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Allowing Perpetuities In North Carolina

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As one state after another acts to make perpetual trusts possible, a little-noticed provision in some state constitutions forbidding "perpetuities" is receiving new attention. The first such provision—originally in North Carolina's 1776 Constitution and later copied by other states—is now the subject of litigation that will determine the constitutionality of the state's recent repeal of the Rule Against Perpetuities as applied to beneficial interests in trust. The case, *Brown Brothers Harriman Trust Co. v. Benson*,[1] seems set to become a landmark that could be influential as other states with similar constitutional provisions respond to the demand for allowing perpetual trusts.

> ***Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.***
> N.C. CONST. art. I, § 34.

On August 19, 2007, House Bill 1384 became law in North Carolina.[2] It repealed the Rule Against Perpetuities as applied to trusts if the trustee has a power of sale.[3] It is, therefore, now possible in this state to create perpetual trusts. Popularly known as "dynasty trusts," such trusts can preserve property for the benefit of a settlor's descendants from generation to generation forever, that is, in perpetuity.

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1. No. 08-CVS-13456 (N.C. Super. Ct. Feb. 26, 2009), *appeal filed*, Notice of Appeal, No. 08-CVS-13456 (N.C. Ct. App. Mar. 5, 2009).

2. An Act to Repeal the Statutory Rule Against Perpetuities as it Applies to Trusts Created or Administered in this State and Codify the Law Regarding the Power of Alienation for Trusts Created in North Carolina, ch. 41, 2007 N.C. Sess. Laws 390 (codified as amended at N.C. GEN. STAT. §§ 41-15, -23).

3. *Id.* at sec. 1, § 41-23(e).

By adopting this statute, North Carolina joined a nationwide movement away from the centuries-old policy of limiting the duration of trusts. Although the dynastic impulse is as old as the human race, settlors today create such trusts mainly to shelter assets from federal taxes on succession at death.[4] Since 1986, when the United States Congress amended the tax code to provide for a tax on assets in excess of an exempt amount transferred at death at each generation, either in the form of the traditional estate tax or a new "generation-skipping transfer tax,"[5] the District of Columbia and twenty-three states have adopted legislation permitting perpetual or nearly perpetual trusts.[6] If care is taken in settling the trust, no estate or generation-skipping transfer tax on the exempt amount or its accumulations will be due until the trust terminates and the money is finally distributed. In effect, the perpetual trust allows individuals to fund a trust for the use and enjoyment of their descendants forever. Those lobbying for the new legislation have been lawyers and bankers seeking the business of establishing and servicing dynasty trusts.[7]

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4. *See* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1312-16 (2003).

5. 26 U.S.C.A. §§ 2601-2664 (2002 & Supp. 2008). In 2009, the exemption is $3.5 million per transferor. *Id.* § 2631(c).

6. Since the 1986 tax code amendment, the District of Columbia and sixteen states have enacted statutes permitting perpetual trusts: ALASKA STAT. §§ 34.27.051, -.100 (2008); ARIZ. REV. STAT. ANN. § 14-2901(A)(3) (2005 & Supp. 2009); DEL. CODE ANN. tit. 25, § 503 (1989 & Supp. 2008); D.C. CODE ANN. § 19-904(a)(10) (LexisNexis 2008); 765 ILL. COMP. STAT. §§ 305/3(a-5), /4(a)(8) (2001); ME. REV. STAT. ANN. tit. 33, § 101-A (Supp. 2008); MD. CODE ANN., EST. & TRUSTS § 11-102(b)(5) (LexisNexis Supp. 2008); MICH. COMP. LAWS §§ 554.91-.94 (Supp. 2009); MO. REV. STAT. § 456.025 (2000); NEB. REV. STAT. § 76-2005(9) (2003); N.H. REV. STAT. ANN. § 564:24 (2006 & Supp. 2008); N.J. STAT. ANN. §§ 46:2F-9 to -11 (West 2003); N.C. GEN. STAT. § 41-23 (Supp. 2008); OHIO REV. CODE ANN. § 2131.09(B) (LexisNexis 2007); 20 PA. CONS. STAT. § 6107.1(b)(1) (West Supp. 2008); R.I. GEN. LAWS § 34-11-38 (Supp. 2008); VA. CODE ANN. § 55-13.3(C) (2007). The following seven states acted to permit very long trusts in the aftermath of the 1986 tax code amendment: COLO. REV. STAT. § 15-11-1102.5 (2008) (1000 years); FLA. STAT. ANN. § 689.225 (West 1994 & Supp. 2009) (360 years); NEV. REV. STAT. § 111.1031(1)(b) (2007) (365 years); TENN. CODE ANN. § 66-1-202(f) (Supp. 2008) (360 years); UTAH CODE ANN. § 75-2-1203 (Supp. 2008) (1000 years); WASH. REV. CODE § 11.98.130 (West 2006) (150 years); WYO. STAT. ANN. § 34-1-139 (2005) (1000 years). In 1986, three states already permitted perpetual trusts: IDAHO CODE ANN. § 55-111 (2007); S.D. CODIFIED LAWS §§ 43-5-1, -8 (2004); WIS. STAT. ANN. § 700.16(3) (West 2001).

