Tax planning: avoiding the rule against perpetuities with foreign-based trusts - why, how and whether (ethically speaking)

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Abstract

It is not uncommon for the interests and desires of those who plan the disposition of their estates to become entangled with principles of property and probate law not originally intended to thwart their goals, but which do so nonetheless. Keeping a family business intact for the indefinite future, for example, is quite likely to be a wish of its founder. It can be extremely disappointing for this proprietor to discover that in the 17th century the ambitions of the King of England, while trying to protect his treasury, conspired with the Duke of Norfolk led the English courts to pronounce a rule that bedevils testamentary intent to this day. The principle in question, known as the Rule Against Perpetuities, lives on in many American jurisdictions in spite of the modern absence of oaths of fealty and inheritable titles.

Like so many arcane principles of ancient English Common Law, the Rule Against Perpetuities appears to have had more than one purpose. The stated goal of the rule was to protect the free alienability of estates, which is clearly a desirable objective. But it appears that curbing the avoidance of death taxes was also an important end. Modern application of this rule of law, whatever its original purpose might have been, potentially has both effects. It can assure that the estate will be subject to taxation even though doing so will thwart the Testator or Settlor's desire to benefit future generations without regard to estate tax considerations. Moreover, it does so without the slightest bit of consideration for the intentions of the parties.

Several states have abolished or modified the Rule Against Perpetuities and now allow the benefit of future generations (and have been rewarded by increased trust activity in their jurisdictions), regulations promulgated by the Internal Revenue Service, which preempt state law, continue to ensure that all estates in the United States are periodically taxed thus essentially achieving the same result as the rule. Certain foreign jurisdictions, however, have no analog to the Rule Against Perpetuities, allowing a trust, properly established under local law, to escape US-based estate taxation while serving the creator's intent to benefit descendants well into the future. We briefly examine the history and application of the rule and explore this offshore option.

Keywords: Perpetuities, deferred taxes, trusts, the rule, avoiding the rule

INTRODUCTION

It is not uncommon for the interests and desires of those who plan the disposition of their estates to become entangled with principles of property and probate law not originally intended to thwart their goals, but which do so nonetheless. Keeping a family business intact for the indefinite future, for example, is quite likely to be a wish of its founder. It can be extremely disappointing for this proprietor to discover that in the 17th century the ambitions of the King of England, while trying to protect his treasury, conspired with the Duke of Norfolk led the English courts to pronounce a rule that bedevils testamentary intent to this day. The principle in question, known as the Rule Against Perpetuities, lives on in many American jurisdictions in spite of the modern absence of oaths of fealty and inheritable titles.

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A BRIEF PRIMER ON TRUSTS

The ultimate purpose of estate planning is to provide a way for the owner of property to direct or control its distribution in the ultimate transfer -- at the time of death. This goal of the testator, however, is often in conflict with the ever present interest on the part of government in meeting its fiscal needs. In the Anglo-American legal system, taxing transfers occasioned by death have historically provided an opportunity for collecting revenue, an opportunity dating back to the pre-medieval payment of "relief," a form of death tax originating on the continent centuries before the Norman conquest.

The tension between satisfying the needs of society as a whole and the desire to fulfill the dying wishes of the decedent, coupled with the real difficulty of determining what was in a person's mind at any particular time -- in this case known as "testamentary intent" -- has caused our legal system to struggle for centuries with various tools and techniques. Anglo-American legal history is replete with examples of creative strategies utilized by grantors and testators or undertaken on behalf of the deceased to carry out this testamentary intent, usually in conflict with equally creative strategies on the part of governments to obtain some modicum of revenue from a party who is not present to complain. One such strategy, with roots in ancient doctrine of "uses" is the trust.

A trust is a legal contractual entity which is characterized by the management and control of property by one who does not have what would be recognized by the layperson as ownership. Under current law, trusts may be created to perform a variety of functions, including the ownership and management of either real or personal property. The trust depends for its existence entirely on a contractual arrangement between the trustee, whose function is characterized by the ownership of property (referred to as "bare legal title") without the right to benefit from it (other than compensation for services), and the "real" owner who receives or directs the disposition of the benefit of the property. This relationship, being a matter of contract, is entirely a creature of state law or the law of the jurisdiction in which it is domiciled.

