PERPETUAL TRUSTS, CONSERVATION SERVITUDES, AND THE PROBLEM OF THE FUTURE

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Private wealth-protecting perpetual trusts and environment-protecting conservation servitudes are likely to elicit very different attitudes and reactions among people who encounter them, but they share a major problem: the "problem of the future." Both are long-term property arrangements that are likely to last far longer than the ability of their creators to predict what the future will bring. Unless the trust or servitude has a built-in mechanism for adapting to changes over time, the legal system will be called upon to address the problems that will inevitably arise. The law has developed five principal doctrines to address "the problem of the future"—the cy pres doctrine of charitable trust law, the administrative-deviation and no-further-purpose doctrines of private trust law, and the changed conditions and frustration-of-purpose doctrines of servitudes law. Will these be adequate to deal with the problems perpetual trusts and conservation servitudes will inevitably present?

Before addressing this question, however, let me explain why it might be useful to consider perpetual trusts and conservation servitudes together. Although they serve different purposes and implicate different policies, they share a number of similarities.

I. COMPARING PERPETUAL PRIVATE TRUSTS AND CONSERVATION SERVITUDES

Both private perpetual trusts and conservation servitudes are newcomers to the legal scene, and both are products of changes in state laws that overturned long-standing rules limiting their duration. Perpetual private trusts became possible only when state legislatures exempted them from the Rule Against Perpetuities.[1] Widespread use of

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[1] For accounts of the rule's demise, see Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601 (2000); Jesse E. Dukeminier & James Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds:*

conservation servitudes became possible only when state legislatures exempted them from the rule that restrictive covenants could be enforced against successors only by covenant beneficiaries who held land that would benefit from covenant enforcement.[2] Formerly, if a land trust or governmental body obtained a conservation servitude, without becoming the owner of an adjacent parcel of land, it would be able to enforce the restrictions only against the original owner of the burdened estate. The burden would not run with the land, with the result that the landowner could terminate the servitude at any time, severely limiting its duration and its utility. Legislative changes thus freed both private trusts and conservation servitudes from mandatory ex-ante durational limits, allowing them to be created for an indefinite duration, like corporations, common interest communities, charitable trusts, other servitudes, and other property-holding arrangements.

Both perpetual private trusts and conservation servitudes have been heavily affected by federal tax laws. The perpetual trust was invented to take advantage of a loophole in the generation-skipping tax,[3] enacted in 1986,[4] which allowed an exemption for $1 million per donor, or $2 million for a married couple. That amount of the exemption is now tied to the amount of the unified credit against estate tax[5] and will rise to

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An Empirical Analysis of Perpetuities and Taxes, 115 YALE L.J. 356 (2005); 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); Angela M. Vallario, *Death by a Thousand Cuts: The Rule Against Perpetuities*, 25 J. LEGIS. 141 (1999).

[2] This rule may be characterized as a rule prohibiting servitudes with benefits in gross. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.6 (2000).

Virginia's Open-Space Land Act, enacted in 1966, was the first to authorize public bodies to acquire conservation servitudes. Jesse J. Richardson, Jr., *Maximizing Tax Benefits to Farmers and Ranchers Implementing Conservation and Environmental Plans*, 48 OKLA. L. REV. 449, 456 (1995). Other states followed, and then the Uniform Conservation Easement Act was promulgated in 1981. Today forty-nine state recognize conservation servitudes, Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 426 (2005). The Restatement not only specifically recognizes conservation servitudes held by conservation organizations, section 1.6, but also states that servitude benefits in gross and in third parties may be freely created, section 2.6. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 1.6, 2.6.

Although widespread concerns about the potential invalidity of conservation easements led to legislation authorizing them, there are so few cases involving conservation servitudes that it is difficult to say with confidence that courts would not have recognized their validity when increasing environmental concerns made their utility apparent. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.6 cmt. *a*, for the history of prohibitions on benefits in gross, and cmt. *b* on the rationale for eliminating the prohibition in modern servitudes law. See Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 470-76 (1984), for a description and analysis of what cases there are.

[3] Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006), supplies a direct empirical defense of this claim.

[4] I.R.C. § 2601 (2000).

