



Senate

General Assembly

File No. 265

January Session, 2001

Substitute Senate Bill No. 1409

Senate, April 12, 2001

The Committee on Judiciary reported through SEN. COLEMAN of the 2nd Dist., Chairperson of the Committee on the part of the Senate, that the substitute bill ought to pass.

AN ACT CONCERNING THE ALTERNATIVE RULE AGAINST PERPETUITIES.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) Sections 1 to 5, inclusive, of this act may be cited
2 as the Alternative Rule Against Perpetuities.

3 Sec. 2. (NEW) (a) The provisions of sections 1 to 5, inclusive, of this
4 act shall not apply unless a testator, settlor, transferor or other creator
5 of a testamentary, revocable or irrevocable inter vivos agreement or
6 other instrument creating or amending a trust or granting a power of
7 appointment makes a qualifying election as provided in subsection (b)
8 of this section.

9 (b) A qualifying election is made if: (1) The instrument evidences a
10 specific intent to have the Alternative Rule Against Perpetuities apply;
11 (2) the instrument provides, at the time of its execution, that the law of
12 this state shall govern the interpretation of the instrument, and the

13 administration of the trust, if a trust is created or amended; (3) the
14 instrument is created by one or more persons, at least one of whom is
15 domiciled in this state at the time the instrument is executed, or if a
16 trust is created or amended, one or more of the individual or corporate
17 trustees of the trust is domiciled in this state at the time the trust is
18 executed; (4) the instrument does not provide for the suspension of
19 power of alienation, as provided in subsection (c) of this section, with
20 respect to property subject to the trust or power of appointment; and
21 (5) the instrument is executed on or after October 1, 2001.

22 (c) For the purposes of subdivision (4) of subsection (b) of this
23 section: (1) Subject to the provisions of subdivision (2) of this
24 subsection, the power of alienation is suspended if there is no person
25 alive who, alone or in combination with others, may, as to property
26 that is subject to the power granted or the trust created or amended by
27 the instrument, convey (A) title to real property in fee, or (B) complete
28 ownership of personal property; and (2) the power of alienation is not
29 suspended by an instrument creating or amending a trust if (A) the
30 trustee is not prohibited from selling property subject to the trust for a
31 period greater than ten years from the date the trust became
32 irrevocable, (B) at all times during the duration of the trust the trustee
33 of the trust has the power, either expressed or implied, and either
34 alone or in combination with others, to sell property subject to the
35 trust, or (C) at all times during the duration of the trust, at least one
36 person has an unlimited power to terminate the trust pursuant to the
37 terms of the instrument.

38 (d) Interests for which a qualifying election, as provided in
39 subsection (b) of this section, is made to subject such interests to the
40 Alternative Rule Against Perpetuities pursuant to an instrument as
41 provided by subsection (a) of this section, shall not be subject to the
42 Uniform Statutory Rule Against Perpetuities as provided in sections
43 45a-490 to 45a-496, inclusive, of the general statutes.

44 Sec. 3. (NEW) (a) A nonvested property interest is invalid unless the
45 interest either vests or terminates within two thousand years after its
46 creation.

47 (b) A general power of appointment not presently exercisable
48 because of a condition precedent is invalid unless the condition
49 precedent is either satisfied or becomes impossible to satisfy within
50 two thousand years after its creation.

51 (c) A specific power of appointment or general testamentary power
52 of appointment is invalid unless the power is irrevocably exercised or
53 otherwise terminates within two thousand years after its creation.

54 Sec. 4. (NEW) (a) Except as provided in subsections (b) and (c) of
55 this section, the time of creation of a nonvested property interest or a
56 power of appointment is determined under general principles of
57 property law.

58 (b) For the purposes of sections 1 to 5, inclusive, of this act, if there is
59 a person who alone can exercise a power created by a governing
60 instrument to become the unqualified beneficial owner of (1) a
61 nonvested property interest, or (2) a property interest subject to a
62 power of appointment described in subsection (b) or (c) of section 3 of
63 this act, the nonvested property interest or power of appointment is
64 created when the power to become the unqualified beneficial owner
65 terminates.

66 (c) For the purposes of sections 1 to 5, inclusive, of this act, a
67 nonvested property interest or a power of appointment arising from a
68 transfer of property to a previously funded trust or other existing
69 property arrangement is created when the nonvested property interest
70 or power of appointment in the original contribution was created.

