

**Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2265**

**Date:** 22-Dec-14  
**From:** Steve Leimberg's Estate Planning Newsletter  
**Subject:** [Steve Oshins: The Rebuttal to Unconstitutional Perpetual Trusts](#)

*“This pronouncement by the Nevada Supreme Court is in direct conflict with the claim made by Horowitz and Sitkoff, at least with respect to Nevada. The Nevada Supreme Court makes clear, first, that the precise legal meaning of ‘perpetuities’ is not fixed by the Nevada Constitution. The Court indicates that it has looked to another constitutional provision, statute, or common law rule. In other words, the constitutional provision itself does not incorporate a specific meaning.*

*Second, inasmuch as the Supreme Court looks for a statute as a potential source of meaning of ‘perpetuities,’ the clear implication is that the legislature has the power to ‘defin[e] the rule against perpetuities.’ If the legislature could not constitutionally do so then the Court would not have been seeking out a statute that does so.”*

In a recent article published in The Vanderbilt Law Review titled *Unconstitutional Perpetual Trusts*,[\[i\]](#) (“the article”), co-authors **Steven J. Horowitz** and **Robert H. Sitkoff** call 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 that article and claimed that the article’s position may be correct.

Now, frequent **LISI** contributor **Steve Oshins, Esq., AEP (Distinguished)** rebuts the arguments made in the law review article.

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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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Before we get to Steve's commentary, members should note that a new **60 Second Planner** by **Bob Keebler** was recently posted to the **LISI** homepage. In his commentary, Bob reports on the passage of the Achieving a Better Life Experience (ABLE) Act, which will allow for the creation of tax-favored savings accounts for individuals with disabilities. You don't need any special equipment to listen, [just click on this link](#)

**HAPPY HOLIDAYS to ALL FROM THE LISI TEAM.** We're taking the rest of the week off and we'll be back on the 29<sup>th</sup>.

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 their recent law review article, co-authors **Steven J. Horowitz** and **Robert H. Sitkoff** call the constitutionality of these statutes into question. The authors argue that the perpetuities period adopted by a trust administered in one of these states, even if constitutional, will not be respected by the home state of the grantor, if the home state, such as Texas, has a constitutional provision of its own that prohibits "perpetuities."

Importantly, the authors recognize that in the case of the vast majority of states that do not have a constitutional provision relating to perpetuities, the rule against perpetuities is not a matter of public policy. For that reason, the establishment of a dynasty trust in a state with an extended perpetuities period, such as Nevada, will almost certainly be given effect in the home state under

traditional conflict of laws analysis employed by the courts. This is a vital point to make, because in a New York Times article [\[ii\]](#) showcasing Professor Sitkoff, the *opposite* impression was created.

The law review article notes that eleven states have had constitutional bans on perpetuities. Of the eleven states, California and Florida are the only states to later repeal those bans, thereby leaving nine states that currently have those bans. The nine states are Arizona, Arkansas, Montana, Nevada, North Carolina, Oklahoma, Tennessee, Texas and Wyoming. Of these states, Arizona, Nevada, North Carolina, Tennessee and Wyoming have enacted longer-term perpetuity statutes.

The article claims that Dynasty Trusts administered under the laws of these states are invalid despite state statutes with extended or no perpetuities limits because the states also have constitutional bans against “perpetuities.” According to the article:

[b]ecause these statutes permit entailment of property down the generations by way of a string of perpetual (or effectively perpetual) life estates, they are constitutionally suspect in a state with a constitutional ban on perpetuities. [\[iii\]](#)

The ultimate theme of the article is that the meaning of “perpetuities” is synonymous with the common law rule against perpetuities, that is, remoteness of vesting, and is in furtherance of an historic policy of discouraging consolidation of power and wealth in a few, select dynastic families. According to their article, only minor deviations from this constitutional mandate should, therefore, be permitted and vastly extended terms such as have been enacted in many of the states with the constitutional provision, should be held unconstitutional.