There are many valid estate planning reasons for creating trusts. Their purposes are defined by the desires of the trust creator (variously known as the grantor, settlor or even trustor -- hereafter, "grantor" will generally be used), to accomplish specific goals for the preservation or conservation of assets, minimizing tax consequences, or perhaps, to provide to for the management of the trust assets in out-of-the-ordinary circumstances. An obvious, but unfortunately restricted, purpose would be to maintain the integrity of an estate such as a business for multiple generations.

It is clear that compliance with local law is essential to the de jure existence of the trust entity. As a consequence, the trust is administered and taxed according to the laws of the jurisdiction where it is created and not the jurisdiction in which the grantor resides. The grantor has the trust document created to fit his or her wishes and then transfers specific assets to the trust. A trustee, appointed in the trust instrument, is charged with fiduciary duties concerning the trust, requiring the exercise of a high degree of skill and caution in administering the property. The beneficiary, either the grantor or a person designated by the grantor, receives the benefit of the trust in the form of income or property distributed by the trustee. The beneficiary's rights are determined by the trust document and the laws governing trusts in the jurisdiction where the trust is created and administered.

Future ownership of the assets placed in trust is also of significance, especially in determining the applicability of the rule against perpetuities. For example, an "Irrevocable Trust" is one which may not be changed or revoked by the grantor after its creation. This relinquishment of control by the grantor has the same effect as a sale or absolute transfer, and removes the trust assets from the grantor's estate. When a grantor establishes a trust which does not have this feature, death of the beneficiaries or other termination of the purpose of the trust results in the return or reversion of the interest to the grantor. This is referred to as a "reversionary interest" and it satisfies the unbending policy of Anglo-American law that requires all aspects of ownership of assets to eventually reside in some person or entity. That is, once the beneficial interest is no longer "owned" by an existing entity, it has to go somewhere -- and that somewhere will be back to the grantor.

The assets comprising any trust, under the rule, must eventually find their way to a single person or entity who will "own" the unfettered right to dispose of the property at will (this is referred to as "vesting" of the interest in the property). The reversionary interest is satisfactory to meet this requirement for a revocable trust. In the case of an irrevocable trust, however, it has become well established that there is no "reversionary interest," meaning there are no circumstances in which the property would once again come into the hands of the grantor. The grantor cannot direct the disposition of any benefits from the trust after it has been correctly established. Ownership must then pass to someone else in order to satisfy the rule. On the other hand, if the grantor retains a reversionary interest or other controls over the use or disposition of the assets, the trust is a "Grantor Trust" and the assets remain a part of the grantor's taxable estate. As will be seen in the next section, the issue of revocability has important tax consequences.

THE INTERNAL REVENUE SERVICE AND TRUSTS

For as long as anyone can remember, property transfers have presented opportunities to exact tax revenues. There is no exception for transfers by reason of death, and particularly no exception when it comes to federal taxes. The income taxation of trusts in the United States is covered and governed by Subchapter J of the Internal Revenue Code, §§ 641 through 692. While the Internal Revenue Service Code does not contain a specific definition of a trust, it does provide the basis for broad regulations governing the tax treatment of trusts. Section 671 requires that when the grantor or any other person retains or has an ownership interest in a trust, such person shall report any items of income, deductions, or other tax related items to the extent that they would be included in an individual's income.

The code provides a number of classifications of interest. A"Simple Trust" is one which does not make contributions to charities, does not make distributions of the corpus of the trust, is neither a grantor trust nor is required to be treated as a grantor trust, and is required to distribute all of its income annually. (Internal Revenue Service Code of 1986, 2009, §§ 651) A "Complex Trust" is any trust other than a "Simple Trust". The complex trust itself is taxed, after reducing its taxable income by its distributions, and then the beneficiary is taxed on its distributions. The fiduciary (trustee) is required to file a Form 1041, U.S. Tax Return for Estates and Trusts when the trust has gross income of $600 or more or a non-resident alien is a beneficiary.(I.R.S. Code §6012(a)).

For purposes of this discussion, of course, trusts which are created for estate planning purposes, whether created during the life of the grantor ("inter vivos trusts") or in the decedent's will ("testamentary trusts"), are the ones of interest.

