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R.I.P. RAP

THOMAS E. SIMMONS[†]

The common-law rule against perpetuities is not in force in this state.

SDCL § 43-5-8

Yeah, you know what this is. It's a celebration . . . .

Kanye West[*]

In 1983, South Dakota's Legislature confirmed that the Rule Against Perpetuities ("RAP") was neutralized: "The common-law rule against perpetuities is not in force in this state." The legislative pronouncement, essentially unnoticed at the time, proved to be the seed from which the state's trust industry grew. This article, the second of two installments, continues the life history of RAP in South Dakota. The first installment surveyed common law RAP and its obscure, labyrinthine, counter-intuitive mechanics. This installment picks up with a survey of pre-1983 caselaw and uncovers an interesting nugget—it appears that South Dakota never recognized RAP in the first place. South Dakota, it is contended here, has never subjected its citizens to the Rule Against Perpetuities, as an analysis of the state's decisional law largely confirms. Following the caselaw survey, the (arguably superfluous) legislative repeal is retold. The article concludes with a brief narrative of the success story of South Dakota trust companies in the years following 1983 and concludes with three appendices, one containing sample form provisions for the statutory dead hand restrictions that South Dakota retains—twin statutory rules addressing unreasonable and absolute restraints on alienation.

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† Professor, University of South Dakota Knudson School of Law. My thanks to my research assistant, Donald "Andy" Keyes who conducted painstaking research and historical statutory analyses in connection with this article. Thanks also to the South Dakota Law Review editors who tirelessly edited and improved my not infrequently half-baked prose and citations. And a deep gratitude to Robert Leech for sharing his recollections of the history of the repeal of RAP in South Dakota which took place all the way back in 1983. All errors are my own.

[*] KANYE OMARI WEST, CELEBRATION, LATE REGISTRATION (Def Jam Recordings 2005).

I. INTRODUCTION

The fiduciary-for-hire services industry in South Dakota is alive and well. The reasons underlying that success are numerous, but one special spark which initiated the growth of the trustee services was undoubtedly the State's legislative act in 1983. That act, commonly referred to as the repeal of the common law Rule Against Perpetuities ("RAP"), increased the flexibility with which trusts could be drafted.[1] The first half of the title to this article ("R.I.P. RAP") signifies RAP's death, though arguably at least, it was never alive, neither in this State nor the territory which preceded it. Unambiguous confirmation of the rule's inapplicability and an absence of a state income tax, however, were the initial environmental factors which encouraged trust industry growth.[2] The state's robust fiduciary services regulation along with its statutory trust privacy and asset

1. *See* SDCL § 43-5-8 (2004) ("The common-law rule against perpetuities is not in force in this state."). The state's initiative in repealing RAP was recently questioned by members of Congress. In May of 2022, U.S. Representative Bill Pascrell Jr. of New Jersey, Chairman of the House Ways and Means Subcommittee on Oversight, "convened an oversight hearing on how wealthy families increasingly [are] using states like South Dakota and [other jurisdictions] as favored tax havens to hide their money right within U.S. borders." BILL PASCRELL, *Pascrell Convenes Hearing on Tax Fairness and the IRS* (May 18, 2022), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=5110.

In response, the South Dakota Trust Association composed a letter to the Congressman, explaining:

> South Dakota, like many other states, repealed the rule against perpetuities and adopted modern trust laws to allow families to engage in legacy and generational estate planning without an arbitrary cutoff date that requires termination. Dynasty trusts permit a family to coordinate the transfer of wealth as well as family values, incentives, and legacies to future generations according to the wishes and terms of the settlor. Such trusts are often used in South Dakota to pass on family businesses, farms, and ranches which further a family's commitment to values and philanthropy.

South Dakota Trust Association Board of Directors, *SDTA Response to US House Committee Oversight*, 2 (Jan. 4, 2022). The letter continued:

> The suggestion that perpetual trusts are untaxed and unregulated is severely misrepresented. All trusts must pay and abide by all federal and state taxation rules at all times. This includes gift taxes, estate taxes, generation skipping transfer taxes (GST), income taxes, FATCA, and FBAR. All trust income is taxed by the federal government annually. Non-grantor trusts normally reach the highest federal marginal tax rate at much lower thresholds than individual taxpayers and therefore pay higher income taxes.

Id; see also Daniel Pascucci, *How Western States Help the Wealthy Avoid Taxes, Creditors,* LAW 360 2 (July 16, 2021) (explaining that states like South Dakota "have built robust and growing industries" and compete for trust deposits, a "race [which] started with changes to the rule against perpetuities—an unwieldy vestige of English common law").

2. *See* Alexis Leondis, *Is Setting Up a Trust in South Dakota Really Worth it?*, BLOOMBERG (Oct. 14, 2021), https://perma.cc/MT9T-L2BH (noting the advantages for trusts located in South Dakota). Leondis writes:

> South Dakota offers everything a wealthy person setting up a trust could want. There is no state income tax or capital gains tax, so investment gains on assets placed in the trust are tax-free if it's structured correctly. Robust protections provide anonymity and shield assets from creditors. And special provisions allow trusts established there to last forever, which means those assets would never be subject to the federal estate tax.

Id.

protection options are icing on the cake.[3] Today, the South Dakota Division of Banking reports that trust industry growth continues.[4] The forty-first anniversary of the official death of RAP merits a celebration.[5] Or, at the very least, an upbeat wake. To that end, this article retells the death (and/or clear confirmation of lifelessness) of RAP in South Dakota.

To the extent that whispers of RAP predated its 1983 repeal, this article examines the doctrine's faint imprints from statehood in 1889 until the state's controversial repeal of the rule in 1983. I say "controversial" for two reasons: first, RAP is notoriously complex and oftentimes unjustifiably harmful to legitimate transactions, gifts, and trusts.[6] On the other hand, it has its share of vocal proponents.[7] Second, it is not entirely clear that RAP existed in South Dakota's common law prior to its repeal at all.[8] The repeal, in other words, may have simply confirmed what had already been the case. But in either case, the

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3. *See* Carter S. Albrecht, Note, *Modernizing Iowa's Wealth Transfers Through Directed Trusts and Decanting*, 70 DRAKE L. REV. 667, 671-73 (2023) (highlighting South Dakota's attractive trust laws). Albrecht explains:

> South Dakota is known for towing the rope of progressive trust laws in the United States. . . . South Dakota takes a bold stance on taxes and levies no state income tax, no inheritance tax, and no capital gains tax. Further, South Dakota eliminated the rule against perpetuities, thus allowing dynasty trusts that can endure in perpetuity. Directed trusts and liberal decanting standards also provide huge benefits for settlors who choose to establish trusts in South Dakota. South Dakota has established itself as an ultra-wealthy haven because of the favorable tax savings, progressive trust laws, and allowance of dynasty trusts.

Id.; *see also* Allison Anna Tail, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981, 997 (2020) (noting that "South Dakota permanently seals all trust documents that a family files"); Francis H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 730 (2006) (characterizing "the most blatant example" of the idea that "privacy increasingly outweighs openness" as "South Dakota's legislation entitled 'Petition to protect privacy'" governing trusts) (citing SDCL § 21-22-28 (2004)); Michael J. Myers and Rollyn H. Samp, *South Dakota's Trust Amendments and Economic Development: The Tort of "Negligent Trust Situs" at its Incipient Stage?*, 44 S.D. L. REV. 662, 664 (1999) (explaining that "trust reform measures, while polishing South Dakota's gem-like characteristics, were enacted within the context of five principles governing trust administration: (1) flexibility, (2) notice, (3) privacy, (4) accessibility, and (5) efficiency"); *U.S. Gains Favor as Trust Jurisdiction for Nonresidents*, 62 FED. TAXES WEEKLY ALERT ART. 27 (2016) (observing that "Alaska, Delaware, Nevada, and South Dakota are examples of jurisdictions with favorable asset protection and privacy regimes for trusts").

4. *See* S.D. DEPT. OF LABOR & REGULATION, ANNUAL REPORT FY 2022 (2022) 33 available at annrpt22.pdf (sd.gov) (reporting: "Trust assets grew by more than 21% year over year, which is substantial growth but less than the prior year due to several mergers and volatility in investment markets"). Trust company examination, supervision, and charter fees to the State totaled $1,867,140 in 2022. *Id.*

5. Acknowledgement of the creative source of this article's title must be extended to Professor Stewart Sterk, the Mack Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University. Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003).

6. *See* Thomas E. Simmons, *RAP Traps*, 68 S.D. L. REV. 374, 376 (2023) (tracing the counter-intuitive textures and destructive ruthlessness of common law RAP).

7. *See, e.g.*, RONALD CHESTER, FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND 40 (2007) ("While the Rule against Perpetuities dealt with the problem of ending longterm trusts only imperfectly, it was certainly better than nothing."); Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 710 (1955) (arguing that "if it were not for this Rule, property would be unproductive and society would have less income"); *id.* at 723 (asserting that "it is socially desirable that the wealth of the world be controlled by its living members and not by the dead").

8. *Infra* note 11; Section II.D (discussing the events leading to South Dakota's repeal of RAP).

state is better off without RAP. History has proved it; economic vitality and good-paying trust industry jobs have been the result, not stagnation.[9]

RAP may lay claim to relatively noble ends, but the legitimate intentions to which it lays waste in pursuing those ends far offset its negligible benefits.[10] It takes aim at remote vesting in order to deter the sorts of alienability restraints which dampen the market for property of one kind or another. Its concerns are with inalienability. Its objectives are therefore better achieved through rules directly addressing suspension of the power of alienation (herein, rules I term "RAA" for ease of reference, signifying the Rules Against Alienation restraints), and this is precisely what South Dakota did: it jettisoned RAP and retained a somewhat tamed RAA.[11] As to RAP's repeal, South Dakota may have accomplished the former as early as pre-statehood territorial legislation.[12] If it did

9. "Our people are thriving, our economy is growing, and the state has never been in a more stable fiscal situation. We have cut taxes, created jobs, and maximized opportunities." Governor Kristi Noem, *2024 State of the State Address*, NEWS.SD.GOV (Jan. 9, 2024), https://perma.cc/U6KA-CRNB.

10. *See* Lawrence M. Friedman, *Immortal Longings: Perpetuity in Context*, 71 BUFF. L. REV. 695, 756 (2023) (opining: "The rule against perpetuities seemed in some ways fairly sensible (even if it had some nonsensical details)").

11. *See* SDCL § 43-3-5 (2004) ("Conditions restraining alienation, when repugnant to the interest created, are void."); SDCL § 43-5-1 ("The absolute power of alienation may not be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being plus a period of thirty years at the creation of the limitation or condition."). "The rule against perpetuities and the rule against unreasonable restraints on alienation are two separate and distinct doctrines . . . ." Lonnie E. Griffith, Jr. & Thomas Smith, 41 OHIO JUR. 3D ESTATES § 215 (2022). The RAA rules are older than RAP. *Id.*

12. North Dakota parted ways with South Dakota when both the northern and southern half of Dakota Territory were admitted as states. *See* Herbert L. Meschke & Ted Smith, *The North Dakota Supreme Court: A Century of Advances*, 76 N.D. L. REV. 217, 224 (2000). But they both began without a codified RAP and, instead, codified rules respecting alienation restraints. North Dakota seems to have adopted the common-law Rule Against Perpetuities by a decision by the North Dakota Supreme Court in 1986. *See* Nantt v. Puckett Energy Co., 382 N.W.2d 655, 659-60 (N.D. 1986) (observing that "interests in oil and gas leases may be subject to the rule against perpetuities in proper cases"); Owen L. Anderson & Charles T. Edin*, The Growing Uncertainty of Real Estate Titles*, 65 N.D. L. REV. 1, 3 (1989) ("In *Nantt* the court, for the first time, appears to adopt the common-law rule against perpetuities" although "[t]he court could have reached the same conclusion by simply applying the traditional interpretation of the State's statutory rule against the absolution suspension of the power of alienation, which, up until Nantt, was presumed to be the only perpetuities rule in effect in North Dakota."). In *Nantt*, the North Dakota Supreme Court imperfectly distinguished between common law RAP and the "statutory rule against perpetuities." *Nantt*, 382 N.W.2d at 661 (citing the now repealed N.D. CENT. CODE § 47-02-27 (1978) (providing: "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation")). North Dakota amended its RAA term in 1953, adding a twenty-one-year term to the lives in being span. 1953 N.D. Laws 444. According to Anderson and Edin, however, North Dakota has never recognized common law RAP, treating references to the "Rule Against Perpetuities" as *synonymous* with the statutory rules respecting restraints against alienation. Stated another way, North Dakota's statutory rules governing restraints against alienation subsumed common law RAP (at least until *Nantt*):

> [T]he overall tenor of the court's opinion [in *Nantt*] suggests that the court treated the North Dakota statutory rule against the absolute suspension of the power of alienation as identical to the common-law rule against perpetuities. Other than in two footnotes, the court's analysis treats the North Dakota statutory rule and the common-law rule as synonymous. In one footnote, the court correctly recognizes that the North Dakota statutory rule modifies the common-law rule; and in another footnote, the court contradicts its earlier statement that an option could violate the North Dakota statutory rule.

not, it certainly did so unambiguously with the express statutory repeal of RAP in 1983.[13] If RAP was not dead prior to 1983, it was certainly lifeless thereafter.[14] And in any case, RAP's demise—whether it occurred in the nineteenth century or the twentieth—merits a party.[15] Let us celebrate, dear reader, in the pages which follow.

II. BACKGROUND AND DISCUSSION

The common law origins of RAP can be traced to the seventeenth century English *Duke of Norfolk's Case*.[16] Originally, RAP was authored by common law judges, not legislators. More recently, in many jurisdictions, RAP has taken on a statutory cloak.[17] Some loyal fans persist. Some still defend the rule.[18] But in more jurisdictions than just South Dakota, the rule has been dramatically weakened or jettisoned.[19] Its scope can be sketched by statutes in states that have codified it. Additional legal authority concerning RAP is contained in case law, of course, but secondary authorities are especially relied upon in those cases.

Anderson & Edin at 80. The issue was mooted by South Dakota in 1983 and by North Dakota in 1993 with its adoption of the Uniform Statutory Rule Against Perpetuities. N.D.C.C. §§ 47-02-26.1 to 47-02-27.5. In so doing, North Dakota repealed its restraints on alienation laws. N.D.C.C. § 47-02-27.1; Alexander J. Bott, *North Dakota Probate Code: Prior and Revised Article II*, 72 N.D. L. REV. 1, 1 n.3 (1996). So, in North Dakota, an article unpacking the history considered here might have its title inverted: *R.I.P. RAA – Long Live RAP*.

13. SDCL § 43-5-8.

14. For authority reasoning that a state's adoption of a statutory RAA impliedly abrogates RAP, see *In re* Water Front on Upper New York Bay, 157 N.E. 911 (N.Y. 1927); Lowell v. Lowell, 240 P. 280 (Ariz. 1925).

15. *See* Raymond H. Young*, For Whose Benefit?*, ALI-ABA 791, 805 (2010) (linking RAP repeal and trust industry vibrancy). Young writes:

> The absence of a Rule Against Perpetuities or of a serious Rule Against Perpetuities has paid off for a few of the states that now allow perpetual or near-perpetual trusts. In an empirical study based on the annual reports that institutional trustees filed with federal banking authorities, the authors found that roughly $100 billion in trust assets had flowed into those states. The states that attracted the most trust business were those that do not tax trust income produced by funds originating from out of state. States that levied an income tax on trust funds attracted from out of state experienced no observable increase in trust business.

Id.

16. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682). *See generally* 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 (1977) (examining the impact of *The Duke of Norfolk's Case* on the Rule Against Perpetuities).

17. *See* Statutory Rule Against Perpetuities (Unif. L. Comm'n 2011), https://perma.cc/ZB9A-D9BB (providing an updated map of the states that have adopted the Statutory Rule Against Perpetuities).

18. Verner F. Chaffin, *Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GA. L. REV. 1, 26 (2000); Bridget J. Crawford, *Who Is Afraid of Perpetual Trusts?* 111 MICH. L. REV. 79, 89 (2012); *see supra* note 7 and accompanying text.

19. To cite one example, Nebraska—South Dakota's neighbor to the south—adopted the Uniform Statutory Rule Against Perpetuities in 1989. Bauermeister v. Waste Management Co. of Nebraska, Inc., 783 N.W.2d 594, 597 (Neb. 2010) (citing NEB. REV. STAT. §§76-2001 through 76-2008). "The Act has been widely adopted." *Id.* at 598. The Uniform Act, recognizing the "harsh" application of the common law rule, substitutes a "wait and see method." *Prefatory Note*, Statutory Rule Against Perpetuities, *supra* note 17; *see also* Simmons, *supra* note 6, at 415-419 (sketching various RAP reforms including the wait-and-see method).

When it comes to secondary sources, the classic monograph for the American version of the rule is John Chipman Gray's *The Rule Against Perpetuities* which went through several editions beginning in 1886, culminating with the fourth published posthumously in 1942.[20] Gray is so authoritative that his "is one of the relatively few American works habitually cited by English Courts in preference to works on the same subject by English authors."[21] Other influential book-length treatments include Jesse Dukeminier's *Perpetuities Law in Action*, Robert Lynn's *The Modern Rule Against Perpetuities,* and Simes' and Smith's four-volume *The Law of Future Interests*.[22] Powell's, Bogert's, and Scott's treatises are reliable and widely cited.[23] The Restatement, of course, comes in handy.[24] Among law review articles, W. Barton Leach's *Perpetuities in a Nutshell* is essential, along with his follow-ups including the aptly titled *Reign of Terror* article.[25] But there are several others which are noteworthy as well.[26]

The sources outlined above have surveyed the RAP landscape with a microscopic lens. They are recommended for the lawyer who wishes to grasp RAP's intricacies. Judges tend to rely upon and cite to secondary sources by respected scholars such as these in analyzing RAP to a greater degree than with other legal issues, perhaps implicitly recognizing that RAP demands much from those who must wield it. The most respected RAP scholars have spent decades studying the rule and thousands upon thousands of words trying to make sense of its intricacies. It is not my intent to re-plumb that depth of level of detail. A wide-angle lens will suffice. For an introductory level of nuance, the reader is referred to my earlier article in this same law review, *RAP Traps*.[27]

RAP was intended to function as a pro-private enterprise constraint and help ensure the marketability of resources, especially real property, though it applies to transfers of personal property as well.[28] Theoretically, if too much property and

20. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942).

21. 6 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES 3 (1952) (A. James Casner et al. eds., 1952).

22. JESSE DUKEMINIER, JR., PERPETUITIES LAW IN ACTION: KENTUCKY CASE LAW AND THE 1960 REFORM ACT (1962); ROBERT J. LYNN, THE MODERN RULE AGAINST PERPETUITIES (1966); LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS (2d ed. 1956).

23. POWELL, THE LAW OF REAL PROPERTY (1949); GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES (1977); AUSTIN W. SCOTT ET AL., ASCHER AND SCOTT ON TRUSTS (2006).

24. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000).

25. W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); *see also* W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965) (updating the original again). Leach also co-authored a book on RAP. J. MORRIS & L. LEACH, THE RULE AGAINST PERPETUITIES (2d ed. 1962).

26. *See* Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867 (1986); Robert J. Lynn & James W. Carpenter, *Applying the Rule Against Perpetuities to Class Gifts: The Influence of Leech*, 43 TEXAS L. REV. 37 (1964); Ralph A. Newman, *Perpetuities, Restraints on Alienability, and the Duration of Trusts*, 16 VAND. L. REV. 57 (1962); Richard R. Powell, *Nutshells and Perpetuities*, 7 U. CHI. L. REV. 489 (1940); Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683 (1958); Charles Sweet, *The Monstrous Regiment of the Rule Against Perpetuities*, 18 JURID. REV. 132 (1906).

27. Simmons, *supra* note 6.

28. *See* Sherman v. Richmond Hose Co. No. 2, 130 N.E. 613, 616 (N.Y. 1921) (applying RAP to future interests in personal property); Morrison v. Piper, 566 N.E.2d 643, 645 (N.Y. 1990) (applying RAP

resources were taken off the market for too long, economic growth would be dampened. Free alienability is desirable.[29] So is freedom of disposition and freedom of contract, but everything has limits.[30] RAP sets some.[31] But its scope and limits are weird and unnecessarily destructive. Without any acknowledgement of self-conscious irony whatsoever, RAP decimates legitimate testamentary and commercial objectives in the name of advancing them.[32] It recklessly throws out the baby to protect the bathwater for a community of vague, theoretical bathers who deserve a freely alienable tub of suds.[33] Whether RAP effectively achieves its goals and whether its achievements outweigh the costs of its complexities and its disruptions can be reasonably called into doubt, for in attempting to reinforce wealth generation and bolster marketability, RAP also frustrates ordinary transactions and upends commonplace gifts, whether testamentary or *inter vivos*.[34] RAP's costs lie both in its unrelenting complexities and in its upending of the very markets it seeks to invigorate.[35]

A. A TRUNCATED RAP REVIEW

The most popular formulation of RAP in shorthand form is that which was articulated by Gray: "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."[36] *RAP Traps* delved into the rule in some detail.[37] Suffice it to say here that it forbids the creation of certain varieties of future interests that might vest more than a period equal to a lifetime plus twenty-one years. It is closely related to—but easily distinguishable from—the twin rules addressing unreasonable restraints on alienation along with a cluster of related rules which address, for example, unreasonable accumulations of income or the fee tail estate.[38] RAP attacks the

to preemptive rights). *But see* Producers Oil Co. v. Gore, 610 P.2d 772, 773 (Okla. 1980) (reasoning that "the Oklahoma rule against perpetuities does not apply to contractual preemptive options in operating agreements under oil and gas leases"); Am. Nat. Res., LLC v. Eagle Rock Energy Partners, L.P., 374 P.3d 766, 769 (Okla. 2016) (finding that RAP does not apply to "contracts which are entirely personal").

29. *See* Wildenstein & Co. v. Wallis, 595 N.E.2d 828, 831-32 (N.Y. 1992) (asserting that RAP (and its partner rule which attacks restrains on alienation) as "striv[ing] to strike a balance between society's interest in the free alienability of property and the rights of owners to direct future transfers").

30. *See id.*

31. *See id.* at 831.

32. *See id.* at 833 (explaining how the objectives are decimated in the name of advancing them).

33. *See id.*

34. *See id.* at 831-32 (describing RAP as "a rigid formula that invalidates any interest that may not vest within the prescribed . . . period" with accompanying "capricious consequences" which amount to "a 'Reign of Terror'") (citations omitted).

35. The complexities of RAP can also be considered as frustrating a robust free market environment insofar as adding cost-frictions and timeliness-drags to transactions in the form of attorneys' fees and assessments in order to navigate its mazes.

36. GRAY, *supra* note 20, at 191.

37. Simmons, *supra* note 6.

38. The Missouri Supreme Court has explained:

> The Rule Against Unreasonable Restraints on Alienation and the Rule Against Perpetuities are examples of restraints on property rights, which the common law will not tolerate. These two rules are linked in that a violation of the Rule Against Perpetuities also results in a violation of the Restraints Rule, but the reciprocal is not

vesting of an interest when it cannot be demonstrated that the vesting will either occur or fail within the RAP period of twenty-one years plus a lifetime.

