# THE CONSTITUTIONALITY OF NEVADA'S STATUTORY RULE AGAINST PERPETUITIES

by Layne T. Rushforth[1]

## A. OVERVIEW

The English common law provided that any interest in property[2] must vest[3] no later than 21 years after the death of someone alive at the time the interest was created. This is referred to as the "rule against perpetuities", and that rule has prohibited trusts from continuing forever. In application, the rule against perpetuities was arbitrary and hard to implement because it potentially invalidated interests even if there was the least possibility that an interest would not "vest" in time. Because of that, decades ago, the trend was to "modernize" the rule against perpetuities to make it easier to comply with. In 1987, the Nevada legislature adopted the "Uniform Statutory Rule Against Perpetuities", which allowed an interest in property to last 90 years or 21 years after the death of an individual living at the time of the interest's creation, whichever is longer.[4] The 1987 version of the statute negated concerns about the birth of children after death and allowed the reformation of an interest that was in violation of the rule. The law was modified in 1991 to add a "savings clause" that negates any provision that delays vesting but does not negate the creation of the interest from its inception.

## B. ABOLISHING THE RULE AGAINST PERPETUITIES

The rule against perpetuities assures that every 90 years or so, there will be an owner of assets with freedom to transfer those assets. It also means that those assets can, once again, be subjected to the gift, estate, and/or generation-skipping transfer tax. Starting with Delaware in 1995, several states decided to eliminate their rule against perpetuities to allow people to create trusts that do not have a maximum duration period, thus allowing "generation-skipping trusts" to continue from one generation to the next until the assets are fully distributed in the normal course of trust administration. These multi-generation trusts are commonly referred to as "dynasty trusts".

Nevada is among nine states that have a prohibition against "perpetuities" in their state constitutions.[5] In 2002, by voter referendum, there was an attempt to amend the Nevada Constitution to repeal the constitutional prohibition against "perpetuities", but the voters declined to ratify that action. In 2005, the Nevada Legislature modified the statutory rule against perpetuities to allow 365-year interests. This long term would allow effective dynasty trusts, but it would not allow a trust to exist in perpetuities, and the idea was to avoid creating a "perpetuity".

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[2] "Property" refers to any asset.

[3] "Vest" essentially means "belong to someone".

[4] For the current statutory rule against perpetuities with links to historical changes, see http://www.leg.state.nv.us/NRS/NRS-111.html#NRS111Sec103.

[5] Section 4 of the Nevada constitution contains one sentence: "*No perpetuities shall be allowed except for eleemosynary purposes.*" See http://www.leg.state.nv.us/const/nvconst.html#Art15Sec4.

## C. CONSTITUTIONALITY QUESTIONS

C.1 In an article titled "Unconstitutional Perpetual Trusts", attorney Steven J. Horowitz and law professor Robert H. Sitkoff call into question statutes allowing a long-term trust in states that have constitutional bans on "perpetuities".[6]

(a) The authors' analysis attempts to discern what the word "perpetuities" must have meant when the state constitution was adopted. Their conclusion is that "perpetuities" must have meant "an entail", which is a restriction on the sale or inheritance of property. If I follow the authors' logic, the rules prohibiting entails evolved into the common law rule against perpetuities. They specifically state that the rule was intended "*to prevent resurrection of the entail by way of a string of successive life estates subject to indestructible contingent future interests.*"

(b) The authors conclude that the 365-year trust period clearly violates the public policy upon which the prohibition of "perpetuities" is based. The authors warn that a trust formed in Nevada or any other state with a constitutional prohibition against perpetuities could be disregard in another state with a constitutional prohibition against perpetuities.

C.2 Attorneys Jonathan Blattmachr, Mitchell Gans, and William Lipkind joined the fray with a commentary on the Horowitz-Sitkoff article that initially appeared in the LISI Estate Planning Newsletter #2263, (December 18, 2014).[7]

(a) The authors point out that if a trust is invalid, "it could mean the property is still held by the trust's settlor, keeping it in his or her gross estate for Federal state tax purposes, causing all income and gain to be included in the settlor's gross income, exposing it to claims of creditors of the settlor, and the potential wasting of gift-tax and GST-tax exemptions used in creating the trust. (I have concluded that this scenario is not realistic for Nevada, given the statutory language permitting reformation and the statutory "savings clause".)