## **COMMENT:**

### **I. The Law in Nevada**

This rebuttal is primarily focused on Nevada law. The article itself goes into few details with respect to Nevada, but does include the state among those in which the statutory period is deemed violative of the state constitution. This conclusion is simply incorrect with respect to Nevada! In particular, the article

fails to consider *Sarrazin v. First Nat'l Bank of Nevada*.<sup>[iv]</sup> In *Sarrazin*, the Nevada Supreme Court stated:

Section 4 of Article XV of the Constitution of Nevada reads: “No perpetuities shall be allowed except for eleemosynary purposes.” There is no Nevada statute defining the rule against perpetuities. The common-law rule 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.” Gray, *The Rule against Perpetuities*, 3d Ed., p. 174, § 201. And see 48 C.J. 937, § 4; 21 R.C.L. 282, § 2. Other than the constitutional provision above quoted, 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.

This pronouncement by the Nevada Supreme Court is in direct conflict with the claim made by Horowitz and Sitkoff, at least with respect to Nevada. The Nevada Supreme Court makes clear, first, that the precise legal meaning of “perpetuities” is not fixed by the Nevada Constitution. The Court indicates that it has looked to another constitutional provision, statute, or common law rule. In other words, the constitutional provision itself does not incorporate a specific meaning.

Second, inasmuch as the Supreme Court looks for a statute as a potential source of meaning of “perpetuities,” the clear implication is that the legislature has the power to “defin[e] the rule against perpetuities.” If the legislature could not constitutionally do so then the Court would not have been seeking out a statute that does so.

The Court also looks to the common law rule as *one* possible source for giving meaning to “perpetuities.” But it is one of several sources and is not given preference to a statute. Whether statute or common law, these are after-the-fact. The constitutional provision itself is generic and without clear, binding definition. Note as well that the Court describes the common law rule as “usually” stated in accordance with John Chipman Gray’s single sentence formulation. The use by the Court of the word “usually” makes clear that Gray’s formulation is not the exclusive statement of the common law rule, let alone of the constitutional meaning of “perpetuities.”

Indeed, the reference by the Court to the common law rule, citing Gray's work, is especially noteworthy. The first edition of Gray's work did not appear until 1888, that is, more than 20 years after the adoption of the Nevada Constitution in 1866. Gray is credited with the now well-known one sentence formulation focused on remoteness of vesting. At the time of the adoption of the Nevada Constitution in 1866, it is far from clear that there even was a uniformly accepted statement of the common law rule. Gray's precise formulation had not yet been published.

The bottom line is that, if the common law rule against perpetuities, as stated by Gray, was the constitutionally prescribed rule in Nevada, then the statement by the court in *Sarrazin* would have been quite different. It would likely have read something along the following lines:

Section 4 of Article XV of the Constitution of Nevada reads: "No perpetuities shall be allowed except for eleemosynary purposes." For purposes of the state Constitution, the meaning of "perpetuities" is synonymous with the common law rule. The common-law rule, as intended by the constitutional provision, is as follows: "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." Gray, *The Rule against Perpetuities*, 3d Ed., p. 174, § 201. And see 48 C.J. 937, § 4; 21 R.C.L. 282, § 2. While Gray's work was not published until more than twenty years after the adoption of the constitutional provision, his formulation was nothing new, but rather was already well-known and widely accepted.

Finally, the last sentence of the quote from the Court's opinion confirms that it did not consider the term "perpetuities" to be concerned *exclusively* with remoteness of vesting, as in the common law rule and as argued by the authors of the article. It also expresses recognition of a second branch of which the common law courts were concerned -- restraints on the power of alienation. Those restraints might apply even to vested estates and interests. In other words, "perpetuities" in its more expansive, policy sense was implicated.

Horowitz and Sitkoff also completely ignore the facts of Nevada's state constitutional history. They assume that Nevada just followed California's lead and bought into that state's rationale for adopting the "perpetuities provision." It is true, judging from the official record, that in the debates in 1866 over the state constitution, a provision was introduced that is identical in wording to the

one in the California Constitution of 1849. However, at the time of its introduction, no reference was made to the California Constitution as the provenance of the provision. In other words, there is no evidence in the official record that the representatives at Nevada's constitutional convention understood that they were endorsing California's approach to the constitutional meaning of the term "perpetuities."

