

Is Tennessee's Rule Against Perpetuities Unconstitutional?

Nine states, including Tennessee, have constitutional prohibitions on perpetuities.[1] Many states, including Tennessee and four others of those nine, have by statute extended the applicable Rule Against Perpetuities (RAP) period for vesting far beyond lives in being plus 21 years, to 360 years or longer.[2]

A cat may have nine lives, but compared to one human life in being, 360 years may seem like a perpetuity.[3]

A statutory long-duration RAP period confronting a constitutional prohibition may be like an irresistible force meeting an immovable object. The experience in three states is instructive.

TENNESSEE

"[P]erpetuities … are contrary to the genius of a free State, and shall not be allowed," says the Tennessee Constitution, echoing common law public policy.[4] Notably, "perpetuities" for constitutional purposes has never been defined. By implication and by case law, the English common law Rule Against Perpetuities prevailed in Tennessee after it gained statehood in 1796.

In 1994, Tennessee adopted the Uniform Statutory Rule Against Perpetuities (USRAP), codified in *Tenn. Code Ann.* §66-1-201, *et seq.*, superseding the common law rule.[5] The key change was to allow a 90-year "wait and see" period in which an interest might vest, after which a still nonvested interest could be reformed by a court to vest. The 90-year duration was not a substantial change from the possible duration of the common law period of lives in being plus 21 years.

In 2002, this column[6] noted that a dozen or so states, in the competition for out-of-state trust business, were either repealing their RAP completely[7] or vastly extending the 90-year period, such as Florida's adoption of 360 years in which to vest. The column added that "the common law rule served a valuable social objective.…

> Tennessee joined the movement in 2007 … by extending its vesting period to 360 years. The constitutionality of Tennessee's current statute seems never to have been addressed.

A Primer on Perpetuities

The common law public policy was that property remain alienable and inheritable and therefore productive for the common good. Two doctrines emerged for enforcement. First, a rule against perpetuities applied to future interests, such as interests in trust, its most famous formulation being as follows: "No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."[17] Any theoretical potential violation of that rule, no matter how remote the possibility, invalidated the interest at inception, perplexing generations of law students and leading to unintended consequences in practice. Second, a rule against restraints on alienation voided any restraint on alienation in conjunction with a "general estate," such as fee simple, except for "limited or partial restraints on alienation that are reasonable and limited,"[18] as determined by the courts.

[R]epeal is not generally enacted for reasons of policy, since USRAP adequately addresses the shortcomings of the rule. Rather, commerce has trumped policy, much to the chagrin of those who still believe the rule serves a vital purpose."

Predictably, Tennessee joined the movement in 2007, as amended further in 2010, by extending its vesting period to 360 years. The constitutionality of Tennessee's current statute seems never to have been addressed.

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NORTH CAROLINA

Tennessee, originally part of North Carolina territory, had borrowed much of its law from its parent state, including copying verbatim this provision in the North Carolina Constitution: "[P]erpetuities … are contrary to the genius of a free state and shall not be allowed."[8]

In 2007, North Carolina completely repealed its RAP as to remoteness of vesting in trusts, although it explicitly retained a prohibition on restraints on alienation.[9]

In 2010, in the *Benson* case,[10] the North Carolina Supreme Court dismissed an appeal from the Court of Appeals that had denied a constitutional challenge to the RAP, on the basis that the state Constitution did not prohibit trusts that allow for indefinite postponement of vesting, only indefinite restraints on alienation. Under principles enunciated by the U.S. Supreme Court,[11] the state Supreme Court's dismissal of the appeal is considered a decision on the merits. As we might say in Tennessee, "That dog don't hunt."

ARIZONA

The Arizona Constitution contains this provision: "[N]o law shall be enacted permitting any perpetuity or entailment in this State."[12]

In 2008, the Arizona version of USRAP, as adopted in 1994, was amended to extend the vesting period to 500 years, provided that the Trustee has a power of sale.

On July 2, 2018, the Arizona Attorney General issued Opinion No. 118-006 (R17-010), holding that Arizona's RAP, as amended, "likely" violates the Arizona Constitution.[13] The opinion recognized the *Benson* case in North Carolina but differentiated the constitutional language.

On May 23, 2019, Les Raatz, a prominent trust and estate lawyer in Arizona, sent an open letter to the Arizona Attorney General, accompanied by a legal brief, requesting that the opinion be either revised or withdrawn.[14] Mr. Raatz had authored a law journal article in 2017 arguing that the Arizona Constitution did not prohibit remote vesting of trust interests, only excessive suspension of the power of alienation of title,[15] the same distinction upon which the *Benson* case upheld the constitutionality in North Carolina. At the time of this writing, the Attorney General had not yet responded to Mr. Raatz.