B. THE INDEFATIGABLE RULES AGAINST ALIENATION RESTRAINTS

The common law incorporated another set of rules addressing the same concerns as RAP, lesser known but no less important.[39] In South Dakota, they are codified in two principal sections, one addressing suspensions of the absolute power of alienation, and a second, less precise rule concerned with alienation impairments relative to the interest in question.[40] These rules are sometimes referred to as the Rule(s) Against Unreasonable Restraints of Alienation.[41] Here, I will refer to them as RAA. The underlying concerns RAA addresses are the same which underpin RAP. Public policy insists on, generally speaking, greater alienability of both personal and real property. Restraints on alienation threaten to interfere with laissez faire economic vitality since property is withdrawn from the stream of commerce:

> [R]estraints tend to take the property out of commerce. The undesirable effects on society potentially resulting from this include: (1) the unnatural increase in the market value of property which might result if restraints were widely employed in a particular locale; (2) the discouragement of improvements to the

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> true. However, any interest which violates one or both of the rules, is void and unenforceable.

Cole v. Peters, 3 S.W.3d 846, 850 (Mo. 1999) (citations omitted). Other less prominent rules also function to achieve a balance between freedom of disposition and free alienability of property. *See, e.g.*, SDCL 43-7-4 (2004) (abolishing the fee tail estate); Robert H. Sitkoff, *The Lurking Rule Against Accumulation of Income*, 100 NW. U. L. REV. 501, 501-02 (2006) (noting that "the rule against accumulations of income has lurked in the shadow of its older and more distinguished cousin, the Rule Against Perpetuities"); Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. STATE U. L. REV. 913, 931-32 (1999) (noting that "noncharitable purpose trusts are subject to a second, (unnamed) rule, shadowing the Rule Against Perpetuities, though not identical to it").

39. *See* JOSEPH A. D'ANGELO ET AL., NEW YORK JURISPRUDENCE § 373 (2d ed. 2022) ("Under early English law, two remedies were developed to preserve the alienability of property: the rule against perpetuities and rules against restraints on alienation."); Percy Bordwell, *Alienability and Perpetuities*, 22 IOWA L. REV. 437 (1937).

40. *See* Laska v. Barr, 2016 SD 13, ¶ 12, 876 N.W.2d 50, 55 (characterizing the twin RAA rules as separate and distinct from each other in noting that the lower court had failed to assess "whether this agreement constitutes an unreasonable restraint against alienation *or* whether it may constitute a suspension of the absolute power of alienation") (citing SDCL § 43-3-5 and § 43-5-1 to -2) (emphasis supplied). One could read SDCL § 43-5-3 as articulating a *third* RAA rule. It reads: "The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee." SDCL § 43-5-3; *see also*, OKLA STAT. § 60-32 (same wording but applying the prohibition "solely to real property not held in trust"). A "term of years" is a present possessory estate similar to a life estate except measured by a specified number of years rather than life and typically are classified as a leasehold. *See* Moche v. Leno, 41 S.E.2d 369, 370 (N.C. 1947) ("Estates less than freehold include primarily estates for a fixed period . . . called 'estates for years.'") (quoting TIFFANY ON REAL PROPERTY § 73 (3d ed. 1939); Thacker v. Flottmann, 244 S.W.2d 1020, 1022 (Mo. 1952) ("Estates less than freehold . . . include leasehold estates or estates for years.") (citations omitted); RESTATEMENT (THIRD) OF PROPERTY § 24.6 (2011) ("The term of years is a present interest that terminates on the expiration of a term that is measured in one or more years.").

41. *Cole*, 3 S.W.2d at 805.

> property, since it may be unprofitable to the owner to make such improvements while threatened with such restraint; (3) the hampering of the most effective use of property, if a prospective purchaser would be a more effective user than the present owner; and (4) the removal from trade of an increasing amount of the national capital.
>
> When property is removed from commerce, then coincidentally there tends to be a concentration of wealth. Just as the former has potentially undesirable social effects, so does the latter. When the concentration is large, too much economic power comes into the hands of the holder, and his affairs have substantial effect upon the public. As such, they are a matter of public concern. Such phenomena as great family dynasties or extreme inequality of the distribution of wealth are inconsistent with much present day socio-political thinking.
>
> A further effect is a sort of "survival of the least fit." That is, the one under restraint is protected by the restraint from his own foolishness, a result which has been the subject of some criticism.
>
> Moreover, one must consider creditors . . . .
>
> We must also consider the policy against dead hand control. While society recognizes the desire of a property owner to control the distribution of his property after his death, it also recognizes that life is for the living and not for the dead. Thus, the wishes of the passing generation to fetter property must be balanced against the desires of the coming generation to take property without restraint.[42]

As adopted by the Dakota Territorial Legislature, RAA was derived from the Field Code.[43] (The Field Code was a nineteenth century creation of David Dudley

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42. Herbert A. Bernard, *The Minority Doctrine Concerning Direct Restraints on Alienation,* 57 MICH. L. REV. 1173, 1179-81 (1959). Grattan adds this flourish to the "survival of the least fit" justification, characterizing paternalistic protections imposed on a potentially foolish property owner as restraints which foster "paternalism and a weak race, inconsistent with Anglo-Saxon traditions of virility . . . [!]" Scott Grattan, *Revisiting Restraints on Alienation: Public and Private Dimensions*, 41 MONASH UNIV. L. REV. 67, 69 (2015).

43. *See* Anderson & Edin, *supra* note 12, at 80 ("The North Dakota statutory rule against the absolute suspension of the power of alienation can be traced in small part to the California Civil Code of 1872 and in large part to the Field Code; the Field Code provisions, in turn, can be traced to New York statutes enacted in 1830."). "The original Field Code and Dakota Territory provisions are, in turn, virtually identical to provisions enacted in New York in 1830." *Id.* at 81. Nothing stands still and New York has obviously since gone through significant statutory revisions through the years. A somewhat conflicting version of the Field Code origin history is highlighted *infra* note 44. It is beyond the scope of this article to sort out—much less resolve—the controversies therein.

Field.[44]) RAA was—and is—codified in South Dakota, but RAP never was, except at the point of confirming its repeal.[45] In order to properly conceptualize the unique aspects of the two, it is important to distinguish RAP from RAA (although in the nineteenth century, this distinction was controversial and courts and scholars often muddled them).[46] It is equally necessary to conceptualize RAA as itself containing two distinct requirements: one concerned with absolute suspension of an excessive duration and a second concerned with suspensions repugnant to the estate or interest in question.[47] Stated another way, there are two potential ways in which a gift or transaction might be voided under RAA—by means of *first*, a time-span-oriented prohibition on the absolute suspension of alienability or account of; *second*, a repugnancy-focused proscription. The twin RAA rules remain alive and well in our great state, even while RAP lies inert in its grave.[48] The twofold aspects of RAA are not unique to South Dakota.[49]

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44. Scott J. Burnham, *Let's Repeal the Field Code!* 67 MONT. L. REV. 31, 32 n.6 (2006). Burnham explains:

> In the 1860s, David Dudley Field, a New York lawyer, toiled for years on codification. Field codified not only substantive areas of law like contracts and property, but laws for local governments, civil procedure, and even international law. The attraction of the codes is readily apparent—the codes would produce the same law for every jurisdiction, clearly organized and easily accessible.

Id at 36-37. The Field Code was adopted in various forms in places such as California, Oklahoma, Idaho, North Dakota, Alabama, Montana, New Mexico, Guam, and South Dakota. *Id*. at 38 n.44 & 45.

45. New York, by contrast, now codifies RAP but not RAA. *See* D'Angelo, *supra* note 38, § 373 (explaining that "New York has adopted a statutory rule against perpetuities . . . [while] the rule against restraints on alienation is uncodified"). And although New York's RAA "developed through decisional law," South Dakota's RAP never really did emerge from its decisional law. *Id.*; *see infra* Section II.D (discussing the events leading to South Dakota's repeal of RAP); *supra* note 11.

46. *See* Simes, *supra* note 7, at 711-12 (describing "the controversy which was waged nearly a half a century ago between John Chipman Gray and other property experts on the question whether the Rule against Perpetuities is a rule against remoteness of vesting or a rule prohibiting the suspension of the power of alienation"); Note, *Perpetuities – Applicability of Restraints on Alienation to Charities*, 40 YALE L.J. 143, 143-44 (1930) (emphasizing "the rule against perpetuities is not a rule against the restraint of alienation but rather against the creation of remote contingent interests" and "inaccurate use of this famous rule as a basis for the decision [on the basis of RAA] serves only to perpetuate the already sufficiently confused understanding of the rule").

47. *Compare* SDCL § 43-5-1 (2004) *with* § 43-5-2.

48. The common law origins of RAA can be traced back to the Magna Carta. JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 8 (2d ed. 1895) (hereinafter, GRAY, RESTRAINTS).

> The 1217 edition of *Magna Carta* expressly recognized the right of an overlord to object to alienation in some cases. Nevertheless, there is reason to believe that by 1284 the courts recognized the power of an owner of land to transfer it without the consent of his overlord. However that may be, the question was settled by the enactment in 1290 of the Statute of Westminster III, commonly known as *Quia Emptores Terrarum.* This statute forbade further transfers by way of subinfeudation and provided, "[t]hat from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them . . . . This statute extendeth but only to lands holden in fee simple."

William F. Fratcher, *Restraints on Alienation of Legal Interests in Michigan Property: I*, 50 MICH. L. REV. 675, 676 (1952).

49. *See* NOAH J. GORDON, FLORIDA JURISPRUDENCE, ESTATES, POWERS AND RESTRAINTS ON ALIENATION § 67 (emphasizing that attempted restraints on alienation which are *repugnant* to the necessary incidents of an estate are "totally inoperative" while "[t]he rule against unreasonable restraints on the use of property concerns restraints of such *duration* that they prevent the free alienation of property") (emphasis supplied). "An invalid partial restraint on alienation, however, does not destroy the

1. The Suspension Rule re: Absolute Restraints

The first of these two statutory RAA rules (contained in SDCL ch. 43-5, titled "Restraints on Alienation of Property") is the "suspension rule."[50] It operates—like RAP—with a specified timeframe (a "perpetuities period").[51] We might call it the RAA suspension rule.[52] The suspension rule's perpetuities period measures the timescale during which the absolute power of alienation is suspended; if the power is suspended in excess of the perpetuities period, the rule was violated.[53] Originally, the RAA perpetuities time period in South Dakota was simply lives-in-being.[54] There was no additional period in gross.[55] The suspension rule read:

> The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition . . . .[56]

With only a single life-in-being measuring time stick for suspending the absolute power of alienation under the version of SDCL 43-5-1 which existed prior to 1983, a trust for any specific term (ten years, for example) could be found to violate RAA since there is no guarantee that any given living person will live more than a given term of years.[57] Suspension of a trustee's power to alienate trust property constituted "a suspension of the power of alienation."[58] And so, theoretically, even a trust for a six-month term would violate the pre-1983 suspension rule granted it was possible that any given measuring life would expire prior to six months from the creation of the interest.

In 1983, however, as detailed below, the legislature extended the RAA perpetuities period to lives-in-being plus thirty years.[59] Moreover, trusts were exempted so long as the trustee's power to sell was not suspended for a period longer than the new perpetuities period.[60] A wait-and-see approach to invalidations further softened the impact of RAA.[61] These prudent reforms

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validity of the estate; instead, a court will judge the limitation as a nullity and permit the estate to vest free of the condition or limitation attempted to be imposed." *Id.* § 72.

50. SDCL §§ 43-5-1 to -9.

51. SDCL § 43-5-1.

52. *See* Lowell Turrentine, *The Suspension Rule and Other Statutory Restrictions on Trusts and Future Interests in California*, 9 HASTINGS L.J. 262, 262 (1958) (observing that the rule against suspension of the absolute power of alienation for longer than the perpetuities period has been labeled the "suspension rule").

53. *Id.* at 269.

54. SDCL § 43-5-1 (Allen Smith Co. 1967).

55. *Id.*

56. *Id.*

57. *See, e.g.*, *infra* Section II.C.7 (analyzing *In re* McNair's Estate, 38 N.W.2d 449 (S.D. 1949)).

58. SDCL § 43-5-4 (Allen Smith Co. 1967).

59. SDCL § 43-5-1 (2004).

60. *See* SDCL § 43-5-4 (2004) (codifying the suspension of all power to alienate trust property is a suspension of the power to alienate).

61. *See Prefratory Note*, Statutory Rule Against Perpetuities, *supra* note 17 (explaining: "Instead of invalidating an interest because of what might happen, waiting to see what does happen . . . seems now to be more sensible.").

retained RAA's suspension rule while making its application to suspensions of the absolute power of alienation much more sensible.

What is a suspension of the absolute power of alienation? The code defined a suspension of "the absolute power of alienation" as a condition existing "when there are no persons in being by whom an absolute interest in possession can be conveyed."[62] Whenever there was "any possibility" in which the absolute power of alienation be suspended for a longer period than [permitted], the "future interest [was] void in its creation."[63]

2. The "Repugnant" or Unreasonable Restraints Rule

The second RAA rule (codified at SDCL § 43-3-5) requires a second swing at invalidating gifts or transactions on account of alienation restraints. It addresses unreasonable restraints: "Conditions restraining alienation, when repugnant to the interest created, are void."[64] No perpetuities time period is involved with the second codified RAA rule.[65] It simply invalidates transfers in which the conditions restraining alienation are repugnant to the interest in question.[66] Repugnancy is typically construed as a technical one linked to the law of estates.[67] But in South Dakota, it often takes the form of a question of reasonableness.[68] Although the text of this statute does not contain an explicit reference to a reasonableness standard, the South Dakota Supreme Court has interpreted it thusly: "The question is whether the particular restraint is reasonable under the circumstances."[69] Or, in other words, the question is whether "an unreasonable restraint against alienation" has been imposed.[70] Thus, it is a more flexible rule

62. SDCL § 43-5-2 (Allen Smith Co. 1967).

63. *Id.* Moreover: "The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee." SDCL § 43-5-3 (Allen Smith Co. 1967); *see also* Section II.D (assessing RAA remedies under contemporary law).

64. SDCL § 43-3-5 (2004).

65. *Id*.

66. *See* Cowell v. Springs Co., 100 U.S. 55, 57 (1879) ("Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property."); Richard E. Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373, 390 (1935) (noting the view that contingent remainders may be coupled with alienation restraints given "the historical fact that contingent remainders were totally inalienable at common law, and that, therefore, no necessary incident of the estate is removed by the restriction [on alienation]"). *But see* Everett Fraser, *Rules Against Restraints on Alienation & Against Suspension of the Absolute Power of Alienation in Minn*., 8 MINN. L. REV. 185, 193 (1924) (opining: "Repugnancy is a scholastic reason that should have no weight in the twentieth century"); GRAY, RESTRAINTS, *supra* note 48, at 241 (asserting that repugnancy "is either 'a notion which savors of metaphysical refinement rather than of anything substantial,' or it means 'against public policy'") (internal citations omitted).

67. *See* Manning, *supra* note 66, at 402 ("[T]he doctrine of repugnancy was entirely one of technical common land law.").

68. Laska v. Barr, 2016 SD 13, ¶ 11, 876 N.W.2d 50, 55 (quoting Edgar v. Hunt, 706 P.2d 120, 122 (1985)).

69. *Id. Laska v. Barr* is analyzed *infra* Section II.C.12.b.

70. *Laska*, 2016 SD 13, ¶ 11, 876 N.W.2d at 55 (citing *Edgar*, 706 P.2d at 122). A nice explication of what reasonableness means in this context can be found in a Delaware decision:

> [P]roperty will be put to its highest and best use if the current owner is allowed to sell the property to others who intend to use it more productively. On the other hand, the law is sensitive to the need for some restraints that occasionally arise. For

for courts—and more unpredictable for practitioners—than the RAA rule addressing suspensions of the absolute power of alienation which are permissible, but only for a particular period of time.[71] This is so because of the flex which necessarily accompanies any reasonableness standard. As assessed by legal scholars, the unreasonable restraints RAA rule can be subdivided into at least eight different types.[72] Each is mapped briefly below.

a. Restraints as to the Eligibility of Owners

The first variety of RAA unreasonable restraints focus on restraints qualified as to persons.[73] For example, in *Morse v. Blood*,[74] the Minnesota Supreme Court considered a bequest to a spouse "on condition that in no case shall she give or bequeath one cent of said estate to any member of my family, or to any relation of her own."[75] The court, in holding the restraint as invalid and granting the widow fee simple, observed:

> example, a tenant who expects to make large investments to improve the premises may be willing . . . to do so only if the owner is willing to give him the option to purchase the property at a fixed price. Accordingly, the rule is not that all restraints are prohibited. Rather, a balance is struck; only 'unreasonable' restraints are prohibited.

Libeau v. Fox, 880 A.2d 1049, 1058-59 (Del. Ch. 2005) (quoting McInerney v. Slights, 1988 WL 34528, at *6 (Del. Ch. Apr. 13, 1988)). Reasonableness is also the standard in related fields such as when assessing restraints on trade. *See* Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 396 (1993) ("In assessing reasonableness, courts purport to balance the interests of the employer, the employee, and the general public.").

71. *See* NOAH J. GORDON, 22 FLA. JUR. 2D ESTATES § 70 (2022) (explaining: "Unreasonableness as a restraint on alienation turns on whether the price is fixed by the restraint itself or is, instead, allowed to be determined by the relevant market when the sale is had"). "Unreasonable restraints on alienation of real property are, of course, invalid; reasonable restraints on alienation, on the other hand, are valid if justified by the legitimate interests of the parties." McCausland v. Bankers Life Ins. Co. of Nebraska, 757 P.2d 941, 944 (Wash. 1988) (en banc). As the Restatement explains, "Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint." RESTATEMENT (THIRD) PROP. SERVITUDES § 3.4 (2000). The Restatement further distinguishes between direct restraints and indirect restraints:

> Indirect restraints include transfer fees and other servitudes that reduce the amount likely to be realized by the transferor or reduce the desirability of the property to prospective transferees, as well as use restrictions and other servitudes that may affect the value or marketability of property. Direct restraints on alienation covered under this section are valid only if reasonable; indirect restraints are valid .†.†. unless they lack a rational basis. The test for direct restraints is more stringent because they clearly interfere with the process of conveying land and have long been subjected to common-law controls, which often have been more stringent than a reasonableness test. Indirect restraints, by contrast, constitute a more amorphous category, which could include any kind of arrangement that affects the value of property. Many economic arrangements for allocating risks and sharing profits of land transactions can be challenged as indirect restraints on alienation.

Id. cmt. B.

72. Contenders for additional RAA categories include "restraints prohibiting the assignment of a contract, . . . [and] restraints calling for the forfeiture of one piece of property if another piece is alienated." Herbert A. Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173, 1176 (1958-1959).

73. Manning, *supra* note 66, at 375.

74. 71 N.W. 682 (Minn. 1897).

75. *Id.* at 682.

> Some of the cases hold that the condition is good if it merely prohibits alienation to certain persons or classes of persons, and bad if it allows alienation only to certain persons or classes of persons. Other cases hold that the condition is good unless it takes away substantially the whole power of alienation. We doubt the correctness of the latter rule.[76]

Racial restrictions, pre-*Shelley v. Kramer*,[77] also fell within this class of restraints.[78] Although the authorities are not all in conformity with one another, the general "rule which naturally suggests itself is that a condition is good if it allows of alienation to all the world with the exception of selected individuals or classes; but is bad if it allows of alienation only to selected individuals or classes."[79] (or restraints qualified as to manner).[80]

b. Modal Restraints

Here, no black letter rule can be found. The issue typically becomes a matter of degree. The cases are rare. One example is a restraint intended to forbid partition among tenants in common.[81]

c. Fee Simple Estate Restraints

Says Gray: "In a fee simple a condition or conditional limitation on alienation generally is void. This is now past dispute."[82] The difficulty is not in applying the rule, but in determining whether a fee simple estate was in fact created. The reasoning often gets circular: If a fee simple estate was created, then a condition

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76. *Id.* The court also took note of the fact that the attempted restraint placed upon the bequest was "inconsistent with itself" insofar as if the widow "commits a breach of the condition, the property vests in her late husband's heirs, though this condition was inserted to prevent them from ever getting any benefit from the property." *Id.* at 683.

77. 334 U.S. 1 (1948).

78. *E.g.*, Queensborough Land Co. v. Cazeaux, 67 So. 641, 643 (La. 1915) (upholding a covenant prohibiting ownership by a non-white and distinguishing restraints which result from mere "caprice"). *See generally*, David A. L. Smout, *An Inquiry into the Law on Racial and Religious Restraints on Alienation*, 30 CAN. B. REV. 863 (1952) (examining the historical development of racial and religious restrictions affecting land rights).

79. GRAY, RESTRAINTS, *supra* note 48, at 30. An alternative black letter statement of RAA as applied to restraints on alienation qualified as to persons is "whether the condition takes away the whole power of alienation substantially." *In re* Macleay, L.R. 20 Eq. 186, 189 (1875). This is known as "the Jessel rule" after its author, Sir George Jessel, a British jurist. Manning, *supra* note 66, at 392.

80. Manning, *supra* note 66, at 391.

81. *Id.* at 392; *see, e.g.,* Am. Trust Co. v. Nicholson, 78 S.E. 152 (N.C. 1913) (finding a restraint on partition valid).

82. GRAY, RESTRAINTS, *supra* note 48, at 8; *see also* Note, *Restraints on Alienation on Estates in Fee Simple*, 26 COLUM. L. REV. 88, 89 (1926) (explaining that "since a grant in fee simple is a grant of the maximum quantum of rights in the property, a restraint limiting the amount is repugnant"). *But see* Abbott v. Perkins, 132 P. 1177 (Kan. 1913) (explaining that "[e]ven under the old arbitrary rule which treats the habendum of a deed as something distinct from the other parts of the instrument there is no ground for a claim of repugnancy, as the premises of the instrument do not purport to transfer any more than an inalienable and nonmortgagable life estate").

on restraint is repugnant, but if the estate itself was conditional, then the condition is not. And this may turn on an overly technical assessment of text.[83]

d. Life Estate Restraints

Another variety of repugnancy-type RAA challenges relate to restraints on legal life estates.[84] Attempted restraints on alienation placed upon life estates merit their own separate category.[85] The *Tscherne* case, discussed below, is one of this type.[86] Life estates are freely alienable, and so, as with fee simple estates, a restraint on alienation is repugnant to the estate and therefore void.[87] A restraint upon a contingent remainder, however, would be good insofar as contingent remainders are themselves not freely alienable.[88] By extension, a restraint on a continent remainder would not be repugnant to the interest in question.

Restraints on a life estate, a fee simple estate, or any other estate are typically expressed in one of two ways: as a forfeiture or as a withholding of rights. An example of the former would be a deed to a grantee "until such time as she attempts to alienate or encumber Blackacre, whereupon title shall vest in her sibling." An example of the latter would be a deed to grantee "except that she shall lack any power or authority whatsoever to alienate to encumber Blackacre."

e. Collateral Restraints

Restraints for a collateral purpose may offend RAA's repugnancy rule.[89] A collateral restraint is one in which alienation is restrained not for the purpose of

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83. Thus:

> The common procedure is to arbitrarily catalogue the grant as a fee if the first part of the habendum clause has the superficies thereof and to disregard the words in the following part of the grant embodying the condition. It is easily understood then why the latter part of the grant subtracting some of the rights granted in the former part is repugnant. The more recent analysis, however, attempts to discover the intention of the grantor and draws a single conclusion as to the quantum of the estate from a consideration of the whole deed. Of course, if this method is employed, the repugnancy theory cannot be applied since the unity of the result gleaned from all the words precludes repugnancy. If the restraint is found removed in point of space from the granting clause, it would seem that the inquiry would then be open, whether to use the test of repugnancy or to ascertain the intention of the grantor from all the words. But if the restriction is adjacent to, or inserted in, the granting clause, the estate may properly be described as a determinable fee and the restriction would be valid. Thus it may be possible to circumvent a strict rule against alienation by placing the conditions within the granting clause.