A trust created during lifetime can be either revocable or irrevocable, as discussed above. The important distinction is that in the case of an irrevocable trust, the assets forming its corpus have been transferred without a reversionary interest and are thereby removed from the grantor's estate. Consequently, the trust assets are no longer taxable to the grantor. Significantly, the trust itself becomes a taxable entity. Subchapter J requires, under its modified conduit principle, that distributions to beneficiaries is taxable income and its Distributable Net Income (DNI) must be recognized by the beneficiary (I.R.S. Code §§ 652(a) & 662(a)). DNI is the maximum amount of the income distribution taxed to the individual, and is also the maximum amount that the trust can recognize during its taxable year as a deduction (I.R.S. Code §§ 6521(b) & 661(c)). The trust can recognize this distribution as a deduction, since the beneficiary recognizes the same amount in its income. This is relevant because the estate left by a decedent is potentially taxable if large enough.

Under existing federal income tax laws and regulations, a taxable estate is one in which the fair market value of the estate exceeds the unified tax credit amount. The amount of credit for 2008 is $780,800 which is equal to an exclusion amount of $2,000,000. The Tax Relief Reconciliation act of 2001 established a phase-out schedule for estate taxes. This phase-out scheme increased the credit for federal estate taxes each year, effectively raising the amount exempt from estate tax, with a total phase out of the estate tax in 2010. In 2001 there was a Unified Credit of $1, 000, 000, which applied to both Federal estate tax and Federal gift tax exemptions and the maximum tax rate, once the credits were applied, was 55%. In 2008 the exemption was be equivalent to $2,000,000 for the Federal estate tax and the maximum tax rate was reduced to 45%. The Federal gift tax exemption has remained at $1,000,000. However the Act contained a "sunset" provision which reinstates the Federal estate tax to the level in effect prior to the implementation of the phase out in 2011.

There has been a continuing debate among politicians concerning what will actually happen in 2011. The Federal estate tax is a source of significant revenue for the government and with the recent proliferation of wealthy individuals whose estates will be required to pay significant estate tax, this item will be a hot topic greatly influenced by the desires of the political party in power when the tax is due to be reinstated. This political situation leads to great uncertainty in estate tax planning and, in reality, precludes any meaningful, long term, estate planning in the United States. As of this writing, early revival or extension of the estate tax has not been a major issue in the 2008 presidential campaign but that does not, of course, guarantee it will not become a point of contention.

The obvious usefulness of the trust as an estate planning tool has historically been greatly limited by courts and legislatures in response to one aspect of the trust that affects revenue collection -- the postponement of transfers resulting in the postponement of taxation. Under various guises and in various ways, the death of a property owner has triggered a taxable event in the eyes of the tax collectors.

In the early days of the feudal system, this "tax" was the "relief" payment made to the lord to allow the heir to repeat his father's oath of allegiance ("lief ") thus guaranteeing continued control of the property. Today, of course, it is the tax on transfers through the estate -- the "estate tax" or "death duty." Until, that is, the development of the Use threatened to do away with death taxes.

THE USE, THE STATUTE OF USES AND THE RULE

The Use was functionally indistinguishable from the trust as it is known today, and, in fact, any differences between trust and Uses lie almost exclusively in historical technicalities of property law which are no longer of interest to anyone except scholars and law professors. A Use was created by transferring property (to the extent possible under feudal law) to a third-party called the Feoffee-to-Uses (hereinafter trustee) ". . . for the use of . . ." a named Cestui Que Use (beneficiary). Upon the death of that beneficiary, the property could continue to be held for the use of someone else, ad infinitum. The creator of the Use could thus control the benefit of the property for many generations without it ever passing through the estate of a decedent (and being taxed in the process). The death of the Feoffee-to-Uses was not considered a taxable event (the courts ignored the apparent inconsistency), and legal title could be readily transferred to someone else to be held "for the use of" others. In this fashion, death duties could be avoided and a family fortune could be maintained intact for many generations.

Henry VIII became aware of the danger of losing death duties as an important source of revenue as a result of the proliferation of Uses. His concern led, among other things, to his insistence upon Parliament's adoption of the Statute of Uses (27 Hen. VIII c. 10, 1535), an interesting historical example of the application of the Law of Unintended Consequences. Although the purpose of the Statute of Uses was to eliminate inheritance tax avoidance by vesting full legal title in the party serving in the position of a modern-day trustee, it is widely believed that creative use of the statute resulted in the final destruction of the last vestiges of the feudal land system, and led to the development of allodial land titles and the relatively easy transfer of real estate which characterizes modern practice. The effect of this, of course, was to further reduce the income to the Crown as a result of the elimination of feudal dues, apparently resulting in a net loss for Henry's treasury. Although sharply restricted by the Statute of Uses, the Use (and later the trust) became an extremely popular tool for effecting testamentary intent for many generations into the future. Until, that is, the _Duke of Norfolk's Case_ (3 Ch. Case 1, 22 Eng. Rep. 931, Ch. 1682) and _Cadell v. Palmer_ 1 Cl. & Fin. 372, 6 Eng. Rep. 936, H.L. 1832, 1833). These two cases serve as the primary source of a court-made rule of law which has undoubtedly stricken terror into the hearts of first-year law students ever since, the Rule Against Perpetuities.