[5] I.R.C. § 2631(c). The amount is $2 million for 2006-08 and $3.5 million for 2009. *See*

$3.5 million for the year 2009. If the exempt amount is placed in trust, it remains exempt from the generation-skipping tax until distributed out from the trust. So long as the trust continues, the assets can be shielded from both the estate tax and the generation-skipping tax. Once lawyers figured out the tax avoidance opportunities afforded by the exemption, banks and trust companies eager for business persuaded legislatures to get rid of the Rule Against Perpetuities.[6]

Unlike perpetual trusts, conservation servitudes were not invented to exploit a tax loophole, but their widespread use[7] is attributable in a large degree to another federal tax law change made in 1986—adoption of provisions allowing a charitable deduction for land donated for conservation purposes. Internal Revenue Code § 170(h)(2)(C) specifically authorizes a deduction for restrictions on the use of real property "granted in perpetuity."[8] To take full advantage of the generation-skipping tax exemption and to obtain any advantage from the charitable deduction, private trusts and conservation servitudes must both be created to last in perpetuity. Because they are specifically created to endure in perpetuity, they present the problem of the future in its most acute form.

Another similarity between private trusts and conservation servitudes is that they are frequently created by gift, with an explicit direction from the donor that they are to last in perpetuity. That they are created by gift raises the question, critically important in thinking about the problem of the future, of how much deference is due to the donor's stated intent. In this respect, private trusts and conservation servitudes are much more like charitable trusts than they are like other property-holding devices or shared-use land arrangements. Corporations, common interest communities, and other servitudes are like private perpetual trusts and conservation servitudes in that they enjoy unlimited duration (though nothing requires that they be created in perpetuity), but they are usually created in commercial transactions and can usually be changed by current owners to suit their current preferences, without regard to the intent of the creators. By contrast, charitable trusts can be terminated or modified contrary to the donor's expressed intent only by judicial action applying the cy pres doctrine.

I.R.C. § 2010(c).

6 For the story, see sources cited, *supra* note 1.

7 The Land Trust Alliance reports that between 1998 and 2003, the number of conservation easements held by land trusts increased from 7392 to 17,847, and the area protected by those easements increased from 1,385,000 to 5,067,929 acres. Land Trust Alliance, 2003 Land Trust Alliance Census Addendum (2004), http://www.lta.org/census/lta_census_addendum.doc; *see also* Terry L. Anderson & Jon Christensen, *Conservation Easements Face a Crisis*, PERC REPORTS 10 (2005), http://www.perc.org/perc.php?subsection=5&id=551.

8 I.R.C. § 170(h) allows a deduction from the income tax. Similar deductions are allowed by § 2055(f) (estate tax) and § 2522(d) (gift tax).

The major difference between private perpetual trusts and conservation servitudes lies in the nature and degree of the interests involved. Private perpetual trusts serve primarily private and selfish ends. They are designed to allow the wealthy to shield their descendants from paying estate taxes and creditors. If they are successful, they will probably exacerbate class divisions between the wealthy and the rest of Americans, who will bear a heavier tax burden and, with recent changes to the bankruptcy act, will find it harder to escape their creditors.[9] Although allowing perpetual trusts may bring wealth to a state,[10] the only public policies that perpetual private trusts themselves serve are to encourage people to generate wealth and to provide for their families. These benefits may be substantial, but the costs can be high. Considering the possible effects of moving from the common law Rule Against Perpetuities to the statutory ninety-year rule of the Uniform Statutory Rule Against Perpetuities in 1990, I wrote:

> Having property tied up in a trust providing a steady stream of economic benefits to a family may provide a solid base from which family members can pursue productive lives without the insecurity and compromises on education and culture that lack of money may bring. Alternatively, it may induce them to arrogance and sloth. If more members of our society had a secure financial base, we might have a healthier, better educated and more creative society. We might end up, however, with a more complacent, boring, and less productive society. Who knows?
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> . . . I find it very difficult to feel certain either that more dead hand control is a bad thing or that it is a good thing.[11]

I still don't know whether allowing really long-term trusts is a good or bad idea, but my intuitive reaction is that perpetual trusts are a lot worse than ninety-year trusts, if only because they are likely to increase perceptions of inequality and undeserved privilege.

Conservation servitudes, by contrast, are designed to serve primarily public ends. They are used to protect the environment and historic land uses and structures from the ills caused by logging and resource extraction and by urban and suburban development. The values promoted are protection of life and health for people, plants, and wildlife. They protect historical and cultural resources as well as natural resources for enjoyment by future generations. Of course, conservation servitudes are also used by the wealthy to obtain tax

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[9] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[10] Professors Sitkoff and Schanzenbach have reckoned that $100 billion in trust funds flowed into states that abolished the Rule Against Perpetuities between 1985 and 2003. Sitkoff & Schanzenbach, *supra* note 1, at 420.