(b) The conclusion of that article is that dynasty trusts formed in Arizona, Nevada, North Carolina, Tennessee and Wyoming should be avoided just because there is a concern about the constitutionality of the statutory rule against perpetuities in those states. They go on to imply that it may be malpractice not to warn those forming dynasty trusts in those states about the constitutional issues.

C.3 Nevada attorney Steven Oshins replied to the Horowitz-Sitkoff article in an article titled "The Rebuttal to Unconstitutional Perpetual Trusts".[8] Mr. Oshins makes the following points:

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[6] A copy of the very lengthy and well-researched article is available at http://rushforth.net/pdf/NYTimes.Horowitz-Sitkoff.pdf, which was downloaded from the *New York Times* web site. It was officially published as an article in the *Vanderbilt Law Review*, cited as 67 Vanderbilt Law 1769 (2014).

[7] A copy of the Blattmachr-Gans-Lipkind article is available at http://rushforth.net/pdf/lisi-blattmachr-et-al-article.pdf.

[8] The Oshins article is available at http://oshins.com/images/Perpetuities.pdf.

(a) The Nevada Supreme Court in *Sarrazin v. First Nat'l Bank of Nevada* stated, "Other than the constitutional provision. . ., there have not been called to our attention any other provisions, either constitutional or statutory, invalidating interests which vest too remotely, or forbidding restraints on alienation."[9] From that, Mr. Oshins concludes "the constitutional provision itself does not incorporate a specific meaning." Mr. Oshins' most important inference from *Sarrazin* is that the Nevada Supreme Court believes that the Nevada Legislature has the power to define the rule against perpetuities, which makes the 365-year trust period acceptable.

(b) Normal choice-of-law rules will support the enforceability of a Nevada trust under Nevada law, citing the Restatement (Second) of the Conflict of Law as authority for the proposition that "*the local Rule against Perpetuities may not be invoked as a matter of public policy to avoid application of the law designated in the trust instrument.*" He goes on to point out that Messrs. Horowitz and Sitkoff seem to have confused choice of law with issues related to jurisdiction.

(c) Most states do not have a constitutional prohibition against perpetuities, and the validity of a Nevada trust will not be in question there.

(d) A state constitution "must be construed as stating fundamental concepts in broad and comprehensive terms, anticipating implementation by statute or liberal construction by the courts to meet changing conditions." [Citation omitted.]

C.4 The arguments against the constitutionality may be well-reasoned academically, but from my perspective, they appear to be somewhat contrived and tainted with a bias against Nevada's leadership in the area of trusts. Even so, the arguments have been laid to rest with the Nevada Supreme Court's recent ruling in the *Bullion Monarch* case, which is discussed below.

## D. *BULLION MONARCH V. BARRICK GOLDSTRIKE*

D.1 In my opinion, the Nevada Supreme Court has, for all practical purposes, negated any concerns about the constitutionality of Nevada's 365-year rule against perpetuities. On March 26, 2015, in *Bullion Monarch v. Barrick Goldstrike*, 131 Nev. Adv. Op. 13,[10] the Nevada Supreme Court issued a ruling that made it clear that the definition of "perpetuities" is fluid and evolving and that the Legislature is in a position to decide how the rule against perpetuities applies today. Although the *Bullion Monarch* case dealt with the application of the rule against perpetuities to commercial transactions, the analysis is very helpful and instructive. Here are some key points in the decision that have persuaded me that the Nevada Supreme Court has, in essence, confirmed the validity of Nevada's statutory rule against perpetuities:

(a) Ratification of statutory modification of the rule against perpetuities. On page 3 of the advance opinion the Nevada Supreme Court states:

[9] 60 Nev. 414, 111 P.2d 49 (1941).

[10] The full text of the *Bullion Monarch* decision can be downloaded from http://goo.gl/gwAlF2.

