



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>July 2, 2018</p>	<p>No. I18-006 (R17-010)</p> <p>Re: Arizona's Rule Against Perpetuities</p>
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To: The Honorable Olivia Cajero Bedford
Arizona State Senate

Questions Presented

You have requested an opinion related to Arizona's statutory and constitutional provisions on the Rule Against Perpetuities, specifically whether Arizona Revised Statutes ("A.R.S.") § 14-2901(A)(2) and (3) violate Article II, § 29 of the Arizona Constitution.

Summary Answer

1. Section 14-2901(A)(2) is likely unconstitutional. The original meaning of Arizona's constitutional prohibition on "perpetuities" cannot reasonably allow a future interest to vest as long as five hundred years after its creation. Thus, A.R.S. § 14-2901(A)(2) permits restrictions on the alienability of property in contravention of the Arizona Constitution.
2. Section 14-2901(A)(3) is likely unconstitutional. The constitutional prohibition on "perpetuities" and "entailments" was not reasonably understood at the time of its drafting

to allow the creation of perpetual trusts. Section 14-2901(A)(3) allows for the creation of just such trusts. The statute also allows for the vesting of future interests far outside the framers' conception of the perpetuities period.

Background

A. The Common Law Rule Against Perpetuities

A fundamental property right in common law jurisdictions is the right to control the disposition of property. *Hodel v. Irving*, 481 U.S. 704, 716 (1987). That right, however, is limited. The common law rule requires all contingent future interests—whether in trust or otherwise—to vest or fail during the lives of every person reasonably known to the donor, known as the “lives in being,” plus a “reasonable time after,” defined as twenty-one years. John Chipman Gray, *The Rule Against Perpetuities* § 201, at 191 (Roland Gray ed., 4th ed. 1942). To survive a Rule Against Perpetuities analysis at common law, the person conveying property had the burden to show—upon conveyance—that the future interest was certain to vest or fail within this “vesting period.” *Id.*

B. Arizona's Constitution and the Rule Against Perpetuities

Arizona's Constitution prohibits perpetuities and entailments. It provides that “[n]o hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting any perpetuity or entailment in the state.” Ariz. Const. art. II, § 29. The Arizona Legislature codified the common law Rule Against Perpetuities in A.R.S. § 33-261. For most of the State's history, this statute governed whether a future interest was valid. *Malad, Inc. v. Miller*, 219 Ariz. 368, 373, ¶ 27 (Ct. App. 2008). That is, future interests were valid upon creation only if they were guaranteed to vest or fail to vest within twenty-one years after the

death of a life in being. *Id.*; *see also* Restatement (Second) of Property: Donative Transfers § 1.1 (1983).

Eventually, many State legislatures utilized the Uniform Statutory Rule Against Perpetuities (“USRAP”) to reform their common law rules. In 1994, the Arizona Legislature adopted a “wait-and-see” rule, which does not invalidate future interests upon their creation. Unif. Statutory Rule Against Perpetuities § 1 (amended 1990). Under the reformed rule, courts will wait and see whether the interest *does* vest or fail before modifying the trust or conveyance at issue. A.R.S. § 14-2901(A)(2) (2018). Instead of requiring the interest to vest or fail within “the lives in being plus twenty-one years,” courts wait for a fixed period of ninety years after conveyance. A.R.S. § 14-2901(A)(2) (1994). If the interest fails to vest in that period, the property reverts back to its original owner (or more likely, the owner’s heirs). USRAP § 1 (amended 1990).

In 1998, the Arizona Legislature significantly amended the common law rule by essentially creating an exception to it. Section 14-2901(A)(3) allows a person to create a future interest—which may never vest—so long as the interest is in a trust and the trustee has the power of sale. Specifically, the interest is valid if it “is under a trust whose trustee has express or implied power to sell the trust assets and at one or more times after the creation of the interest one or more persons who are living when the trust is created have an unlimited power to terminate the interest.” *Id.* Finally, in 2008, the Arizona Legislature’s most recent amendment to the Rule Against Perpetuities statute extended the wait-and-see period from ninety to 500 years. A.R.S. § 14-2901(A)(2).

Analysis

The “Constitution of Arizona is . . . a limitation upon the power of” the Legislature. *Earhart v. Frohmler*, 65 Ariz. 221, 224 (1947). In reviewing the constitutionality of legislation, courts presume “the Legislature is acting within the Constitution . . . until it is made to appear in what particular it is violating constitutional limitations.” *Id.* (internal quotations omitted). In determining whether the Constitution prohibits legislation, courts consider “the constitution itself and the effect that particular legislation has on the constitution.” *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 113, ¶ 34 (Ct. App. 2012).

The Arizona Constitution provides that “[n]o hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting any perpetuity or entailment in the state.” Ariz. Const. art. II, § 29. It does not define “perpetuity” or “entailment.”