7. Dukeminier & Krier, *supra* note 4, at 1315-16. On the general topic of jurisdictional arbitrage, see John V. Orth, *"The Race to the Bottom": Competition in the Law of Property*, 9 GREEN BAG 2D 47 (2005).

The race to allow perpetual trusts has brought new attention to little-known provisions in a number of state constitutions. Ten states have constitutional provisions prohibiting "perpetuities."[8] North Carolina's ban, adopted in 1776, was the first, and is representative of the others: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."[9] Every North Carolina Constitution since 1776 has included this section in its Declaration of Rights.[10]

North Carolina's first state constitution consisted of two documents: the Declaration of Rights, adopted on December 17, 1776, and the constitution, adopted the following day and incorporating the Declaration of Rights by reference.[11] The Constitution of North Carolina (specifically so-called) also contained a provision against perpetuities which stated, "[T]he future legislature of this state shall regulate entails in such a manner as to prevent perpetuities."[12] Entails are

8. ARIZ. CONST. art. II, § 29; ARK. CONST. art. 2, § 19; MONT. CONST. art. 13, § 6; NEV. CONST. art. 15, § 4; N.C. CONST. art. I, § 34; OKLA. CONST. art. 2, § 32; TENN. CONST. art. 1, § 22; TEX. CONST. art. 1, § 26; VT. CONST. ch. II, § 63; WYO. CONST. art. 1, § 30.

9. N.C. CONST. art. I, § 34. "Genius" is relevantly defined as a "peculiar, distinctive, or identifying character" and "an attendant spirit of a person or place." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 486 (10th ed. 1993). Monopolies still had political overtones at the time of the American Revolution. English monarchs had used grants of monopolies to reward their political favorites, provoking parliament to adopt the Statute of Monopolies, 21 Jac. I, c. 3 (1624), which made all monopolies illegal except those authorized by parliament or those granted to protect inventions. JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 75 (1993).

10. N.C. CONST. of 1776, Decl. of Rts., § 23, *available at* http://avalon.law.yale.edu/18th_century/nc07.asp; N.C. CONST. of 1868, art. I, § 31; N.C. CONST. art. I, § 34. The 1776 Declaration of Rights provided that, "Perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed." That wording was carried forward in the 1868 Constitution. In 1971 "shall not be allowed" was substituted for "ought not to be allowed," a change presented by the drafters as merely editorial. N.C. STATE CONSTITUTION STUDY COMM'N, REPORT OF THE N.C. STATE CONSTITUTION STUDY COMMISSION TO THE N.C. STATE BAR AND THE N.C. BAR ASSOCIATION 4, 65 (1968). All other current state constitutions banning perpetuities, *see* sources cited *supra* note 8, also use the construction "shall not be allowed."

11. N.C. CONST. of 1776, § 44, *available at* http://avalon.law.yale.edu/18th_century/nc07.asp. North Carolina's first constitution was adopted by a "provincial congress," not by popular vote. 10 THE COLONIAL RECORDS OF NORTH CAROLINA 913, 973-74 (William L. Saunders ed., 1890), *available at* http://docsouth.unc.edu/csr/index.html/document/csr10-0442. Since the adoption of the state's second constitution in 1868, the Declaration of Rights has appeared as Article I. ORTH, *supra* note 9, at 37. For a survey of North Carolina's constitutional history, see *id.* at 1-34.