In the first case, the Duke of Norfolk attempted to direct the passing of one of his titles and associated property to a child other than his eldest son, but his scheme was thwarted by the decision of the House of Lords that doing so unreasonably affected the control and ownership of property "too far" into the future. How far was too far was the subject of the Cadell decision, leading to the rule as it is known today. The best-known statement of the rule, that of Harvard's John Chipman Gray, cites the 21 year time limit of Cadell and the postponement of that time until the expiration of the last person alive at the time the interest, whether in real or personal property, was created; thus Gray said: "No interest is good unless it must vest, if at all, not later than 21 years after a life or lives in being at the creation of the interest." (Gray, 1886).

Understanding this rule and applying its multiple and arcane exceptions has long been a trial for law students and even for judges attempting to decide cases involving it. A technical understanding of the rule, however, is thankfully not necessary to understand its impact on trust and estate planning in modern times. Simply (and somewhat inaccurately, but acceptable for these purposes) stated, the rule prohibits creation of trusts which may go beyond two generations without terminating and paying out the corpus -- i.e., without vesting it. Thus, although founded in the revenue preservation schemes of Henry VIII, the official reason for the rule is, and has been, preserving the alienability of property by requiring it to vest within a relatively short period. Its effect, of course, has been to assure taxation of transfers that were not intended to be made.

THE RULE AND ITS CONSEQUENCES TODAY

The rule against perpetuities was originally recognized and harshly (some say mindlessly) applied in its full force in virtually every US common law jurisdiction, having an impact on estate planning throughout the country. In recent times, 20th century desires for simplification and, if one may speculate, the desires of former-law-students-turned-legislator to rid the first-year law curriculum of this famously difficult hurdle to understanding property law, have resulted in the modification or repeal of the rule in a large number of states. For a thorough (and for those inclined to be interested in such matters, highly entertaining) treatment of the slow disappearance of the rule, *see* Dobris, Joel, *The Death of the Rule against Perpetuities, or The RAP Has No Friends -- An Essay,* UC Davis Legal Studies Research Paper No. 49, 35 Real Property Probate and Trust Journal (2006). This move by many states to abolish the rule represents only a short term fix, since modification of state law does not preclude, and has not precluded, the promulgation of Internal Revenue Service Regulations which negate the federal revenue effects of the state's abolition of the rule. Before abolition, the existence of the Rule Against Perpetuities assured that estates would be subject to federal estate taxation at least every other time around. Repealing this rule of law provides creators of trusts an opportunity for tax avoidance as well as an opportunity to exercise the restraints of testamentary intent over future generations, thus providing an incentive to base their trusts in those jurisdictions. Studies have shown that this has actually resulted in increased economic activity and non-estate tax revenues for those states that have taken the step. Max M. Schanzenbach and Robert H. Sitkoff, 27 Cardozo Law Revue 2465, (Apr. 2006) This also results in lowered revenues under the federal estate tax.

The fight to tax all income, from whatever source earned, of course, goes on. Congress is always hungry and is always anxious to obtain more money to spend. Thus, with passage of the Tax Reform Act of 1986, Congress made its first move to close the loophole utilizing a generation –skipping transfer. (I.R.S. Code §§ 2601 – 2663. As a general rule the term "taxable termination" means the termination by death, lapse of time, release of power, or otherwise of interest in property which is held in trust. (I.R.S. Code §2612 a(1)).