Arizona courts have consistently defined “perpetuity” in accordance with its common law definition. *See In re Hayward’s Estate*, 57 Ariz. 51, 61 (1941). In *Buehman v. Bechtel*, 57 Ariz. 363, 376 (1941), the Arizona Supreme Court understood that the founders’ prohibition on perpetuities centered around their concerns about restraints on alienation. The court explained that “restraints on alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand.” *Id.* This policy goal, the court’s consistent use of the common law rule, and the Legislature’s codification of the common law rule in A.R.S. § 33-261 suggests the Constitution’s definition of “perpetuity” accords with its common law definition. Thus, without any legislation enforcing the prohibition, courts would apply the common law rule.

A. A.R.S. § 14-2901(A)(2) likely violates Article II, § 29 of the Arizona Constitution by allowing a person to create a “perpetuity” within the original meaning of Article II, § 29.

At common law, the Rule Against Perpetuities required a future interest to “vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.” Gray, *supra* at 191. The interest was invalid at its creation if it violated this rule. *Id.* The rule did not change in Arizona until the late-twentieth century, when the Legislature adopted the USRAP’s ninety-year “wait-and-see” period. That legislation selected 90 years because it approximated the average time period produced “through the use of an actual set of measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor.” USRAP § 1, comment c (1990). The original reform adopting a 90-year rule was a mere simplification that did not materially expand the common law rule. By contrast, § 14-2901(A)(2) now allows for the creation of a future interest so long as it vests within 500 years of its creation. Because it allows contingencies far outside the common law time period—by hundreds of years—A.R.S. § 14-2901(A)(2) is likely unconstitutional.

The Arizona Legislature need not adhere to the strict common law rule in prohibiting perpetuities. It could almost certainly alter the possible vesting period within the general parameters of the common law rule. *See County of Apache v. Southwest Lumber Mills, Inc.*, 92 Ariz. 323, 327 (1962) (“The governing principle of constitutional construction is to give effect to the intent and purpose of the framers of the constitutional provision and of the people who adopted it.”) A 500-year period, however, more than tests the margins of the Constitution’s prohibition because an interest can now vest more than 400 years outside the period allowed at common law. No reasonable interpretation of Article II, § 29 would allow an interest to vest five hundred years from its creation.

B. A.R.S. § 14-2901(A)(3) likely violates Article II, § 29 of the Arizona Constitution by allowing a person to create a perpetuity or an entailment.

As explained above, Arizona courts have interpreted the word “perpetuity” in accordance with its common law meaning. Although Arizona courts have not defined it, an “entailment” at common law was a “perpetual string of life estates,” or a fee tail estate. Dukeminier & Krier, *supra* at 1319-20. Fee tails perpetually passed on through inheritance. Gray, *supra* § 156 at 50. Courts developed the Rule Against Perpetuities in part to prevent their existence, and in part to prevent unreasonable restraints on alienation. *See* Gray, *supra* at 185. Some States prohibited fee tails to prevent concentrated power and wealth in family dynasties, which would give them “unequal and undue influence in a republic.” John V. Orth, *Does the Fee Tail Exist in North Carolina?*, 23 Wake Forest L. Rev. 767, 779 (1988). The framers of the Arizona Constitution sought to address those same concerns when they drafted Article II, § 29. Les Raatz, *State Constitution Perpetuities Provisions: Derivation, Meaning, and Application*, 48 Ariz. St. L.J. 803, 821-822 (2016).

Section 14-2901(A)(3) allows any future interest if it exists “under a trust whose trustee has the expressed or implied power to sell the trust assets and at one or more times after the creation of the interest one or more persons who are living when the trust is created have an unlimited power to terminate the interest.” A.R.S. § 14-2901(A)(3). This statute allows individuals to create perpetual or long-enduring trusts, which closely resemble fee tail estates.

The following is an example of a perpetual trust: “O funds a trust to pay the income of her daughter, A, for life. A has the power to appoint the trust corpus outright or in further trust to such of O’s descendants, but not to herself, as A names by deed or will. On A’s death, the remainder not appointed by A is to be held in separate share trusts for each of A’s children,

subject to the same terms, thus re-starting the cycle, which shall continue in perpetuity.”
Richard W. Nenno, *Delaware Trusts*, 333 (2012).

There are two major constitutional problems with perpetual trusts. First, A.R.S. § 14-2901(A)(3) allows individuals to place restrictive, perpetual future interests on property. The creation of these trusts implicates the core concerns the Rule Against Perpetuities—and Arizona’s Constitution—sought to address. A person can create a trust with an infinite series of vesting future interests, or “perpetual clogs upon the estate.” *Duke of Norfolk’s Case*, 3 Chan. Cas. at 31. To be sure, these trusts are different than the former fee tail estates because the underlying trust property remains transferrable, meaning that the trust can sell one asset and buy another. However, this does not save perpetual trusts under the Arizona Constitution. Although the trust’s assets can change over time, the trust remains in effect and interests in the trust’s proceeds continue to vest in each subsequent generation—potentially forever. This effectively creates a perpetual series of life estates or an “equitable fee tail.” Restatement (Third) of Property: Wills and Donative Transfers § 24.4 cmt. c (2011). The Arizona Constitution explicitly prohibits these “entailments.”