Note, *Restraints*, *supra* note 81, at 89-90.

84. Manning, *supra* note 66, at 394.

85. *See, e.g.*, Kessner v. Phillips, 88 S.W. 66, 68-69 (Mo. Ct. App. 1905) (holding that an attempted restraint on a life estate offends RAA).

86. *Supra* Section II.C.3 (examining Tscherne v. Crane-Johnson Co., 227 N.W. 479 (S.D. 1929)).

87. *See* Fratcher, *supra* note 48, at 678 ("The transferability of estates for life seems to have been conceded without serious opposition in the mediaeval period.").

88. Fulton v. Fulton, 162 N.W. 253, 258 (Iowa 1917).

89. *See* Manning, *supra* note 66, at 398-99, 401.

restricting alienability but for some other purpose.[90] Options, preemptions rights, and mortgages, for example, may indirectly impose restraints on alienation.[91] There are several South Dakota Supreme Court decisions of this type.[92] They may be the most common subtype of repugnancy restraints.

f. Temporal Restraints

Another variety of cases dealing with restraints which are unreasonable or "repugnant" to the interest in question concern themselves with restraints qualified as to time.[93] Historically, temporal restraints limited to a reasonable duration were construed as "an exception to the general rule that all forfeitures or restraints on the alienation of vested interests in fee are void."[94] The analysis under South Dakota law, however, would require an assessment of whether a temporal restraint ran afoul of either SDCL 43-3-5 or SDCL 43-5-1.[95] A temporary restraint on alienation imposed on a fee simple estate, for example, would pass muster under SDCL 43-5-1 if the restraint were limited to a lifetime plus thirty years, but nevertheless fail under the repugnancy standard of SDCL 43-3-5.[96]

g. Spendthrift Trusts

Spendthrift trusts were once much more controversial than they are now.[97] Gray found them especially distasteful: "Unless the payment of debts be

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90. *See* Charles Sweet, *Restraints on Alienation*, 33 L. Q. REV. 236, 246 (1917); *see also* Bernard, *supra* note 42, at 1773 ("A promissory restraint exists when the conveyee has promised not to alienate the property; it may arise out of a covenant either in the conveyance itself or in a separate contract."); Everett Fraser & Arthur M. Sammis, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities*, 4 HASTINGS L. J. 101, 104 (1953) ("It is said the promissory or forfeiture restraints on a fee simple or ownership with are reasonable are valid.").

91. Bernard would include three sub-types among the different varieties of collateral restraints:

> [1]. Promissory (and sometimes forfeiture) restraints in the form of a right of pre-emption.
>
> [2]. Restraints for protection of the vendor in a land-sale contract.
>
> [3]. Reasonable provisions in the articles of a business organization prohibiting transfer of shares.

Bernard, *supra* note 42, at 1175.

92. *Infra* Section II.C; *see, e.g.*, Malouff v. Midland Federal Sav. & Loan Ass'n, 509 P.2d 1240, 1244 (Colo. 1973) (en banc) (upholding a due-on-sale clause in a deed of trust). Manning also groups cases under this heading (collateral restraints) in which the court attempts to undertake its analysis based upon the underlying motivations of the person imposing the restraint and approve the restraint if it was motivated by wholesome aims like protecting a spendthrift and disapprove the restraint if it was based on mere whim or caprice. Manning, *supra* note 66, at 398-401. Nothing in the way of an ill-conceived wholesomeness approach to RAA can be discerned in the South Dakota jurisprudence.

93. Manning, *supra* note 66, at 381.

94. *Id. see, e.g.,* Cronk v. Shoup, 197 P. 756, 757 (Colo. 1921) (recognizing a lifetime restraint).

95. SDCL § 43-3-5; SDCL § 43-5-1.

96. *See* Everett Fraser, *The Rules Against Restraints on Alienation, and Against Suspension of the Absolute Power of Alienation in Minnesota*, 8 MINN. L. REV. 185, 191 (1924) ("Restraints on alienation of the fee simple qualified as to time are void by the great weight of American authority.").

97. *See, e.g.*, GRAY, RESTRAINTS, *supra* note 48, at 240 ("As soon as [spendthrift] trusts appeared, equity hastened to give a remedy; and the remedy was simply to apply the venerable principle of law and equity alike—that property shall be alienable and liable for debts.").

considered un-American, it is hard to see the Americanism of spendthrift trusts."[98] Once, only Pennsylvania gave spendthrift clauses effect.[99] Now, every state does.[100] Given that an effective spendthrift clause wholly restraints any attempted or involuntary alienation of a beneficiary's beneficial interest, a restraint is certainly involved.[101] But so long as the trustee (as legal owner of trust property) retains unimpaired alienability rights, contemporary RAA law will not be offended by the alienability of beneficial rights.[102] A similar construction typically follows restrictive buy-sell covenants relative to closely-held company stock; so long as the company-as-owner can alienate corporate property, alienation restraints on a shareholder's interest are perfectly acceptable.[103]

h. Charities Cases

The final subtype of RAA repugnancy applications is concerned with restraints on gifts to charities.[104] Charities are typically exempt both from RAP and RAA.[105] So the issue is often whether a gift or recipient qualifies as charitable.[106] In *Sisters of Mercy of Cedar Rapids v. Lightner*,[107] however, the issue was whether a donor may impose restraints as a condition of an agreement with a charity.[108] There, one W.H. Lightner undertook to construct a grotto, and lagoon on an acreage owned by a Catholic eleemosynary corporation which, in turn, agreed "[t]o not sell, grant, devise, convey, and/or cause the premises upon which the work is situated to become mortgaged without the approval, in writing, of [Lightner]."[109] The charity later brought a quiet title action, arguing that it held title free of the promised restraints, asserting that agreements or gifts for charitable purpose are exempt from RAA. The court recited the rule that while charitable gifts may impose alienation restraints, contracts may not.[110] As such, the charity held its acreage free from restraints against transfers or encumbrances.[111]

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98. *Id.* at 246.

99. Willard M. Bushman, *The (In)Validity of Spendthrift Trusts*, 47 OR. L. REV. 304, 306 (1968).

100. John V. Orth, *Allowing Perpetuities in North Carolina*, 31 CAMPBELL L. REV. 399, 404 n.25 (2009).

101. Some jurisdictions recognize exception creditors to spendthrift trusts. *See, e.g.*, UNIF. TR. CODE § 503(b).

102. *See* SDCL § 43-5-4 (2004).

103. *See* Bernard, *supra* note 42, at 1175 (noting that "[r]easonable provisions in the articles of a business organization prohibiting transfer of shares" do not offend RAA).

104. SIMES & SMITH, *supra* note 22, at § 1170.

105. *E.g.*, Tr. Of First Presbyterian Church of Town of Salem v. Wheeler, 149 A. 589, 590 (N.J. 1930) (holding that a gift for charitable purposes restraining alienation is valid); *see also* Bernard, *supra* note 42, at 1184 (noting that "property in the hands of a charity—particularly if a trust form is used—is usually almost inalienable as a practical matter anyhow").

106. *See, e.g.*, Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E.2d 786, 792 (Va. 1951) (determining that a gift to students in trust in perpetuity violates RAP when not based on financial need).

107. 274 N.W. 86 (Iowa 1937).

108. *Id.* at 87-88.

109. *Id.* at 88.

110. *Id.* at 92.

111. *Id.*; *see also* SDCL § 43-5-7(1)-(2) (2004) (exempting transfers to charities or for charitable purposes from the RAA suspension rule). Interestingly, there is no express statutory exemption for

C. THE UNABRIDGED CASE LAW

Although tamed and clarified in the same bill which repealed RAP in 1983, the twin RAA rules introduced above remain alive and well in cases and controversies in South Dakota even today.[112] In fact, by directly confronting the policy concern of alienability suspension, the twin RAA rules arguably rendered RAP (which confronts the same policy concern indirectly, by means of assessing the timing of vesting) unnecessary. However, the judicial application of the twin RAA rules tended to muddle whether the application of RAP in South Dakota prior to its official repeal could be advanced as a matter of common law.[113] Many of the cases discussed below illustrate this uncertainty. It is often unclear whether the South Dakota Supreme Court is applying RAP, one or both of the RAA rules, or all three. In some instances, the South Dakota Supreme Court explicitly refers to RAP but applies RAA.[114]

Arguably, the pre-statehood enactment of the RAA framework impliedly rejected common law RAP, replacing it with something similar.[115] The Court's reference to RAP when it means RAA, then, could be understood as simply a matter of terminology; in South Dakota, the Rule Against Perpetuities referred to

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charities from the RAA repugnancy rule. SDCL § 43-3-5. See *supra* Section II.B.1-2 for a discussion of the twin RAA rules.

112. *Infra* Section II.C.12. (discussing the South Dakota cases involving the RAA rules after the repeal of RAP). "While the subject of restraints on alienation is often regarded as peculiarly academic, it is in reality a vital balancing of conflicting human motives and a study in the wielding of a potential instrument of economic and social control." Manning, *supra* note 66, at 374.

113. *See supra* Section I.C.

114. *See infra* Section II.C.7 (discussing McNair's Estate, 53 N.W. 210, 212 (S.D. 1952) wherein the court refers to the "rule against perpetuities" but seemingly applies RAA); *see also* Mallery v. Griffin, 117 N.W. 818, 818 (S.D. 1920) (referring to the appellant's argument relying upon "the statutes of this state against restraints upon alienation *and* against perpetuities") (emphasis supplied); Wood v. McCain, 149 N.W. 426, 427 (S.D. 1914) (reciting an assertion relative to "the provisions of the statutes against perpetuities *and* accumulations"). Since there has inarguably never been a statutory RAP in South Dakota, these references suggest that its references to "perpetuities" (or even the "rule against perpetuities" in *McNair*) actually refers to RAA, which was and is codified in statute.

115. South Dakota's RAA statutes were modeled on California's, and California's were derived from New York. Estate of Hinckley, 58 Cal. 457, 472-73 (1881); *see, e.g.*, OKLA. STAT. tit. 60, § 32 (1941) (reflecting the same language as South Dakota's RAA statutes); MONT. CODE ANN. § 70-15-208 (1947) (same); 21 GUAM CODE ANN. § 3110 (2022) (same). Bogert opines:

> The revisers who prepared the New York Revised Statutes of 1830 attempted to frame a Rule Against Perpetuities that they probably thought was the equivalent in effect of the English common law rule but with a more limited period. The revisers used language relating to the suspension of the power of alienation rather than to the vesting of contingent interests. They believed they were simplifying property law by this and other provisions; instead, they created traps and pitfalls for laymen and lawyers, and the statues gave rise to a large body of litigation. They might better have left the common law rule in effect.

GEORGE G. BOGERT ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 219 (2022); *see also* 3 SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 1416 (3d ed. 2022) ("Prior to [California's adoption of statutory RAA in 1872] the common-law rule against perpetuities *had* been in force.") (emphasis supplied). A comparative state-to-state analysis, however, is complicated by the state constitutional RAP provisions in states like California. *See* Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1791-93 (2014) (noting state constitutional RAP rules in Montana, California, Oklahoma, and elsewhere).

the Rules Against Alienation restraints.[116] This interpretation is further explored in the discussion of pre-1983 caselaw in this section.

In any case, South Dakota's perpetuities case law is relatively sparse. When University of South Dakota Law School Dean Oval Phipps wrote his *Perpetuities in South Dakota* article in 1956 (the very first article in the very first issue of the very first volume of the *South Dakota Law Review*), he surveyed five cases and could not be certain whether the common law rule even existed in the state.[117] If it did, he reasoned, it was embedded within the text of the statutory rule against suspension of the power of alienation and thereby limited by the same truncated life-in-being term. Phipps wrote:

> It remains uncertain whether a rule against remoteness of vesting exists in South Dakota, but if such a rule does exist, it is an ingredient of the statutory rule against suspension of the absolute power of alienation, and the measuring period necessarily is that of lives in being at the creation of the interest, with no permissible period in gross.[118]

An exploration of the relevant pre-1983 caselaw confirms that Dean Phipps' suspicions were short of the mark insofar as it appears that RAP *never* existed in South Dakota. There is no compelling evidence that RAP was still slumbering, ignored by any published appellate decision, embedded within the statutory text of RAA. At the very least, RAP was never once expressly recognized. The South Dakota Supreme Court has not directly addressed the question, although it refers to a rule against perpetuities a total of four times—twice before 1983 (and twice post-1983 to simply recite its repeal).[119] Not once does our supreme court articulate an actual statement of RAP (e.g., the one modeled by Gray—or any other variation). When it does refer to RAP, it appears only to mean South Dakota's statutory RAA. Indeed, late-nineteenth and even early-to-mid-twentieth

116. *See* Estate of Murphy v. Comm'r, 71 T.C. 671, 679 (Tax Court 1990) (referring to RAA and RAP as alternative variations of RAP: "On the one hand, there were those States which modeled their perpetuity statutes after New York's in terms of suspension of the power of alienation or absolute ownership; on the other hand, there were those States whose rule was expressed in concepts concerning remoteness of vesting."); Comment, *Legislative Interference with the Rule Against Perpetuities*, 46 HARV. L. REV. 701, 706 (1933) ("Suspension of the practical power of alienation might be the desirable test of a perpetuity."). A nineteenth century scholar might offer: "Our state's rule against perpetuities measures absolute and unreasonable restraints on alienation" while a twenty-first century scholar would probably say: "Our state has no rule against perpetuities, but it does enforce restraints on alienation."

117. Oval A. Phipps, *Perpetuities in South Dakota*, 1 S.D. L. REV. 1, 25 (1956).

118. *Id.* This line of reasoning—that the statutory RAA perpetuities impliedly imposed the same perpetuities period to common law RAP can be seen, for example, in *McNair's Estate*. *Infra* Section II.C.7. But no South Dakota Supreme Court decision ever reached this conclusion. Dean Phipps concluded with a recommendation: "Official consideration of the situation by the State Bar is recommended." *Infra* Section II.C.7. The legislature eventually took up his recommendation, some thirty years later. *See infra* Section II.D.

119. *See* Laska v. Barr, 2016 SD 13, ¶ 11, 876 N.W.2d 50, 55 (noting "South Dakota has abolished the common law rule against perpetuities."); Matter of Voorhees, 403 N.W.2d 738, 740 (S.D. 1987) (highlighting the challenges of reinstating a lawyer's license to practice after a gap of fourteen to fifteen years given the changes in the law of torts, commercial law, and "revisions in the area of future interests (SDCL ch. 43-5), including repeal of the common-law rule against perpetuities"); *In re* McNair's Estate, 53 N.W.2d 210 (S.D. 1952) (discussed *infra* Section II.C.7); *In re* Geppert's Estate, 59 N.W.2d 727 (S.D. 1953) (discussed *infra* Section II.C.8).

century commentary tends to collapse RAA and RAP.[120] And in South Dakota's jurisprudence, too, perpetuities seem to have meant the state's twin RAA rules. Consequently, it appears that South Dakota had already jettisoned RAP in favor of RAA and the 1983 "repeal" merely confirmed what was already the case.[121] The "repeal" thus functioned to remove any doubt about RAP's breathlessness.

The best support for this conclusion is contained within the *McNair's Estate* decision, discussed below, where we get the closest view of pre-1983 RAA. The result of pre-1983 RAA omitting the period in gross was to render a much greater number of gifts and bequests invalid. In the cases which follow, it is admittedly not absolutely clear whether the South Dakota Supreme Court is applying only the state's twin statutory alienation rules or an ill-defined cocktail in which RAP might also represent an ingredient of the mix. But it would appear that South Dakota's RAA statutes effected a "recasting [of] the law as to perpetuities in terms of prohibited restraints upon alienation."[122] And by means of this recasting, RAP itself was subsumed. In other words, while RAA remained alive, its pre-statehood statutory enactment necessarily obliterated RAP even before its official "repeal" in 1983. The examination of decisional law which follows largely confirms this conclusion. The cases also illustrate the restrictive nature of RAA when its perpetuities period was limited to lives-in-being, as the statute read prior to 1983.

1. Rousseau's Estate *(S.D. 1925)*

The earliest perpetuities case from South Dakota is *Rousseau's Estate*.[123] Victoria Rousseau's will prudently created a testamentary trust for her children.[124] Her will directed the trustee to apply distributions "for the care and education" of two sons and two daughters.[125] Upon the completion of their education, the

120. *E.g.*, STEWART CHAPLIN, SUSPENSION OF THE POWER OF ALIENATION AND POSTPONEMENT OF VESTING UNDER THE LAWS OF NEW YORK 6 (2d ed. 1911) ("Some learned writers both in England and America, have held . . . that the Rule against Perpetuities was nothing whatever but a rule against undue suspension of the power of alienation."); Les Raatz, *State Constitution Perpetuities Provisions: Derivation, Meaning, and Application*, 48 ARIZ. ST. L.J. 803, 805 (2016) (determining that "the meaning of the states' constitutional prohibitions against perpetuities was not to address remoteness in vesting, but to address the historic meaning of 'perpetuities,' that of restraints against alienation of title"); Note, *Rule Against Perpetuities – Statutory Provision Against Suspension of Power of Alienation – Application to Options*, 40 HARV. L. REV. 913, 913 (1927) (construing a Michigan statute).

121. South Dakota's RAA was based upon the Field Code and New York law clarified that RAP *was* its statutory RAA. "[T]he New York Rule against Perpetuities expressly states that it is a rule against the suspension of the power of alienation." Bernard E. Docherty, *Suspension of the Power of Alienation*, 5 ST. JOHN'S L. REV. 302, 304 (1931). This lends additional weight to the conclusion that from South Dakota's beginning, the term RAP referred to RAA and nothing more. RAP itself was displaced from the common law by means of the RAA statutes on point. The word choice of the 1983 "repeal" lends additional support to this idea since the statute did not proclaim that RAP was repealed. Rather, it merely clarified what was already the case using the passive voice: "The common-law rule against perpetuities is not in force in this state." SDCL § 43-5-8 (2004). Perhaps it would have been clearer had the legislation read: "The common-law rule against perpetuities is not—and never has been—in force in this state."

122. W.W. Allen, Annot., *Violation of Rule Against Perpetuities, or Unlawful Restraint of Alienation or Suspension of Ownership, by Postponement of Vesting or Alienation of Ownership Until Exercise of Discretion as to Sale or Disposal*, 89 A.L.R. 1046 (1934).

123. 205 N.W. 222, 223 (S.D. 1925).

124. *Id.*

125. *Id.*

trustee was instructed to distribute income among all six of her children.[126] Then, upon reaching the age of thirty, the trustee was instructed to distribute to a child his or her share of the principal.[127] So far, so good.

The rub lay in the trust provision describing the scenario in which one or more of her children should die before receiving an outright distribution of their share of the trust. Victoria Rousseau's will provided that in the event a child survived her, but failed to survive until his or her thirtieth birthday:

> [T]hen upon his or her death I give, devise and bequeath his or her share to and among *his or her issue*, if any, and if none, to and among *his or her brothers and sisters*, if any, to be given and conveyed to *them* by my said trustee upon the same terms and conditions as the said brother or sister would have received his share of said trust funds; the issue of the said deceased brother or sister to take the share to which their parent would be entitled if living.[128]

Accordingly, her will contemplated that as to any child who died prior to attaining age thirty, the decedent child's share would be distributed to her issue.[129] If a predeceasing child left no issue surviving, then the share would instead be distributed to her siblings.[130]

But the challengers put a different spin on the will's language and asserted that the italicized *them* "has a double antecedent, and refers both to 'his or her issue' *and* to 'his or her brothers and sisters.'"[131] Under this reading, distributions to a deceased child's issue would necessarily be postponed until those children (the testator's grandchildren) *themselves* turned thirty. Some of those grandchildren might be born after the testator's death. Those grandchildren might not turn thirty until after the death of all of the testator's children. "[A]nd thereby the absolute power of alienation of the trust property might be suspended for a period longer than the continuance of lives in being at the creation of the trust."[132]

But for the South Dakota Supreme Court's rejection of the challenger's grammatical analysis, the trust would presumably have been declared invalid, despite the reasonable (and prudent) trust planning which would defer distributions to grandchildren until they had reached sufficient maturity.[133]

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126. *Id.*

127. *Id.*

128. *Id*. (emphasis supplied).

129. *Id.* at 223.

130. *Id.*

131. *Id.* at 224.

132. *Id.* at 223. The court relied upon South Dakota's prohibition on the suspension of the absolute power of alienation for more than a life or lives in being. *Id.* (citing sections 294 and 295 of S.D. REV. CODE 1919).

133. The court's construction of the trust was confirmed by language in the will confirming and restating the testator's intent:

> It is my intention that by this will the entire income from the rest and residue of my estate be first used to educate my four youngest children, and that after they have received their education that each of my said children shall receive an equal share of

Instead, however, the court determined that *them* referred to a single antecedent, the siblings of a predeceasing child, and not her issue. With this logic, the trust was saved.[134]

Dean Phipps' gloss on *Rousseau* is worth considering.[135] He has no quarrel with the outcome, labeling it "perfectly justified."[136] However, he concludes that the trust should have been determined valid even if *them* were construed to include the issue of Victoria Rousseau's children.[137] Why? Because even if that were the case, the interests in those issue would be fixed within the lifetime of the children who were all lives-in-being at the testator's death.[138]

Furthermore, Phipps notes, the duration of the trust itself was inoffensive insofar as it lacked an enforceable spendthrift clause.[139] The rights of beneficiaries to alienate their beneficial interests, therefore, was not impaired for any period of time.[140] "The duration of the trust itself does not suspend the absolute power of alienation, since there was no clause in the will providing against alienation by the beneficiaries."[141] A valid spendthrift trust, Phipps

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> the income from my estate until each reaches the age of thirty years, when he or she shall each receive an equal share of the principal thereof.

Id. Thus, the trust terminated no later than the death of the testator's children (the measuring lives-in-being) and did not offend RAA.

134. The challengers did not simply seek to invalidate the contingent future interests of the testator's grandchildren but sought to invalidate the trust entirely. *See id.* (explaining that "the objectors prayed that distribution be made directly and unconditionally to the children of testatrix"). Indeed, the Dewey County circuit court had granted this relief. The South Dakota Supreme Court's decision reversed the circuit court. *Id.* at 224.

135. Phipps, *supra* note 117, at 20-21.

136. *Id.* at 20.

137. *Id.*

138. *Id.* Phipps says:

> The absolute power of alienation would only be suspended so long as there remained some possibility of some child-of-testatrix beneficiary having issue able to take and the parent dying before reaching thirty or before all brothers and sisters and himself died or reached thirty or completed their educations. No such event or events – not death leaving issue, not death without issue, not failing to reach thirty, not failing to complete education – could occur except during the lifetimes of the six children, lives in being at the creation of the interest, plus any actual period or periods of gestation. The interests were all good, also, under the common-law Rule against Perpetuities or any supposed rule or remoteness of vesting to be measured by the lives-in-being period of the [RAA suspension rule] of the South Dakota Code.

Id. at 20-21. This is true enough, except "upon an improbable and unusual construction that the testatrix created the trust to provide for the education of potential issue of her children" whereupon vesting might occur outside the suspension period and this was the very construction, improbable as it was, that had been urged upon the court. *Id.* at 21.

