<u>How Long Exactly is a Perpetuity</u>

by Russell A. Willis III, J.D., LL.M.

[The author questions whether a transfer to a "dynasty" trust designed to take advantage of the 365-year "wait and see" period under the 2005 amendment to NRS 111.1031.1(b) would violate the prohibition of "perpetuities" at article 15, section 4 of the Nevada state constitution.]

In 2002, Nevada voters rejected by a margin of three to two a legislative referendum, Question 5, that would have repealed the state constitutional prohibition of perpetuities, article 15, section 4.

Despite this setback, proponents of repeal persuaded the legislature only three years later to extend the "wait and see" period under the statutory rule against perpetuities, NRS 111.1031.1(b), to 365 years, effectively eviscerating the rule.

NRS 111.1031.1(a), which paraphrases the common law rule, was rendered meaningless, as there is no circumstance under which a future interest would meet the requirements of the common law rule while failing the 365-year "wait and see."

Whether a transfer designed to take advantage of the extended period would violate the constitutional prohibition has not yet been tested in a Nevada court.

A brief history of the rule in Nevada

Delegates to the constitutional convention of 1864 adopted article 15, section 4 by unanimous consent. The drafter remarked "if there is no such prohibition, entailed estates may be created, the same as in England." It may be inferred the framers understood the word "perpetuities" to include "entailed estates," though the terms may not be coextensive.

The framers thus sought to deter the unreasonable accumulation of wealth in the hands of a few families, which they viewed as a threat to the viability of a representative democracy. While the primary form of wealth has since migrated from land to financial instruments, the policy concern is if anything more urgently compelling today.

Prior to the enactment in 1987 of the statutory rule, with a 90-year "wait and see" provision, Nevada courts had applied the common law rule. See, *e.g.*, *Sarrazin v. First National Bank of Nevada*, 60 Nev. 414, 111 P.2d 49 (1941). The rule, as we dimly remember from first year property, says a nonvested interest in property is not valid unless it is certain to vest or fail within 21 years after the death of some person who is alive at the time the interest is created.

The validity or invalidity of a future interest is determined at the moment it is created. If there is a scenario under which vesting of an interest might be delayed beyond the period of the rule, that interest is invalid on day one.

The simplest example is a trust that is to continue through multiple generations, benefiting great-great-grandchildren and more remote descendants whose parents have not yet been born. But -- again, as we remember from first year property -- the rule can sometimes invalidate a future interest based on some scenario that seems extremely unlikely to occur. The fertile octogenarian and so on. And for this reason, the rule has been criticized as highly technical, invalidating some transfers that do not actually offend the underlying policy.

The "wait and see" rule

It is of course not difficult for a competent lawyer to draft around the rule, and courts have long been willing to reform a will or a trust to bring it into compliance with the rule. Nonetheless, in recent decades some state courts and quite a number of state legislatures have adopted a "wait and see" approach, validating any future interest that does in fact vest within the period of the rule. Allowing the unlikely scenarios to play out, in other words.

Nevada was among these. In 1987, the legislature enacted a 90-year "wait and see" statute, largely tracking the Uniform Statutory Rule Against Perpetuities, developed in the mid-1980s. This was codified at NRS 111.103 through 111.1039.

But then something happened.

The project to abrogate the rule

Question 5 was placed on the 2002 ballot by AJR4 of the 70th Session of the state legislature. Pursuant to section 1 of Article 16, the resolution had also been referred to the 71st Session, where it passed both chambers unanimously.

A companion bill enacted in the 71st Session, AB325, would have abrogated the common law rule as to a future interest in trust if the trustee were given a power of sale, or if someone were given a power to terminate the trust. But that measure was expressly conditioned on the voters approving Question 5, so it did not take effect.

Why was it made conditional? Apparently the proponents believed AB325 might be unconstitutional if Question 5 failed. And why might they have believed this?

Possibly because the Legislative Counsel had issued an opinion letter saying another bill introduced in the 70th Session, AB75, which would have increased the statutory "wait and see" period from 90 years to 500, would be unconstitutional if AJR4 were not also enacted.

The opinion letter noted the existing 90-year period approximated the interval contemplated by the common law rule -- lives in being plus 21 years --, but argued a 500-year "wait and see" period would "greatly interfere" with the alienability of property interests, as a court would have to wait out the much longer interval to determine whether a future interest was valid.

Floor amendments

Nonetheless, proponents of the project to limit or abrogate the rule returned in the 73rd Session in 2005 with a proposal to increase the "wait and see" period to 1,000 years. This was offered on the Senate floor as an amendment to SB382 on its third reading, and adopted on a voice vote. But it met with some resistance in the Assembly Judiciary Committee, specifically with reference to the constitutional question. The committee reported an amendment reducing the period to 150 years, and it was in this form that the bill passed and was signed into law on May 26.

But that same day the chair of the Assembly Judiciary Committee offered a floor amendment to another bill, SB64 -- which otherwise had only to do with beneficiary deeds --, to increase the period to 365 years. This was adopted on a voice vote. The Senate concurred in the amendment, again on a voice vote, and that bill was also signed into law on June 6.

The "wait and see" period was extended twice in a single session, bypassing or overriding committee processes in both chambers.