Second, the future interests attached to these trusts also implicate constitutional concerns about remoteness in vesting. At their creation, the interests are not certain to vest within any time period, let alone the common law vesting period. If a trust is capable of existing even three or four generations after its creation, the interests in the trust will vest beyond the constitutional vesting period. In theory, the cycle of vesting interests in the trust could continue forever—something the Constitution explicitly prohibits. Ariz. Const. art. II, § 29.

Certainly, perpetual trusts are not identical to the former fee tail estate. Fee tails almost always consisted of real property, and only one person possessed the entire fee each generation.

Here, the trusts can benefit multiple people in each generation, and the trustee can always sell the underlying property. But these distinctions are immaterial because the Constitution is not limited to fee tails and instead bans all perpetuities and entailments.

Likewise, a power to terminate the trust does not save it from the Constitution's ban on perpetuities. The Arizona Constitution prohibits transfers containing perpetual entailments of property. If a trust has enough assets to continue to distribute property beyond the common law perpetuities period, the trust remains unconstitutional because of the potential perpetuity; it is not saved by the potential disposition. One person's power to terminate a trust may create *finality* with respect to future vesting interests; however, that power does not necessarily prevent an unconstitutional *remoteness* in vesting.

We are aware of only one State with a constitutional prohibition on perpetuities that has directly addressed the constitutionality of perpetual trust statutes. In *Brown Bros. Harriman Trust Co., N.A. v. Benson*, 688 S.E.2d 752 (N.C. App. Ct. 2010), the North Carolina Court of Appeals held that a perpetual trust statute did not violate the State's constitutional prohibition on perpetuities. *Id.* at 757. The North Carolina Constitution provides that “[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.” N.C. Const. art. I, § 34. In *Benson*, the court found that this language prohibited “unreasonable restraints on alienation.” *Benson*, 688 S.E.2d at 757. Accordingly, the court determined that a trustee's power to terminate the trust was enough to relieve perpetual trusts from “unreasonable restraints on alienation.” *Id.* at 758.

Arizona's constitutional language on perpetuities is significantly different than that of the North Carolina Constitution. Arizona's constitutional language is a directive to the legislature: “no law shall be enacted permitting *any* perpetuity or entailment in this state.” Ariz. Const.

Art. II, § 29 (emphasis added). The Constitution also expressly prohibits “entailment[s][,]” whereas the North Carolina constitutional language is not so limiting. Thus, North Carolina provides flexibility for courts to weigh the reasonableness of laws that permit remote vesting of future interests because a trustee’s power to terminate the trust ensures that restraints on alienation are not “unreasonable.” Because Arizona’s Constitution does not provide the same flexibility as the North Carolina Constitution, and expressly prohibits entailments, North Carolina’s reasoning does not provide any guidance. Perpetual trusts in Arizona are essentially entailments, and for the reasons stated above, they implicate all the framers’ concerns about remoteness in vesting and concentrations of family wealth.

Section 14-2901(A)(3) allows a person to create a perpetual trust, which likely violates the Constitution’s prohibition on entailments and perpetuities.¹ The statute effectively allows “equitable fee tail” estates, which implicates both the constitutional prohibition on “perpetuities” and the constitutional concerns over the inalienability of property.

¹ This opinion does not reach the issue of whether charitable trusts violate the Arizona Constitution. However, the Arizona Court of Appeals has held that because a charitable trust’s purpose is “beneficial to the community,” they are subject to an equitable exception to the common law rule. *Olivas v. Board of Nat. Missions of Presbyterian Church, U.S. of America*, 1 Ariz. App. 543, 547 (App. Ct. 1965). Other courts have long understood the common law rule to allow charitable trusts. *See Russell v. Allen*, 107 U.S. 163, 167 (1883) (“Being for objects of permanent interest and benefit to a public, [charitable trusts] may be perpetual in their duration, and are not within the rule against perpetuities.”); *Nat’l Sav. & Trust Co. v. Sarolea*, 269 F. Supp. 4, 7 (D. D.C. 1967) (“[C]haritable trusts have always been favorites of the law and they are construed with liberality.”).

Conclusion

Article II, § 29 of the Arizona Constitution prohibits perpetuities and entailments, both of which carry their common law definitions. Arizona Revised Statutes § 14-2901(A)(2) allows a future interest to vest within 500 years of its creation, which is far outside the common law vesting period. Section 14-2901(A)(3) allows the creation of perpetual trusts, which enables a future interest to vest far outside the vesting period, if at all. Accordingly, A.R.S. § 14-2901(A)(2) and (3) likely violate Article II, § 29 of the Arizona Constitution.

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