12. N.C. CONST. of 1776, § 43, *available at* http://avalon.law.yale.edu/18th_century/nc07.asp. The Vermont Constitution to this day includes an almost identical

estates created by grants in fee tail, by which land is limited to pass only to descendants from generation to generation forever, in perpetuity.[13]

In 1784, the North Carolina General Assembly, as part of a sweeping reform of property law,[14] obeyed the constitutional directive concerning entails, and legislated that anyone seized of an estate in fee tail shall be deemed to be seized of the same in fee simple.[15] A prologue to the legislation explained its purpose in political terms, reminiscent of the phrase in the Declaration of Rights that perpetuities and monopolies are "contrary to the genius of a free state."[16] The prologue stated that "entails of estates tend only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice."[17] The adoption of the statute eliminating the fee tail as a possessory estate obviated the need for a constitutional provision directing such legislation, and the section disappeared from subsequent North Carolina constitutions. But the general ban on

provision. VT. CONST. ch. II, § 63 ("The Legislature shall regulate entails in such manner as to prevent perpetuities."). Three state constitutions ban perpetuities and entails in the same section. ARIZ. CONST. art. II, § 29 ("No hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting any perpetuity or entailment in this State."); OKLA. CONST. art. 2, § 32 ("Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State."); TEX. CONST. art. 1, § 26 ("Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.").

13. Created by a grant in the form "O to A and the heirs of his body," the fee tail limited inheritance to the grantee's descendants, rather than to his heirs in general. It formed the legal basis of the landed aristocracy. For a brief history of the fee tail, see John V. Orth, *Does the Fee Tail Exist in North Carolina?*, 23 WAKE FOREST L. REV. 767, 773-78 (1988).

14. At the same time, the General Assembly eliminated the right of survivorship associated with the concurrent estate of joint tenancy. Act of 1784, ch. 22, § VI, *reprinted in* 24 THE STATE RECORDS OF NORTH CAROLINA 574 (Walter Clark ed., 1904) (now codified at N.C. GEN. STAT. § 41-2 (2007)). Not until 1990 did the right of survivorship return as an incident of a statutory joint tenancy. *See* John V. Orth, *The Joint Tenancy Makes a Comeback in North Carolina*, 69 N.C. L. REV. 491 (1991).

15. Act of 1784, ch. 22, § V (now codified at N.C. GEN. STAT. § 41-1 (2007)). For a history of the statute through various revisions and consolidations, see Orth, *supra* note 13, at 778-82. For the context of the American abolition of primogeniture and entailments, see John V. Orth, *After the Revolution: "Reform" of the Law of Inheritance*, 10 LAW & HIST. REV. 33 (1992).

16. N.C. CONST. art. I, § 34; Act of 1784, ch. 22, § V.

17. Act of 1784, ch. 22, § V.

perpetuities in the Declaration of Rights remained and has been carried forward to the present day.

What Is a Perpetuity?

Nowhere constitutionally defined, the word "perpetuity" had three distinct but related meanings at common law.[18] The first, as we have seen, was the entailed estate. In its original form, the fee tail was "unbarrable"; that is, it could not be converted into a fee simple and sold or directed away from the grantee's descendants. Barring the entail became possible in England by legal fiction, notably through a device called common recovery, traditionally dated to *Taltarum's Case* in 1472.[19] However, by a quirk of history the device did not cross the Atlantic with the English settlers. Unbarrable entails were still possible in North Carolina at Independence, which is why the first Constitution of North Carolina directed their elimination.

In addition to an unbarrable entail, "perpetuity" had two other meanings: an inalienable interest and a future interest that could remain unvested for too long.[20] These were dealt with, respectively, by the Rule Against Restraints on Alienation and the Rule Against Perpetuities.

The Rule Against Restraints on Alienation

Alienation is the power to convey title. At common law, all vested property interests, present and future, are presumed to be alienable. Although limited exceptions are allowed under special circumstances and for a reasonable time, disabling restraints are not favored.[21] A significant inroad into the Rule Against Restraints on Alienation was

18. *See* Charles Sweet, *Some Recent Decisions on the Rule Against Perpetuities*, 27 L.Q. REV. 150, 170 (1911) ("That unfortunate word has three distinct meanings . . . ."), *cited in* 7 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 194 n.2 (2d ed. 1937) (mistaking the volume number in which the Sweet article appeared).

19. Y.B. 12 Edw. IV (1472), *discussed in* 3 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 117-20 (5th ed. 1942).

20. Unvested future interests were inalienable at common law, so the two types of perpetuity were related. Future interests that would remain unvested for too long continued to be regarded as perpetuities even after they became generally alienable. *See* N.C. GEN. STAT. § 39-6.3(a) (2007) (making all future interests alienable, devisable, and inheritable).