[11] Susan F. French, *Perpetuities: Three Essays in Honor of My Father*, 65 WASH. L. REV. 323, 352-53 (1990).

advantages while protecting their trophy properties from development. Conservation servitudes offer the wealthy another way to restrain property so that it passes down through the family under restrictions designed by the donor. Even when these are used for private and selfish purposes, however, substantial public benefits often flow from leaving the land in a relatively undeveloped state. The public subsidizes many conservation servitudes by tax deductions when they are created and by allowing reduced property taxes so long as the restrictions remain in force.

II. LIKELY FUTURE PROBLEMS

A. *Perpetual Private Trusts*

Perpetual private trusts over time will present several different kinds of problems. One quite likely problem is that the trust will prove a very costly and inefficient vehicle for managing family money.[12] As the number of the settlor's descendants increases, the amount of the trust principal available to produce income for each of them will decrease. The rate of increase in descendants is likely to be greater than the rate of increase in the size of the trust estate. As the shares available

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[12] *See* Joel Dobris, *Why Five? The Strange, Magnetic, and Mesmerizing Affect of the Five Percent Unitrust and Spending Rate on Settlors, Their Advisers, and Retirees*, 40 REAL PROP. PROB. & TR. J. 39 (2005); *see also* Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 514-15 (2006) ("[E]ven after the recent modernization of trust investment law, as compared to outright ownership the trust form carries with it additional agency costs, an extra layer of fees and commissions, and higher rates of federal income taxation. Each of these factors imposes drag on trust fund performance.").

In a January, 2000, press release by the National Conference of Commissioners on Uniform State Laws, Prof. Lawrence Waggoner, who is also the Director of Research of the Joint Editorial Board for the Uniform Probate Code, commented on the movement to abolish the Rule Against Perpetuities:

> [The movement] is ill-advised . . . because Congress is not likely to allow this loophole to continue indefinitely. In addition, . . . the creation of such trusts is problematic. Over time, the administration of such trusts is likely to become unwieldy and very costly.
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> Government statistics indicate that the average married couple has 2.1 children. Under this assumption, the average settlor will have more than 100 descendants (who are beneficiaries of the trust) 150 years after the trust is created, around 2,500 beneficiaries 250 years after the trust is created, and 45,000 beneficiaries 350 years after the trust is created. Five hundred years after the trust is created, the number of living beneficiaries could rise to an astounding 3.4 million.

Press Release, National Conference of Commissioners on Uniform State Laws, Uniform Statutory Rule Against Perpetuities is Law in 26 States (Jan. 2000), http://www.nccusl.org/nccusl/pressreleases/pr1-00-7.asp. Even if manageability of the trust for ever-increasing numbers of beneficiaries can be maintained by splitting the trust into shares for various branches of the family, tax pressures to distribute income and administrative costs for smaller shares are likely to lead over time to shares that are uneconomically small.

for each get smaller, the costs of administration will loom larger. Unless continuance of the trust provides significant advantages in avoiding taxes or creditors that outweigh the administrative costs, the beneficiaries will have strong incentives to seek legal help to terminate the trust. In addition to the probable increase in the costs of holding the assets in trust, changes in tax law or creditor-shield law could well make many perpetual trusts highly undesirable.

Inflexible administrative provisions, investment directions, or dispositive provisions that condition receipt of benefits on the beneficiaries' meeting certain conditions are also likely to raise problems over time. Changes in technology, in investment opportunities and standards, and in social conditions can render these provisions obsolete, inefficient, unwise, or socially unacceptable. Trust provisions that require beneficiaries to be stay-at-home moms, to adhere to a particular religion, or to pursue particular educational pathways, for example, are likely to become problematic over time.[13]

B. *Perpetual Conservation Servitudes*

Conservation servitudes, required by federal tax law to be "granted in perpetuity" to qualify the donor for a charitable deduction will also present future challenges to the legal system. Two kinds of problems are sure to arise: the owner of the servient estate will come to value the property's development potential more highly than the aesthetic and conservation values advanced by the servitude; or the specifications for use of the property will become obsolete or otherwise undesirable. Professors Gerald Korngold[14] and Julia Mahoney[15] have pointed out several ways in which conservation servitudes may impose restrictions on use of land that prove socially undesirable. One set of concerns clusters around preventing development of specific parcels of land that could otherwise be used for needs that turn out to be more important than the particular conservation purpose served. For example, by preventing development of close-in land, conservation servitudes may exacerbate problems of sprawl. They might also preserve land for marginally important conservation purposes at the expense of much-needed housing. Prof. Korngold suggests that modifying or terminating conservation servitudes to make restricted land in a community

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[13] Prof. Jeffrey G. Sherman suggests that courts should readily free beneficiaries from certain constraints related to personal behavior in *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273 (1999).

