STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 08-CVS-13456

BROWN BROTHERS HARRIMAN TRUST CO., N.A., as Trustee of the Benson Trust,

Plaintiff

v.

ANNE P. BENSON, as Grantor of the Benson Trust, JOHN H. BENSON, as Beneficiary under the Benson Trust, ANNE H. BENSON, as Beneficiary under the Benson Trust, LINLEY C. BENSON, as Beneficiary under the Benson Trust, RUTH PRINGLE PIPKIN FRANKLIN, as Contingent Beneficiary under the Benson Trust, and the UNBORN AND UNASCERTAINED ISSUE AND HEIRS OF ANNE. P. BENSON, as Contingent Beneficiaries under the Benson Trust,

Defendants.

**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

**COMES NOW**, Plaintiff Brown Brothers Harriman Trust Co., N.A., Trustee of the Benson Trust, by and through counsel, and hereby respectfully submits this Brief in Support of its Motion for Summary Judgment:

## I. FACTUAL SUMMARY

On November 27, 2007, Defendant Anne P. Benson, as Grantor, executed that certain trust agreement entitled the Anne P. Benson Trust ("Benson Trust") naming Plaintiff Brown Brothers Harriman Trust Co., N.A. ("Brown Brothers") as Trustee, and funded the Benson Trust with the sum of Ten Thousand Dollars ($10,000). The beneficiaries of the Benson Trust are

Anne P. Benson's children, namely, Defendants John H. Benson, Anne H. Benson, and Linley C. Benson ("Benson Children"), and their descendants living at any time. Anne P. Benson's sister, Ruth Pringle Pipkin Franklin, and Anne P. Benson's unborn and unascertainable heirs are contingent beneficiaries under the Benson Trust. A family tree illustrating the relationship of these beneficiaries to Anne P. Benson and identifying their counsel is attached as Exhibit A.

Pursuant to the terms of the Benson Trust, Anne P. Benson instructed Brown Brothers to administer the Benson Trust as a perpetual or dynasty trust that is not subject to the rule against perpetuities based on remoteness of vesting. Item XI of the Benson Trust states, "(I)t is intended that this Trust be perpetual. It is also intended that this Trust not be subject to any rule against perpetuities that is based on remoteness of vesting."

The Trustee under the Benson Trust is given broad power to convey trust property. Item X (b)(1) of the Benson Trust gives the Trustee power "(t)o sell, exchange, or otherwise dispose of any property at any time held or acquired hereunder." Item X (l) of the Benson Trust directs, "The Trustee shall have the power to sell any trust property, including but not limited to the power to convey an absolute fee in possession of land, and full ownership of personal property." Item X (a) of the Benson Trust additionally confers upon the Trustee all powers given to trustees by the North Carolina Uniform Trust Code, Chapter 36C of the General Statutes of North Carolina. N. C. Gen. Stat. § 36C-8-816(2) gives trustees power to "(i)nvest and reinvest trust property as the trustee considers advisable in accordance with the trust, and to acquire or sell property, for cash or on credit, at public or private sale."

Anne P. Benson and her counsel have instructed Brown Brothers that (1) the administration of the Benson Trust is valid under the Act Defining Perpetuities and Suspension of Power of Alienation for Trusts (N.C.G.S. § 41-23) since the Benson Trust gives the Trustee

broad powers to sell the trust property, and (2) the Benson Trust is to be administered as if it will continue indefinitely. The Benson Children, through counsel, have instructed Brown Brothers to terminate the Benson Trust and distribute its assets immediately, alleging that the Benson Trust violates the Common Law Rule Against Perpetuities as defined in Section IV ("Overview of North Carolina Rule Against Perpetuities") of this Plaintiff's Brief in Support of Motion for Summary Judgment. Because the Benson Children's instructions to terminate the trust are contrary to Anne P. Benson's instructions to administer the trust in perpetuity, an actual controversy exists.