Delaware became the first state to repeal its rule against perpetuities. This allowed the creation in the state of a trust that might be exempt from certain federal generation-skipping transfers. (Financial Times, March 13, 2007). In 2007 the Internal Revenue Service published its 2007 guidance rules. One of the high priority items addressed qualified severance rules under Code Section 2642, which pertains to the inclusion ratio for property involved in a generation-skipping transfer. (Russell, Sep. 2006) This, once again, indicates the Internal Revenue Service's interest in collecting its share of perpetual trust assets. Trusts are generally taxed upon the passage from one generation to a later generation. A perpetual trust in a state with no rule against perpetuities does not pass from one generation to the next, and thereby does not, at the present, create a tax consequence. As noted above, the present estate tax is slated for termination in 2010, and resurrection the year following, but congress has already announced that this phase-out is up for close examination. After all, a repeal of the estate tax fairly or unfairly “benefits” or treats wealthy individuals (who have already paid tax once on their wealth and are wise investors) fairly or unfairly, that is, depending on which party is in power. A permanent repeal of the estate tax or allowing a state’s lack of a rule against perpetuities to keep the Internal Revenue Service from such a large source of revenue does not, in the authors’ personal opinion, seem likely.

The Internal Revenue Service, however, has for a long time had in place regulations which may prove unavoidable. I.R.S. Code §2652(c) (2) requires that that an interest which is primarily used to postpone or avoid the Generation Skipping Tax is to be disregarded for Generation Skipping Tax purposes. Treasury Regulation §26.2612-1(e) (2) further provides that an interest is to be disregarded if a significant purpose for its creation is to avoid or postpone taxation. The Internal Revenue Service has a long history of collapsing and holding illegal any scheme or transaction entered into just to avoid the paying of taxes. Therefore, while it is theoretically possible to establish a Dynasty Trust in a state which has abolished the rule against perpetuities, one must be aware of the attractiveness of large estates held in the United States when Congress is looking for further sources of revenue.

SOME OPTIONS FOR AVOIDING THE RULE

Attention, then, might be turned to the creation of a trust outside the jurisdiction of the Internal Revenue Service. A "Foreign Trust" is a trust which has productive assets or income sources outside of the United States, and such sources are not connected with a trade or business in the United States, so the income is not taxed within the United States. (I.R.S. Code § 301.7701(31)(a)) In order for a United States citizen to escape taxation on a foreign trust the citizen must give up all matters of direction of the trust, now and in the future. A United States citizen cannot set up an offshore bank account, trust, or other entity to serve as an alter ego in an attempt to evade United State taxes. (Morgan, & I.R.S. Code §7426). In Morgan, the United States seized bonds held by a Caribbean offshore bank to satisfy the tax liability of a U.S. citizen. In this case John O’Keefe, a U.S. citizen exercised primary control over the bank and his account)

It appears that the way to success, when dealing with the Internal Revenue Service, is to ensure that once a valid, legal, trust is established in an offshore jurisdiction all incidents of ownership are surrendered and the ownership and control is passed to a trustee within the foreign jurisdiction. Property held by a foreign entity in a foreign country is not taxable in the United States. While there may be some safety in the establishment of an irrevocable trust in a state in which the rule against perpetuities is no longer in effect, it appears it would be much better to establish an irrevocable trust in a country which has never adopted rules such as the rule against perpetuities or which imposes taxes on accumulations, assuming, of course, such jurisdiction has a stable banking and financial climate. Countries such as Liechtenstein, for example, offer an environment where an individual can still establish a legal dynasty trust which benefits all future generations without the interference of tax authorities.

The Principality of Liechtenstein has well settled laws and practices regarding trusts and bank secrecy. Liechtenstein has an investor friendly tax climate which does not differentiate between its citizens and non-citizens in its financial centers. The Principality does not tolerate money laundering or criminal activities. In the aforementioned instances Liechtenstein banks must produce requested documents to the proper authorities. In an interesting aspect of its laws, tax evasion is a civil matter, not criminal, and therefore bank secrecy prevails. Tax evasion in the United States, of course, is a criminal matter. Even though Liechtenstein does not help other jurisdictions in the pursuit of purely fiscal matters, its judges can elect to cooperate. Liechtenstein bank regulations do not permit anonymous accounts so that a name is associated with all accounts. As a practical matter, however, there are no restrictions on the account holder's use of an alias which is known only to the bank. (http://www.liechtenstein.li/en/grundlagenpapier_finanzplatz_2007e-2.pdf)

A definite boon to the establishment of trusts in Liechtenstein is the fact that it does not recognize the rule against perpetuities. There is also no rule against accumulations so that a trust, once validly established, does have perpetual existence. (http://www.arcomm.li/desktopdefault.aspx?tabid=273) Thus, a grantor can establish a trust which is administered to his or her wishes, spelled out in the trust document, while enjoying the tax advantages of having the trust domiciled in Liechtenstein or some other favorable tax jurisdiction. (ibid) Jersey, also, has abolished its 100-year perpetuity and now has a perpetual trust life. (Private Banker, 2006)