21. *See* LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 113 (2d ed. 1966) ("With the exception of restraints on alienation incident to beneficial interests in spendthrift trusts, all disabling restraints are void."). The classic text on restraints against alienation is JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895), expressing the author's vehement opposition to spendthrift trusts.

made by the recognition in a growing number of states beginning in the late nineteenth century of the so-called "spendthrift trust," a trust with a provision forbidding the beneficiaries from alienating their equitable interests either voluntarily or involuntarily.[22] The effect is to insulate the interests in trust from the claims of the beneficiaries' creditors; in other words, to protect the assets for successive beneficiaries from the improvidence of a spendthrift.[23]

North Carolina courts have traditionally applied the common law Rule Against Restraints on Alienation,[24] and the North Carolina General Assembly was among the last to legislate in favor of spendthrift trusts.[25] Even the 2007 legislation permitting perpetual trusts voids trusts that suspend the trustee's power of alienation for too long–longer than the period measured by a life in being at the creation of

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22. N.C. GEN. STAT. § 36C-1-103(18) (2007).

23. A spendthrift is defined as "1: one that spends or uses improvidently or wastefully," and "2: one who spends his estate (as by drinking or gambling) so as to expose himself or his family to want or suffering or to becoming a charge upon the public." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2190 (1971). The word was at first avoided in trust drafting because of its pejorative connotations, but is now commonly accepted as a term of art. Nonetheless, one should be aware that the term was originated by critics of the device. *Cf.* W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 991 n.78 (1965) ("Items of jargon can also be usefully argumentative, . . . designed as they are to point out the absurdity of the designated doctrines."). Argumentative jargon will appear again in the discussion of the Rule Against Perpetuities.

24. 2 PATRICK A. HETRICK & JAMES P. MCLAUGHLIN, JR., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 18-9 (5th ed. 1999) ("North Carolina has a long history of caselaw striking down restraints on alienation.").

25. In 1995 Professor Hirsch listed New Hampshire and North Carolina as the only two states that "deny effectiveness to spendthrift trusts." Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 3 n.8 (1995). New Hampshire subsequently authorized such trusts. N.H. REV. STAT. ANN. § 564:23 (1997). Until the adoption of the Uniform Trust Code in 2006, N.C. GEN. STAT. § 36C-1-101ff (2007), North Carolina legislation still referred only to a near relative of spendthrift trusts, "protective trusts." N.C. GEN. STAT. § 36A-115(b)(3) (1999) (now codified at N.C. GEN. STAT. § 36C-5-508). Prior to North Carolina's adoption of the Uniform Trust Code, protective trust was defined as:

> A trust wherein the creating instrument provides that the interest of the beneficiary shall cease if
>
> a. The beneficiary alienates or attempts to alienate that interest; or
>
> b. Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise, or
>
> c. The beneficiary becomes insolvent or bankrupt.

Id. Like a spendthrift trust, a protective trust secured the trust assets from the beneficiary's creditors, but it did so at the expense of forfeiting the beneficiary's interest.

the trust plus twenty-one years[26]—a period familiar from the common law Rule Against Perpetuities. While the legal interests must be alienable (or become so within the perpetuities period), the beneficial interests may remain inalienable forever.[27] In other words, successive trustees have the power to invest and re-invest the trust property for the benefit of unborn generations in perpetuity, but the beneficiaries have no power to alienate their beneficial interests either voluntarily or involuntarily. This shelters the beneficiaries forever from the claims of creditors.

Because charitable trusts (trusts for charitable purposes with no definite beneficiaries) involve the recognition of inalienable beneficial interests, they are technically perpetuities. Two state constitutions expressly recognize this fact: the Montana constitution ("No perpetuities shall be allowed except for charitable purposes")[28] and the Nevada constitution ("No perpetuities shall be allowed except for eleemosynary purposes").[29] Although the North Carolina constitution's ban on perpetuities lacks a comparable exception, charitable trusts have always been recognized in this state despite the Rule Against Restraints on Alienation.[30] The exception is necessary if charitable trusts are to exist at all. The beneficial interests in charitable trusts must be inalienable, as Professor John Chipman Gray explained, "because there is no one to alienate them. No one has any alienable rights, because no one has any rights."[31]

The Rule Against Perpetuities

The common law Rule Against Perpetuities, memorized by generations of law students, was stated in capital form by Professor Gray: "NO INTEREST IS GOOD UNLESS IT MUST VEST, IF AT ALL, NOT LATER THAN TWENTY-ONE YEARS AFTER SOME LIFE IN BEING

26. N.C. GEN. STAT. § 41-23(a) (2007). Regardless of the trustee's power of sale, alienation is not considered suspended under the statute if "there exists an unlimited power to terminate the trust in one or more persons in being." *Id.* at § 41-23(e).

