweigh the associated agency costs. What this analysis ignores, however, is that a decision to modify or terminate a trust also may involve value judgments, such as whether education is more important than other accomplishments or whether inherited wealth should be distributed in such a way as to encourage hard work. As discussed above, some settlors may wish to make distributions conditional on college graduation, employment, income level, or other indicators of success.¹⁶⁰ After three or four generations, the beneficiaries may no longer value hard work or education as much as the settlor. Mandatory rules providing for easy modification and termination allow the beneficiaries, at each generation, to substitute their own values for those of the settlor. It is not self-evident that the law should favor the values of fourth- or fifth-generation beneficiaries over those of the settlor, whose labor may have made the trust possible.

Another objection that is sometimes made against perpetuities is that they interfere with equality of opportunity and promote the creation of a leisure class. The law generally does not forbid individuals from making unwise decisions about how their money is to be spent. When a transaction has an adverse effect on society, however, the law will sometimes intervene.¹⁶¹ It has been argued that dynasty trusts perpetuate the concentration of wealth among a select few and make it more difficult for those who have no trust income to compete in the economic marketplace.¹⁶² Over time, this could conceivably lead to a caste of people who live off trust income and do not contribute anything of value to society.¹⁶³ Dukeminier and Krier find this argument unpersuasive given that income from capital represents only a small fraction of total income in

160. See *supra* note 121.

161. For example, laws against prostitution and the sale of "dangerous" drugs can be justified on this basis. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 173–76, 266–68 (5th ed. 1998).

162. Angela M. Vallario, *Death by a Thousand Cuts: The Rule Against Perpetuities*, 25 J. LEGIS. 141, 155–56 (1999).

163. The argument that perpetuities can lead to the creation of an unproductive elite class has a long history in the United States, dating back at least to the late eighteenth century. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 14–18 (1977) (discussing the views of Thomas Jefferson). Early American republican legal writers associated entailments of land, along with primogeniture, with English land-based social hierarchy, which they considered "feudal" and incompatible with a republic. GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 39–40 (1997).

the United States; educational opportunities are available to most children at low cost; and human capital, rather than monetary capital, constitutes the greatest source of inequality of opportunity.¹⁶⁴ Nevertheless, the argument is not without persuasive force in light of the fact that dynasty trusts can grow to be worth hundreds of millions of dollars over the course of a century.¹⁶⁵

In response to the claim that perpetuities are detrimental to society, some would argue that allowing each individual to direct how his or her property will be used after death encourages work and savings, thereby maximizing total wealth.¹⁶⁶ Even if the marginal incentives for potential settlors are insignificant, however, the Dukeminier and Krier proposals are a partial solution to the problem at best. Under the statutes proposed by Dukeminier and Krier, perpetual dynasty trusts will be modified or terminated only when the trustee or the beneficiaries object. The trustee's power to terminate is limited by the fact that the beneficiaries can replace or remove the trustee. This means that, so long as the beneficiaries are happy with the trust, it will last forever. If perpetual dynasty trusts promote the creation of a leisure class, why should the beneficiaries, whose growing wealth is the source of the problem, have the sole power to decide whether to terminate the trust?

A better solution to the potential caste problem, if there is one, would be to reinstate some version of the Rule, or, for those states that have not yet abolished the Rule, to keep it in place. Of course, many states are unlikely to follow this path given their goal of attracting as much trust business as possible. For the same reason, however, the Dukeminier and Krier proposals are unlikely to be adopted, unless the proposed statutes are drafted in such a way that the settlor can specify that they do not apply. While default rules are not the best answer to the caste objection, they may be the only solution that states would actually consider. Alternatively, Congress could amend the GST tax exemption so as not to ap-

164. Dukeminier & Krier, *supra* note 1, at 1323-24.

165. On the growth possibilities of dynasty trusts, see *id.* at 1318-19. One must also remember, however, that the number of beneficiaries will also increase exponentially. Each beneficiary's slice of the pie will be far smaller in 100 years, even if the pie is much larger.