Anne P. Benson desires to merge an existing Alaskan perpetual trust worth approximately $3 million into the Benson Trust for purposes of simplifying the structure of her family's holdings and minimizing the considerable accounting and trustee fees associated with the current structure. Anne P. Benson's counsel is unable to determine whether such merger would be feasible or advisable absent a declaratory judgment holding that the Act Defining Perpetuities and Suspension of Power of Alienation for Trusts (N.C.G.S. § 41-23) does not violate the North Carolina Constitutional Prohibition of Restraints on Alienation (Article I, Section 34 of the North Carolina Constitution).

The Benson Children are named as parties under this proceeding since the manner in which the Benson Trust is administered will significantly impact their interests in the Benson Trust. If the Act Defining Perpetuities and Suspension of Power of Alienation for Trusts (N.C.G.S. § 41-23) is constitutional, the Benson Trust will continue in existence as a perpetual or dynasty trust. If the Uniform Statutory Rule Against Perpetuities (N.C.G.S. § 41-15) applies to the Benson Trust, the class of remaindermen is substantially smaller than it would be under a perpetual or dynasty trust permitted under the Act Defining Perpetuities and Suspension of

Power of Alienation for Trusts (N.C.G.S. § 41-23) based on the rule against undue restraints on alienation. If the Common Law Rule Against Perpetuities applies to the Benson Trust, the Benson Trust is void and the trust property vests in the Benson Children immediately.

Brown Brothers is uncertain how to administer the Benson Trust absent a declaratory judgment holding that the Act Defining Perpetuities and Suspension of Power of Alienation for Trusts (N.C.G.S. § 41-23) does not violate the North Carolina Constitutional Prohibition of Restraints on Alienation (Article I, Section 34 of the North Carolina Constitution) and supersedes both the Common Law Rule Against Perpetuities and the Uniform Statutory Rule Against Perpetuities (N.C.G.S. § 41-15). Specifically, Brown Brothers needs to know whether it should administer the Benson Trust as if it is void and should terminate immediately, as if it will last only a maximum of 90 years, or as if it will continue indefinitely.

## II. HISTORY OF THE RULE AGAINST PERPETUITIES UNDER ENGLISH COMMON LAW: ALIENATION RULE AND EVOLUTION OF THE VESTING RULE

The rule against perpetuities has its origins in historical England, arising from the "struggle of the English courts to preserve property free from inconvenient fetterings." *Restatement of the Law of Property,* Intr. Note at 2123 (1944). Its original purpose was to limit restraints on alienation of land, land being the primary form of wealth in twelfth and thirteenth century England. Enforceable restrictions on alienation of land through generations of the same family would permit the rise of a dynastic landed gentry, in competition with the King's nobility, power, and wealth. As a result, the King's Court had substantial interest in imposing limitations on the ability to restrict alienation of land. 10 Richard R. Powell, *Powell on Real Property*, § 71.01(1) (Michael Allan Wolf ed., 2000).

In ancient England, if property were conveyed "to A and his heirs," A would be unable to transfer the property to defeat the interest of his heirs arising upon his death. *Id.* This form of grant was known as an "entail" or "fee tail" estate, where neither A nor his descendants could transfer the property; the land simply remained in the same family for generations. Thirteenth century courts did away with this form of restraint on alienation in D'Arundel's Case, giving A the ability to convey the land without the consent of A's heirs. *Id.; see also* Bracton NB 1054 (1225) (providing machinery in terms of law of warranty, whereby person holding land granted "to B and his heirs" could convey complete ownership of land without obtaining consent of his "heir"). In Taltarum's Case, fifteenth century courts developed a "recovery" process by which the owner of a fee tail estate effectively could convey fee simple ownership. *Restatement of the Law of Property* 2125-26*; see also* Y.B. 12 Edw. IV 19 (1472). The judiciary continued in later centuries to support the notion of alienability of property. *See* Powell, *supra* (mentioning other judicial decisions favoring the alienation of property); *Restatement of the Law of Property* at 2125-27 (same).