27. *Id.* § 41-23(e), (h).

28. MONT. CONST. art. 13, § 6.

29. NEV. CONST. art. 15, § 4. A proposal to repeal this section of the Nevada constitution was rejected by the voters in 2002. *See Election 2002*, RENO GAZETTE-J., Nov. 8, 2002, at 3C (reporting results). A similar provision in the California constitution was repealed in 1970. CAL. CONST. art. 20, § 9 (repealed).

30. N.C. GEN. STAT. § 36C-4-405(c)(4) (declaring a charitable gift not invalid although it "contravenes any statute or rule against perpetuities").

31. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 567 (Roland Gray ed., 4th ed. 1942).

AT THE CREATION OF THE INTEREST."[32] In this form, the Rule Against Perpetuities was the law in North Carolina until 2007.[33] As is apparent, the Rule is not directed at vested interests, present or future. A vested interest in fee simple may last forever, passing by alienation, devise, or inheritance from one mortal human being to another until the end of time. Indeed, that is the defining characteristic of a fee: an interest that can last forever, in perpetuity.[34] Likewise, future interests retained by a grantor—possibilities of reverter and rights of re-entry (also known as powers of termination)—are interests that can last forever, because they are vested interests.[35]

Actually a rule against remoteness of vesting, the Rule Against Perpetuities voids future interests that are not certain to vest within the "perpetuities period."[36] An interest voided by the Rule Against Perpetuities—one that might vest outside the permitted period—was in that sense a "perpetuity."[37] At the risk of circularity, it could be said that

32. *Id.* at 191. The Rule Against Perpetuities began to take shape in the seventeenth century and reached its final form only in the nineteenth century. For a discussion of the Rule's early development, see George L. Haskins, *"Inconvenience" and the Rule* for *Perpetuities*, 48 MO. L. REV. 451 (1983). For Professor Gray's role in the Rule's later development, see Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982).

33. *See, e.g.*, McPherson v. First & Citizens Nat. Bank of Elizabeth City, 81 S.E.2d 386 (N.C. 1954) (citing Gray); Mercer v. Mercer, 52 S.E.2d 229 (N.C. 1949) (citing N.C. CONST. of 1868, art. I, § 31, the predecessor of current N.C. CONST. art. I, § 34, banning perpetuities); *see also* N.C. Nat. Bank v. Norris, 203 S.E.2d 657, 658 (N.C. Ct. App. 1974) ("The common law rule against perpetuities has been long recognized and enforced in this jurisdiction, and its application has the continuing sanction of Article I, Section 34 of our State Constitution."). The Author commented in a reference guide to the North Carolina constitution that the dictum in *Norris* "should not be taken to mean that the Rule Against Perpetuities in its present formulation is beyond the reach of the legislature." ORTH, *supra* note 9, at 76. Until 1995, North Carolina courts applied the common law Rule Against Perpetuities; from 1995 until 2007, legislation allowed, as an alternative to the common law perpetuities period, a ninety year wait-and-see period. Uniform Statutory Rule Against Perpetuities, N.C. GEN. STAT. §§ 41-15 to -22 (2007). *See infra* notes 48-50 and accompanying text.

34. *See, e.g.*, 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 4 (Oliver Wendell Holmes, Jr. ed., 12th ed. 1873) ("No estate is deemed a fee, unless it may continue forever.").

35. *See* 6 THOMAS E. ATKINSON ET AL., AMERICAN LAW OF PROPERTY 12-13 (A. James Casner ed., 1952) ("Possibilities of reverter and rights of entry for condition broken are 'vested' from the onset . . . ."). Statutes now curtail the duration of these interests. *See, e.g.*, N.C. GEN. STAT. § 41-32 (voiding possibilities of reverter and rights of entry affecting the use of land created after 1995 that fail to become possessory within sixty years).