139. *Id.*

140. *Id.*

141. *Id.* South Dakota law did recognize spendthrift trusts at the time of the decision. *See id*. n.52 (citing SDC 59.0315 (1939) (permitting a restraint upon a beneficiary "from disposing of his interest in [a trust for property rents or annuities out of rents or profits] during his life or for a term of years by the instrument creating the trust"). The trust did not include any spendthrift language. And the default rule in South Dakota at that time was that beneficial interests in trusts were freely alienable. SDC 51.0220 (1939) ("Future interests pass by succession, will, and transfer, in the same manner as present interests."); SDC 59.0118 (1939) ("An interest in an existing trust can be transferred only by operation of law or by a written instrument . . . .").

suggests, might well offend RAA if its duration could exceed the applicable perpetuities period.[142]

2. James Valley Bank of Huron v. Richards *(S.D. 1928)*

James Valley Bank is a forcible detainer decision of less than 800 words.[143] Since 1902, Richards leased three rooms in Huron from for $15/month from the James Valley Bank.[144] After the bank was suspended by the superintendent of banks, an eviction proceeding was commenced in its name in 1925.[145] The tenant unsuccessfully resisted eviction by arguing that it enjoyed a leasehold for as long as he wished to occupy the premises.[146] The South Dakota Supreme Court pointed out that even if there was such an oral agreement which was partially performed so as to exempt it from the statute of frauds, leaseholds within a city may not exceed 20 years.[147] "Since [Richard's] occupancy began in 1902, and an agreement that he might occupy as long as he wished could not give a longer right of occupancy than 20 years, his lease would expire in 1922, and thereafter he would be holding over as a tenant at will."[148] The West headnotes characterize the holding as a matter of perpetuities law. And in a way, the statutory limitations on leasehold terms are indeed another form of perpetuities rules.[149]

3. Tscherne v. Crane-Johnson Company *(S.D. 1929)*

In 1921, Math Tscherne conveyed a life estate in 160 Marshall County acres to Louisa Janisch but "[s]ubject to the condition that the said described property shall not be mortgaged or incumbered."[150] Later, Louisa and her husband purchased lumber and other materials on credit to construct buildings on the land, executing a mortgage to secure repayment.[151] Later still, they defaulted.[152] The Crane-Johnson Company commenced foreclosure proceedings.[153]

The primary issue on appeal was whether Louisa had the power to mortgage her life estate.[154] Applying SDCL § 43-3-5 (then codified as section 293 of the Revised Code of 1919), the court asked whether an alienation restraint prohibiting

142. Phipps, *supra* note 117, at 12, 21. "[I]f a testator made devise to trustees to pay the income to a daughter and her children in monthly installments for their lives, without power of anticipation of assignment of future income or power of beneficiaries to terminate the trust" might create a problem. *Id.* at 12.

143. James Valley Bank of Huron v. Richards, 219 N.W. 560 (S.D. 1928).

144. *Id.* at 561.

145. *Id.*

146. *Id.*

147. *Id.* (citing S.D. REV. CODE 1919 § 296).

148. *Id.*

149. *See* SDCL § 43-32-2 (2004) (limiting agricultural leases to twenty years and municipal lot leases to ninety-nine); *see also* S.D. CONST. Art. 8 § 9 (limiting leases of school lands to five years).

150. Tscherne v. Crane-Johnson Co., 227 N.W. 479, 479 (S.D. 1929).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

encumbrances was indeed repugnant to a life estate.[155] It concluded that the attempted restraint was repugnant to a life estate because life estates are, by definition, alienable:

> Inasmuch as the life estate was actually vested in Louisa M.M. Janisch, and not in some trustee for her benefit, and inasmuch as there is no provision that Louisa M.M. Janisch shall lose her interest through an attempted alienation, but, on the contrary, she is to have it for life, we conclude that the provision against alienation is repugnant to the interest created by the deed; and is void.[156]

Therefore, the mortgage of the property was effective, although the lender could only foreclose upon the mortgagor's life estate and not the remainder (which was held by her seven minor children—contingent upon their survival and subject to open if Louisa had additional children) since the remaindermen had not joined the mortgage.[157] Louisa had the power to alienate her own property interests, but not those of other persons.[158]

4. Havsgaard's Estate *(S.D. 1931)*

Guri Havesgaard's will left life estates to five named individuals (collectively, "the Alricks") with the remainder to the Norwegian Lutheran Church of America except that in the event that one or more of the Alricks became a parent, then their life estate would terminate and vest in the parent in fee.[159] In other words, the property was held by the Alricks as life estates with the remainder vested in the Norwegian Lutheran Church, subject to the church's divestment upon birth of issue to one or more of the life estate holders. This was the reading given to the will by the court, as well. It said:

> From a reading of this paragraph it seems apparent that the testatrix intended to give to those named in the first sentence of the paragraph a life estate which might be increased to a fee upon birth of issue. To the church, we believe, she intended to give the remainder in fee, subject to being divested upon the birth of issue to those named.[160]

However, the Alricks claimed that the will gave them fee simple title as tenants in common.[161] Here, the particular language of the will becomes important:

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155. *Id.* at 481. It will be recalled that SDCL § 43-3-5 provides: "Conditions restraining alienation, when repugnant to the interest created, are void."

156. *Id. But see* Nebraska National Bank v. Bayer, 243 N.W. 115, 117 (Neb. 1932) (concluding: "[W]e adhere to the proposition that the [testator] had the right to limit the power of his son to mortgage the life interest in the property so devised to him . . .").

157. *Tscherne*, 227 N.W. at 479, 481. "By the purchase on foreclosure sale, respondent Crane-Johnson Company acquired only the right to conveyance of the estate which she could mortgage; that is, to a life estate." *Id.*

158. *Id.*

159. *In re* Havsgaard's Estate, 238 N.W. 130, 131 (S.D. 1931).

160. *Id.* at 131.

161. *Id.*

> I Give, devise and bequeath all the real estate which I own or die seized of, to the following named persons, and in the following proportions, to-wit: To Martha J. Alrick, the undivided two-sixths thereof; to Louis J. Alrick, Bertha Alrick, Ida Alrick and Thea Alrick Paul, each an undivided one-sixth thereof.
>
> Each of the above named persons shall have, enjoy and control the share or portion of said real estate so given to him so long as he or she shall live, but the fee title to said real estate shall not pass to any of said persons unless they shall have issue, that is, in the event either of the five above named persons shall die without issue, then the devise given by this paragraph to such person shall upon his or her death go and the same is hereby devised absolutely and in fee to the Norwegian Lutheran Church of America to be used in the support and maintenance of Foreign Missions of said Church. It is however, my will that upon the birth of issue to either one of the five above named persons, that thereupon that person shall become the absolute owner of the title in fee to the share or portion given to such person by this will.[162]

The Alricks asserted that the first sentence represented an absolute devise.[163] Indeed, standing by itself, it does. It gave the Alricks undivided sixths in "all the real estate."[164] Full stop. It is the next sentence which limited the devise to life estates.[165] But this next sentence, the Alricks reasoned, "is void because of its repugnance to such absolute devise."[166] Theoretically, if the property passed with the legal effect of the first sentence, absolutely, then the next sentence would be ineffective in attempting to partly retract the gift. The court rejected the Alrick's argument, distinguishing cases which tracked their logic.[167] In those cases, the court noted, a devise contains "such words as 'to be hers *absolutely*,' 'to his wife and heirs *forever*,' and involve provisions where the first taker is given the power of disposition and an attempt is made to bequeath or devise what may be left."[168] Absent this sort of absolute language, the courts construe a gift as limited by the language which follows.

The Alricks were not finished, however. Next, they argued that the church's remainder represented "a perpetual trust for the benefit of 'Foreign Missions' of said Church and is void."[169] This argument invoked RAA since a perpetual trust could be seen as suspending the absolute power of alienation by the trust beneficiary for a period longer than lives-in-being. Here, the Alricks were

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162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 132.
168. *Id.* at 131 (emphasis supplied).
169. *Id.* at 132.

similarly unsuccessful.[170] A gift to a corporation to allow it to carry out one or more of its purposes does not create a trust, the court explained.[171]

But the Alricks had still one more argument left in their quiver. "[T]here is a possibility," they asserted, "under the terms of the will that the absolute power of alienation of the property may be suspended for a longer period than during the lives of the persons in being at the creation of the limitation or condition."[172] How? In the event that one of the male devises died while his wife was pregnant, and she later gave birth to a posthumous child of her deceased husband, then "if this should happen, there would be a period between the death of said Alrick and the birth of such child when there would be no one in being who could alienate the absolute title in fee."[173] The period of gestation for a child conceived before a father's death but born thereafter voided the gift since it would necessarily extend beyond the lives-in-being measuring stick, they reasoned.

The court was unmoved:

> Under the terms of the will, it must be noted, the issue of Louis J. Alrick or any other Alrick inherit nothing. There is no interest over to the child, if born. The birth of a child only affixes the time when the parent will take the fee. Obviously, then our statutes relating to inheritance by children conceived but not born or posthumous children have no application.
>
> The condition of the title to the devised property is as follows: The Alricks have a life estate, the church has the remainder in fee, subject to be divested by birth of issue to any Alrick to the extent of the interest of that particular Alrick, upon the happening of which contingency fee title would vest, not in the issue, but in the parent. The possible issue of the Alricks not having any interest of any kind in the property, there is nothing to prevent the church and all the Alricks from at any time joining in a deed and conveying the absolute fee title in possession to the property. Under the terms of the will, the church and the five Alricks together take the whole and complete title to the property. These are the only beneficiaries named in the will, and were all in being at the time of the creation of the interests which they were to take under the will, and all capable of conveying their interests. It follows that the power of alienation was not suspended for any period, whatsoever, after the death of the testatrix.[174]

The court implicitly acknowledged that there could be a period of time following the death of a life estate holder and the birth of a posthumous child

170. *Id.*
171. *Id.* (citations omitted).
172. *Id.*
173. *Id.*
174. *Id.*

where two alternative contingencies were in play: either the posthumous child would be born and fee simple title would vest in the estate of the deceased father or the posthumous child would not, in which case the remainder would vest in the church. Still, even in that instance, the father's estate and the church and all the other life estate holders could "patch together an absolute fee."[175] Accordingly, absolute alienability would not be unlawfully suspended beyond the father's lifetime.

5. Gerin v. McDonald *(8th Cir. 1933)*

Michael Gerin died with a will which outlined seventeen specific bequests and devised the residue in trust.[176] The trust provided for an annual sum of $1,000 to be paid to a Dr. Gerin for life and the remaining income to George McDonald for life.[177] Thereafter, the trustee was to pay $10,000 "to a Roman Catholic orphanage or old people's home, and the balance to the diocese of Sioux Falls."[178]

The trust appeared on its face to fall within the parameters of South Dakota's RAA since it was measured by a length constrained by two lives in being; its two lifetime individual beneficiaries, Gerin and McDonald.[179] However, the trust was challenged on the basis that it could not commence until after the specific bequests designated in the will were all carried out "and certain other provisions prevent any alienation of property until that is done, so that it might well be that the payment of these bequests would require the trust to exist for a much longer period than the two lives."[180] (This is a sort of replay of the slothful executor problem familiar to RAP scholars.[181])

The Eighth Circuit acknowledged the strength of the argument but looked beyond the term of the trust to assess the powers of alienation held by the trustees:

> [T]he provisions, concerning the powers of the trustees to alienate, are decisive. These powers include the general power of alienation, which is expressed as being 'absolute right, when in their judgment it is considered advisable and to the best interest of my estate, to sell, assign, transfer and convert into cash, any and all of my property, either real or personal'; and, in connection with the specific bequests, there is the authorization that, if there be not sufficient money at the death of the testator to pay them outright, the executors 'are authorized to sell and are hereby given

175. *Id*. (quoting STEWART CHAPLIN, SUSPENSION OF THE POWER OF ALIENATION AND POSTPONEMENT OF VESTING § 39 (2d ed. 1911)).

176. Gerin v. McDonald, 64 F.2d 394, 394 (8th Cir. 1933). The jurisdiction of the federal courts is not stated: "The matter of jurisdiction has not been presented in this court, and we confine ourselves to the ruling on the sufficiency of the petition." *Id*.

177. *Id*. at 395.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See* Simmons, *supra* note 6, at 404, 406 (unpacking the slothful executor problem).

> such power to sell such of my property as they may consider advisable for the purpose of paying said bequests.'[182]

In other words, the court shifted its focus from the period in which Gerin's and McDonald's powers as trust beneficiary to alienate trust property were suspended (i.e., for their joint lifetimes once the trust was funded) to the alienation rights of the trustee over trust property, a power which was unimpaired.[183] Since the trustee could freely alienate trust property (selling it, exchanging it, encumbering it, etc.), alienation was not suspended. Or, as the court put it, "all idea of compulsion is excluded."[184] Thus, there is no violation of the statute against alienation."[185] The Court of Appeals similarly rejected an unlawful accumulation of income argument.[186] The South Dakota Supreme Court has never once elected to cite the *Gerin* decision, though the Minnesota Supreme Court has—on the issue of unlawful accumulations of trust income.[187]

6. Higgins v. Higgins *(S.D. 1945)*

When Marsh Higgins died, he had one child, Maurice Higgins, and several grandchildren.[188] Higgins' will gave his son $50 and created a testamentary trust naming his brother as trustee and his grandchildren as beneficiaries.[189] The trust provided:

> In the event of the death of any of my grandchildren without issue, his or her share shall be divided equally between the remaining grandchildren, and in the event of the birth of other grandchildren not herein named, the said grandchildren shall become heirs of my estate and share equally with those named herein, in so much of the estate as remains at the time of his or her birth.[190]

The grandchildren contended that they were entitled to take the property outright and free of trust on account of their grandfather's attempt to include later-born grandchildren as trust beneficiaries.[191] The class of trust beneficiaries would necessarily remain open until the death of Maurice, the testator's son, and continue thereafter, thereby exceeding the lives-in-being RAA perpetuities period.[192] The court characterized the issue as a "difficult question."[193]

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182. *Gerin*, 64 F.2d at 395.

183. *Id.* at 395-96; *accord* SDCL § 43-5-4 (confirming that there is no offending RAA "if the trustee has power to sell [trust property]").

184. *Gerin*, 64 F.2d at 395.

185. *Id.* The Eighth Circuit similarly rejected an argument that the trust offended the rule against accumulations of income. *Id*. at 396 (citing S.D. REV. CODE 1919 §§ 298-300).

186. *Id.*

187. *In re* Bailey's Trust, 62 N.W. 829, 837 (Minn. 1954).

188. Higgins v. Higgins, 20 N.W.2d 523, 524 (S.D. 1945).

189. *Id.* at 524-25.

190. *Id.* at 524.

191. *Id.*

192. *Id.* at 525.

193. *Id.* at 524. "The difficult question presented is whether the trust as set up by the decree of the county court is a valid trust." *Id.*

Higgins' will, the court noted, was "not artistically drawn."[194] Nothing in it indicated the term of the trust or when it should terminate. Presumably, if it continued for any period of time following the death of the testator's son and all the grandchildren in existence at the testator's death, it would exceed the measuring rod of lives-in-being. Instead, the court interpreted the trust to terminate upon the death of the testator's son.[195] "Such construction," the court explained, "does no violence to the language of the will" and avoided invalidation.[196] So long as all interest vested no later than the death of testator's son, the court held:

> [There was no] suspension of the power of alienation contrary to the provisions of SDC 51.0231 or SDC 51.0232, which prohibit the creation of a condition or future interest which suspends the absolute power of alienation for a longer period than during the continuance of the lives of persons in being at the creation of the condition or future interest.[197]

By assessing whether property "vests in the grandchildren upon the death of Maurice" in order to answer the alienation suspension question, the court suggests that South Dakota law blended remote vesting worries (RAP) with alienation suspension concerns (RAA).[198] RAP turns on vesting while RAA considers alienation suspensions, and the court posited the principal issue as depending on remote vesting.[199] But questions of vesting and alienability often overlap.[200] Once an interest has vested, the identity of the individuals necessary to join in coordinated action to "patch together an absolute fee" is set, and alienability is thereby achieved, as articulated in the *Havsgaard's Estate* decision, above.[201] So, it would seem, in *Higgins*, South Dakota's highest court was once again applying RAA without any whiff of common law RAP, its reference to vesting notwithstanding.

194. *Id.* at 526. The grandchildren also argued—unsuccessfully—that the trust was void for indefiniteness and uncertainty. *Id.* at 525.

195. *Id.* at 524.

196. *Id.* at 525.

197. *Id.*

198. *Id.*

199. *Id.*

200. *See* Note, *Remoteness of Vesting as the Test Under the New York Rule Against Perpetuities*, 22 HARV. L. REV. 520, 520 n.4 (1909) (noting that "a vested estate, liable to be divested, is not 'alienable'"); Newman, *supra* note 26, at 57 (asserting: "The vesting criterion is unnecessary since the presence of any contingent interest generally interferes with the salability of the property").

201. *Supra* Section II.C.4; *In re* Havsgaard's Estate, 238 N.W. 130, 133 (S.D. 1931) (citation omitted). Granted, *Havsgaard's Estate* involved future interests and not a trust, but beneficiaries, acting unanimously, also have something akin to the power to unite so as to terminate the trust and thereby freely alienate the trust's property upon its distribution to them. *See generally*, Comment, *Trust Termination*, 46 YALE L.J. 1005 (1937) (outlining different methods of trust termination).

7. McNair's Estate *(S.D. 1952)*

Ella McNair died in Huron, South Dakota, in 1946.[202] Her holographic will was composed in cursive on three sheets of ruled tablet paper.[203] One paragraph read:

> I give, devise and bequeath unto George E. Longstaff . . . as trustee and in trust the following properties and all the rest and remainder thereof. The trustee is to hold the same, pay taxes and repairs thereon and pay to Cecil Richardson $1000 each year from the net proceeds and to hold the remainder in trust for ten years when it may be paid to said Cecil Richardson, if he is living and if not, it may be turned to Huron College to found a scholarship fund for needy worthy ambitious students. This to be known as the J D McNair scholarship fund.[204]

A description of the property to be held in the trust followed. Decedent McNair was a widow and childless.[205] Her nephew, Cecil Richardson, predeceased her by two weeks.[206]

McNair's Estate is a confounding opinion. It meanders. It rambles. It hopelessly jumbles the issues. It is so confusing it seems at times to confuse itself. Ultimately, the court upheld the gift to Huron College, but it clearly indicated in dicta that only Cecil Richardson's untimely death saved the gift.[207] Had Cecil Richardson survived decedent McNair, the court indicated, the ten-year trust would resulted in a perpetuity.[208] Had he survived and lived out the ten-year term, the trust provided him with fee simple; had he died midway through, Huron College would take at the expiration of the term.[209] Because of the contingency which would either vest or fail to vest a full ten years after the decedent's death, the determination of who would take the fee estate could have been deferred until after the lifetime of Cecil Richardson, the measuring life.[210] (Recall that South Dakota's pre-1983 RAA used a measuring stick of only lives-in-being, not lives-in-being plus 21 years.[211]) For example, if Cecil Richardson had survived Ella McNair by three years, it would have been an additional seven years for the remainder to vest in Huron College, at least according to the reading given to the will by the court:

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202. *In re* McNair's Estate, 38 N.W.2d 449, 453 (S.D. 1949), rehearing den. [hereinafter *McNair I*]. In *McNair I*, the court held that the instrument signed by the decedent qualified as a holographic (termed "an olographic") will. *Id.* at 456. Two justices dissented. *Id*. (Roberts, J., dissenting); *Id*. at 457 (Sickel, J., dissenting). A copy of the entire handwritten instrument is included in the opinion. *Id*. at 450-53.

203. *Id.* at 453.

204. *Id.* at 452.

205. *Id.* at 453.

206. *Id.*

207. *In re* McNair's Estate, 53 N.W.2d 210, 211-12 (S.D. 1952), rehearing den. [hereinafter *McNair II*].

208. *Id.* at 212.

209. *Id.*

210. *Id.*

211. SDCL § 43-5-1 (2004).

> [I]f Cecil Richardson should die before the expiration of the term the future interest of Huron College could not vest in anyone, and the power of alienating the property would be suspended, from the date of death until the expiration of the term and this would violate the rule against perpetuities.[212]

Indeed, even Huron College conceded as much: "[R]espondents concede that the bequest to Huron College cannot be sustained if the devise to Cecil Richardson is to be considered."[213] Both parties and the court expressly refer to the rule against perpetuities, and yet it appears that by this they mean the twin statutory rules against alienation restraints.[214]

In any case, the problem confronting the court was one of remoteness: "A problem of remoteness arises out of the fact that the devise is first to Longstaff, trustee, for a term of ten years and then to Huron College."[215] Remote vesting, even under a one-measuring-life perpetuities term, it should be noted, does not appear to be a problem. If Cecil had survived the testator for one year, at the expiration of Cecil's life, the remainder would vest irrevocable in Huron College. Vesting was guaranteed to occur in either the college or Cecil within Cecil's lifetime. Postponed alienability was the actual culprit, for under the terms of the will, had Cecil survived her for one year, nine years of waiting would occur before Huron College's vested remainder became possessory. Presumably, during that nine-year span, Huron could not have alienated the underlying property because title would have remained in the trustee until the ten-year term had expired. At any rate, however, Cecil had not survived Ella, and so the problem had solved itself:

> Here the trust property is to be retained and managed by a trustee for a term of ten years, and then transferred to Huron College and to be then used in aid of needy, worthy, ambitious students. The devise is unconditional. No intermediate estate was created for anyone between the testatrix' death and the time for the application of the property to charity. There was no gift of any interest in the property or the income thereof prior to that of the college, and consequently there was no first taker having preference over the college. The application of the property to

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212. *McNair II*, at 212 (citing 41 AM. JUR., *Perpetuities and Restraints on Alienation* § 3).

213. *Id.*

214. Dean Phipps notes:

> The opinion quotes extensively from Gray, *The Rule Against Perpetuities* and *Ingraham v. Ingraham*, 169 Ill. 432, 48 N.E. 561, (1897), both of which authorities concern the common-law rule against perpetuities—the rule against remoteness of vesting. Taken with the obvious fact that even if the Huron-College interest had been ruled contingent there would still have been no suspension of the absolute power of alienation, this decision may qualify as inferential authority that a prohibition against remoteness of vesting [i.e., RAP] exists in South Dakota as an ingredient of the lives-in-being standard.

Phipps, *supra* note 117, at 24. Phipps reasoned that "Huron College together with the trustees and heirs or devisees under the will" could, acting in concert, convey marketable title. *Id.* n.60.

215. *McNair II*, at 214.

> charity was not postponed to await the expiration of an antecedent estate. Therefore the property vests in the college immediately, and the privilege of adapting it to charitable use awaits the expiration of the ten-year term.[216]

8. Geppert's Estate *(S.D. 1953)*

Herman Geppert was a millionaire resident of Buffalo County when he died in 1951.[217] His will devised the residue of his estate to the Bishop of the Catholic Diocese of Sioux Falls for the benefit of poorer parishes in the Diocese.[218] Given that the bequest was to the Bishop, the lower court and the appellate court both construed the bequest as creating a trust; the Bishop would take title as trustee.[219]

The testator's heirs at law claimed the trust failed for want of ascertainable beneficiaries.[220] The court rejected the argument and upheld the will.[221] In doing so, the court observed that charitable trusts are exempt from the ascertainable beneficiaries requirement.[222] Moreover, and more importantly for our purposes, the court emphasized that "charitable trusts do not come within the scope of the rule against perpetuities."[223] Once again, the court seemingly embarked on a vesting analysis, creating confusion as to whether it was applying statutory RAA or common law RAP with a single life-in-being perpetuities period.[224]

Twice—once in *McNair's Estate* and once again in *Geppert's Estate*—the South Dakota Supreme Court made explicit reference to a rule against perpetuities, but in neither instance did it clarify whether RAP was subsumed within the statutory RAA rules or still had legal effect by reason of the common law.[225] There is actually a third instance before 1983 in which RAP is mentioned by the court; the reference is contained within a single phrase from *Mallery v. Griffin*[226] wherein RAP and RAA are mentioned in the disjunctive.[227] This is interesting,

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216. *Id.* In dicta, the *McNair* Court was unwilling to grant an exemption on account of the charitable beneficiary of the trust, explaining: "[W]hile it is true that the nature of charitable trusts makes them inalienable, and therefore perpetuities, in the natural sense of that term, it is by no means a necessary incident of charitable trusts that they should be allowed to *begin* in the remote future . . . ." *Id.* at 213-14 (emphasis supplied).