166. This is a long-standing argument, dating back at least to the thirteenth century. See 2 HENRY DE BRACON, BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 181 (George E. Woodbine ed. & Samuel E. Thorne ed. & trans., Harvard Univ. Press 1968) (c. 1230) ("[A] citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives."); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 7-8, 8 n.25, 16, 16 n.60 (1992) (citing Bentham, Blackstone, John Stuart Mill, and others). The argument has its detractors. See *id.* at 8-9 (offering a variety of psychological and other reasons that motivate a person to accumulate wealth).

ply to perpetual trusts,¹⁶⁷ which would reduce (but not eliminate) the incentive for creating perpetual dynasty trusts. Amending the federal tax code would probably be simpler than rewriting the law of trusts in every state that has abolished the Rule.

Unlike the current variations on the Rule, the proposals of Dukeminier and Krier do not simply limit the duration of a trust: they also affect how trust income is distributed among the beneficiaries. Allowing beneficiaries to keep a perpetual trust in existence while modifying its terms would not necessarily prevent the creation of a leisure class, but would give the members of that class the power to reduce or eliminate incentives for productive behavior. It is possible to hold the view that perpetuities should be curbed because of their likely negative impact on society while also taking the position that, so long as a trust remains in existence, the settlor's wishes should govern the manner in which income is distributed. Even a supporter of the Rule, therefore, might prefer no statute at all to a statute that allows the beneficiaries to modify a trust without terminating it.

There may be situations in which modification or termination of a trust is necessary regardless of the settlor's wishes. After many decades, multiplication of beneficiaries could make a perpetual trust so cumbersome that the expense of administering the trust far outweighs the benefit that the beneficiaries receive. When a settlor has failed to anticipate a change in circumstances, modification or termination can be justified. As discussed above, both the Uniform Trust Code and the Third Restatement offer mechanisms by which a court can intervene to modify or terminate a trust under certain circumstances,¹⁶⁸ and it is not the aim of this Article to discuss the wisdom of those reforms. Under either the Code or the Restatement, the settlor's intent must always be taken into consideration. Dukeminier and Krier would make the settlor's intent irrelevant: they would allow courts to modify or terminate a trust without considering the settlor's intent and would give broad powers to beneficiaries and trustees to modify or terminate without court approval. These proposals go far beyond what the drafters of the Code and the Restatement have proposed, and state legislatures need to consider carefully whether the wishes of the settlor should be pushed aside in the manner suggested by Dukeminier and Krier.¹⁶⁹

167. See Dukeminier & Krier, *supra* note 1, at 1342–43 (discussing the effect of limiting the GST tax exemption).

168. See *supra* text accompanying notes 70–82.

169. Another difficulty with the proposals of Dukeminier and Krier is that, by eliminating court supervision, they offer no protection for underage or incompetent beneficiaries. Court supervision is

VI. CONCLUSION

Dukeminier and Krier suggest that their statutory proposals are a response to problems likely to arise from the creation of perpetual dynasty trusts. In fact, however, the proposals of Dukeminier and Krier go far beyond that, and would have an impact on all trusts, not just perpetuities. While some of the proposals made by Dukeminier and Krier would apply only when the beneficiaries known to the settlor have died, two are not limited in this way: the proposal that the trustee have a statutory power to terminate the trust and the proposal that the beneficiaries have the power to replace the trustee at will.¹⁷⁰ Taken together, these two rules would allow the beneficiaries to shop for a trustee who is willing to terminate the trust, rendering moot any conditions on access to trust funds specified by the settlor.

It is appropriate for legal scholars to suggest ways in which the law can be improved. It is also important, however, for state legislatures to understand the nature of the proposals that academics are suggesting. When a proposal would move the law into uncharted waters, states should be made aware of that fact. American courts may not always implement the settlor's intent, but ignoring the settlor's wishes is the exception rather than the rule. Dukeminier and Krier would effectively transfer the settlor's freedom to the beneficiaries. That would be a bold change indeed, and one that state legislatures are probably unwilling to make. In any event, whether it is proper to respect the settlor's intent is a policy question with far-reaching implications. It would be unwise to answer the question in haste simply because several states now allow for the creation of perpetuities, and it is far from clear that substituting the beneficiaries' wishes for the settlor's intent would be the best solution. The abolition of the Rule should not be used as a pretext for conducting a wholesale revision of the American law of trusts.

necessary to ensure that each beneficiary has meaningfully consented to modification or termination.

170. Dukeminier & Krier, *supra* note 1, at 1341-42.