[14] Korngold, *supra* note 2, at 470-76.

[15] Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002).

available for uses most valuable to the community will be difficult because the holders of conservation servitudes are often not members of the affected communities. Thus, they will not respond to community needs for use of the land. Another set of concerns, raised by Prof. Mahoney, clusters around the currently incomplete state of knowledge about environmental science. Conservation uses and purposes and methods of conservation directed in servitudes created today may become obsolete, may turn out to be useless, or may even turn out to be harmful. Climate change, extinction, or other factors may completely frustrate the purposes of servitudes, or it may turn out that the wrong land was preserved—other land would better serve the particular conservation purpose.

Another problem certain to arise with conservation servitudes is that the value of conservation to the owner of the burdened land will decrease and the value of the land for development will increase. At some point the land owner will pressure the land trust or other organization that holds the benefit of the conservation servitude to agree to a modification or termination of the servitude that fails to protect the public's interest. Even though most conservation servitudes are relatively new, this has already begun to happen. The *Wall Street Journal* carried a story on November 2, 2005[16] about a family that changed its mind only eleven years after granting a perpetual servitude to the City of Encinitas over sixty-eight acres of a poinsettia farm, requiring that it remain in an agricultural state. Although the family was granted development permission for the bulk of its lands in 1994 when the servitude was created, it now seeks a release from the city so that more of the property can be developed. The city put the question to the voters who rejected it 65% to 35%.[17] When the restriction was agreed on in 1994, the median price of a single family home in the area was $176,000; it is now $605,600.[18] Skyrocketing land values and changing ownership of restricted lands will lead to escalating challenges to development restrictions. Protecting the interests of the public will be a significant problem of the future.

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[16] Joel Millman, *Flower Power Struggle*, WALL ST. J., Nov. 2, 2005, at B1.

[17] Unofficial results were reported in Angela Lau, *A Lot of No Votes: Ecke Ranch Owner Fails to Pave the Way for Land Sale*, THE SAN DIEGO UNION-TRIBUNE, Nov. 10, 2005, *available at* http://www.signonsandiego.com/uniontrib/20051110/news_1n10local.html, and in *San Diego Election Results*, NORTH COUNTY TIMES, Nov. 9, 2005, *available at* http://www.nctimes.com/articles/2005/11/11/election2005/sandiego/results.txt.

[18] Millman, *supra* note 16, at B1.

III. ARE EXISTING DOCTRINES ADEQUATE TO HANDLE FUTURE CHANGES?

A. *Perpetual Private Trusts*

Although perpetual trusts are a recent phenomenon, private trusts subject to the Rule Against Perpetuities have often lasted long enough that significant problems of adaptation to changing circumstances have arisen and many have been resolved. Allowing deviation from administrative and investment provisions of trusts has long been accepted, reformation and modification to obtain tax advantages is allowed in several states, and there has been some movement toward allowing courts to authorize deviation from the dispositive provisions of trusts as well.[19] In addition to statutes in California, Alaska, and Florida, the Restatement (Third) of Trusts and the Uniform Trust Code authorize deviation from dispositive provisions.[20] The Uniform Trust Code provides:

> § 412. Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively
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> (a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
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> (b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.
>
> (c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.[21]

The one area in which existing doctrines are unlikely to prove satisfactory for perpetual trusts is termination. Under the *Claflin* doctrine,[22] even if all the beneficiaries are in existence and consent, they are not entitled to terminate a trust if doing so would frustrate a material purpose of the settlor. Perpetual trusts pose two problems: there will always be unborn beneficiaries, and the settlor's purpose in providing a perpetual trust is likely to be regarded as material. As other

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19 JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 577-79 (7th ed. 2005).

20 *Id.*

21 UNIF. TRUST CODE § 412 (2005).

22 So called after the leading case, *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889).

commentators have pointed out, this is an area where legal change will be needed[23] to give the beneficiaries power to modify or terminate the trust despite the donor's stated intent that it be perpetual.[24]

B. *Conservation Servitudes*

In servitudes law, the primary legal mechanisms for adaptation to change are consensual modification or termination, and in the absence of agreement, the changed conditions doctrine. Unlike private trusts, which the parties cannot terminate if a material purpose of the settlor would thereby be frustrated,[25] ordinary servitudes can be terminated at any time by agreement of the burdened and benefited parties. When all parties agree, they are free to ignore the original purpose of the developer, or other creator, of the servitude. When all parties do not agree, they may seek judicial modification or termination of the servitude under the changed conditions doctrine.[26]

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[23] *See, e.g.*, Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697 (2001); Dukeminier & Krier, *supra* note 1, at 1340-42.