217. In re Geppert's Estate, 59 N.W.2d 727, 727 (S.D. 1953).

218. *Id.* at 728.

219. *Id.* at 729.

220. *Id.*

221. *Id.* at 731-32.

222. *Id*. at 731.

223. *Id.* at 730.

224. *See* Newman, *supra* note 26, at 57 (observing "[t]he simultaneous existence of both [RAP and RAA] rules in many jurisdictions in the United States leads to almost hopeless confusion").

225. The phrase "rule against perpetuities" also occurs in two additional post-1983 decisions—*Laska v. Barr* and *Matter of Voorhees*, but only to note that South Dakota abolished common law RAP in 1983. Laska v. Barr, 2016 SD 13, ¶ 11, 876 N.W.2d 50, 55 (citing SDCL § 43-5-8 (2004)); Matter of Voorhees, 403 N.W.2d 738, 740 (S.D. 1987) (citing SDCL § 43-5-8).

226. 177 N.W. 818 (S.D. 1920).

227. *Id.* at 818.

but it fails to resolve the controversy.[228] The best source of clues is the analysis contained within the rambling discourse which makes up the opinion in *McNair's Estate*. There, the court refers to RAP but unquestionably proceeds to apply RAA.[229] Implicitly, then, the court suggests that common law RAP had no place in South Dakota law even prior to the explicit legislative pronouncement in 1983 that simply confirmed this fact.[230]

9. 1st Federal v. Kelly *(S.D. 1981)*

In *1st Federal Savings and Loan v. Kelly*,[231] the court considered a due-on-sale clause in a mortgage.[232] The mortgagor argued that enforcing a due-on-sale clause in the absence of the mortgagee's impairment or jeopardization of security amounted to an unlawful restraint on alienation.[233] He cited case law from other states which reasoned "that due on sale clauses are, at least, an indirect restraint on alienation and thus violative of public policy."[234] The South Dakota Supreme Court, however, concluded that it was precluded from such a holding by the express statutory authorization of due-on-sale clauses.[235] Therefore, no showing of impairment of security is required in enforcing a due-on-sale clause.[236] Two additional cases with the same lender and essentially the same issue would follow.[237] *Kelly* is the first in a trio of cases concerning First Federal Savings & Loan, its mortgages, and RAA.

10. 1st Federal v. Clark Investment Co. *(S.D. 1982)*

In *1st Federal Savings and Loan v. Clark Investment Company*,[238] the court revisited due-on-sale clauses.[239] The mortgagee in *Clark* argued that the holding of *Kelly* was inapplicable since it did not concern a long-term redemption mortgage.[240] The court disagreed and again upheld the due-on-sale clause.[241] It acknowledged California precedent construing California's identically worded statute, which provided that a condition restraining alienation is void "when

228. *See id.* (referring to the appellant's contention "that the trust deed is void because in violation of the statutes of this state aginst [sic] restraints upon alienation *and* against perpetuities") (emphasis supplied).

229. *McNair II*, at 213-14.

230. *Id.* at 214.

231. 312 N.W.2d 476 (S.D. 1981).

232. *Id.* at 478.

233. *Id.* at 479.

234. *Id.*

235. *Id.* (citing SDCL § 21-49-13(7) (2004)). The court further noted that "SDCL ch. 43-5, which deals with restraints on alienation of property, contains no reference to due on sale clauses." *Id.*

236. *Id.*

237. *Infra* Sections II.C.10-11 (describing two additional cases with the same lender and basically the same issue).

238. 322 N.W.2d 258 (S.D. 1982).

239. *Id.* at 259.

240. *Id.* at 260.

241. *Id.*

repugnant to the interest created."[242] The court preferred the reasoning of the Nebraska Supreme Court and noted that the lender had never assured the mortgagor that anyone could simply assume the mortgage on his property.[243]

11. 1st Federal v. Wick *(S.D. 1982)*

1st Federal Savings and Loan v. Wick[244] rounds out the trio of due-on-sale cases from the early 1980s.[245] Once again, a mortgagor sold property mortgaged to 1st Federal (on a contract for deed) to a third party without the mortgagee's consent.[246] Doing so violated the mortgage's due-on-sale clause and the lender foreclosed after acceleration.[247] Resisting foreclosure, the mortgagor argued unsuccessfully that "the contract for deed did not constitute a sale or transfer as provided for in the due-on-sale clause, but rather created a lien or encumbrance subordinate to First Federal's mortgage which would constitute an exception to the enforcement of the due-on-sale clause."[248] The South Dakota Supreme Court also rejected the mortgagor's unconscionability defense.[249] Justice Morgan penned a concurring opinion and commented on restraints on alienation which he characterized as unlike the standard equitable defenses in a foreclosure action and, in fact, rather "a property principle" which the court had addressed in *Kelly* and "not with the broad topic of equitable defenses."[250] This, then, completes a tour of South Dakota's perpetuities jurisprudence up to 1983 when RAP was officially repealed.

12. RAA Redux: The Post-RAP-Repeal Cases

Before turning to the events surrounding the legislative repeal of RAP, brief mention should be made of the continuing vitality of South Dakota's RAA post-1983. RAP—if ever it did exist in South Dakota—was purged from the legal landscape by the legislature in 1983.[251] At the same time, as detailed below, the legislature tweaked RAA. It extended the RAA term from a life in being to a lifetime plus thirty years and removed its application to trusts, greatly softening its effect.[252] But even in diluted form, RAA's twin prohibitions continued to be

242. *Id.* (citing SDCL § 43-3-5 (2004), which was earlier codified as § 200 of Territory of Dakota Revised Civil Code 1883 which copied verbatim California Code § 711).

243. *Id.* (construing Occidental Savings & Loan Assn. v. Venco Partnership, 293 N.W.2d (Neb. 1980)).

244. 322 N.W.2d 860 (S.D. 1982).

245. *Id.*

246. *Id.* at 861.

247. *Id.*

248. *Id*. at 862 (overruling Sweet v. Purinton, 166 N.W. 161 (S.D. 1918)). *Sweet* had reasoned that "a vendee did not become vested with equitable title until he tendered full and complete performance on an executory contract." *Id.*

249. *Id*. at 862-63.

250. *Id*. at 863 (Morgan, J., concurring) (citing REST. OF PROPERTY § 404(1)(b) (1944)).

251. SDCL § 43-5-1 (2004).

252. *Id.*

enforced and examined in South Dakota Supreme Court jurisprudence even after RAP was clearly dead. The vitality of RAA, however, survives.[253]

a. *McCroden v. Case* (S.D. 1999)

First in the line of post-RAP-repeal RAA decisions is *McCroden v. Case*.[254] It involved shareholder litigation concerning Hickock's, Inc., a Deadwood gaming establishment.[255] Two of Hickock's shareholders, Brett and Angel Hamm, had purportedly sold 400 shares to Gary Case.[256] Notice was given to Hickock's along with its other shareholders in conformity with their respective thirty- and forty-day preemptive rights.[257] The periods passed, and the purchase was finalized.[258]

Disappointed shareholders sued, but the South Dakota Supreme Court upheld the trial court's ruling that the sale was effective.[259] In doing so, it commented: "To further extend the time requirements of Hickok's Articles of Incorporation without the Hamms' consent is an unreasonable, repugnant and void restraint on the alienation of property."[260] The court thereby indicated that RAA could also be applied in the corporate law context.[261]

b. *Laska v. Barr* (S.D. 2016)

In *Laska v. Barr*,[262] the circuit court was confronted with an instrument regarding purchase rights to certain farm ground in Charles Mix County.[263] The instrument read partly like an option and partly like a right of first refusal ("ROFR") with a fixed per acre price of $10,500.[264] Circuit Judge Patrick Smith read the instrument as granting a right of first refusal which had terminated upon the death of the optionors.[265] The South Dakota Supreme Court reversed upon finding that the instrument was ambiguous, meaning that the circuit court could have (and should have) considered parol evidence.[266] However, the court did find that the instrument was unambiguous in one respect—it was "meant to survive the

253. For contemporary examples of the vitality of RAA, see *supra* Sections II.C.12 and II.D (discussing three RAA cases decided between 1999 and 2022).

254. 1999 SD 146, 602 N.W.2d 736.

255. *Id.* ¶ 2, 602 N.W.2d at 737. Four previous decisions dealt with the same controversies. Case v. Murdock, 488 N.W.2d 885 (S.D. 1992); Case v. Murdock, 528 N.W.2d 386 (S.D. 1995); Case v. Murdock, 1998 SD 117, 487 N.W.2d 205; Case v. Murdock, 1999 SD 22, 589 N.W.2d 917.

256. *McCroden*, 1999 SD 146, ¶ 2, 602 N.W.2d at 738.

257. *Id.* The corporation held a thirty-day preemptive right; shareholders a forty-day preemptive right.

258. *Id.* ¶ 2, 602 N.W.2d at 742.

259. *Id.* ¶ 2, 602 N.W.2d at 737.

260. *Id.* ¶ 19, 602 N.W.2d at 742 (citing SDCL § 43-3-5 (2004)).

261. *Id.*

262. 2016 SD 13, 876 N.W.2d 50.

263. *Id.* ¶ 1, 876 N.W.2d at 50, 51.

264. *Id.* ¶¶ 3-4, 876 N.W.2d at 51-52.

265. *Id.* ¶ 3, 876 N.W.2d at 52.

266. *Id.* ¶¶ 7, 9, 876 N.W.2d at 54.

parties' death."[267] The court next surveyed the potential voiding of an indefinite option or preemptive right under RAA:

> [I]f the parties clearly make the right of preemption descendible, ''the right would have to be weighed against the common-law prohibition on restraints on alienation and the rule against perpetuities[.]'' South Dakota has abolished the common law rule against perpetuities. *See* SDCL 43–5–8. However, SDCL 43–3–5 provides: ''Conditions restraining alienation, when repugnant to the interest created, are void.'' Therefore, it must be determined whether the agreement constitutes an unreasonable restraint against alienation. *See Edgar v. Hunt,* 218 Mont. 30, 706 P.2d 120, 122 (1985) (citations omitted) (construing statute identical to SDCL 43–3–5 ''as a statement of the majority common law rule that restraints on alienation, when reasonable, are valid. The question is whether the particular restraint is reasonable under the circumstances.''). SDCL 43–5–1 also provides:
>
> > The absolute power of alienation may not be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being plus a period of thirty years at the creation of the limitation or condition, except in the single case mentioned in § 43–9–5 relating to contingent fee remainder on a prior fee remainder.
>
> Neither the parties nor the circuit court considered whether this agreement constitutes an unreasonable restraint against alienation or whether it may constitute a suspension of the absolute power of alienation. *See* SDCL 43–3–5, SDCL 43–5–1 to –2. Nor have they briefed the issue and presented it to us. Therefore, on remand, the parties and the court must also address whether the parties may bind the respective heirs of the contracting parties to this contract.[268]

The court thereby once again saluted the continuing vivacity of RAA in demonstrating that it was willing to raise the issue *sua sponte*.

c. *Powers v. Powers* (S.D. 2022)

Finally, the most recently decided RAA case in the state is *Powers v. Powers*.[269] The case concerned a father and son, Jerome and Dennis, who purchased just under a section of ground in Bon Homme and Charles Mix Counties

267. *Id.* ¶ 11, 876 N.W.2d at 54.

268. *Id.* ¶¶ 11-12, 876 N.W.2d at 54-55 (Old Mission Peninsula Sch. Dist., 107 N.W.2d 758, 760 (Mich. 1961).

269. 2022 SD 25, 974 N.W.2d 706.

from Jerome's parents.[270] Two years later, Jerome was facing a drug-related prison sentence.[271] He sold his interest to his son, retaining repurchase rights by means of a ROFR with a fixed, below-market $430 per acre exercise price.[272]

A few years later, Prevailing Winds, LLC began to negotiate with Dennis for a wind energy lease and easement for a wind farm.[273] Dennis agreed, but Jerome opposed the project.[274] When Prevailing Winds sought Jerome's consent on account of the ROFR, Jerome sued, alleging that by entering into the wind energy lease and easement, Dennis had violated the ROFR.[275]

Among the defenses raised by Dennis and Prevailing Winds was the assertion that the ROFR amounted to an unreasonable restraint on alienation.[276] Circuit Judge David Knoff granted the defendants summary judgment on alternative grounds: that the ROFR was only limited to sales of fee interest transfers of the property and that it was void as an unreasonable restraint on alienation.[277] The South Dakota Supreme Court affirmed as a matter of contract interpretation, agreeing that the ROFR applied only to sales of the property, not leases or easements, and so did not analyze the RAA issue.[278]

Judge Knoff's opinion, however, merits consideration here as the most contemporary statement on the law in South Dakota. (A handful of other cases

270. *Id.* ¶ 2, 974 N.W.2d at 706, 708. The purchase was for 630 acres. *Id.* A section is 640 acres.
271. *Id.*
272. *Id.* ¶¶ 2-3, 974 N.W.2d at 708.
273. *Id.* ¶ 6, 974 N.W.2d at 709.
274. *Id.*
275. *Id.*
276. *Id.* ¶ 8, 974 N.W.2d at 710.
277. *Id.* ¶¶ 12-13, 974 N.W.2d at 711.
278. *Id.* ¶ 24, 974 N.W.2d at 714.

have mentioned but not applied or construed RAA.[279]) Judge Knoff's thoughtful analysis is reprinted in an appendix hereto.[280]

D. THE REPEAL—IF YOU CAN CALL IT THAT

Having now completed a survey of the RAP landscape, such as it was in South Dakota, a description of RAP's 1983 "repeal" is appropriate. The story of South Dakota's repeal is at once easy and difficult to tell. The legislative path is straightforward. But as to the details and background, forty years is a long time during which participants have passed on and memories have dimmed. Some accounts I gathered informally did not jibe with others. I doubt that any attorneys I spoke with misrepresented the facts as they remembered them, however. From the written record and those participants that I visited with, the following account can be reconstructed with reasonable certainty.

Recall that originally, RAP was not codified in South Dakota.[281] Very likely, it had been displaced in toto from the common law subsoil by the state's twin statutory RAA rules which were codified pre-statehood. After all, RAA accomplished more or less the same thing as RAP by a more direct route.[282] In at

279. *See* Prudential Kahler Realtors v. Schmitendorf, 2003 SD 148, ¶ 12, 673 N.W.2d 663, 666 (declining to address whether a listing agreement's 360-day provision was invalid as an impermissible restraint on alienation); Brown v. Powell, 2002 SD 75, ¶ 17, 648 N.W.2d 329, 333 (observing that "though this Court will at times enforce covenants in leases against assignment, such restraints against alienation are looked upon with disfavor") (citing Smith v. Hegg, 214 N.W.2d 789, 791 (S.D. 1974)); *In re* Estate of Neiswender, 2000 SD 112, ¶ 16, 616 N.W.2d 83, 87 (affirming the trial court's finding of insufficient proof to establish a family settlement agreement arising out of probate by which the parties jointly agreed that realty could only be transferred to blood relatives directly descended from its original owners and also noting that "the putative agreement goes far beyond simply distributing or disposing of estate property; it attempts to create an interminable restriction, perpetually barring transfer to anyone other than those in the . . . bloodline"); Taylor Oil Co., Inc. v. Contemporary Indus. Corp., 305 N.W.2d 854, 855 (S.D. 1981) (finding a non-assignment clause in a lease had been waived and noting that "covenants in leases against assignment are valid and enforceable, but that such restraints against alienation are looked upon with disfavor.") (citations omitted); Schroeder v. Herbert C. Coe Trust, 437 N.W.2d 178, 182 (S.D. 1989) (reasoning that a non-charitable trust without ascertainable beneficiaries "is so nebulous . . ." that it "violates statutory restraints on the alienation of property") (citing SDCL §§ 43-5-1 to -9); *Smith*, 214 N.W.2d at 791 (finding the lessor had waived a covenant against assignment and emphasizing that non-assignment lease provisions constitute "restraints against alienation"); Baron Bros., Inc. v. Nat'l Bank of S.D., Sioux Falls, 155 N.W.2d 300, 303 (S.D. 1968) (noting that "covenants restricting or prohibiting the right of a lessee to assign or sublet the premises without the consent of the landlord are restraints"); Lien v. Northwestern Engineering Co., 39 N.W.2d 483, 490 (S.D. 1949) (declining to invalidate an exclusive contract to remove lime rock and a covenant not to lease other acreage to third parties for similar purposes for three years); Kirby v. Western Surety Co., 19 N.W.2d 12, 13-14 (S.D. 1945) (upholding, from a collateral attack, a ruling on the invalidity of a bequest of Western Surety capital stock in the Will of Joe Kirby (d. 1926) in trust to his widow for ten years, remainder to his children which the county court had reordered as a life estate in trust, remainder in the children); Mallery v. Grivvin, 117 N.W. 818, 818 (S.D. 1920) (declining to reach a RAA argument in connection with a quiet title suit where the argument had not been raised at the trial level); Minneapolis Threshing Mach. Co. v. Roberts Co., 149 N.W. 163, 165-66 (S.D. 1914) (Whiting, J., dissenting) (reasoning that the construction of a personal property tax lien as enjoying superiority over all other liens amounted to an unlawful restraint on alienation of personality).

280. *See infra* Section IV.B (reprinting Judge Knoff's learned opinion).

281. *See supra* Part II (describing the history of RAP).

282. *See, e.g.*, Hohm v. City of Rapid City, 2008 SD 65, ¶ 14, 753 N.W.2d 895, 903 (citing SDCL § 1-1-24 (originally REV. CODE TERR. DAK, CIVIL CODE §§ 5 & 6 (1877)) ("In this state the rules of the common law . . . are in force, except where they conflict with the will of the sovereign power" such as statutes); *id*. ¶ 15, 753 N.W.2d at 903 (quoting Burnett v. Myers, 173 N.W. 730, 731 (S.D. 1919) (internal

least three other states, the replacement of RAP with RAA was expressly accomplished by the early 1960s.[283] In South Dakota, it seems that RAP may very well have been jettisoned pre-1983—and it was unambiguously purged thereafter.

As explained above, in their original form, the RAA rules contained both a prohibition against unreasonable restraints as well as a ban on absolute restraints for longer than lives-in-being at the creation of the interest.[284] As confirmed in numerous cases, RAA clearly applied to trusts and therefore interfered with any ambitions to create a trust lasting longer than the lives of the beneficiaries alive at the instant the trust become irrevocable. A simple trust, for example, for a testator's children for life, remainder to their children upon attaining the age of majority, might not fly. RAA, therefore, before 1983, presented a serious problem to routine and prudent trust planning.

The impetus for the introduction of House Bill 1134 lay partly in a longstanding dissatisfaction amongst South Dakota practitioners with the one-measuring-life restriction imposed by SDCL § 43-5-1. If RAA was more or less equivalent to RAP, and common law RAP allowed a perpetuities period of lives-in-being *plus* twenty-one years, the single measuring life yardstick seems too restrictive. That a single life-in-being measuring stick can be unreasonably restrictive is illustrated by cases like *McNair's Estate*.[285] Moreover, whether RAP exists alongside RAA created additional ambiguities and drafting challenges for the practitioner. Dean Phipps had suggested in 1956 that clarifications to RAA ought to be considered and nearly thirty years later, they were long overdue.[286] By extending the RAA period from lives-in-being to lives-in-being plus thirty years, the rule could be tamed without being eliminated.[287] The deletion of RAP seems to have come almost as an afterthought as drafters realized that a common law RAP might still lurk in South Dakota's common law, although a meticulous examination of that caselaw seems to confirm that it did not.[288]

Parallel to practitioners' dissatisfaction with the too-restrictive RAA suspension rule's measuring stick, a second event coalesced. In the early 1980s, Emory T. Clark (1905-84) was poised to agree to a buy-out of his closely-held oil company. A private equity firm, Apex, was the purchaser.[289] Emory Clark had

citation omitted) ("When a statute revises the whole subject of a former one and is clearly designed as a substitute, the former law is repealed, although no express terms to that effect are used."); *id*. ¶ 15, 753 N.W.2d at 904 (quoting *Burnett*, 173 N.W. at 731 (explaining that when a statute "prescribes the method of procedure to secure the remedy [and it] is clear from the degree of minuteness with which the Legislature went into the whole subject, that the remedy provided was intended to be exclusive").

283. *See* Newman, *supra* note 26, at 65. Those states are Idaho, Wisconsin, and Minnesota. *Id.* Newman cites Iowa and Arizona as states in which it is unclear whether RAA's enactment impliedly repealed RAP. *Id.*

284. *See supra* Section II.B (explaining RAA).

285. *Supra* Section II.C.7.

286. *Supra* Section II.C (discussing Dean Oval Phipps's article on perpetuities in South Dakota).

287. "The period in gross was made 30 years in Wisconsin in 1931." William F. Walsh, *Indestructible Trusts and Perpetuities in New York*, 43 YALE L.J. 1211, 1219 n.26 (1934).

288. *See supra* Section II.C (thoroughly examining eleven pre-1983 RAP repeal cases).

289. Telephone Interview with Robert Leech, Certified Financial Analyst (July 24, 2019).

built Clark Oil and Refining Corporation from its humble beginning as a single filling station in West Allis Wisconsin into a chain of over 1,800 gas stations marketing his own premium fuel, "Clark Super Gas."[290] Back in 1965, Emory Clark had created two dozen separate trusts, one for each of his grandchildren, with each trust funded with low-basis shares of the Clark corporation.[291] Each trust provided that its term could continue for multiple generations so long as not prohibited by any applicable perpetuities law.[292]

Emory Clark's attorney, Roger C. Minahan (1910-1994), practiced with the Milwaukee, Wisconsin firm of Mihahan and Peterson.[293] After eyeballing the state and federal income tax ramifications of the pending sale, he began assessing various states other than Wisconsin in which the trusts might be relocated to avoid the application of state capital gains tax to the transaction.[294] He travelled to South Dakota and met with Robert Leech, then a young trust officer who had been tasked with growing the trust department of National Bank of South Dakota in order to discuss "some potential trust matters."[295] Ultimately, the trusts were relocated to South Dakota. Then, on the date of the sale, Minihan (who had a pilot's license) flew his client to South Dakota while executives from Apex arrived in a private jet.[296] The deal closed in the trust conference room of the bank in 1981.[297] The trusts exchanged their shares for some $535 million, of which Clark owned 43.5%.[298] Approximately $25 million was paid to a charitable trust (which remained in Wisconsin) and approximately $150 million was paid to National Bank of South Dakota as trustee, nearly doubling the assets managed by the bank's trust department, which had been the largest in the state even prior to the Clark trusts.[299] The lack of a South Dakota capital gains tax amounted to an immediate tax savings of $15-20 million.[300] Wisconsin's Revenue Department launched an investigation once it realized the scope of the sale but relented once it learned about the location of the closing as well as the situs of the non-charitable Clark trusts.[301]

290. *Emory T. Clark*, UNIV. OF WIS. MILWAUKEE**,** https://perma.cc/SWH4-RRBY **(**last visited May 22, 2023).