36. ATKINSON ET AL., *supra* note 35, at 13.

37. *Id.*

one of the common law meanings of the word "perpetuity" was any interest that is void for remoteness under the Rule Against Perpetuities.[38]

Although relatively simple of application in ordinary cases—limiting the duration of unvested interests to the lifetimes of persons known to the grantor and their descendants in the next generation until what was then the age of majority—the Rule became complicated by the efforts of conveyancers to stretch the period to the uttermost; for example, by the extravagant "royal lives clause" in England[39] or the "nine healthy babies clause" in America.[40] Legal academics invented labels for the logical traps laid by the Rule, at first perhaps in an effort to make the subject understandable and interesting, but later as a means of pointing out its absurdities in extreme cases.[41]

One of the Rule's greatest strengths, the certainty provided by voiding remote interests *ab initio*, was also one of its weaknesses. Because any possibility of remote vesting was fatal, bizarre and unlikely eventualities caused the failure of benign interests. The common law's conclusive presumption of fertility until death, regardless of age or sex—a source of certainty in applying the Rule—was ridiculed as the Fertile Octogenarian Rule.[42] Also, the unlikely possibility that a

38. *Id.*; Sweet, *supra* note 18, at 170 (listing one of the meanings of the word "perpetuity" as "an interest which is void for remoteness under the modern Rule against Perpetuities").

39. *See In re* Villar, [1929] 1 Ch. 243 (C.A.) (upholding a gift to descendants who shall be living twenty-one years after the death of all lineal descendants of Queen Victoria now living). The loophole in the Rule allowing clauses using "extraneous lives" was the phrase "*some* life in being at the creation of the interest," not limiting the measuring life to a beneficiary or someone related to a beneficiary. *Id.* at n.1.

40. *See* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 642 (1938) ("Bequest 'to such of my children and more remote issue as shall be living 21 years after the death of the survivor of R, S, T, U, V, W, X, Y, and Z' (these being nine healthy babies selected at random).").

41. The shift is indicative of the changing role of the law professor, from transmitter of tradition to legal reformer. *See* Leach, *supra* note 23, at 991 n.78 ("Items of jargon can also be usefully argumentative, . . . designed as they are to point out the absurdity of the designated doctrines."). Interestingly, the "spendthrift" label did not cause that device to be repudiated; instead, it became a term of art, while the chamber of horrors associated with the Rule Against Perpetuities brought it into disrepute and hastened its decline. *See supra* note 23. Perhaps the explanation can be found in the self-interest of settlors: spendthrifts endanger the dynastic assets, while the Rule Against Perpetuities shortens the settlors' reach into the future.

42. Leach, *supra* note 23, at 992. The common law presumption of fertility is best exemplified by the decision in *Jee v. Audley*, (1787) 29 Eng. Rep. 1186 (Ch.), actually involving a septuagenarian. See A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 76-99 (1995), for the details of the case. Covering the other end of the age

beneficiary might marry a woman not alive at the creation of the interest, which leads to the likely possibility that the woman will outlive the beneficiary, was caricatured as the Unborn Widow Rule.[43]

If the problem with the Rule Against Perpetuities was its prospective application ("at the creation of the interest"), the solution was to allow retrospective application. Thus, the Rule was occasionally restated as: NO INTEREST IS GOOD UNLESS IT VESTS [not "must vest, if at all"] NOT LATER THAN TWENTY-ONE YEARS AFTER SOME LIFE IN BEING AT THE CREATION OF THE INTEREST. In other words, one must await the expiration of the perpetuities period and see if the interest actually vests by that time. A few states, beginning with Pennsylvania in 1947,[44] adopted this change, which was subsequently endorsed by the Restatement (Second) of Property.[45] North Carolina did not adopt this version.[46]

Next, problems were raised about ascertaining the "life in being" relevant to the application of the Rule. To this problem the solution was to adopt, as an alternative to the common law Rule, a rule that the interest must vest within a certain period of time, arbitrarily set at 90 years.[47] This alternative, in other words, was to restate the Rule: NO

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continuum was the Precocious Toddler Rule. *See* Re Gaite's Will Trusts, [1949] 1 All Eng. Rep. 459 (Ch.). The common law presumption of fertility must be understood in the context of a policy that sought rapid and conclusive decisions concerning the validity of interests without extended fact-finding, as well as the limited medical knowledge in those pre-modern societies.