[24] I disagree with the position taken in Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 626 (2005) (suggesting that giving beneficiaries more power to determine what should be done with trust assets, particularly along the lines proposed by Dukeminier & Krier, *supra* note 1, would be a radical and probably undesirable step). Even though he recognizes that later generations of beneficiaries will have better information than the settlor about their needs and propensities, he takes the position that deference to the settlor's intent should still be given because:

> [A] decision to modify or terminate a trust also may involve value judgments, such as whether education is more important than other accomplishments or whether inherited wealth should be distributed in such a way as to encourage hard work . . . . [S]ome settlors may wish to make distributions conditional on college graduation, employment, income level, or other indicators of success. After three or four generations, the beneficiaries may no longer value hard work or education as much as the settlor. Mandatory rules providing for easy modification and termination allow the beneficiaries, at each generation, to substitute their own values for those of the settlor. It is not self-evident that the law should favor the values of fourth- or fifth-generation beneficiaries over those of the settlor, whose labor may have made the trust possible.

Id. at 623.

By the time that three or four or five generations have passed, however, it seems self-evident to me that the settlor's views are likely to be so outdated that they will deserve little deference. The fact that the settlor amassed (or inherited) the funds does not give the settlor special ability to predict future conditions and should not justify maintaining the funds for purposes that no longer meet the needs of the beneficiaries.

[25] This is the *Claflin* doctrine, discussed *supra* note 22.

[26] The generally applicable changed conditions doctrine is stated in RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.10 (2000):

> § 7.10 Modification and Termination of a Servitude Because of Changed Conditions
> (1) When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the

Conservation servitudes should probably be treated differently from other servitudes, however, because they are more like charitable trusts than most servitudes, which are created in commercial transactions. There is a strong public interest in many conservation servitudes, not only because they provide public goods in the form of open space, wildlife habitat, wetlands protection, forests, and sometimes recreational lands and educational opportunities, but also because of the tax benefits accorded the creator of the servitude, and often to successive owners of the land. The Restatement (Third) of Property: Servitudes recognizes that conservation servitudes should be treated differently from ordinary servitudes where there is little or no public interest at stake in modification and termination decisions. To protect the public interest in maintaining the utility of conservation servitudes, the Restatement adopts the cy pres doctrine from charitable trusts; to protect the public's financial investment, it provides that a court may require the servient owner to pay appropriate damages and restitution of governmental benefits as a condition of obtaining a release from the servitude. The applicable provision is:

> § 7.11 Modification and Termination of a Conservation Servitude Because of Changed Conditions
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> A conservation servitude held by a governmental body or conservation organization may not be modified or terminated because of changes that have taken place since its creation except as follows:
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> (1) If the particular purpose for which the servitude was created becomes impracticable, the servitude may be modified to permit its use for other purposes selected in accordance with the cy pres doctrine, except as otherwise provided by the document that created the servitude.
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> (2) If the servitude can no longer be used to accomplish any conservation purpose, it may be terminated on payment of appropriate damages and restitution. Restitution may include expenditures made to acquire or improve the servitude and the value of tax and other government benefits received on account of the servitude.

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servitude. Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude.
(2) If the purpose of a servitude can be accomplished, but because of changed conditions the servient estate is no longer suitable for uses permitted by the servitude, a court may modify the servitude to permit other uses under conditions designed to preserve the benefits of the original servitude.
(3) The rules stated in § 7.11 govern modification or termination of conservation servitudes held by public bodies and conservation organizations, which are not subject to this section.