The provision does not appear to have been explained or debated at all. In California and some of the other states there is at least minimal explanation of the reason for inclusion of the provision in the state constitution. The extrapolation in the Horowitz and Sitkoff article about what Nevada intended by adoption of the wording of the California constitutional provision is entirely speculative and utterly without historical foundation.[\[v\]](#)

Unfortunately, Horowitz and Sitkoff leave the impression with the reader that Nevada expressly followed California's lead and reasoning when there is absolutely no evidence in the official reports to sustain this. They also suggest that the public's rejection of an amendment to repeal the prohibition of "perpetuities" altogether, which was voted down in 2002, shows that the public wants enforcement of a ban on "perpetuities." However, the rejection of a constitutional repeal of all "perpetuities" does not prove the public also does not support a statutory period of 365 years. In fact, the Nevada legislature passed a 365-year perpetuities term just three years later in 2005. This statutory change was permitted pursuant to the reference given in *Sarrazin*.

## **II. The North Carolina Provision**

Much of Horowitz and Sitkoff's article focuses on the North Carolina experience. It is crucial to their thesis because they regard North Carolina's constitutional provision banning "perpetuities" as the fountainhead for all subsequent state constitutional bans. The article argues that North Carolina's constitutional prohibition against "perpetuities" was addressing remoteness of vesting, essentially what we now call the common law rule against perpetuities. Unfortunately for Horowitz and Sitkoff, the North Carolina court of appeals handed down an opinion only a few years ago completely disagreeing with their thesis. In 2010, in *Brown Brothers Harriman Trust Co. v. Benson*,[\[vi\]](#) the North Carolina Court of Appeals upheld the state's perpetual trust statute, which eliminates the rule against perpetuities altogether if a

trustee has a power of sale. This was done, notwithstanding the state constitution's ban on "perpetuities."

Horowitz and Sitkoff seek to diminish the significance of the decision by asserting that the counsel, as evidenced by their briefs, as well as the judges, were simply unfamiliar with the history of perpetuities. They advise that "because [the Court of Appeals'] analysis of the constitutional provision is deeply flawed, it should not be followed by the North Carolina Supreme Court or by courts in other states." An accompanying footnote adds that "the North Carolina Supreme Court declined twice to review the appellate court's decision."[\[vii\]](#) But, if the decision is so constitutionally flawed, why was review denied twice? Is the North Carolina Supreme Court also ignorant of North Carolina's constitutional history?

The appellants sought review under two provisions - discretionary review and a substantial constitutional question. In denying the appeal on discretionary review grounds, the Supreme Court would have had to conclude that the subject matter of the appeal had no significant public interest and that the cause did not involve legal principles of major significance to the jurisprudence of the state of North Carolina.[\[viii\]](#) Further, as to a substantial constitutional question arising under the state constitution, the appellants were entitled to an appeal as of right.[\[ix\]](#) However, their petition was denied *ex mero motu*. The precise reason for dismissal by the Court of its own accord is not made clear. Discussions with North Carolina counsel have confirmed that these days the decision is considered reliable authority and that attorneys who at one time had moved trusts to other states have now repatriated them to North Carolina based on the validity of the statutory rule.

Notwithstanding the strong criticism by Horowitz and Sitkoff of the analytical skills of North Carolina counsel and judiciary, other authorities disagree. For example, the decision has been cited positively by the authoritative and venerable treatise on future interests, Simes and Smith, *The Law of Future Interests* §1444 n.1 (3d ed. last updated WESTLAW August 2014). Specifically, the treatise cites *Benson* as confirmation for its earlier conclusion that: "The [North Carolina] General Assembly's modification of the common law rule against perpetuities through passage of USRAP in 1995 supports our interpretation of the rule as one acceptable method for regulating unreasonable restraints on alienability rather than as a constitutionally required rule."