43. The problem in this case was not with the gift to the "unborn widow," but with interests that remained contingent until her death. *See* Gray, *supra* note 31, at 208 (describing it as "a mistake which has been often made"); Leach, *supra* note 23, at 992 (indicating the label). Other instances of argumentative jargon include: The Slothful Executor, The Magic Gravel Pit, The War that Never Ends, and The Birthday Present that Blows Up. *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 681-86 (7th ed. 2005).

44. *See* 20 PA. CONS. STAT. ANN. § 6104(b) (West 2005); *see also* W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 730 (1952) (approving of the Pennsylvania legislation).

45. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.4 (1983).

46. *See* N.C. GEN. STAT. §§ 41-15 to -23 (2007).

47. Ninety years was an estimate of "the average period of time that would traditionally be allowed by the wait-and-see doctrine." Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 162 (1988) (reporting rationale of drafters of the Uniform Statutory Rule). The English Law Commission estimated that a skilled conveyancer, using a royal lives clause, *see* sources cited *supra* note 40 and accompanying text, could stretch out the period as long as 125 years. THE ENGLISH LAW COMM'N, THE RULES AGAINST PERPETUITIES AND EXCESSIVE ACCUMULATIONS § 8.13 (1998), *available at* http://www.lawcom.gov.uk/docs/lc251.pdf.

INTEREST IS GOOD UNLESS IT VESTS NOT LATER THAN NINETY YEARS AFTER [not "twenty-one years after some life in being at"] THE CREATION OF THE INTEREST. This alternative, incorporated in the Uniform Statutory Rule Against Perpetuities, was proposed by the National Conference of Commissioners on Uniform State Laws in 1986 and was adopted by North Carolina in 1995.[48] However, as we have seen, it was repealed in 2007 as applied to trusts if the trustee has a power of sale.[49]

Allowing perpetual trusts is defended on the grounds that such trusts do not remove property from the market, assuming the rule against the suspension of the power of alienation of the legal interests remains intact.[50] The trustee remains free to alienate the trust property in response to "market demands," that is, to sell to the highest bidder. But perpetual trusts with spendthrift provisions do make the equitable interests inalienable in perpetuity, creating generations of beneficiaries profiting from the trust while protected from the claims of their creditors. As Professor Lewis M. Simes explained, one of the purposes of the Rule is "prevent[ing] undue concentration of wealth."[51]

As we have seen, competition for the business of wealthy settlors has made the perpetual trust available in many states. Failure to allow perpetuities in North Carolina would likely cause some settlors to locate their trusts elsewhere.[52] But even with the recent legislation,

48. N.C. GEN. STAT. §§ 41-15 to -22 (allowing a ninety year wait-and-see period as an alternative to the common law perpetuities period). *See* Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. REV. 1783 (1996).

49. An Act to Repeal the Statutory Rule Against Perpetuities as it Applies to Trusts Created or Administered in this State and Codify the Law Regarding the Power of Alienation for Trusts Created in North Carolina, ch. 41, 2007 N.C. Sess. Laws 390 (codified as amended at N.C. GEN. STAT. §§ 41-15, -23).

50. The economic purposes of the Rule Against Perpetuities, whether in its common law or Uniform Statutory form, have been described as: "(1) to keep property marketable and available for productive development in accordance with market demands, and (2) to limit 'dead hand' control over the property, which prevents the current owners from using the property to respond to present needs." DUKEMINIER ET AL., *supra* note 43, at 674-75. *See also id.* at 723 ("The policy underlying [the Rule Against Perpetuities] is that all contingent interests, assignable and nonassignable, impair marketability.").

51. LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 56 (1955).

52. *See* Dukeminier & Krier, *supra* note 4, at 1342 ("Given the federal tax advantage of perpetual trusts free of death taxes, the Rule against Perpetuities has the effect of penalizing beneficiaries of trusts located in states that do not permit perpetual trusts."). *The Wall Street Journal* reported that as of the end of 2003, assets

North Carolina is already behind in the race for trust business. Settlors seek not only unlimited duration for their trusts, but other advantages as well. For example, settlors have begun to seek protection for the trust assets not only from the beneficiaries' creditors, but also from their own creditors; in other words, settlors seek to create self-settled spendthrift trusts, politely known as "asset protection trusts."[53] At last count, eleven states now permit asset protection trusts, though North Carolina does not.[54] Unless North Carolina permits everything that is allowed by the least restrictive state, it will remain less attractive to wealthy settlors seeking to create perpetual trusts.