71 Sec. 5. (NEW) In the case of a disposition for which a qualifying
72 election to be subject to the Alternative Rule Against Perpetuities has

73 been made pursuant to section 2 of this act, upon petition of an
74 interested person, a court shall reform such disposition in the manner
75 that most closely approximates the transferor's manifested plan of
76 distribution and is within the two thousand years allowed by section
77 3 of this act if: (1) A nonvested property interest or a power of
78 appointment becomes invalid under section 3 of this act; (2) a class gift
79 is not but may become invalid under section 3 of this act and the time
80 has arrived when the share of any class member is to take effect in
81 possession or enjoyment; or (3) a nonvested property interest may vest
82 but not within two thousand years after its creation.

JUD *JOINT FAVORABLE SUBST.*

The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for the purpose of information, summarization, and explanation, and do not represent the intent of the General Assembly or either House thereof for any purpose:

OFA Fiscal Note

State Impact: None

Affected Agencies: Probate Court (Judicial Department)

Municipal Impact: None

OLR BILL ANALYSIS

sSB 1409

AN ACT CONCERNING THE ALTERNATIVE RULE AGAINST PERPETUITIES.**SUMMARY:**

This bill allows, under some circumstances, people to place restrictions on the use, transfer, or ownership of property for up to 2,000 years. It does this by creating a procedure that allows people to “opt out” of the existing law (known as the Uniform Statutory Rule Against Perpetuities (USRAP)). The latter generally prohibits trusts from creating “nonvested property interests” (rights to property some time in the future) that do not either vest or end (terminate) within the later of 90 years or 21 years after the death of a person living (a “life in being”) when the trust was created.

The bill requires those creating nonvested property interests for which they want the longer rule (called under the bill the Alternative Rule Against Perpetuities (ARAP)) to make this intention clear in the instrument that creates the interests. It establishes other rules limiting the applicability of the alternative procedure and specifies when the 2,000 year period begins to run. The USRAP does not apply when a qualified election of ARAP has been made.

The bill applies to trusts created on or after October 1, 2001 by (1) will (testamentary trusts); (2) revocable or irrevocable inter vivos agreements (trusts created during the creator’s lifetime, regardless of whether the creator can revoke it); and (3) other instruments creating or amending a trust or granting someone a power of appointment (the power to designate recipients of interests in property).

Finally, the bill creates a mechanism for a court to “reform” (i.e., re-write) a trust subject to ARAP’s terms before the expiration of 2,000 years if nonvested interests become or appear likely to become invalid.

EFFECTIVE DATE: October 1, 2001

QUALIFYING ELECTIONS

In addition to indicating the intent that the ARAP apply in the trust-creating instrument, a testator, settlor, transferor, or other creator must:

1. provide in the instrument creating the trust or power of appointment a provision specifying that the law of Connecticut governs its interpretation, and if it creates or amends a trust, its administration;
2. either be domiciled in Connecticut (if more than one person creates the instrument, only one must be domiciled in Connecticut) or designate one or more individual or corporate trustees domiciled in the state at the time the trust is executed; and
3. execute an instrument that does not provide for the suspension of the power of alienation of the trust property or power of appointment over the property.

Suspension of Alienation

The bill specifies that alienation is suspended (and thus the arrangement not qualified for ARAP) if there is no person alive who, alone or in combination with others, may (1) convey title to the trust's real property "in fee" (without restrictions) or (2) complete ownership of its personal property. But it specifies that a suspension will not occur so long as:

1. the trustee is not prohibited from selling property subject to the trust for more than 10 years from the date the trust becomes irrevocable;
2. the trustee has the power, either expressed or implied, to sell the trust's property at all times during the trust period, either alone or in combination with others; or

3. at least one person has an unlimited power to terminate the trust at all times during the trust period.

INVALID PROPERTY INTERESTS AND APPOINTMENTS

Under the bill, nonvested property rights are invalid unless they either vest or end within 2,000 years after they are created. General powers of appointment that cannot be exercised until a specific event (“condition precedent”) occurs are invalid unless the event occurs or its occurrence becomes impossible within 2,000 years. Finally, a specific power of appointment or general testamentary power of appointment is invalid unless it is irrevocably exercised or ends within 2,000 years of its creation.