291. Interview with Leech, *supra* note 289.

292. *Id.*

293. *Roger Copp Minahan*, PRABOOK, https://perma.cc/FME7-MV9W (last visited Aug. 12, 2023); *1991 Press Photo Roger C. Minahan, Business* Lawyer, HISTORIC IMAGES, https://perma.cc/4S6S-4PN7 (last visited Aug. 12, 2023).

294. Interview with Leech, *supra* note 289.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *See also* Dick Lammers, *$234-Billion Trust Industry Enjoys Generous Pathway to SD Lawmaking*, WATERTOWN PUB. OP. (Mar. 6, 2018) (noting that by 2018, "more than 30 other states have since lifted their rules against perpetuities, [but] South Dakota's lack of state or local income tax and its generous privacy laws help keep it atop biennial state rankings published by industry journal Trusts & Estates").

301. Interview with Leech, *supra* note 289.

The hitch was South Dakota's overly restrictive life-in-being RAA suspension rule. It threatened to unnecessarily truncate the term of the trusts. Wisconsin had repealed RAP and so attorney Minahan was familiar with that concept.[302] South Dakota could likewise confirm the repeal of RAP and the reworking of RAA if the legislature approved the idea. Mustering the political will to achieve some measure of perpetuities reform in South Dakota had already been primed with practitioner dissatisfaction with its RAA lives-in-being statute along with some forward-thinking ambitions to encourage the growth of a corporate fiduciary services industry in the state.[303]

Robert Leech reached out to attorney Deming Smith (1920-1996) and retained him to pursue legislative relief on behalf of First Bank.[304] Deming Smith was one of the four original members of the Davenport, Evans, Hurwitz & Smith law firm.[305] Minahan stayed on the sidelines since everyone agreed that having a Wisconsin lawyer lobby the state for a change in South Dakota law to benefit an out-of-state client would be bad optics.[306] Smith scheduled an appointment with Governor William Janklow, who was known for taunting other states with South Dakota's superior business climate.[307]

The meeting with Janklow and an aide lasted no longer than ten minutes.[308] The Clark trusts themselves were not brought up.[309] Instead, Smith and Leech highlighted the benefits which would accrue to the trust industry.[310] Governor Janklow had only two questions: whether the bill would bring business to South Dakota and whether it would cost South Dakota taxpayers anything.[311] When the answer to the first question was in the affirmative and the answer to the second in the negative, the Governor put his support behind it.[312] "In the end," Leech

302. *See* WIS. STAT. ANN. § 700.16(5) ("The common-law rule against perpetuities is not in force in this state."); WIS. STAT. ANN. § 700.16(1)(a) ("A future interest or trust is void if it suspends the power of alienation for longer than . . . a life or lives in being plus a period of 30 years."); *see also supra* note 26, 283 and accompanying text (identifying Idaho and Minnesota as having followed a similar path).

303. Telephone Interview with Charles Riter, Retired Partner, Bangs, McCullen, Butler, Foye & Simmons (Aug. 26, 2019); Interview with Sarah Larson, Partner, Davenport, Evans, Hurwitz & Smith (Sioux Falls, SD) (July 2, 2019).

304. *Deming Smith*, GENI, https://perma.cc/BT85-N2XF (last visited Aug. 12, 2023).

305. *About Us*, DAVENPORT EVANS, https://perma.cc/UC7N-Y7EV (last visited Aug. 12, 2023).

306. Interview with Leech, *supra* note 289.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. South Dakota thus could position itself for economic development in the dynastic trust marketplace with little more than the cost of the ink of the legislation. Individuals in states other than South Dakota can utilize South Dakota fiduciary services to implement perpetual trusts. As Professor Lawrence Friedman has observed:

> Rich people in South Carolina can, if they want, set up a trust administered in Fairbanks, Alaska: no need to go there, especially in winter when that town is ghastly cold; the work can all be done long-distance. Alaska can abolish the rule against perpetuities and get a slice of the market in dynasty trusts for itself, its trust companies, and its law firms. States that got rid of the rule against perpetuities, or modified it drastically, were states that saw this as a business opportunity. Mostly these were small states, but then more and more states piled on. Obviously, managing

recalls, "Janklow pushed the bill, and nobody objected—it just kind of happened."[313] Leech is today the only surviving participant of the meeting with Governor Janklow.[314]

House Bill 1134—captioned "Regulation of Future Interests in Property Amended: An Act" and titled "An act to clarify the length of time that powers of alienation may be suspended"—contained eight sections, five which added new sections of code and three which amended existing statutory provisions in chapter 43-5.[315] The bill left chapter 43-3 (with its parallel prohibition on restraints repugnant to the interest created) untouched. The thrust of the bill was modeled after Wisconsin statutes.[316]

The three redlined sections amending existing sections of the law read:

> Section 6 (amending SDCL § 43-5-1).
>
> The absolute power of alienation may not be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being plus a period of thirty years at the creation of the limitation or condition, except

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dynasty trusts would never be a big economic factor in California or Texas or New York, but it might be worthwhile for Alaska or Delaware; perhaps even for Colorado.

Friedman, *supra* note 10, at 757. Perhaps, one might add: "or South Dakota." The competition for corporate fiduciary services is well mapped in Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, YALE L.J. 356 (2005). The more states that enter the marketplace, the stiffer the competition and many still see competition in a free market economy as a good thing. Professor Friedman observes: "At some point, abolition [of RAP] would not give states a competitive advantage . . . ." Friedman, *supra* note 10, at 757. True enough. But states compete on more than just a RAP-repeal playing field since there are other factors involved in selecting the "perfect" trust jurisdiction (e.g., other comprehensive and flexible trust laws, privacy provisions, an unbiased and thoughtful judicial branch, a robust regulatory framework, ongoing attention to the industry, the lack of a state income tax, and a wide array of competent corporate fiduciaries to choose from in a given jurisdiction). *See* Steven J. Oshins, *Poll Results: Which is the Best Trust Jurisdiction?* ULTIMATE ESTATE PLANNER (May 1, 2023) (opining: "South Dakota likely has a very slight edge in Dynasty Trusts, Nevada has a very slight edge in Domestic Asset Protection Trusts, both states are equal in Trust Decanting, and neither state has a state fiduciary income tax"). After South Dakota and Nevada, Oshins ranks "Tennessee and Delaware, and Ohio and Alaska aren't too far behind these two." *Id.*

313. E-mail from Robert Leech, Certified Financial Analyst, to Tom Simmons, Prof. of L., Univ. of S.D. Knudson Sch. of L. (May 23, 2023) (on file with author) [hereinafter July 23, 2019, E-mail from Leech]. One of the direct consequences of the legislation and the resultant growth in trust business for National Bank of South Dakota (now US Bank) as corporate trustee for the Clark Trusts, was the bank's hiring—as his first job as a trust officer—attorney Dennis Martin Daugaard, later Governor of the State of South Dakota from 2011 to 2019. *Id.*; Dennis M. Daugaard, S.D. LEGISLATURE, https://perma.cc/7RLM-Y3WF. Robert Leach took his B.A. from Ursinus College and his M.B.A. from the College of William and Mary. He is a certified financial analyst and worked in the wealth management industry from 1981 until 2009.

314. July 23, 2019, E-mail from Leech, *supra* note 313.

315. 1983 S.D. Sess. Laws ch. 304.

316. Interview with Leech, *supra* note 289. There is a certain irony in Wisconsin statutes inspiring a plan by which that state would be deprived of a sizable sum of state capital gains tax revenue. The Clark deal "saved over $20 million of Wisconsin income taxes." July 23, 2019, E-mail from Leech, *supra* note 313.

> in the single case mentioned in § 43-9-5 relating to contingent fee remainder on a prior fee remainder.[317]
>
> Section 7 (amending SDCL § 43-5-2).
>
> Every future interest is void ~~in its creation,~~ which~~, by any possibility,~~ suspend~~s~~ the absolute power of alienation for a longer period than is prescribed in this code. A power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.
>
> Section 8 (amending SDCL § 43-5-4).
>
> The suspension of all power to alienate the subject of a trust~~, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust,~~ is a suspension of the power of alienation. However, there is no suspension of the power of alienation by a trust or by equitable interests under a trust if the trustee has power to sell, either expressed or implied, or if there is an unlimited power to terminate in one or more persons in being.[318]

The five sections of new code read:

> Section 1 (eventually codified as SDCL § 43-5-5).
>
> If a future interest or trust is created by exercise of a power of appointment, the permissible period is computed from the time the power is exercised whether the power is general, limited or testamentary.
>
> Section 2 (codified as SDCL § 43-5-6).
>
> If, at the expiration of the period in which any instrument or any provision thereof created by a trust or other legal relationship is not to be rendered invalid by the provisions of this chapter measured by actual, rather than possible, events, any of the assets which have not by the terms of the instrument become distributable or vested shall then be distributed as the court having jurisdiction directs, giving effect to the general intent of the creator of the trust or other instrument.

317. The lives-in-being plus thirty years suspension period appears to have been lifted from Wisconsin's statute. *See* WIS. STAT. § 700.16(1)(a) (providing: "The permissible period is a life or lives in being plus a period of 30 years").

318. 1983 S.D. Sess. Laws ch. 304 §§ 6-8, 524.

Section 3 (codified as SDCL § 43-5-7).

> This chapter does not limit any of the following:
>
> (1) Transfers, outright or in trust, for charitable purposes;
>
> (2) Transfer [sic] to charitable corporations;
>
> (3) Transfers to any cemetery corporation, society, or association; or
>
> (4) Employees' trusts created as part of a pension, retirement, insurance, savings, stock bonus, profit sharing, or similar plan established by an employer for the benefit of employees eligible to participate.[319]

Section 4. (codified at SDCL § 43-5-8).

> The common-law rule against perpetuities is not in force in this state.[320]

Lastly, the bill included a one-year statute of limitations for bringing actions to invalidate transfers under the pre-1984 law running from the effective date of the legislation on July 1, 1983:

Section 5 (codified at SDCL § 43-5-9).

> If no action or proceeding has been instituted by July 1, 1984, to declare void any instrument which existed prior to the effective date of this Act under the provisions of this chapter as it existed prior to the effective date of this Act, then all such instruments shall be interpreted under chapter 43-5 as amended by this Act.[321]

Thus, every section in SDCL ch. 43-5 would either be newly minted or refreshed but for one section, SDCL § 43-5-3.[322] The bill represented a total overhaul of South Dakota perpetuities law. Typically, the South Dakota Bar Association, and its Real Property, Probate and Trust Section, in particular, would be closely involved in any such proposal.

Thomas Foye was President of the South Dakota State Bar Association in 1982-83. Although some practitioners seem to recall the State Bar's involvement in drafting the bill, this appears to have not actually been the case; the State Bar's attention appears to have only been directed to the legislation after its enactment as it gradually began to sink in that RAA had been modified and that RAP was

319. SDCL § 43-5-7 (1983); 1955 S.D. Sess. Laws ch. 428 § 1, 504-05.

320. 1983 S.D. Sess. Laws ch. 304 § 1-4, 523-24.

321. 1983 S.D. Sess. Laws ch. 304 § 5, 524.

322. SDCL § 43-5-3 (providing "[t]he absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee").

undoubtedly no more.[323] Indeed, the State Bar Newsletter contained no reference whatsoever to the repeal of RAP until August,[324] the month following its July 1, 1983, effective date.[325]

The bill dropped on January 25.[326] Back in 1983, Rapid City attorney Al Scovel served in the South Dakota Legislature and agreed to carry the bill at the behest of the majority leader.[327] (Thomas Barnett did not testify in support of it; though he was a lobbyist in Pierre at the time, he was not yet then representing the State Bar.[328]) The bill was introduced in the House and promptly referred to the House Judiciary Committee where it passed and returned to the House floor. Oddly, on the initial vote count, it failed sixty-three votes to two.[329] Then, almost immediately afterwards, upon a motion to reconsider, it passed seventy-five votes to two. It then proceeded over to the Senate where it passed out of the Senate Judiciary Committee and the full Senate unanimously. There was little debate—and, quite likely—little in the way of thorough comprehension about how RAP actually worked.[330] The only persons who spoke (aside from Al Scovel, who presented the bill) were both proponents—Tom Shelby (vice president of First Bank of South Dakota) and Dick Bogue, counsel for the bank.[331] The bill sailed through. Governor Janklow signed it on March 22, 1983. It went into effect July 1, 1983.[332]

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323. Thomas Foye (1930-2011) penned a "President's Page" in the State Bar monthly newsletter in the spring of 1983 which related three important pieces of legislation which the Real Property, Probate and Trust Law Section had drafted: a bill clarifying the inheritance tax treatment of QTIP trusts, a bill addressing creditor claims in probate, and a lengthy validating statute applicable to probate and guardianship proceedings. Thomas Foye, *President's Page*, STATE BAR OF S. D. NEWSL., May, 1983, at 2. He also highlighted bills the Bar supported, notably the judicial salary bill which "survived a gauntlet of death wishes." *Id.* at 3. And he acknowledged bills that were unsuccessfully opposed, such as a "guilty but mentally ill bill" to which attorneys Rick Johnson (1942-2004) and John Harmelink (1937-2019) testified against. *Id.* at 4. But Foye did not even allude to the repeal of RAP. *See also* 1983 S.D. Sess. Laws ch. 79 (inheritance tax bill); 1983 S.D. Sess. Laws ch. 223 (probate creditor claims bill); 1983 S.D. Sess. Laws ch. 222 (probate/guardianship curative rules bill).

324. *See infra* text accompanying notes 334-336 (quoting the State Bar Newsletter's announcement of RAP's repeal and RAA's revisions).

325. STATE BAR OF S. D. NEWSL., Aug. 1983, at 7.

326. 1983 S.D. Sess. Laws ch. 304.

327. Telephone Interview with Al Scovel (July 8, 2019). Al Scovel served in the legislature from 1983 to 1986. Allen Leedom Scovel, S.D. LEGISLATURE, https://perma.cc/SYC6-KDZT (last accessed Feb. 5, 2024).

328. E-mail from Thomas Barnett to Tom Simmons, Prof. of L., Univ. of S. D. Knudson Sch. of L. (July 8, 2019) (on file with author).

329. According to Canton attorney Dick Bogue, on the first vote, the legislators were "having fun with him [i.e., Al Scovel]." Telephone Interview with Richard Bogue (July 26, 2019).

330. Professor Markey relates a narrative wherein the Uniform Statutory Rule Against Perpetuities was being considered by the South Carolina General Assembly:

> Alan Melin "asked the Senator who sponsored the bill how he explained to his colleagues what it did. 'The Senator, a very able and intelligent lawyer, told me he got on the floor, looked around the chamber, and said, "Ladies and gentlemen, this is a good thing." Whereupon he sat down. The bill passed soon thereafter.'"

Maureen E. Markey, *Ariadne's Thread: Leading Students Into and Out of the Labyrinth of the Rule Against Perpetuities*, 54 CLEV. ST. L. REV. 337, 339 n.3 (2006) (citation omitted).

331. E-Mail from David Ortbahn, S. D. Legisl. Rsch. Council, to Tom Simmons, Prof. of L., Univ. of S.D. Knudson Sch. of L. (July 26, 2019) (on file with author).

332. 1983 S.D. Sess. Laws ch. 304.

And after the bill went into effect, basically nothing happened. Or at least not immediately or all at once. The Clark trusts continued to be administered by two South Dakota corporate fiduciaries: First Bank of South Dakota (later US Bank) along with Norwest (later Wells Fargo).[333] Things went on pretty much as before except that things were a little easier for South Dakota practitioners to navigate when it came to RAP and RAA. (One additional minor change to RAA was enacted in the years to come, but nothing with nearly the same breadth and importance as the 1983 legislation had wrought.[334]) The State Bar Newsletter brought the legislative change to the attention of practitioners a month after the legislation's effective date.[335] It was captioned a "Reminder" but for most lawyers it must have served more as an announcement:

> REMINDER TO ATTORNEYS OF
> CHANGES IN THE RULES AGAINST ALIENATION
> OF PROPERTY
>
> The 1983 Legislature revised the restraints on alienation of property. As of July 1st, the power of alienation may be suspended for the term of lives in being, plus thirty years. Also, the common-law rule against perpetuities is no longer in effect in this state. Cases to void instruments which conflict with SDCL 43-5, "Restraints on Alienation of Property," as that chapter existed before the 1983 legislative changes must be brought before July 1, 1984. See chapter 43-5 in the Interim Supplement for additional details.
>
> South Dakota Code Commission.[336]

Gradually, though, the significance of RAP's repeal began to take shape as other developments made South Dakota even more attractive for trusts.[337] Three developments in particular stood out.

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333. Interview with Leech, *supra* note 289.

334. *See* S. B. 77, 64th Sess. (S.D. 1989); 1989 S.D. Sess. Laws ch. 378 (removing RAP's application to contingent remainders) (repealing SDCL § 43-9-8); *see also* H. B. 1236, 68th Sess. (SD 1993) (codified at SDCL § 43-5-5 (2004)).

335. Foye*, supra* note 323, at 7.

336. *Id.*

337. Leech explains that his trust department's "business continued to grow exponentially and started to get the attention of other trust companies." July 23, 2019, E-Mail from Leech, *supra* note 313. Leech continues:

> One of the largest and most satisfying was the acquisition of the Levitt trust. In 1983 the Levitt family agreed to sell Dial Financial to Norwest. Dick Levitt, CEO, wanted to move the family trusts, which held most of the stock, from Iowa to South Dakota to avoid income tax. Dick was also on the Board of Norwest, and didn't want to tip anyone at Norwest of the impending deal, so decided to name National Bank of South Dakota as successor trustee. When the deal closed in Des Moines I flew down to deliver the stock certificates at the closing.

Id. Leech also recalls the growing realization of how attractive South Dakota had become for dynastic trust planning:

> In April of 1984, in cooperation with the Sioux Falls Estate Planning Council, I put together a full day program on "Changing the Situs of Trusts" at the Holiday Inn in Sioux Falls. Featured speakers were Jim Brick and Tom Cronin, an attorney and CPA with McGladrey in Minnesota. On a whim I called Robert Hendrickson, a

First, three years after South Dakota's RAP repeal, Congress passed the Tax Reform Act of 1986 which included the enactment of the "new" generation skipping transfer ("GST") tax.[338] (The act simultaneously and retroactively repealed the "old" 1976 GST.[339]) The new GST imposed a tax upon a "generation-skipping transfer."[340] A generation-skipping transfer includes *inter vivos* and testamentary "direct skip" gifts as well as transfers to trusts naming "skip persons" (typically grandchildren and more remote descendants of the settlor) as trust beneficiaries.[341] Although a GST exemption was allowed, amounts in excess of the exemption would be taxed at a rate equal to the estate tax rate.[342] Thus, taxpayers were encouraged to maximize their GST exemption by funding trusts at an amount equal to their exemption which would continue for multiple generations.[343] States like South Dakota, which permitted perpetual trusts, were best suited for this kind of legitimate tax planning.[344] The IRS had earlier acquiesced to the tax leveraging of trusts by means of this particular type of state legislation.[345]

> partner in the international law firm of Coudert Brothers law firm in New York and the acknowledged expert on change of situs who was the author of the text, "Changing the Situs of a Trust." I had talked to Mr. Hendrickson occasionally and he was familiar with our activities, and decided to invite him to come to Sioux Falls and be our keynote speaker. To my surprise he agreed to come, along with his wife at no charge. He presented for over two hours with a record attendance of over 100 attorneys and accountants. Subsequently he devoted a paragraph in his book to our "Groundbreaking activities" at National Bank.

Id.; *see also* ROBERT A. HENDRICKSON & NEAL R. SILVERMAN, CHANGING THE SITUS OF A TRUST §6.04, at 6-11 to 6-12 (Updated by Richard E. Kaye, 2003) (1982) (discussing the "leadership of Vice President Robert E. Leech, and the Sioux Falls Estate Planning Council" and the seminar "Changing the Situs of Trusts").

338. Tax Reform Act of 1986, 26 U.S.C. § 2601 (1986).

339. *Id.*

340. *Id.*

341. 26 U.S.C. § 2611; *see also* 26 U.S.C. § 2651 (defining the "generation" of persons for purposes of the GST tax); Treas. Reg. § 26.2612-1(a)(1) (trusts as "skip persons").

342. 26 U.S.C. §§ 2602, 2623.

343. *See id.* Professor Pennell explains:

> [E]very taxpayer now is granted an exemption from the [GST] tax that can be applied to transfers during life or at death. It began at $1 million per taxpayer .†.†. but today it is tied to the applicable exclusion amount for estate tax purposes. With proper planning, a married couple may transfer double the amount of the applicable exclusion amount/GST exemption without ever incurring a GST [tax] .†.†. . Ironically, the exemption encourages the creation of more trusts designed to run for the full period of the Rule Against Perpetuities.

JEFFREY N. PENNELL, WEALTH TRANSFER PLANNING AND DRAFTING 18-27 (2005).

344. Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511, 2511-12 (2006); *see also* Danny Fein, *A Defense of Perpetual Trusts*, 47 ACTEC L.J. 215, 219 (2022) (observing: "The longer the duration of a Dynasty Trust, the greater its tax advantage").

345. Estate of Murphy v. Commissioner, 71 T.C. 671, 680 (Tax Ct. 1979). The court in *Murphy*, acquiesced to the manner in which Wisconsin had abolished RAP (but retained RAA) in connection with an assessment of the application of the Delaware Tax Trap:

> The language of [26 U.S.C. § 2041(a)(3)] regarding postponement of vesting, suspension of absolute ownership, and suspension of the power of alienation, does not . . . provide for alternative conditions applicable in all cases. Rather, each condition of title is simply shorthand terminology for the local rule against

The timing was particularly important; that is, first, South Dakota officially repealed (or confirmed the nonexistence of) common law RAP, and second, the modern GST tax was enacted. Only two other states—Wisconsin and Idaho—share this distinction and both of them impose a state income tax, making South Dakota the only state which repealed RAP prior to the GST tax and lacks a state income tax.[346] This alone makes South Dakota stand out as a premier trust jurisdiction for individuals with estate tax exposure since there is zero possibility of the IRS mustering an argument that the RAP repeal interfered with principles of federalism by intentionally watering down a federal tax.[347] Moreover, as we

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> perpetuities . . . . [Thus,] if the local rule is expressed in terms of suspension of the power of alienation or absolute ownership, a determination must be made as to whether the prohibited condition may exist for longer than the permissible period.

Id. South Dakota Trust Company's Al King and Pierce McDowell III (also known as "P3") deftly explain the impact of the Murphy decision on the intersection of state law repeal of RAP and federal tax statutes, asserting that South Dakota's 1983 confirmation of RAP's nonexistence essentially—and effectively—"codified" the *Murphy* holding:

> The *Murphy* case approach to abolishing the RAP shifted the perpetuities inquiry from remoteness of vesting to suspension of the power to alienate. For example, if the trustee has an explicit or implied power to sell, the trust jumps outside the rule of suspension of alienation, which limits the duration of the trust, thus allowing for an unlimited duration trust. Generally, states that have embraced *Murphy* have also abrogated or abolished the RAP, which addresses the timing issue. As a result, these states address both the timing and the vesting issues associated with doing away with the RAP as required by *Murphy*, which is key according to most generation-skipping transfer tax ("GST tax") and RAP experts.
>
> *Murphy* was relied upon by both South Dakota and Wisconsin in their respective state enactments of RAP laws prior to the imposition of the modern GST tax in 1986. Idaho also enacted a pre-1986 RAP statute that followed the *Murphy* case approach to abolishing the RAP. Consequently, these state statutes cannot be construed as an attempt to circumvent the GST tax, thus making them the only three bellwether states.
>
> Delaware enacted a *Murphy* case type RAP statute in 1995 in response to South Dakota and the business South Dakota was generating, as delineated in Delaware's legislative history. Alaska then followed suit in 1997 with a RAP statute that partially relied on *Murphy*; Alaska further amended its statutes in 2000 to advance, but not completely align with *Murphy*. Missouri, New Hampshire, New Jersey, and North Carolina have also relied on *Murphy* when designing RAP statutes, but many of these states have other trust, income tax, or asset protection limitations. Many states do not follow the *Murphy* approach, which may or may not present a significant risk to both self-settled and third party dynasty trusts.