> (3) If the changed conditions are attributable to the holder of the servient estate, appropriate damages may include the amount necessary to replace the servitude, or the increase in value of the servient estate resulting from the modification or termination.
>
> (4) Changes in the value of the servient estate for development purposes are not changed conditions that permit modification or termination of a conservation servitude.[27]

Application of the provisions of this section should address some of the concerns about long-term conservation servitudes, particularly that the donor's specifications as to how conservation is to be carried out will become outdated, and that termination will provide a huge windfall to the owner of the servient estate without any compensation to the land trust or governmental agency for the loss of a conservation resource. What section 7.11 does not address are concerns that the land may become more valuable to the community for a non-conservation use and that the servient land owner and servitude holder can terminate the servitude by agreement without court involvement or any other process designed to protect the public's interest. A reasonable solution to the latter problem could be found by treating conservation servitudes like charitable trusts, as recent commentators have suggested.[28]

But, what if it turns out that the land would be better used for something not allowed by the conservation servitude? If the land can still be used for conservation purposes and the servitude holder does not agree to a release, the changed conditions doctrine will not allow judicial termination. Even if the landowner and the servitude holder do agree, application of charitable trust principles might prevent them from doing so because the cy pres doctrine allows a change of purpose only when it is impossible or impracticable to carry out the donor's intended purpose.[29] At this point, the problems of perpetual trusts and conservation servitudes converge: the deference to donor's intent under existing legal doctrines prevents termination even though it may be highly desirable.

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[27] *Id.* § 7.11.

[28] Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91 (2002), and McLaughlin, *supra* note 2, at 426, make a convincing case that charitable trust law can provide good solutions to future problems of conservation servitudes.

[29] One way out of this impasse might be to use eminent domain to condemn the servitude benefit, but this will often not be practical. Another approach a community could use would be to adopt land use regulations that make uses permitted under the servitude illegal. This would set the stage for application of the changed conditions doctrine.

IV. HOW MUCH DEFERENCE SHOULD BE GIVEN TO THE DONOR'S INTENT?

My inclination is to think that the amount of time that has passed since the trust or servitude was created should play a significant role in determining how much to defer to the donor's intent.[30] I doubt that allowing termination after a substantial period of time has gone by would discourage people from engaging in productive wealth-generating activity or from donating land for conservation purposes. Another factor to be considered is how much deference should be paid to the desires of the current owners and how skeptical an eye should be cast on their claims that the trust or servitude has become an inefficient or undesirable use of the property. Because I think that perpetual trusts serve little public purpose and are primarily to benefit the family, I agree with Professors Dukeminier and Krier, that when the family members known to the donor are no longer beneficiaries, current family members should be able to decide whether the trust should continue.[31] Their interests are far stronger than those of the donor and they are likely to be in a much better position to decide what is in their best interests. Unless someone other than the trustee objects, I would allow them to terminate without court involvement.

With respect to conservation servitudes, I am inclined to think the public interest involved should require some sort of public review before the parties are allowed to terminate the servitude. The public's interest could be safeguarded by allowing neighbors and local officials to challenge decisions to release a servitude or to develop the property in violation of its terms.[32] In this context, deference to the wishes of the donor becomes an issue only after the donor has died or transferred the property to others. In many cases, the public's interest and the donor's

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[30] A similar idea appears in recent scholarship on charitable trusts that suggests a more liberal application of cy pres after the perpetuities period ends. *See* Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 355-56 (1999).

[31] Practitioners who recommend perpetual dynasty trusts recommend giving each generation a choice of whether to continue the trust by a special power to appoint the remainder in further trust or to appoint it outright to the trustor's descendants. *See, e.g.*, RICHARD W. NENNO, DELAWARE DYNASTY TRUSTS, TOTAL RETURN TRUSTS, AND ASSET PROTECTION TRUSTS 164 (2005) (supplying a model clause); *see also* Pierce H. McDowell, III, *The Dynasty Trust: Protective Armor for Generations to Come*, TR. & EST., Oct. 1993, at 47, 53 (noting that it "is often desirable to give at least some of the beneficiaries special testamentary powers of appointment that will enable them to change the dispositive terms of the trust" in light of unanticipated changes in circumstances).

[32] Prof. Carol Necole Brown calls for granting community members standing to enforce conservation servitudes in *A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements*, 40 GA. L. REV. 85 (2005).

interest will coincide. Where they diverge, the public interest should outweigh the donor's.

CONCLUSION

Both perpetual trusts and conservation servitudes pose special challenges to the legal system, which will require new ways of dealing with the problem of the future. Existing doctrines can be used and extended to solve many problems that are likely to arise, but more will be needed. For perpetual trusts, the beneficiaries should be given more protection by increasing their ability to terminate the trust and determine how the assets shall be used. For conservation servitudes, more attention should be given to protecting the public interest against collusive terminations by action of a developer and the servitude holder and against retention of conservation servitudes of marginal value when the land is needed for other uses of benefit to the community. Interesting work lies ahead for scholars, courts, and legislatures as they grapple with perpetual trusts, conservation servitudes, and the problem of the future.