Some observations

If the Legislative Counsel was asked to comment on the constitutionality of a 1,000-year or a 365-year "wait and see" period, she did not make her findings public. No one at any of the committee hearings asked what might be the social consequences of abrogating the rule, though these are reasonably predictable:

> multiple generations of beneficiaries insulated from civil liability for their actions because their assets are tied up in perpetual spendthrift trusts;
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> large pools of financial assets controlled by a handful of families -- or worse, a handful of corporate trustees --, who can then manipulate the mechanisms of government through their armies of bankers and lawyers;

and so on. The proponent witnesses -- lawyers and bankers who of course had a strong self interest in drawing fees from creating and maintaining these arrangements openly acknowledged their purpose was to attract and retain trust business in state that might otherwise go elsewhere.

There was a further effort in 2007 to float a joint resolution creating another referendum to repeal article 15, section 4, but the measure died in committee. The fact this resolution was even introduced might suggest the proponents of the extended "wait and see" period were still concerned about the constitutional question.

It might be argued 365 years is not forever. But it is a very, very long time. The history of the common law rule itself is usually traced to the Duke of Norfolk's Case, decided by the House of Lords in 1682, not quite that long ago. Much has changed since then, and much may be expected to change between now and the 24th century.

The North Carolina experiment

When North Carolina went through a similar exercise in 2008, enacting a statute that abrogated the common law rule as to a trust if the trustee had a power of sale, the organized bar manufactured an ostensibly adversarial lawsuit, with the minor children of a trust settlor pretending to challenge the validity of a perpetual trust in the face of a similar prohibition in that state's constitution.

The state bankers association filed an amicus brief, openly acknowledging the purpose of the statute was to benefit the trust industry by making North Carolina a haven for perpetual trusts. Lawyers for the nominal plaintiffs did not offer an argument that a perpetual restraint on alienation of the equitable interests of remote contingent beneficiaries -- an "entailment," albeit not of the legal title to trust assets -- would violate the policy expressed by the constitutional prohibition.

Despite numerous procedural anomalies, [footnote] the trial court ruled the constitutional prohibition applied only to restraints on alienation and not to remote vesting of contingent interests, and the state appeals court affirmed. *Brown Bros. Harriman Trust Co. v. Benson*, 202 N.C. App 283, 688 S.E.2d 752 (2010).

The state supreme court twice refused to put its imprimatur on this result -- see, 684 S.E.2d 692 (2009), denying a petition for discretionary review prior to determination by the appeals court, and 364 N.C. 239, 698 S.E.2d 391 (2010), dismissing a notice of appeal from the appeals court and denying discretionary review --, but the appeals court decision still stands as a shaky precedent.

No one has yet pursued a similar course in Nevada -- nor in Arizona or Wyoming, both of which have also enacted legislation extending "wait and see" statutes out hundreds of years, despite state constitutional prohibitions on perpetuities.

Not what you think it means

Last year in *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 345 P.3d 1040 (2015), the Nevada supreme court sitting en banc determined that the common law rule against perpetuities did not apply to an "area of interest royalty" created in a commercial mining agreement.

The question had been certified by the 9th Circuit federal appeals court, 686 F.3d 1041 (2012).

The court found it unnecessary to reach a second certified question, whether the agreement at issue, which predated the 1987 enactment of the statutory rule, could be reformed pursuant to that statute. The statute expressly excludes nondonative transfers from the rule, and while the statute applies prospectively only, it includes a reformation mechanism for nonvested interests created before the effective date.

One of the parties argued that the Nevada constitution in effect required the court to apply the common law rule as it existed in 1864, which "may have" extended to commercial agreements. The court rejected this argument, saying the common law evolves to reflect changed circumstances.

The Nevada court cited decisions from other jurisdictions declining to apply the rule in commercial contexts, "where its purposes will not be served." In particular, the court noted a 1991 New Jersey appeals court decision, *Juliano & Sons Enterprises, Inc. v. Chevron, USA, Inc.*, 250 N.J. Super. 148, 593 A.2d 814 (1991), in which the court referred to that state's recent enactment of the uniform statutory rule as expressing "current" public policy, which it applied to a transaction entered into prior to the effective date of the statute.

Acknowledging the statute did not apply retroactively to the transaction at issue, the New Jersey court observed it did not repeal or amend any "prior statutory policy," and none of the parties had relied on "existing law" to its detriment.

Proponents of the Nevada statute have seized on *Bullion Monarch* as somehow validating the statutory 365-year "wait and see." They have pointed to the fact that the court recited the 1987 enactment of the statutory rule and the subsequent revisions to the statute, including the extended "wait and see," without suggesting any of this was beyond the legislature's authority.

And it may be that this dictum in *Bullion Monarch* does imply the Nevada supreme court might find the 365-year "wait and see" does not violate the constitutional prohibition of "perpetuities," if the question were before it. On the other hand, in discussing what the word "perpetuities" might have been understood by the framers to mean, the court quoted from a roughly contemporaneous legal dictionary which illustrated the definition using the example of a perpetual trust.

In any event, in the actual case, the court made it clear it was basing its decision on the common law rule, as informed by recent expressions of legislative policy. The validity of the statute itself was not at issue.

footnote:

For a detailed examination of the procedural anomalies in the *Benson* case, see the author's unpublished article "Landmark or Mirage" at http://www.plannedgiftdesign.com/landmark-or-mirage.html

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