Al W. King, Jr. & Pierce H. McDowell, III, *A Bellwether of Modern Trust Concepts: A Historical Review of South Dakota's Powerful Trust Laws*, 62 S.D. L. REV. 266, 267-68 (2017). Although Wisconsin and Idaho share the honor of "abolishing" RAP prior to the modern GST tax enactment in 1986, neither Wisconsin nor Idaho are considered top-tier trust jurisdictions for other reasons. For one: "Both Idaho and Wisconsin imposed state income taxes on trusts." *Id*. at 268. For additional analysis on the interplay between RAP repeal and the Delaware tax trap, see Stephen E. Greer, *The Delaware Tax Trap and the Rule Against Perpetuities*, 28 EST. PLAN. 68 (2001); Kasey A. Place, *Section 2041(A)(3): A Trap Not Easily Sprung*, 55 REAL PROP. TR. & EST. L.J. 259 (2020); James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute is Too Clever by Half (of Infinity)*, 43 REAL PROP. TR. & EST. L.J. 673 (1999).

346. *Infra* note 347; Timothy Vermeer, *State Individual Income Tax Rates and Brackets for 2023*, TAX FOUNDATION, https://taxfoundation.org/data/all/state/state-income-tax-rates-2023/ (Feb. 21, 2023).

347. *See Trust and Estate Law: South Dakota Dynasty Trusts 101*, ROBINS & KAPLAN (Sept. 11, 2015) ("While other states have followed suit and passed legislation permitting trusts to last for longer periods of time, South Dakota trust law is one of the few state schemes that permit perpetual trusts in the manner approved by the IRS.").

have seen, the repeal of RAP likely simply confirmed something that was already the case insofar as South Dakota seems to have implicitly jettisoned RAP with its statutory RAA provisions.[348] Idaho and Wisconsin are the only states which statutorily confirmed the full repeal RAP earlier than South Dakota.[349] Indeed, on balance, the most defensible reading of history and law endorses the conclusion that South Dakota's comprehensive rejection of RAP, predating even statehood, was matched only by Idaho's.[350] That is quite a claim to fame, every bit.[351] And Idaho lacks a Mount Rushmore.

Second, the trust services industry itself took root, with greater vigor offering consumers a healthy, competitive, and regulated environment from which to select a trustworthy fiduciary. The growth of trust companies, however, started with the growth of the credit card industry, which launched three years prior to the repeal

348. *See infra* Section IV.C (setting forth the relevant Territorial Code provisions); Meschke & Smith, *supra* note 12, at 224 (recounting the history of North Dakota which originally shared South Dakota's pre-statehood legislation as a single territory (the Dakota Territory)).

349. *See* Grayson M.C. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291, 1294 (2013) (asserting: "Both [Idaho and Wisconsin] had adopted statutory rules against suspension of the power of alienation *in lieu of* the common law rule against remote vesting") (emphasis supplied). Wisconsin, however, seems to have retained RAP with respect to real property only. *See* Becker v. Chester, 91 N.W. 87, 98 (Wis. 1902) (reasoning that common law RAP respecting *personal* property is not in force in Wisconsin). *But see* Eldred Dede, *Perpetuities in Private Trusts in Wisconsin*, 42 MARQ. L. REV. 514, 515 (1959) (opining: "(1) The common law rule against perpetuities was repealed and abrogated in its entirety [and] (2) The statutory rule applied only to real estate and there was no rule of any kind applicable to personal property prior to July, 1925"). *See generally* J. O'Brien*, Perpetuities in Wisconsin: Will the Rule be Construed Merely as One Against Suspension of Alienation or Likewise Against Remoteness of Vesting?* 10 MARQ. L. REV. 241, 241 (1926) (concluding: "Perhaps no other realm of Wisconsin law is in a more chaotic condition at the present time than that relating to the rule against perpetuities,—especially insofar as personal property is concerned"). Clarity as to full RAP repeal in Wisconsin (i.e., as to both real and personal property) had to wait until 1976. WIS. STAT. ANN. § 700.16(5).

350. *See* Locklear v. Tucker, 203 P.2d 380, 386 (Idaho 1949) (reasoning that by the Idaho legislature's having enacted statutory RAA, "we are constrained to hold that Idaho has adopted what is intended to be a complete system governing alienation of real property; and that the common law rule against perpetuities is not in force in this jurisdiction"). Idaho later proclaimed in 1957: "There shall be no rule against perpetuities applicable to real or personal property." IDAHO CODE § 55-111. But its courts had already confirmed that in 1949. *Locklear*, 203 P.2d at 384. The *Locklear* court's holding was founded upon IDAHO CODE § 54–111 (which stated: "The absolute power of alienation can not [sic] be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of the persons in being at the creation of the limitation or condition, except in the single case of contingent remainder in fee"). "It is clearly inferable from this case . . . that the common law rule against perpetuities is not in force . . . ." 3 SIMES AND SMITH, *supra* note 115, at § 1424. In response to *Locklear*, the Idaho legislature clarified the scope of RAA. *See* Angela M. Vallario, *Death by a Thousand Cuts: The Rule Against Perpetuities*, 25 J. OF LEGIS. 141, 153 (1999) (explaining that "Idaho did not limit its abolition legislation to real property but instead enacted broad legislation, which included both real and personal property"). Idaho's section 54-111, like South Dakota's originally codified RAA suspension rule, was enacted pre-statehood. IDAHO TERRITORY R.S. § 2836 (1887). (Idaho was admitted to the union in 1890.)

351. Perhaps South Dakota's license plates (featuring the four faces since 1952 (although the first reference to the memorial is displayed on the 1939 plates (the memorial was completed in 1941))) could be updated to replace the image of Mount Rushmore (*Tȟuŋkášila Šákpe*) with a reference to the state's unique status with regard to rejecting RAP. Or at least a specialty plate could be offered.

of RAP.[352] The spark that set off that growth was the decision of the state legislature to invite Citibank to depart New York for Sioux Falls.[353]

Three years prior to the 1983 RAP/RAA legislation, South Dakota's exemption of banks from usury laws was adopted.[354] It was signed into law early in the session in 1980, clearing both houses on February 6 and being signed by Governor Janklow shortly thereafter.[355] The motivation behind the usury exemption was not—as some have claimed—to lure Citibank to the state.[356] Rather, lawmakers were concerned with the lack of access of farmers and small businesses to credit.[357] But at the same time, New York leaders were broadcasting their unwillingness to exempt banks from usury laws.[358] It was on the last day of the 1980 session that Governor Janklow, having recognized the opportunity, and after having deftly mustered support from the local banking community, introduced legislation carefully designed to invite Citibank to relocate operations to South Dakota.[359] That legislation (the "Citibank Bill") was approved and signed into law—and it did have its desired effect.[360] Citibank brought its credit card operations to the state.[361] (The usury law repeal only happened to coincide with the deal.[362]) By the following year, Citibank employed 400 people in Sioux

352. Douglas J. Hajek, *When Citibank Came to South Dakota* 1 (2021) (unpublished manuscript) (on file with author). *See generally*, Gary Bingner, *South Dakota Banking: The Lowdown of High Finance in Middle America, a History of the Citibanking Revolution, 1980-1983* (1983); PHILIP L. ZWEIG, WRISTON: WALTER WRISTON, CITIBANK AND THE RISE AND FALL OF AMERICAN FINANCIAL SUPREMACY (1996); *Frontline: The Secret History of the Credit Card* (PBS 2004).

353. Hajek, *supra* note 352, at 2-3.

354. 1980 S.D. Sess. Laws ch. 335 § 2, 541.

355. *Id.*

356. *See* Douglas J. Hajek, *When Citibank Came to South Dakota*, DAVENPORT EVANS (Jan. 5, 2015), https://perma.cc/9953-9KNX. A slightly different and later version of this excellent history is cited *supra* note 352.

357. *See* Hajek, *supra* note 352, at 2 (explaining how "[t]he easing of Regulation Q . . . was rapidly draining [banks] of their deposits as customers found other places to get better returns on their money"). "Where usury limits applied, every new loan was a money lower for the bank; so borrowing became very difficult, especially for farmers and small businesses." *Id.* Regulation Q is unpacked in Richard Wald, *Regulation Q and Glass-Steagall: Limits on Bank Holding Company Alternatives to Money Market Mutual Funds*, 3 ANN. REV. BANKING L. 291 (1984).

358. *Id.*; *see also* Sean H. Vannatta, *When South Dakota Became the New Cayman Islands for Banks and Finance*, THE WASHINGTON POST (Oct. 14, 2021), https://perma.cc/T2J8-MVW9 (explaining that "New York capped the interest rate that banks could charge at 18 percent (and only 12 percent on balances above $500)—no matter where the cardholder happened to live").

359. 1980 S.D. Sess. Laws ch. 335 § 2, 541. "According to the rules of interstate banking, an out-of-state bank had to be officially invited in by a state in order to set up business." Eric Renshaw, *Looking Back: Citibank's South Dakota Invite Benefited Both*, ARGUS LEADER (Oct. 4, 2016); *see also* Marquette National Bank v. First Omaha Services Corp., 439 U.S. 299 (1978) (holding that if national banks located in a state they could apply that state's credit laws to card users in other states).

360. H.B. 1370, 55th Sess. (S.D. 1980); Hajek, *supra* note 352, at 6.

361. Hajek, *supra* note 352, at 6.

362. *Id.* Charles E. Long, Senior Vice President of Citibank's card operations, approached Governor Janklow in February of 1980. *Id.* at 4.

> The Governor assumed Charlie [Long] was there because of the just-passed usury legislation. But Charlie said that was not the purpose of his visit—he said Citibank had no mechanism to track state legislation as it was happening—so he didn't even know about South Dakota's usury bill. Now Janklow was puzzled. Why was it so urgent for them to talk Charlie explained that Citibank needed to move to a new state

Falls.[363] By 1983, it had 900 employees.[364] At its peak, there were 3,000 Citibank jobs added to the state economy.[365] And it served as an anchor for other financial sector enterprises to take root.[366] Wells Fargo, Capital One, and First Premier followed.[367] Today, South Dakota holds more bank assets than just about any other state in the country.[368]

Citibank is a large operation and provides several financial services besides credit cards.[369] Its trust and fiduciary services arms go back to 1929 when it merged with Farmers' Loan and Trust Company, founded in 1822 as the first trust

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> but because of the Douglas Amendment, it could not come without an invitation from the Legislature. He was there to see if South Dakota would invite Citibank.

Id. at 5. The Douglas Amendment, section 3(d) of the Bank Holding Company Act, 12 U.S.C. §1842(d), allowed the Federal Reserve "to approve an application by an out-of-state bank holding company to acquire a bank located outside of the state in which it principally conducts its operations [but] only if the law of the state in which the acquired bank is located specifically authorizes such acquisitions." Independent Community Bankers Association of South Dakota, Inc. v. Board of Governors of the Federal Reserve System, 838 F.2d 969, 970 (8th Cir. 1988). *Independent Community Bankers* reasoned that the Douglas Amendment "only permits States to enact authorizing statutes that fall within the boundaries of the Commerce Clause." *Id.* at 967-77 (citing Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 49 (1980)). South Dakota's Citibank Bill, the Eighth Circuit went on to hold, did not fall within those boundaries, and directed the Federal Reserve to "withhold approval [of Citibank's move] until such time as the State of South Dakota may modify its authorizing statute so as to bring it into conformity with federal law." *Id.* at 977. The South Dakota Bankers Association (a/k/a the ICBA) had won its challenge to Citibank's relocation, but it didn't have long to celebrate since the legislature corrected the problem a mere three weeks after the decision was issued. Hajek, *supra* note 352, at 9. Governor George Mickelson promptly signed it into law. *Id.* Because the legislation contained an emergency clause, it went into effect immediately. *Id*. Hajek notes the irony in the legal narrative: "[W]hile ICBA was successful in convincing the 8th Circuit Court that the Citibank Bill was constitutionally flawed, the Court's proposed remedy ultimately led to the repeal of the provision that was most critical to the original passage of that bill in 1980." *Id.*

363. Renshaw, *supra* note 363.

364. *Id.*

365. *Id.*

366. Amy Sullivan, *How Citibank Made South Dakota the Top State in the U.S. for Business*, THE ATLANTIC (July 6, 2013), https://perma.cc/HT3F-TDD4. Sullivan explains:

> Citibank committed to expanding its workforce in Sioux Falls and recruiting locals for its financial-management training programs. That has allowed several generations of workers the opportunity to gain experience in the financial sector that simply isn't available in any other town of that size, and it provided an experienced, educated workforce for the other financial institutions that began bringing their credit- and bankcard operations to town. Without Citibank, a local college graduate who wanted to work in high-level banking would probably end up moving to Chicago or New York City to gain the necessary training and exposure. Instead, Sioux Falls has an entire managerial class that trained locally—and stayed local.

Id.

367. *Id.*

368. *Id.*; *see also* Hajek, supra note 352, at 8 (explaining that South Dakota was first in the country in banking assets from 2011 to 2018 but "[t]oday it ranks #2, behind Ohio, the home of JP Morgan Chase Bank's charter").

369. *See Citi Opens State-of-the-Art Operations Site in Sioux Falls*, CITI (Sept. 5, 2019), https://perma.cc/9SXW-U9QX ("Since 1981, when Citi opened a credit card operations center in Sioux Falls, the breadth of work has diversified, expanding to 22 business functions, including credit operations, technology, finance, treasury and transactions and customer service."). In 2011 when "Citibank (South Dakota) merged with Citibank, N.A., and Citibank, N.A. designated Sioux Falls as its Main Office" it became a $1.2 trillion bank. Hajek, *supra* note 352, at 8.

company incorporated in the nation.[370] The reputation and name brand of Citibank for trust services (i.e., as Citi Trust) was well established on the East Coast.[371] Once it opened a trust office in South Dakota (in 1995), it was not long before East Coast estate planning lawyers began to put two and two together: combine a state without a state income tax and no RAP and add a well-drafted wealth-preservation trust with Citi Trust as trustee and one could please a number of clients.[372] Others noticed too, and the focus on South Dakota as a premier trust jurisdiction really began to take hold.[373] Citi Trust even began producing a binder of trust forms for practitioners to consult.[374]

The third and final development that animated the dynamic growth of the trust industry in South Dakota took place two years after Citi Trust opened its doors in Sioux Falls. In 1997, Governor Janklow entered an executive order which established the Governor's Task Force on Trust Administration Review and Reform.[375] He foresaw the "opportunity niche" presented by South Dakota's repeal of RAP.[376] South Dakota is unique in staffing a trust task force—composed of lawyers and nonlawyers—tasked with generating proposed legislation on an annual basis. Over the years, the task force has steadfastly crafted legislation (such as directed trusts and trust decanting) which enable estate planners to create trusts to better achieve their client's objectives.[377] As a result of the task force, a favorable statutory environment has been created, preserved, and maintained with regular updates and improvements.[378] That business-friendly environment

370. *New Bank Born in New York*, CITI (last visited July 18, 2022), https://perma.cc/R2PS-ZWMP. Citibank's origins go back to the War of 1812. *Id.*

371. *See generally* Rob Laughlin, *Trust & Wealth Planning*, CITI (last visited, July 18, 2022), https://perma.cc/4W5C-UYWE (marketing Citi Trust's fiduciary services and noting its office locations in the Bahamas, Jersey, Singapore, Switzerland, Delaware, New York, and South Dakota).

372. Telephone Interview with Jonathan G. Blattmachr, J.D., LL.M., Director of Estate Planning for Peak Trust Company (July 16, 2020). He is a retired member of the Milbank, Tweed, Hadley & McCloy law firm.

373. *E.g.*, Pierce H. McDowell III, *The Dynasty Trust: Protective Armor for Generations to Come,* 132 TR. & EST. 47, 47-54 (Oct. 1993) (highlighting South Dakota's dynasty trust industry and the protections that South Dakota provides); Thomas H. Foye, *Using South Dakota Law for Perpetual Trusts*, 12 PROB. & PROP. 17, 17 (1998) (emphasizing that "South Dakota law . . . is well suited to the establishment and maintenance of perpetual trusts because the state has no rule against perpetuities or state income tax"). Foye noted that South Dakota retains RAA but that "[a]s long as a trustee has the power to sell assets, a perpetual trust will not violate this rule." *Id.* at 21; *see* Crawford, *supra* note 18.

374. CITICORP TRUST CORP., SOUTH DAKOTA DYNASTY TRUST FORM BOOK (1996).

375. S.D. Exec. Order No. 97-17 (Dec. 29, 1997).

376. *See Governor Says S.D. Should Try to Lure Trust Funds*, ARGUS LEADER 3 (Feb. 8, 1997) (quoting Governor Janklow: "It's another little opportunity niche for South Dakota"). The article awkwardly explains:

> South Dakota, unlike most states, doesn't have a rule against perpetuities—financial arrangements set up to run for eternity, which allow wealthy people to minimize hefty inheritance taxes and estate taxes upon their deaths, as the money passes from one generation to another.

Id. The article noted the Governor's introduction of a bill which "would charge a $25,000 charter fee to start a trust company." *Id.*; H.B. 1279, 72d Sess. (S.D. 1997).

377. Patrick G. Goetzinger & Thomas E. Simmons, *South Dakota's "Trust Task Force*," 26 TRUSTS & TRUSTEES 637 (Sept. 2020).

378. *Id.*

permeates the state, educated workforce and prudent a regulatory oversight add to the attractiveness of the state.

> Banks have come here because South Dakota has had a solid reputation over four decades, with all the components of a good environment for banks: reasonable regulation and taxes, a talented, educated, experienced, and conscientious workforce, and strong communications, technology, and distribution infrastructure. Just as important—our policymakers have for the most part been predictable in showing their belief in the value of an industry that's benefitted the state in so many ways.[379]

III. CONCLUSION

Let us not mourn the repeal of RAP. Good riddance, I say. At least to the extent that RAP was actually ever in force in South Dakota, anyway. Societal concerns about excessive dead hand control are not irrelevant.[380] Life—and property—is for the living.[381] Certain kinds of property are more rightfully resistant to too much dead hand control (especially scarce public resources like land) than others such as a songwriter's songs, closely-held business interests, a philanthropist's reputation, or even an individual's bodily remains.[382] But it is

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> The Task Force answered Governor Janklow's call to modernize South Dakota's trust laws and authored the statutory framework to attract trusts and trust companies, setting off a "trust rush" to South Dakota. From where South Dakota's trust industry started in the 1990s to its present status is nothing short of remarkable. In 1997, South Dakota had just three state-chartered trust companies with less than US $1 billion in trust assets under management. As of March 2020, South Dakota had 105 private and public state-chartered trust companies. (These numbers do not include the state and federal banks with trust offices in South Dakota.)
>
> Those numbers are a testament to the leadership of the Governor's office as well as the effectiveness of the Task Force, the men and women working in the trust industry, and those men and women in state government who oversee and carefully monitor the industry. State regulatory oversight is a key component to the trust industry; regulation must be rigorous yet not overbearing. Much like the banking industry, customer confidentiality and privacy are recognized values—but they are emphatically distinguished from secrecy.

Id.

379. Hajek, *supra* note 352, at 8.

380. *See* Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149, 1161 (2011) (claiming that dynasty trusts are "devoid of any significant offsetting justification"); Crawford, *supra* note 18, at 79 (asserting that if one ""[t]hrow[s] a stone into a room full of law professors . . . it is virtually impossible to hit someone who will defend perpetual trusts"); Lucy A. Marsh, *The Demise of the Dynasty Trust*, 5 EST. PLAN. & COMM. PROP. L. REV. 23, 50 (2012) (characterizing perpetual trusts as "foolish[]").

381. *See* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1111 (2004) (characterizing dead hand control concerns as located in the idea that the dead cannot respond to changed or changing circumstances as nimbly as living persons).

382. *See* Kate Falconer, *Trusts Over Cremated Ashes*, 15 J. OF EQUITY 283, 285 (2021) ("Disputes over the disposal of a body can even reflect a desire on the part of the parties involved to ensure the deceased is protected from harm or evil in the afterlife, or to tie their own identity to the that of the deceased . . . ."); RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 120 (2010) ("Even more than one's body or property, one's reputation is often essential."); *id.* at 141 ("[C]opyright [is] the primary vehicle through which American artists and writers can 'live on' after death.").

unclear whether RAP ever succeeded; whether it even achieved its goals.[383] And it is doubtful whether its legendary complexity justified its meager returns. Perhaps it even exacerbated wealth disparity by injecting a complexity that only the well-heeled could draft around.[384] Moreover, governmental "leveling of the playing field" always smacks to a greater or lesser degree of Stalinism and we are all better off without even a streamlined RAP.[385]

As Al King, a principal of South Dakota Trust Company, has written in this same law review, South Dakota's "claim to fame" is its repeal of RAP; the act "was the watershed moment that put into motion South Dakota's trust industry."[386] What Dean Phipps had already unearthed, however, and what has been largely confirmed by the analysis in this article, is that South Dakota not only repealed RAP pre-GST tax, but it may also enjoy the distinction of being the only state in the nation to never have had RAP in the first place, though in fairness, it probably must share this honor with at least Idaho.[387] The 1983 repeal, *if* you can call it that, was itself barely noticed at the time by anyone except Emory Clark and

383. *But see* Jack H.L. Whiteley, *Inheritance in an Unequal Age*, 117 NORTHWESTERN L. REV. 1477, 1519-20 (2023) ("In some respects, the rule against perpetuities was quite successful, lasting as a widely adopted common law rule for three centuries—significantly longer than permanent federal inheritance taxes.").

384. *See id.* at 1477 ("Complexity in inheritance law has this specific and timely cost: it can enable mechanisms for dynastic wealth defense—even when it is meant to do the opposite.").

385. *See* Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 563 U.S. 721, 749 (2011) ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field'" in the context of political speech.). Governmental attempts to level the playing field by means of taxation might similarly be equally misguided and thwartable:

> The tax law is the paradigmatic system of rules. Over thirteen large black volumes filled with tax rules sit on my shelf. Yet over the last several years, the purely rule-oriented approach to the tax law has begun to be perceived as a failure. The reason is that taxpayers have been able to manipulate the rules endlessly to produce results clearly not intended by the drafters.

David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 860 (1999); *see also* Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 367 (2018) (observing in the context of testamentary formalities "the unequal distribution of undeserved donative errors that fall on those who are less well-off in the donor population"). Instead of deploying complex, costly systems to upend wealth distribution, the role of government should focus on prosecuting criminal enterprises (including trusts or other mechanisms associated with money laundering) while creating rules which honor donor intent: "To the maximum possible extent, any theory of governmental interest in wealth transfer law should seek to minimize undue interference with the substantive core of dispositional freedom, particularly those aspects of dispositional freedom protected by the Constitution." Reid Kress Weisbord, *The Governmental Stake in Private Wealth Transfer*, 98 B.U. L. REV. 1229, 1244 (2018). That is the path mapped by South Dakota.