* * *

Although today perpetuities and monopolies might be considered "contrary to the genius of a free market," to the drafters of the first North Carolina Declaration of Rights they posed a political threat. Like entailed estates, perpetuities "tend only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice."[55] For the first time since 1784, when the General Assembly prohibited unbarrable entails, perpetuities are now allowed in North Carolina. While in every state it is a question of public policy whether to permit perpetual

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worth $100 billion were placed in institutional trusts in states permitting perpetual trusts. Rachel Emma Silverman, *Looser Trust Laws Lure $100 Billion*, WALL ST. J., Feb. 16, 2005, at D1.

53. *See, e.g.*, Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1037-38 (2000). In this case, the "argumentative jargon" works to conceal rather than to point out the reality. Perhaps settlors prefer not to be known as "spendthrifts."

54. ALASKA STAT. § 34.40.110 (2008); COLO. REV. STAT. § 38-10-111 (2008); DEL. CODE ANN. tit. 12, §§ 3536(c), 3570-3576 (2007 & Supp. 2008); MO. REV. STAT. § 456.5-505 (West 2007); NEV. REV. STAT. §§ 166.010-.170 (2008); OKLA. STAT. ANN. tit. 31, §§ 10-18 (2008) (limiting settlors to a single asset protection trust with an initial funding of no more than $1 million); R.I. GEN. LAWS §§ 18-9.2-1 to -7 (2008); S.D. CODIFIED LAWS §§ 55-1-36, -3-47, -16-1 to -16-17 (2008); TENN. CODE ANN. §§ 35-16-101 to -112 (2007 & Supp. 2008); UTAH CODE ANN. § 25-6-14 (2008); WYO. STAT. ANN. §§ 4-10-103, -506(b), -510 to -523 (2008). Of these states only Oklahoma has so far resisted allowing perpetual trusts. *See* sources cited *supra* note 6. Previously, spendthrift provisions were limited to trusts for the benefit of persons other than the settlor. *See* GEORGE T. BOGERT, TRUSTS § 40 (6th ed. 1987) ("[A] property owner may not create a spendthrift trust in his own favor."). The self-settled spendthrift trust has not yet been subjected to significant judicial scrutiny.

55. Act of 1784, ch. 22, § V (now codified at N.C. GEN. STAT. § 41-1 (2007)) (barring entails by converting fee tail in possession into fee simple).

("dynasty") trusts, in North Carolina it is a constitutional question.[56] Unless "perpetuity" is defined in such a way that a perpetual trust is not included in the definition, the statute allowing such trusts is unconstitutional. The North Carolina courts will soon provide an answer to this constitutional question in *Brown Brothers Harriman Trust Co. v. Benson*.[57] Perpetuities may be congenial to dynasts and the bankers and lawyers who serve them, but those who drafted and ratified every North Carolina constitution considered them "contrary to the genius of a free state."

56. Brown Bros. Harriman Trust Co. v. Benson, No. 08-CVS-13456 (N.C. Super. Ct. Feb. 26, 2009), *appeal filed*, Notice of Appeal, No. 08-CVS-13456 (N.C. Ct. App. Mar. 5, 2009). Of the ten states with constitutional provisions prohibiting perpetuities, *see* sources cited *supra* note 8, five express similar or identical concern about the political implications. ARK. CONST. art. 2, § 19 ("contrary to the genius of a republic"); OKLA. CONST. art. 2, § 32 ("contrary to the genius of a free government"); TENN. CONST. art. 1, § 22 ("contrary to the genius of a free State"); TEX. CONST. art. 1, § 26 ("contrary to the genius of a free government"); WYO. CONST. art. 1, § 30 ("contrary to the genius of a free state"). None of the five has, to date, permitted perpetual trusts, although Tennessee and Wyoming allow very long trusts. *See* sources cited *supra* note 6. Arizona, a state that allows perpetual trusts, ARIZ. REV. STAT. ANN. § 14-2901(A)(3) (2005 & Supp. 2009), has a constitutional provision with somewhat different wording: "No hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting any perpetuity or entailment in this State." ARIZ. CONST. art. II, § 29. And in Nevada, which allows trusts lasting 365 years, NEV. REV. STAT. § 111.1031(1)(b) (2007), the constitution prohibits perpetuities "except for eleemosynary purposes." NEV. CONST. art. 15, § 4.

57. *Benson*, No. 08-CVS-13456.