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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2297

Date: 06-Apr-15

From: Steve Leimberg's Estate Planning Newsletter

Subject: [Steve Oshins on Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines: Unconstitutional Perpetual Trusts - Not So Fast Says the Nevada Supreme Court!](#)

*“A number of states that have constitutional provisions barring ‘perpetuities’ have also enacted statutes that either significantly extend the perpetuities period or eliminate it altogether. A recent law review article called the constitutionality of these statutes into question. In *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, the Nevada Supreme Court specifically ratified Nevada’s 365-year rule against perpetuities.*”

The Nevada Supreme Court’s opinion makes it clear that the rule against perpetuities is not static. Precisely because it is a common law rule, it is capable of being changed constitutionally over time in response to the public policy needs of the day.

Those needs are determined primarily by the legislature. The courts, too, may initiate change, doing so in reliance on the public policy manifested by the legislature through its enactments and alterations of the common law rule. The Nevada Supreme Court explicitly references the extension of the rule against perpetuities to 365 years as an example of such constitutionally legitimate action.”

In a recent article published in The Vanderbilt Law Review titled [Unconstitutional Perpetual Trusts](#),^[i] (“the Horowitz/Sitkoff article”), co-authors **Steven J. Horowitz** and **Robert H. Sitkoff** called the constitutionality of certain longer-term dynasty trust statutes into question. In [Estate Planning Newsletter #2263](#), **Jonathan Blattmachr**, **Mitchell Gans** and **Bill Lipkind** provided their views of the Horowitz/Sitkoff article and claimed that the Horowitz/Sitkoff article’s position may be correct.

Frequent **LISI** contributor **Steve Oshins, Esq., AEP (Distinguished)** rebutted these arguments in [Estate Planning Newsletter #2265](#) (“the rebuttal

newsletter”), illustrating and citing multiple cases and treatises. Steve’s rebuttal paid particular attention to his home state of Nevada and maintained that the Nevada statute extending the perpetuities period to 365 years was constitutional and entirely enforceable under Nevada law.

Now, Steve returns and adds to the commentary made in his rebuttal newsletter by reporting on a recent Nevada Supreme Court opinion. The opinion, with respect to the case of [*Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*](#), 131 Nev. [*Advance Opinion 13*](#), was filed by the Supreme Court of the State of Nevada on March 26, 2015.[\[ii\]](#)

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- [The Annual Domestic Asset Protection Trust State Rankings Chart](#)
- [The Annual Dynasty Trust State Rankings Chart](#)
- [The Annual Trust Decanting State Rankings Chart](#)

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Now, here is Steve Oshins’ commentary:

EXECUTIVE SUMMARY:

A number of states that have constitutional provisions barring “perpetuities” have also enacted statutes that either significantly extend the perpetuities period or eliminate it altogether. In a law review article, co-authors Steven J. Horowitz and Robert H. Sitkoff call the constitutionality of these statutes into question.

As the rebuttal newsletter made clear, the conclusions reached in the Horowitz/Sitkoff article are simply incorrect, especially with respect to

Nevada. A recent decision of the Nevada Supreme Court has now lent further support to the arguments presented in the rebuttal newsletter.

COMMENT:

I. The Rebuttal Newsletter

The rebuttal newsletter primarily focused on Nevada law. However, its numerous citations of case law and treatises were equally applicable to the other affected states. The essence of the rebuttal newsletter was that the Horowitz/Sitkoff article was incorrect in asserting that the state legislature and courts could not alter the constitutional prohibition of perpetuities with changing circumstances and changing policy considerations. According to the rebuttal newsletter, the constitutional prohibition is a general statement of policy and does not freeze the constitutional provision. Over time, the application of the ban on “perpetuities” set forth in the state constitution can change. In its recent opinion, the Nevada Supreme Court makes essentially the same argument.

II. The Nevada Supreme Court Speaks!

Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc., 131 Nev. Advance Opinion 13 (2015) (“the 2015 Nevada Supreme Court case”), was filed by the Supreme Court of the State of Nevada on March 26, 2015. The opinion is a response to certified questions presented by the United States Court of Appeals under Nev. Rules of Appellate Proc. Rule 5.

In this new case, the Nevada Supreme Court specifically ratified Nevada’s 365-year rule against perpetuities. According to the Court:

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).
[Emphasis added.][iii]

The *Bullion* case involves an area-of-interest provision in a commercial mining agreement for the payment of royalties. The Ninth Circuit asks specifically whether the rule against perpetuities applies to such an agreement under Nevada law. Under the common law, such agreements were covered. In 1987, Nevada enacted NRS 111.1037(1), which exempted nondonative transfers from the rule against perpetuities. However, the statute was not in effect at the time of the agreement in issue. Accordingly, the common law rule in effect prior to the statute was deemed by the Supreme Court to be applicable.

In a striking departure from the common law, the Court holds that the rule against perpetuities does NOT apply to such agreements. But how can this be if the common law rule was the rule in force and understood to be referenced in the Nevada Constitution's banning of "perpetuities"? The Court explains that the same public policy considerations that motivated the Legislature to alter the common law rule by extending it to 365 years and making it no longer applicable to nondonative transfers can be followed by the courts in altering the common law rule. Although the legislature's statutory modification does not apply to the particular case, the Supreme Court can look to the legislature's action in justifying its own striking departure from the common law rule. Clearly, the court could not rely on the legislature's actions if those actions were unconstitutional!

Building on the principle that contemporary public policy, as determined by the legislature, permits significant deviation from the nineteenth century common law against perpetuities, whatever the purpose then of the rule, the Nevada Supreme Court emphasizes crucially in its opinion the following: "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." [iv] Horowitz/Sitkoff regard the common law rule, because of its incorporation in the Constitution, as frozen in time, but for minor adjustments consistent with original intent. In contrast, the Nevada Supreme Court, in an extraordinary insight, realizes that the Constitution, by initially adopting the common law rule, was recognizing that case law and statute could change it with the demands of a changing society.

As the court explains, "The meanings of the Constitution's words remain constant, but their application may vary with the circumstances of time and

place.”^[v] The court specifically cites to an earlier case in which the common law rule of interspousal immunity was not just modified, but abrogated. “Having been created and preserved by the courts, the doctrine is subject to amendment, modification and abrogation by the courts if current conditions so dictate.”^[vi] The Court added importantly: “This inquiry into the common law is informed by both precedent and policy.”^[vii]

Conclusion

The Nevada Supreme Court’s response to the question presented by the Ninth Circuit Court of Appeals makes clear that the rule against perpetuities is not static. Precisely because it is a common law rule, it is capable of being changed constitutionally over time in response to the public policy needs of the day. Those needs are determined primarily by the legislature. The courts, too, may initiate change, doing so in reliance on the public policy manifested by the legislature through its enactments and alterations of the common law rule. The Nevada Supreme Court explicitly references the extension of the rule against perpetuities to 365 years as an example of such constitutionally legitimate action.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Steve Oshins

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CITATIONS:

[i] [67 Vand. L. Rev. 1769](#) (2014).

[ii] *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 131 Nev. Advance Opinion 13 (2015).

[iii] 131 Nev. Advance Opinion 13, at 3-4.

[iv] *Id.* at 4.

[v] *Id.*

[vi] See *Rupert v. Steine*, 90 Nev. 397, 399, 528 P. 2d 1013, 1014 (1974).

[vii] 131 Nev. Advance Opinion 13, at 6.

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