> The common-law rule [against perpetuities] is usually stated thus: No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." *Sarrazin v. First Nat'l Bank of Nev.*, 60 Nev. 414, 418, 111 P.2d 49, 51 (1941) (internal quotation omitted). In Nevada, the rule is codified in our Constitution: "No perpetuities shall be allowed except for eleemosynary purposes." Nev. Const. art. 15, § 4. But in 1987, Nevada adopted a statutory rule against perpetuities. See NRS 111.1031; 1987 Nev. Stat., ch. 25, §§ 2-8, at 62- 65. The new statutes added a wait-and-see provision, which, as amended, gives contingent property interests 365 years to vest before they are invalidated. See NRS 111.1031(1)(b). The statutory scheme exempts nondonative transfers from the rule against perpetuities. NRS 111.1037(1). It also lets courts reform agreements made before its enactment to bring them into conformity with the rule. NRS 111.1035.

(b) The application of the rule against perpetuities is not static. On page 4 of the advance opinion, the Court states:

> As a creature of the common law, the rule against perpetuities is not static. Our Constitution may have adopted the common law rule, but it did not freeze the rule's application. See Jack M. Balkin, Original Meaning and Constitutional Redemption, 24 Const. Comment. 427, 433 (2007), The meanings of the Constitution's words remain constant, but their application may vary with the circumstances of time and place. See generally Lawrence B. Solum, *The Interpretation- Construction Distinction*, 27 Const. Comment. 95-118 (2010) (distinguishing between discovery of textual meaning and application of text to case at bar). For example, when interpreting the Second Amendment, the United States Supreme Court reasoned that "arms" was not limited to weapons in existence at our nation's founding:
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> > Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo v. United States*, 533 U.S. 27, 35-36, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.
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> *District of Columbia v. Heller*, 554 U.S. 570, 582, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)."

(c) Beginning at the bottom of page 5 of the advance opinion, the Court rules that the definition of "perpetuities" is evolving and means "perpetuities":

> The common law, though adopted in broad form by statute, continued to evolve as new circumstances required new application. Likewise, in our case, the word "perpetuities" in the Nevada Constitution applies to precisely that: perpetuities.

(d) Beginning at the bottom of page 10 of the advance opinion, the Nevada Legislature can determine how the rule against perpetuities should apply.

> Our Legislature has determined that, as a matter of policy, nondonative transfers should not be subject to the rule against perpetuities. See NRS 111.1037. We see no reason to disagree with this policy in our application of the rule.

D.2 In the *Bullion Monarch* case, the Nevada Supreme Court refused to apply the rule against perpetuities in the commercial context because the Nevada Legislature determined that "nondonative transfers should not be subject to the rule against perpetuities."

(a) To be clear, the ruling in the *Bullion Monarch* case does not apply to donative transfers, such as gifts to trusts. The Nevada Supreme Court could have ruled that the 99-year lease was within the 365-year period and thereby ratified the statute, but its actual ruling is actually more deferential to the Legislature's authority to modify the rule against perpetuities.

(b) The *Bullion Monarch* decision totally exempts perpetual leases from the rule against perpetuities, which means that leases and other contracts are not subject to that rule and can be perpetual. In light of that decision, it would take a strange twist of legal logic to assert that the Nevada Legislature is without constitutional authority to permit donative transfers involving 365-year trusts.

(c) If the Legislature has the power to limit the application of that rule to donative transfers, it is clear to me that the Nevada Supreme Court will also defer to the legislature as to the length of the perpetuities period for such transfers.

## E. CONCLUSION

E.1 In my opinion, the current Nevada statute allowing 365-year trusts does not create a "perpetuity" in violation of the Nevada Constitution because the Nevada Supreme Court has indicated that it looks to the state legislature to define the rule against perpetuities. The Nevada Supreme Court would have to reverse its position to find that the 365-year perpetuities period violates the Nevada Constitution.

E.2 While aggressive and creative attorneys can always make contrary arguments, the *Bullion Monarch* case resolves the academic challenge to the meaning of "perpetuities" in the Nevada Constitution. The Nevada Supreme Court has concluded that the definition of "perpetuities" is fluid and evolving and that the Legislature is in a position to decide how the rule against perpetuities applies today.

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