The bottom line is that changes in the RAP in almost all states are in many ways desirable, as the common law RAP was too often unjust, and modern amendments have been useful.[16] Many irrevocable trusts have been created under Tennessee law explicitly allowing up to 360 years to vest in beneficiaries. Let sleeping dogs lie.

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Close the Books

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NOTES

1. States with constitutional prohibitions on perpetuities are Arizona, Arkansas, Montana, Nevada, North Carolina, Oklahoma, Tennessee, Texas and Wyoming.

2. The five states with constitutional prohibitions on perpetuities that have nevertheless set long (or no) limits on remoteness of vesting in trusts are Arizona (500 years), Nevada (365 years), North Carolina (perpetual), Tennessee (360 years) and Wyoming (1,000 years). The other four states with constitutional prohibitions on perpetuities have enacted USRAP or otherwise allowed reformation so as not to invalidate property interests that violate the common law RAP, without extending the potential vesting period beyond 90 years.

3. For humans who rarely live beyond age 100, 360 years may as well be perpetual. A 360-year trust ending now would have been created in 1659, when the population of the territory later known as Tennessee was mostly native Indians, nearly two centuries before most were forcibly removed to Oklahoma in the Trail of Tears.

4. Const. 1870, Art. 1, §22.

5. Holbrook, "A Practitioner's Guide to Perpetuities Reform in Tennessee," *Tenn. Bar J.*, Nov/Dec 1994.

6. Holbrook, "The Rule Against Perpetuities: Time to Re-Examine?" *Tenn. Bar J.*, April 2002.

7. The first state to repeal its RAP completely was South Dakota in 1983, followed by Delaware in 1995.

8. Constitution of North Carolina, Article I, Sec. 34, adopted in December 1776.

9. N.C.G.S. Section 41-23(h).

10. *Brown Bros. Harriman Trust Co., N.A. v. Benson,* 698 E.2d 391 (N.C. 2010).

11. *R. J. Reynolds Tobacco Co. v. Durham County, North Carolina*, 479 U.S. 130 (1986).

12. Ariz. Const. Art. II, § 29.

13. www.azag.gov/opinions/i18-006-r17-010.

14. www.emlaw.com/links/Arizona_AG_Opinion.pdf.

15. Raatz, "State Constitution Perpetuities Provisions: Derivation, Meaning, and Application," 48 *Ariz. St. L. J.* 803 (2017).

16. One study found that through 2003, states that repealed their RAP experienced $100 billion more growth in their trust businesses than states that had retained their RAP, and current commentators believe that study vastly understated the effect of validating perpetual or nearly perpetual trusts. Horowitz and Sitkoff, "Unconstitutional Perpetual Trusts," *Vanderbilt Law Review* (Aug. 8, 2014).

17. Professor John Chipman Gray, *The Rule Against Perpetuities* §201 (4th ed. 1942).

18. 20 Tenn. Jur., Perpetuities, §7.

The TBA Board of Governors voted by a narrow margin at its April 7, 2001, meeting not to proceed with her recommendation. If you ever need an example of responsibility with grace, here it is in her response to that: "Regardless of whether members favored or opposed the proposal to study issues relating to capital justice in Tennessee, the dialogue has been professional, intelligent and civil. The Board exercised its best judgment, and that's what the democratic process and leadership is about."

• **"We cannot be all things to all people or be every place at once when people need us,** but we can be in the moment and do the best we can while we're there. I am fond of telling people that the cleaners lost my Wonder Woman costume, and I broke my magic wand during the '60s, but what I've seen volunteers in this association do this year has renewed my faith and changed my life. If I were a poet, I could write about it."

• **There was a huge celebration of women "pioneer" lawyers while she was TBA president.** What she wrote then about those early strong and gutsy women lawyers, applies to her, too:

"Edna Ferber wrote that 'living in the past is a dull and lonely business, looking back strains the neck muscles, causes you to bump into people not going your way.' I do not disagree, but I also agree with Germaine Greer who said that there have been 'women in the past far more daring than we would need to be now, who ventured all and gained a little, but survived after all.'"

As readers, we are grateful to have benefitted from what Katie has "ventured, gained and survived" — because she shared it with us through the 42 columns she has written for this magazine. For decades, in fact, we have banked on it. ⚖