386. King & McDowell, *supra* note 345, at 271; *see also* Lammers, *supra* note 300, at 5 (noting: "South Dakota's emergence as the nation's premier spot to site trusts can be traced back to its lifting the rule against perpetuities in 1983"). "The [generation skipping transfer tax (GST)] exemption creates a powerful tax incentive to create trusts that will last as long as possible under applicable state law, to fund those trusts with property that is likely to appreciate substantially over time, and to allocate sufficient GST exemption to produce a zero rate of GST tax for the trust." Grayson M.P. McCouch, *Perpetual Generation-Skipping Trusts*, 58 REAL P. TR. & EST. L.J. 167, 173 (2023). Thus, it might also be argued that it was not the repeal of RAP in 1983 but the enactment of the GST tax three years later which generated the perfect environment for dynastic trusts in South Dakota. "In enacting the GST tax in 1986, Congress was undoubtedly aware that taxpayers would strategically exploit the GST exemption, but no one predicted . . . the rapid decline of the rule against perpetuities." *Id.* Congress was at least constructively aware, however, that South Dakota had already taken an ax to the RAP tree when it enacted the GST tax.

387. *See* discussion *supra* note 350 and accompanying text.

his legal advisors.[388] The limitations on dead hand control were adequately addressed with a slightly revised pair of RAA statutes and RAP's remorseless way of further upending donor intent was and is notoriously unsettling (as well as infamously complex).[389] RAA asks simpler questions, is less concerned with the hopeless thickets of future interests, and typically wields a less destructive remedy than RAP.[390] Coupled with the lack of a state income tax, a comprehensive and innovative trust code, and a well-staffed, well-regulated trust industry, the state truly shines as a premier trust jurisdiction. May that it shall continue to do so—in perpetuity.

388. *Id*.

389. *See* Friedman, *supra* note 10, at 739 (characterizing RAP as "arcane and complex—and in its extreme forms, not only maddening, but completely mad").

390. *See, e.g.,* Sisters of Mercy of Cedar Rapids v. Lightner, 274 N.W. 86 (Iowa 1937) (upholding an agreement but removing, as a remedy, the attempted alienation restraint). *But see* Penfield v. Tower, 46 N.W. 413, 415 (N.D. 1890) ("It is not merely future estates which are void. Every estate, present or future, which suspends the absolute power of alienation, is void."). Newman contrasts RAP and the RAA suspension rule:

> The rule against suspension of the power of alienation, like the rule against perpetuities, is designed to restore property to commerce within the prescribed period, but this result is accomplished, in the rule's original form, by the imposition of a different test of alienability than the test established in the rule against perpetuities. The test of the rule against perpetuities is that of practical possibility of sale, not legal possibility. When the owners of a future estate become identified, they can sell their interests, and from the viewpoint of legal possibility the property is potentially restored to commerce. If, however, their ownership is not absolute, that is, unconditional, the salability of the property will be impaired because by the time they agree on the valuation of the contingent interest, the possibility of sale may well have disappeared; or the parties may fail ever to agree. Thus the property, although legally salable if the parties agree on how the proceeds of the potential sale are to be divided, is as a practical matter taken out of the market. Expressed in another way, the property, although legally salable, is as a practical matter unsalable. As Professor Powell has stated the distinction, the rule against perpetuities is concerned with the fact of alienability as well as the possibility. The suspension rule is concerned only with the legal possibility.

Newman, *supra* note 26, at 62.

IV. APPENDICES

A. SAMPLE RAA-SAVINGS CLAUSES

Legal writings are stock-full of sample RAP-savings clauses, but RAA-savings clauses are—inasmuch as I have been able to ascertain—completely unknown. A sample RAA savings clause is provided for the reader's consideration below. To provide context, a restraint on the trustee's power to alienate trust property—arguably an absolute restraint—is provided in section 1. Section 2 assumes that it would be placed within a revocable trust which becomes irrevocable upon the settlor's death and which continues for a period greater than lives-in-being plus thirty years.

Section 2 provides a SDCL ch. 43-5 savings clause but not a § 43-3-5 savings clause. Section 3, however, attempts to provide admittedly clunky SDCL § 43-3-5 savings language as well but given that statute's flexible detuning methodology—invalidating restraints if "repugnant to the interest created"—savings language is particularly nettlesome to draft. What may be better is a basic partial invalidity clause (such as "If any provision of this Trust is deemed invalid, it shall not be deemed to invalidate the other provisions of the Trust.")

> § 1. Restrictions on Trustee's Ability to Alienate Trust Property. The Trustee may not sell, transfer, encumber, or mortgage the McCook County Farm (defined above) without the unanimous advance written consent of all competent adult beneficiaries currently eligible for income or principal distributions. This restriction described in the foregoing sentence shall be referred to in this Trust Agreement as the "Land Restriction." The Land Restriction does not prohibit the Trustee from exercising other legal powers of an owner such as granting easements, licenses, or leases.
>
> § 2. Maximum Duration of Any Absolute Restraints on Alienation.[391] The Land Restriction, shall continue until the first to occur of (1) the expiration of the term of the Trust (or any sub-trust described herein); and (2) a point in which the Trust (or any sub-trust described herein) no longer holds an interest in the McCook County Farm. Notwithstanding the foregoing sentence of this § 2, in the event the Land Restriction is determined by the Trustee in the Trustee's discretion, to amount to a suspension of the absolute power of alienation, the Land Restriction shall terminate on the date measured by the Measuring Lives (defined below) plus thirty (30) years from the date this Trust becomes irrevocable.

391. This sample was inspired by and modeled after Article VI(I) ("Maximum Duration of Trusts") in PRAC. L. TRS. & ESTS., IRREVOCABLE LIFE INSURANCE TRUST FOR INDIVIDUAL: TRUST FOR CHILDREN (TX), Art. VI, Sec. I, Westlaw W-000-3148.

> Measuring Lives shall be measured by the lives of the following persons who are living on the date of this Trust becomes irrevocable: (1) the Settlor's Descendants and (2) the Descendants of the Settlor's parents.
>
> § 3. Maximum Extent of Restraints on Alienation Repugnant to an Interest. Furthermore, notwithstanding §§ 1 and 2, in the event the Land Restriction is determined by the Trustee in the Trustee's discretion, to amount to a suspension of the absolute power of alienation, the Land Restriction shall terminate on the date measured by the Measuring Lives (defined below) plus thirty (30) years from the date this Trust becomes irrevocable.

In some situations, the practitioner intentionally drafts an absolute suspension of the power of alienation in a trust. For example:

> § A. Prohibition of Trustee's Alienation Trust Property. The Trustee may not sell, transfer, encumber, or mortgage the Brule County Farm (defined above) under any circumstances whatsoever. This restriction described in the foregoing sentence shall be referred to in this Trust Agreement as the "Land Prohibitions." The Land Prohibitions do not prohibit the Trustee from exercising other legal powers of an owner such as granting easements, licenses, or leases.

In such an instance, there is a serious SDCL § 43-3-5 concern insofar as the total suspension of all alienation powers could very well be held to be a restraint inconsistent with the fee interest held by the Trustee. Because SDCL § 43-3-5 considers the reasonableness of a restraint in connection with its legitimate reasons, it is strongly advisable to articulate those reasons, preferably in the trust instrument itself.[392] For example:

> § B. Legitimacy and Reasonableness Justifications. The Settlor's insistence upon the Land Prohibitions is based upon the fact that the Brule County Farm has been in her family for seven successive generations, through both good times and bad, and its sentimental value which far exceeds its market value, reflecting the core values and ethics that the settlor has been heir to and hopes to pass to her descendants. The Brule County Farm is registered as a Quasquicentennial Farm with the South Dakota Farm Bureau and the South Dakota Department of Agriculture and Natural Resources and is an extremely important legacy for the settlor and her family. It embodies both family values and family history. It is, in a word, priceless, and for these reasons

392. *Supra* Part II (demonstrating that SDCL 43-3-5 considers the reasonableness of a restrain in connection with its legitimate reasons); *infra* Section IV.B (demonstrating the importance of articulating the reasons in the trust instrument).

> the settlor desires to restrict the Trustee's alienation of the Brule County Farm as a way of preserving and protecting the economic and emotional values associated with said farm.

The drafter is encouraged to lay it on thick and list particular instances or historical family events associated with the property. Is the property the situs for a regular family reunion? Were any ancestors born on the property? Did any die on the land? This kind of drafting is typically seen as verboten in a legal instrument, but here it clearly has a place and can also emphasize to the trust beneficiaries the importance of the land long after the settlor is gone.

Alternatively, the drafter might consider restricting the powers of the trustee to transfer or sell the property, but not to encumber or mortgage it. It would be relatively unusual for there to be a sufficient justification to mortgage farm ground in a trust, and so including the power would create only a small risk that the farm would ever actually be mortgaged, while softening to some degree the otherwise absolute restraint on all forms of alienation.

Given, however, that suspension of the absolute power of alienation clearly triggers, SDCL § 43-5-1, a termination date must be included. For example:

> § C. Term of Land Prohibitions. The Land Prohibitions shall terminate on the date measured by the Measuring Lives (defined below) plus thirty (30) years from the date this Trust becomes irrevocable.
>
> Measuring Lives shall be measured by the lives of the following persons who are living on the date of this Trust becomes irrevocable: (1) the Settlor's Descendants and (2) the Descendants of the Settlor's parents.

The settlor might, if her trust was dynastic, for example, want to replace the absolute suspension provisions of section A—following the end of the lives-in-being plus thirty-year term—with a beneficiary consent requirement such as the one outlined in section 1 above. Unfortunately, there is little or no guidance on whether a simple majority, super-majority, or even a unanimity requirement among beneficiaries amounts to a restraint against alienation. Rights of first refusal are often included when it comes to farm succession planning with trusts, but as seen above, rights of first refusal can also implicate the twin RAA rules. The impact of RAA to trusts with rights of first refusal vested in one or more beneficiaries, however, ought to be reduced.[393]

393. *See* SDCL § 43-5-4 (2004) (providing "there is no suspension of the power of alienation by a trust . . . if the trustee has power to sell, either express or implied, or if there is an unlimited power to terminate in one or more persons in being"). Another draft-around possibility is to vest "an unlimited power to terminate" the trust in the office of one holding the position of trust protector. *See* SDCL § 55-1B-6(5) (2012) (providing that the powers of a trust protector can include the power to "[t]erminate the trust").

B. *POWERS V. POWERS* CIRCUIT COURT MEMORANDUM OPINION

STATE OF SOUTH DAKOTA — CIRCUIT COURT
COUNTY OF CHARLES MIX. — FIRST JUDICIAL CIRCUIT

JEROME POWERS, 11
PLAINTIFF,

CIV. 19-29

vs.

DENNIS POWERS,
DEFENDANT.

Memorandum Decision on
Motion for Summary Judgment

and

PREVAILING WINDS, LLC AND
PREVAILING WIND PARK, LLC,
DEFENDANT

This matter comes before the Court on Defendant Prevailing Wind Park, LLC's Motion for Summary Judgment. The Motion was joined by Defendant Dennis Powers (Dennis). The Court has reviewed the briefs and submissions of the parties including affidavits and the Statements of Uncontested Material Facts as well as any objections to those statements. The Court also received the entire deposition transcript of Dennis Powers and Jerome Powers (Jerome).

FACTS

Jerome Powers is the father to Dennis Powers. They were in a farming operation together and were jointly purchasing 633 acres of real property from Jerome's parents under a contract for deed in both Charles Mix and Bon Homme counties. Under the terms of the contract, they were paying less than fair market value.1 In late 2004, Jerome was caught up in illegal drug actvity2 so he transferred his interest in the property to Dennis' name along in a sale for less than fair market value.

To facilitate the transfer, Jerome quitclaimed his interest in the property to Dennis. He also assigned his interest in the contract for deed with his parents to

1 The property was purchased from Clifford and Carol Powers for approximately $314 per acre, which was around half of fair market value. There was also a purchase of some personal property.

2 Although the parties addressed the illegal drug use in 2004, the Court understands that this was the impetus for the transfer of the property, and is not otherwise relevant to the Court's ruling on the motion for summary judgment.

Dennis. For Dennis's part, he paid Jerome the amount that Jerome had paid his parents under the contract and then became responsible for the entire contract. The proceeds paid to Jerome were obtained through financing with a bank. At this same time the parties entered into a First Right of Refusal (the Agreement). This Agreement is the basis for the motion for summary judgment. At the time the property was transferred, Dennis was only 22 years old, and it is undisputed that Jerome wanted to protect the property.

The relevant language in Section Two of the Agreement sets out:

> In the event Grantor offers the above-described property, or any interest therein, for sale, transfer or conveyance, Grantor shall not sell, transfer, or convey the above-described property, nor any interest therein, unless and until he shall have first offered to sell such property or any interest therein, to Grantee. If Grantor intends to make a bona fide sale of the above-described property, or any interest therein, he shall give to grantee written notice of such intention, which notice shall contain the basic terms and conditions demanded by Grantor for the sale of such property.

There is additional relevant language in the first right of refusal under "Section Three, Terms:"

> Should Grantor accept the offer of Grantee to purchase the property, it shall be on the following terms:
>
> 1. Grantee shall pay Grantor the sum of $420.00 per acre, which shall be paid in cash or cash equivalent at closing.
> 2. Grantor shall convey fee title, which title shall be merchantable, as shown by abstract or title insurance.
> 3. Closing shall take place within thirty (30) days of Grantor delivering title insurance or abstract to the property.
> 4. Grantee shall have possession of the property at closing.

After the sale, Dennis took control of the property. From the time the property was transferred until the time of the suit, Dennis has either leased the property to third parties or Jerome, the property has been mortgaged, the property was retitled into a joint tenancy, and easements have been placed against the property. There is a question of fact to the extent Jerome knew of some of these events.

In 2016 there was an attempt by Prevailing Winds, LLC to permit a wind farm with the South Dakota Public Utilities Commission. This application was withdrawn, however in October 2017, under new ownership (Prevailing Wind Park, LLC) a new application was submitted for a wind farm. Both Dennis and Jerome had an interest in the wind farm however their opinion of the wind farm differed greatly. Dennis was interested in participating in the project. He and his wife obtained information about the project and ultimate received a draft wind energy lease and easement agreement. There is a disagreement whether Dennis and his father discussed the terms and conditions of the Agreement prior to signing. Ultimately Dennis and his wife entered into the lease and wind easement agreement with Prevailing Win Park LLC for both Bon Homme and Charles Mix

counties. At this same time Jerome was actively involved in the public meetings lobbying against the wind farm project. He testified against the wind farm claiming it causes adverse health effects and were bad for business. He claims at this time he learned that Dennis's property was signed up for the project. This caused a breakdown in the father-son relationship.

In early 2019, Prevailing Wind Park, LLC sought consent from Jerome to the wind energy lease and wind easement agreements, due to the language of the Agreement. Jerome did not sign the consent and is asserting his rights under the Agreement.

The crux of the Defendants argument in the Motion for Summary Judgment is the Agreement only applies to the sale of the fee interest in the property to a third-party, or alternatively, the Agreement is void as a restraint on alienation of property. They are also claiming laches, statute of limitations and waiver.

DECISION

Summary judgment is authorized under SDCL § 15-6-56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." It also provides that all reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. Furthermore, unsupported conclusions and speculative statements do not raise a genuine issue of material fact." *Dakota Industries, Inc. v. Cabelas.com*, 2009 SD 39, ¶ 20, 766 N.W.2d 510, 516. "Summary judgment is not a substitute for a court trial or for trial by jury where any genuine issue of material fact exists." *Ahl v. Arnio*, 388 N.W.2d 532, 533 (S.D. 1986). Cases involving the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation begin a legal issue rather than a factual one. *Estate of Lien v. Pete Lien & Sons, Inc*. 2007 S.D. 100 ¶ 10.

This dispute hinges on the phrase "or any interest therein" in the Agreement. If "any interest" includes more than an interest in fee title, summary judgment may be inappropriate because an easement or lease is an interest in property. The Court would then analyze the other claims in the Defendants' Motion. On the other hand, if "any interest therein" means a fee simple interest in a portion of the land, summary judgment would be appropriate. There is no dispute fee ownership has not been transferred.

The Court reviews the language of the first right of refusal to resolve this question. "[T]o find the intentions of the parties, we rely on the contract language they actually used." *Quinn v. Farmers Ins. Exchange*, 2014 S.D. 14 ¶ 16. (Citations omitted). "A contract is ambiguous when application of rules of interpretation leave a genuine uncertainty as to which two or more meanings is correct." *Ziegier Furniture and Funeral Home, Inc. v. Ciemanec*, 2006 S.D. ¶ 16. (Citations omitted). In determining the question of ambiguity, a contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract. Rather a contract is

ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the *entire integrated agreement*. Id. (Citation omitted, emphasis added) the court looks at the language of the parties used in the contract to determine their intention and if that intention is clearly manifested by the language of the agreement [it] is the duty of the court to declare and enforce it. Id. (Citations omitted).

Jerome testified inconsistently at his deposition stating he did not have the right to purchase the property if it was leased to a third-party (SUMF 34) and then stating he does have the right to purchase the property if any [non-fee] interest is transferred (SUMF 44). The language regarding "or any interest therein" is read in concert with the entire Agreement. *Section Three* of the agreement is helpful in analyzing the intent of the Agreement. The Court notes Section Three only contemplates transferring fee interest from Dennis to Jerome. The agreement does not contemplate offering a non-fee interest in the property under the same terms as would be offered to a third-party.3 The Agreement clearly contemplates only a fee simple sale of the real estate or a portion (in fee) of the real estate. This is consistent with the inaction of Jerome when he had knowledge of the property being leased in the past (which he now claims is a violation of the Agreement). Reading the document as a whole, it is intended the right to purchase property is triggered when the property (or a portion of the property) is to be sold in fee simple to a third party.

Even if the Court were to determine the Agreement is ambiguous or applies to transfers of less than a fee interest, this would, as a matter of law, render the agreement void as a restraint against alienation.

Under SDCL 43-3-5, "[c]onditions restraining alienation, when repugnant to the interest created, are void." A right of first refusal is a preemptive right restraining alienation. *Laska v. Barr*, 2018 S.D. 6, ¶ 24. To be valid, the restraint must be reasonable and for a legitimate purpose. Id. "The standard against which the impact of a restraint is to be measured is that of the property owner free to transfer property as his or her convenience at a price determined by the market." Id. At ¶ 25, citing *Restatement (Third) of Prop.: Servitudes* § 3.4 cmt. C Comment c to the Restatement is helpful in analyzing this case. It states in part:

> The harmful effects that may flow from restraints on alienation include impediments to the operation of a free market in land, limiting the prospects for improvement, development, and redevelopment of land, and limiting the mobility of landowners and would-be purchasers. Other harmful consequences include the demoralization costs associated with subordinating the desires of current landowners to the desires of past owners, and frustrating the expectations that normally flow from land ownership. Harmful consequences may also flow from

3 In Jerome's deposition he was asked if a lease was offered to a third party, Dennis would have to offer him the opportunity to lease the property, to which he replied "Yes". Jerome Deposition page 173, lines 15-19. The Court can find nothing in the First Right of Refusal that provides this.

> enforcement of restraints on alienation that place one person in a position to take unfair advantage of another's need or desire to transfer property.
>
> In determining the injurious consequences likely to flow from enforcement of a restraint on alienation, the nature, extent, and duration of the restraint are important considerations. The standard against which the impact of a restraint is to be measured is that of the property owner free to transfer property as his or her convenience at a price determined by the market. Common types of restraints include prohibitions on transfers without consent of another, rights of first refusal, requirements that transfer be made only to persons meeting certain eligibility requirements, and options that require transfer to a particular person at a time selected by that person. The restraint may extend to all types of transfers, or only to certain types, like leases and subleases. It may require transfer at a fixed price, a price determined by a formula, by an appraisal, or by an offer received from a third party. The duration may be a fixed period, long or short, it may be limited by the occurrence of some event, or it may be unlimited. The greater the practical interference with the owner's ability to transfer, the stronger the purpose that is required to justify a direct restraint on alienation.

In the instant case, for the life of Jerome, Dennis is severely restricted in how he operates his land. For any action other than farming the ground himself, he is required to either get permission from Jerome, or risk having to sell the land for far less than fair market value. He would not even be able to make improvements to the property if they entail easements or lending or any other encumbrance on the land – no matter how small. Jerome acknowledges he can limit Dennis' ability to mortgage property during Jerome's life. See Jerome's deposition, page 109. This impedes the operation of a free market in the land. It strictly limits improvements and development of the land. It frustrates expectations that normally flow from land ownership. It places Dennis in a position to be taken unfair advantage of in his simple use of the property. As a matter of law, the agreement is repugnant to ownership of the property and is void.4

CONCLUSION

The Agreement executed between Dennis and Jerome Powers does not cover easements and leases related to wind tower projects. The terms of the document intend to apply to fee interest transfers of the property. As such, summary judgment for the benefit of all of the Defendants is appropriate. If the Agreement did contemplate easements and leases as the Plaintiff argues, the terms of the

4 The Court does not address whether the price in the agreement, which the parties acknowledge is less than fair market value, is on its own a restraint against alienation since the Court finds the far greater restrictions argued by Plaintiff clearly alienate the ownership rights of the property. The Court is also not addressing the additional arguments of Defendants.

Agreement are repugnant to ownership and would be a restraint on alienation, thus the Plaintiff is not able to prevail under either scenario.

Counsel for Prevailing Winds Park, LLC shall prepare an Order.

Dated January 15, 2021

_____

David Knoff
Circuit Court Judge

ATTEST: Jenny Robertson, Clerk

C. THE 1877 STATUTORY LANDSCAPE

South Dakota achieved statehood in 1889. Even before then, its territorial code contained the twin RAA prohibitions – conditions which restrain alienation in a way which is repugnant to the interest are void; and the absolute power to alienate cannot be suspended longer than the lives-in-being at the creation of the interest (with one exception relating to contingent fee remainder on a prior fee remainder).

Dakota Territory Revised Codes, 1877

Part I. Property in General. Title II. Ownership. Chapter II. Modifications of Ownership.

ARTICLE II. —CONDITION OF OWNERSHIP.

§ 200. RESTRAINT ON ALIENATION.] Conditions restraining alienation, when repugnant to the interest created, are void.

ARTICLE III. —RESTRAINTS UPON ALIENATION

§ 201. EXTENT OF LEGAL LIMIT.] The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives in being at the creation of the limitation or condition, except in the single case mentioned in section 229.

§ 202. FUTURE LIMITATION VOID.] Every future interest is void in its creation, which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

Part II. Real or Immovable Property. Title II. Estates in Real Property. Chapter 1. Estates in General.

§ 227. SUSPENSION.] The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

§ 228. FURTHER DEFINED.] The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and re-invest the proceeds to be held upon the same trust, is a suspension of the power of alienation of section 201.

§ 229. REMAINDER IN FEE.] A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may he determined, before they attain majority.

§ 230. SAME ON OTHER ESTATES.] Subject to the rules of this title, and of part 1 of this division, a freehold estate, as well as a chattel real, may be created to

commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a free hold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this title.

§ 231. SUBSEQUENT LIFE ESTATES VOID.] Successive estates for life cannot be limited, except to persons in being at the creation thereof, and all life estates subsequent to those of persons in being are void; and upon the death of those persons, the remainder, if valid in its creation, takes effect in the same manner as if no other life estate had been created.

§ 232. REMAINDER ON SUCCESSIVE LIVES.] No remainder can be created upon successive estates for life, provided for in the preceding section, unless such remainder is in fee; nor can a remainder be created upon such estate in a term for years unless it is for the whole residue of such term.

§ 233. ON TERM VOID, UNLESS.] A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited is such, that the remainder must vest in interest during the continuance or at the termination of lives in being at the creation of such remainder.

§ 236. TO HEIRS OF BODY.] When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.