Horowitz and Sitkoff actually consider USRAP an acceptable legislative modification of the constitution, notwithstanding its admitted deviation from the common law rule against perpetuities, which they argue is the constitutional meaning of “perpetuities.” In contrast, they contend that an extension for several hundred years is too much. As described by Professor Sitkoff to the New York Times: “It’s a matter of degree...It’s like ‘if I shoot you 10 times’ is a stronger case than ‘if I shoot you twice.’ The prosecutor is still going to win the ‘I shot you twice.’ Three hundred sixty-five years is longer than the existence of the United States.”

It is submitted that this is not an especially compelling example of legal reasoning. Likewise, the article’s more sedate explanation that 365 years is at odds “with the deeply principled know-and-see basis for lives in being plus twenty-one years”<sup>[x]</sup> is also less compelling. The *Benson* court, on the other hand, regarded the common law period as “an arbitrary stopping point.”<sup>[xi]</sup>

Indeed, the authors never explain why lives in being plus twenty-one years, especially since the twenty-one years applies even if a minor is not involved, is necessarily “principled.” They also do not explain how a rule that was formulated in Merry Olde England more than 350 years ago in a feudal society where wealth was in the form of land is a more appropriate “know-and-see” rule than one enacted by a modern day legislature in its capacity as the principle formulator of public policy and representative of the people.

Finally, a consideration of texts from the mid-1800s reveal that the *Benson* court’s stance was assumed to be the case in North Carolina. For example, in his work, *The North Carolina Justice: Forms and Precedents According to Modern Practice*, Benjamin Swaim advises with regard to perpetuities. “That the future Legislature of this state shall regulate entails in such manner as to prevent perpetuities.”<sup>[xii]</sup> This clearly demonstrates that at the time, the understanding in North Carolina was that “perpetuities” was not an immutable concept, but one within the ken of the legislature to modify in satisfying the principle reflected in the North Carolina Constitution.

This concept, that it was for the legislature, along with the judiciary, to invest “perpetuities” with meaning from time to time and consistent with current conditions, actually pervaded state constitutional thinking. Thus, in 1867, the year after Nevada ratified its constitution, John Alexander Jamieson published his work on *The Constitutional Convention: Its History, Powers, and Modes of Proceeding*. In that work, specifically citing to the provisions on perpetuities,



among certain other clauses, he explained: “As is generally the case with constitutional provisions, these provisions are not couched in the technical language of laws, nor are they coupled with sanctions... [They are] guides to the departments of government in the exercise of their functions.”[\[xiii\]](#)

This approach to constitutional interpretation persists to this day. As is stated in a standard North Carolina treatise: “It is also recognized that the 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.”[\[xiv\]](#)

### **III. The Authors’ Puzzling Reliance on Professor Gray**

Not only does the judicial precedent and historical experience in Nevada and North Carolina call into question the thesis proposed by Horowitz and Sitkoff, but some of the principal authorities they cite do not support their thesis. For example, they rely heavily on Harvard Professor John Chipman Gray, whose book, the *Rule Against Perpetuities*, originally published in 1886, stands as the first comprehensive American treatise on the rule against perpetuities.

In his treatise, Gray states, when explicitly discussing Nevada’s constitutional provision, along with those of several other states: “These provisions seem to be simply pieces of declamation without juristic value, at least on any question of remoteness.”[\[xv\]](#) While noting this statement of Gray’s, the authors never make clear in their article, how then, Nevada is bound constitutionally to a rule of remoteness.

Gray’s conclusion that “perpetuities” in the Nevada constitution, as well as certain other states, is a “declamation without juristic value” is applied to California by another renowned professor also actually cited in the Horowitz and Sitkoff article, William Burby. Burby was arguably California’s preeminent authority on property law in the twentieth century. As noted previously, California’s constitutional history is relevant to Nevada in only the most attenuated fashion. Nevertheless, Burby’s conclusions regarding the meaning of “perpetuities” under the California constitution are considerably at odds with Horowitz and Sitkoff as well.