How might the settler give up all ownership interest and still help the trustee administer the trust in accordance with the grantor's wishes? Enter the letter of wishes. A letter of wishes is a non-binding indication by the grantor of the manner in which grantor wishes the trustees to exercise its discretion in relation to the trust. The trustee should have a wide range of powers and the discretion to administer the trust as it sees fit. The grantor can make known through a letter of wishes how the grantor would like the trustee to perform its duties. The letter of wishes is a non-binding document to the trustee, while the trust document itself established the binding requirements related to the administration of the trust. Utilizing a letter of wishes the grantor, or a named successor, can express wishes to the trustee, but cannot direct the trustee. The letter of wishes is a precatory document – one which specifies preferences but not instructions – which, by definition, does not give the grantor any degree of direction over trust assets and thereby ensures that the classification as an irrevocable trust remains in force. That is, by releasing all matters of direction or control, the trust remains an irrevocable trust, which takes the trust property out of the taxable estate.

CONCLUSION: IS AVOIDANCE OF THE RULE ETHICAL?

Conflicts between the desire to control and the desire to tax have, over the centuries, produced a huge volume of literature. A natural, and probably completely intended, consequence of delaying the vesting of largest states for a long time – perhaps forever – has been the removal of such as states from the sphere of transfer taxes. A four hundred year old solution, the rule against perpetuities, has produced its own volume of cases, articles and treatises, both pro and con, without adequately or effectively resolving the issues. With the casting away of excess baggage, common in this modern world, we see the rule against perpetuities disappearing from many jurisdictions, but the effort to maintain taxation acts at cross purposes to this relaxation of traditional strictures. A simple solution, it would appear, would be to move the assets in question to a jurisdiction that neither taxes nor forbids the imposition of multigenerational control. With the severance of ownership ties, the grantor of such a trust would find the assets no longer subject to federal estate taxes. The advisability of such a solution, however, has not yet been considered.

The power to tax, granted to the federal government by the Constitution, has been interpreted by the courts as including the power to assure that improper techniques for avoiding taxes are effectively prohibited. It does not require a significant amount of consideration to conclude that actions designed and intended to circumvent proper law and regulation without some saving grace – without some purpose other than denying Caesar what is due to Caesar – are themselves improper, that is, unethical. The tax professional clearly owes every client a duty to counsel against taking actions in contravention of the law and, in addition, a duty to advise the client as to the potential consequences of actions which violate ethical standards. The easy answer to the assertion that using offshore trusts to avoid estate taxation is that it isn't illegal.

It should go without saying that the use of lawful techniques for avoiding the payment of taxes is not only perfectly ethical, but, indeed, the failure to advise a client of the availability of such opportunities would, itself, represent a breach of duty owed the client. There is no obligation, moral, ethical or otherwise, to overpay taxes. Judge Learned Hand famously stated "Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes. Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible. Everyone does it, rich and poor alike and all do right, for nobody owes any public duty to pay more than the law demands." Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) (Hand, J. Learned), aff'd 293 U.S. 465, 55 S.Ct. 266. 2

Some uses of offshore trusts, particularly in the realm of "asset protection" schemes, have been censured and even, as in the "Anderson" case, (FTC, 1999) found to constitute virtual fraud on the courts. The types of estate planning vehicles considered here, however, do not share the nefarious ends or seemingly premeditated self-serving outcomes of such ploys. In the Andersen case, the creation of the offshore trust was specifically for the purpose of preventing creditors or other lawful claimants from having access to assets that would otherwise be available to satisfy their claims. The avoidance of the application of the rule against perpetuities has no similar intent to deny genuine claims but rather seeks only to avoid the unthinking implementation of a "rule of law" which is intended to thwart the otherwise valid wishes of the actual owner of the assets in question. Rules of law apply without regard to intent -- this is one of their features -- and in the absence of a balancing, much less overwhelming, public interest in the achievement of an outcome inconsistent with the desires of the true owner there is no justification for continuing the 400-year-old practice of so limiting the testator or grantor.

This is, of course, convincingly borne out in the fact that so many states are repealing or amending their implementation of the rule. Perhaps our society is more comfortable, today, with the common sense rule of letting people do what they want so long as it does no harm and, thus, is no longer anxious to impose a rule such as the rule against perpetuities merely because that's the way we've always done it.

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