DETERMINING WHEN NONVESTED PROPERTY INTERESTS ARE CREATED

With two exceptions, the bill specifies that general principles of property law determine when a nonvested property interest or power of appointment is created. But for a person who alone can exercise a power to become the unqualified beneficial owner of a nonvested property interest or a property interest subject to a general or specific power of appointment, the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

And when a nonvested property interest or power of appointment arises from property being transferred to a previously funded trust or other existing arrangement covered by the bill, the previously funded arrangement’s creation date is designated as the creation date of the interest or power of appointment.

REFORMING TRUSTS

The bill permits an interested person to petition a court to reform a trust. The court must do so when (1) a nonvested property interest or a power of appointment becomes invalid because it cannot vest or terminate within 2,000 years; (2) a class gift is not, but may become, invalid because it cannot fully vest within 2,000 years and the time has

arrived when the share of any class member is to take effect in possession or enjoyment; or (3) a nonvested property interest may vest but not within 2,000 years after its creation. The reforming court must reform the trust in the manner that most closely approximates the transferor's intent.

BACKGROUND

Rule Against Perpetuities

The Rule Against Perpetuities originated in English common law several hundred years ago. Its purpose is to prevent property from being tied up and excluded for channels of development over long periods of time. The rule favors free alienability and transferability.

The Connecticut Supreme Court adopted the common law rule in 1944. Under this rule, the validity or invalidity of a nonvested property interest is determined on the basis of facts existing when the interest was created. The common law rule is only concerned with what possibly might happen. It invalidates a nonvested property interest if, at the time the interest is created, there is any possibility, no matter how remote, that the interest might not vest or terminate within the period of a life in being plus 21 years.

To lessen the harsh effect of this rule, Connecticut adopted a so-called second look or wait and see statute in 1955. Under this statutory exception to the common law rule, an interest is not invalidated on the facts existing when the interest was created. Rather it becomes valid only if it actually fails to vest or terminate within a given time period, also measured by a life in being plus 21 years. In 1989, the legislature enacted the USRAP, which replaces the latter with a flat 90 year look-back period. The USRAP applies only to trusts created after its passage.

Exclusions. The common law rule against perpetuities generally applied not only to donative transfers (i.e., gifts) but also to nondonative transfers. Examples of nondonative transfers include options, rights of first refusal, leases to commence in the future, and nonvested easements. Under the USRA, the rule against perpetuities is

generally inapplicable to nondonative transfers, with the following specific exceptions:

1. premarital or postmarital agreements;
2. separation or divorce settlements;
3. spouses' elections;
4. similar arrangements arising out of a prospective, existing, or previous marital relationship;
5. a contract to make or refrain from revoking a will or trust;
6. a contract to exercise or refrain from exercising a power of appointment;
7. a transfer in satisfaction of a duty of support; or
8. a reciprocal transfer.

The USRA also explicitly excludes the following from the rule against perpetuities:

1. a fiduciary's power to administer or manage assets;
2. a power to appoint a fiduciary;
3. a discretionary power of a trustee to distribute principal before terminating a trust to a beneficiary who has an indefeasibly vested interest in the income and principal;
4. a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested interest is preceded by an interest held by another such institution;
5. a nonvested property interest or power of appointment with respect to a trust or other arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death-benefit,

income-deferral, or other deferred-benefit plan to which contributions are made, other than a non-vested property interest or power of appointment that is created by an election of a participant, beneficiary, or spouse; and

6. a property interest, power of appointment, or arrangement not subject to the common law rule against perpetuities or excluded by statute.

Nonvested Property Interests

Nonvested property interests often arise in the context of a will. A common example is where a person establishes a trust under his will and directs that his spouse receive the income from the trust during her life and that after her death the principal of the trust be equally divided among his children. Another example is when the person directs by will that his spouse get a life use in real estate with the property going to their children who attain age 21. In each of these examples, the children have a property interest that does not vest until the death of the surviving parent.

Powers of Appointment

A “power of appointment” is the authority to designate recipients of interests in or powers of appointment over property.

A power of appointment is “general” if it is exercisable in favor of the donee (the person who holds the power of appointment), the donee’s creditors, the donee’s estate, or the creditors of the donee’s estate. All other powers of appointment are “nongeneral.”

A power of appointment is “presently exercisable” if, at the time in question, the donee can, by an exercise of the power, create an interest in or power of appointment over property.

A power of appointment is “testamentary” if the donee can exercise it only in the donee’s will.

A power of appointment is “not presently exercisable because of a

condition precedent" if it cannot be exercised until a certain condition occurs.

COMMITTEE ACTION

Judiciary Committee

Joint Favorable Substitute

Yea 40 Nay 0