In his famous article, *The Meaning of the California Constitutional Provision Prohibiting Perpetuities*,[\[xvi\]](#) Professor Burby states: “It was not till Professor Gray made a thorough investigation of the subject, the results of which

investigation form the basis for his treatise on *The Rule Against Perpetuities*, that the rule was generally understood as one against remoteness of vesting. Prior to that time there was considerable confusion regarding the subject, some authorities taking the view that the common-law rule was against suspension of the power of alienation.” Professor Burby later asks “with what meaning in mind did the drafters of this constitutional provision use the word ‘perpetuities?’”<sup>[xvii]</sup> He concludes that the drafters of the California Constitution were referencing the rule against the suspension of the power of alienation.

His argument is as follows: The perpetuities provision was first included in the Constitution in 1849. In 1872, the legislators enacted a law proscribing suspension of the power of alienation beyond a certain number of years. In so doing they relied on the New York law to a large degree. It is undisputed that in New York, there was the belief that the common law rule was the rule against suspension against the power of alienation. Then, only seven years later, in 1879, a new California Constitution was adopted with a re-adoption of the perpetuities provision. Professor Burby claims that this “is at least highly persuasive that the provision contained in the Constitution of 1879 was intended as a prohibition of perpetuities as defined by the legislation of 1872. Under this theory it would seem that in California there is no rule either in the constitution or in the statutes defining the time within which future interests must vest—no rule corresponding to the true common-law Rule against Perpetuities.”<sup>[xviii]</sup>

Horowitz and Sitkoff primarily rely on a 1928 California Supreme Court decision, *In re McCray's Estate*, which indicated in a single line of dictum and without absolutely any discussion of the history, that the common law rule was “ingrafted upon our system by the Constitution.”<sup>[xix]</sup> This dictum has been much criticized. Indeed, the California Supreme Court backtracked sixteen years later, an event not mentioned by Horowitz and Sitkoff. In *In re Micheletti's Estate*,<sup>[xx]</sup> the Court stated, with respect to the argument that the rule against perpetuities is in force in the state on account of the California Constitution: “There is considerable uncertainty as to the soundness of this position.”<sup>[xxi]</sup> Among the authorities cited in support of this uncertainty, the California Supreme Court specifically referenced *Simes on Future Interests*, an earlier edition of Simes and Smith cited above. The Court also cited to the First Restatement of Property, which was then being drafted. The Restatement material cited, had itself specifically endorsed Professor Burby’s analysis and, frankly, barely concealed its distaste with what it considered to be the effort in

*In re McCray's Estate* and several other cases to rewrite California history.[\[xxii\]](#)

Again, the argument over the meaning of “perpetuities” in the California Constitution is not determinative for purposes of Nevada constitutional interpretation. Nevertheless, it is instructive that Horowitz and Sitkoff, though citing to Professor Burby’s classic article, do not devote serious consideration to Burby’s very different vision of what the term “perpetuities” means and the power of the legislature to alter it. The fact is that the history concerning the meaning of “perpetuities” in the California Constitution is utterly in dispute and not easily resolved at this late date. Considerable caution ought to be exercised before making bold assertions or facile claims, as the authors appear to do, about what the drafters meant when they used the term “perpetuities” in the California Constitution.

#### **IV. Apart from the Constitutional Analysis, the Policy Argument Makes No Sense**

Suppose we accept the contention of the authors that the constitutional provision in the Nevada state constitution is in pursuit of a policy of preventing undue accretions of power and wealth to certain families over the course of several generations. But why should it be applicable as well to citizens of other states motivated to take advantage of Nevada’s advantageous law?

This point is very crucial, because the author of the New York Times piece featuring Professor Sitkoff, as well as Professor Sitkoff himself, emphasized this very scenario. In fact, one of the great appeals of Nevada is that its trust laws lead a considerable number of nonresidents to establish trusts administered there. The article itself only discusses this facet of the “perpetuities” question in its last three pages. However, nowhere in the article or in the New York Times piece do the authors seem aware of a seeming oversight in their analysis--specifically, how does the administration in Nevada of a nonresident family’s Dynasty Trust result in the concentration of power and wealth in the hands of a few dynasties in Nevada?

The use of Nevada trustees is actually beneficial to Nevadans generally. It provides rents and salaries. To the extent that capital is actually managed in Nevada it leverages those benefits. The visibility it gives Nevada in the financial world arguably attracts other types of investment in the state. But since the trust corpus and income ultimately will enable persons elsewhere to

maintain their wealth and privilege, it poses no risk of facilitating a nascent aristocracy in Nevada. Thus, if the policy of the state “perpetuities” provision is to prevent dynasties in the state, there is no reason to assign such constitutional meaning to trusts that do not threaten such an outcome.

## **V. The Article’s Conflict of Laws Analysis Is Totally Flawed**

In the last several pages of their article, the authors maintain that if a state has a constitutional provision barring perpetuities and one of its citizens has a dynasty trust in a state such as Nevada, the home state can apply its own rule against perpetuities rather than that of the law designated in the trust instrument, such as Nevada. It can then offset any property unreachable out-of-state, by grabbing the grantor’s own property still situated in the home forum as a make-up remedy. The situation is likened to one in which out-of-state trusts are utilized to defeat spousal claims. It is maintained that courts respond by making adjustments out of available home state property in order to deliver to a spouse the share to which he or she is entitled under local law.

In making their point, Horowitz and Sitkoff do not seem to grasp fully the distinction between jurisdiction and choice of law. Reference is made specifically to section 90 of the Restatement (Second) of the Conflict of Laws.[\[xxiii\]](#) However, section 90 has absolutely nothing to do with choice of law. Rather it allows a state to refuse to entertain a foreign cause of action as a forum if the cause of action is violative of its own strong public policy. Aside from the fact that the Restatement (Second) states that this provision is to be invoked most sparingly, the provision is concerned with the availability of a forum for litigation and not whether the forum may ignore a choice of law in a trust instrument.

As the authors admit, the Restatement (Second) provides unequivocally 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.[\[xxiv\]](#) There is no exception for “perpetuities referenced in a state constitution.” Nevertheless, the authors state, without any support, that when that is the case, the rule against perpetuities does become a matter of public policy. Since the Restatement (Second) sections 269 and 270, which would cover the rule against perpetuities pertaining to trusts of movables, generally permits the forum to deny effect to a choice of law when it is violative of a strong public

policy, the authors maintain that a state can refuse to enforce the choice of a more favorable out-of-state law made by one of its citizens.

The problem with the authors' approach is that it completely ignores the actual rule of the Restatement (Second). The Restatement (Second) permits the forum to ignore the choice of law only when it violates the strong public policy, *not of the forum*, as Horowitz and Sitkoff incorrectly assume, but of the state which, with respect to the matter at issue, has the "most significant relationship." An analysis is required of the factors under section 6 of the Restatement (Second) as to which state has the most significant relationship. The authors do not even mention section 6.

A careful analysis of section 6 demonstrates that Nevada or any other situs of administration of a dynasty trust might well have the most significant relationship, and that the home state would not. To begin with, if the home state does not have a constitutional prohibition, then even the authors would agree, the home state has no case and would have to apply the choice of law of the trust. That just leaves very few states with constitutional provisions that arguably constitute a strong public policy. Essentially, from the standpoint of Nevada, it means that we are basically just talking about citizens of states like Texas who are establishing trusts in Nevada.

The key factors under section 6 of the Restatement (Second) are:

- (a) The needs of the interstate and international systems
- (b) The relevant policies of the forum
- (c) The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue
- (d) The protection of justified expectations
- (e) The basic policies underlying the particular field of law
- (f) Certainty, predictability and uniformity of result, and
- (g) Ease in determination and application of the law applied.

Without belaboring the analysis, several of these factors could well point to Nevada having the most significant relationship. The application of these

factors to particular cases is notoriously unpredictable and the outcome is not determined by a simple counting of the number of factors in favor a state. Nevertheless, there would be a reasonable argument that (a), (c), (d), (e), (f), and (g) would all fall on the side of Nevada. The point here is that the authors completely short-circuit the analysis. They incorrectly assume that as long as the forum has a strong public policy then it can ignore the choice of law.

Likewise, the authors incorrectly analogize the rule against perpetuities situation to that of the use of an out-of-state trust to avoid a spouse's share. In contrast to the rule against perpetuities, which the Restatement (Second) does not consider a matter of strong public policy, the Restatement (Second) makes explicitly clear that a spouse's share is, indeed, a matter of strong public policy.

## **Summary**

As applied at least to Nevada, the authors of the law review article are simply incorrect in their analysis. They made unsupported assumptions and ignore both the case law and historical record. More generally, their thesis about the meaning of "perpetuities" in the North Carolina and California constitutions is seriously flawed. They admit that the term "perpetuities" as used in state constitutions is thematic in nature and does not necessarily embody a specific rule. They also recognize the right of legislatures to define the perpetuities period and to change it over time. However, they fail to make the case as to why the constitution prohibits the legislature from adjusting the rule to the public policy needs of the present day. While acknowledging that the concern about concentrations of wealth are no longer as much a concern in light of the tax law and the dissipation of wealth over generations, they still insist that the common law rule against perpetuities, nevertheless, must continue to be enforced.

As for the use of Nevada or another state with favorable perpetuities rules, their analysis is inapplicable to the vast majority of states that do not have a constitutional provision. With regard to the few that do, like Texas, their assumption that Texas would be free to apply its own law, is highly questionable and does not withstand conflict of laws analysis under the Restatement (Second) of the Conflict of Law. Certainly, the claims made in the New York Times article are thoroughly unsupportable under the law and create a completely misleading impression. These complex issues are best left to be thrashed out in serious journals and not in newspaper features designed to

generate controversy and to make less than well-reasoned or historically accurate claims.

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

*Steve Oshins*

**TECHNICAL EDITOR: DUNCAN OSBORNE**

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**CITATIONS:**

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

[ii] Paul Sullivan, “[The Ins and Outs of Trusts That Last Forever](#),” N.Y. Times, Dec. 5, 2014.

[iii] 67 Vand. L. Rev. at 1807.

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

[\[v\]](#) See Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada 740-41 (Andrew J. Marsh, Official Reporter 1866).

[\[vi\]](#) 202 N.C. App. 283, 688 S.E. 2d 752 (2010).

[\[vii\]](#) See 67 Vand. L. Rev. at 1811 n. 27.

[\[viii\]](#) See N.C. Gen. Stat. Ann. §7A-31.

[\[ix\]](#) See N.C. Gen. Stat. Ann. §7A-31.

[\[x\]](#) 67 Vand. L. Rev at 1813 n. 242.

[\[xi\]](#) 688 S.E. 2d at 756.

[\[xii\]](#) Benjamin Swaim, *The North Carolina Justice: Forms and Precedents According to Modern Practice* 36 (1867).

[\[xiii\]](#) John Alexander Jamieson, *The Constitutional Convention: Its History, Powers, and Modes of Proceeding* 92-93 (1867).

[\[xiv\]](#) See, e.g., Elizabeth M. Bosek et al., 5A N.C. Index 4<sup>th</sup> Constitutional Law §8 (Liberality of Construction) (database updated November 2014 WESTLAW).

[\[xv\]](#) See John Chipman Gray, *the Rule Against Perpetuities* §730, at 535 (2d ed. 1906).

[\[xvi\]](#) 1 So. Cal. L. Rev. 107 (1928).

[\[xvii\]](#) *Id.* at 109.

[\[xviii\]](#) *Id.* at 111.

[\[xix\]](#) 204 Cal. 399, 406, 268 P. 647, 650 (1928).

[\[xx\]](#) 24 Cal. 2d 904, 151 P.2d 833 (1944).



[\[xxi\]](#) 24 Cal. 2d at 908, 151 P. 2d at 835. The uncertainty of the situation was confirmed in the district court of appeals' searching discussion in *In re Sahlender's Estate*, 89 Cal. App. 2d 329, 201 P. 2d 69 (Dist. Ct. App.1948).

[\[xxii\]](#) See American Law Institute, Restatement of the Law—Property Appendix 4B, Topic 3 ¶30 (1944).

[\[xxiii\]](#) See 67 Vand. L. Rev. at 1817 n. 271.

[\[xxiv\]](#) See 67 Vand. L. Rev. at 1819-1820.

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