Despite the judicial development of limitations on restraints against alienation, English lawyers continued to invent new means of restricting alienation. One of these creations was a feel tail estate with a direction that the owner's interest would terminate immediately upon his attempt to destroy the tail. In other words, should an owner of a fee tail estate attempt to convey the underlying property, the owner would be deemed to have died for purposes of determining the subsequent beneficial interest. This type of limitation ultimately was held invalid by sixteenth and seventeenth century English courts, but gave rise to the earliest legal definition of a "perpetuity" as "a present interest so created that (if found valid) it would have lasted forever" (Powell § 71.01(2)), and "an interest which, if it had been permitted, would have lacked

completely the attribute of alienability." *Restatement of the Law of Property, supra,* at 2127. A perpetuity became "in law, the antithesis of freedom of alienation," and "(a)ny interest that threatened to abridge freedom of alienation either was a perpetuity or 'tended' in that direction." *Id.*

Troublesome judiciary decisions in early seventeenth century England permitted the creation of certain indestructible future interests, undermining the policy favoring the alienability of property. Manning's Case, 8 Co. Rep. 94b (1609), held "an executory interest in a chattel real to be indestructible by the act of the first or prior taker." *Restatement of the Law of Property, supra*, at 2127. An "executory interest" is an "interest which may become actual at some future date or upon the happening of some contingency." *Barron's Law Dictionary* 246 (3d ed.1991). A few years later, *Pells v. Brown,* Cro. Jac. 590 (1620), generated a similar holding with respect to a shifting use created on a prior estate in fee simple. *Restatement of the Law of Property, supra,* at 2127. A "shifting use" is "a use which arises in derogation of another, i.e., 'shifts' from one beneficiary to another, depending on some future contingency." *Barron's Law Dictionary, supra,* at 513. In other words, these cases allowed an executory interest to "spring up" or "shift" upon the occurrence of a stipulated remote and uncertain future event, and the prior owner of the interest could do nothing to destroy the springing or shifting future interest. Powell, *supra,* § 71.02(1).

The *Manning* and *Pells* decisions presented new challenges to the legal policy favoring alienability, as they allowed limitations on alienability by a future interest indestructible for a lengthy time or indestructible for forever. The societal interest in promoting the alienability of property necessitated the development of a rule limiting the future events upon which an interest could come into being. *Id.* This need spurred a series of English court decisions from 1682 –

1833 further refining the definition of "perpetuity" to include "interests indestructible for *too long a time* to have them consistent with the social welfare." *Id.* § 71.01(3). These decisions increasingly applied the term "perpetuity" to future interests, with courts generally drawing a line between "convenient" and "inconvenient" interferences with alienability or fetterings of property. *Restatement of the Law of Property, supra,* at 2128. With the focus of this series of cases on distinguishing between "convenient" and "inconvenient" fetterings on the free alienability of property interests,

> the criterion of inconvenience was defined in terms of interferences with alienability, and the cases made it clear that such an interference might be found not only when the limitation suspended the power of alienation for too long but also when the limitation interfered with the fact of alienability by creating a future interest in a presently identified person that could remain indestructible for too long.

Powell, *supra,* at § 71.02(3).

Case law in this area continued to develop, culminating with the Vesting Rule reaching its current form in the 1880s, based largely upon the 1888 publication of John Chipman Gray's ("Gray") seminal treatise, *The Rule Against Perpetuities*. The Vesting Rule fixes the limit beyond which future interests cannot be created by determining the last class of beneficiaries to whom a transfer may be effectuated. *See* John Chipman Gray, *The Rule Against Perpetuities* (3d. ed. 1915) (discussing the Rule Against Perpetuities and relation to remoteness of vesting). Gray believed that the Rule Against Perpetuities should be defined by the Vesting Rule, but recognized that North Carolina's constitutional provision prohibiting perpetuities (as well as that of several other states) did not refer to or contemplate the Vesting Rule. *See id.* at 557-58

(noting that Arkansas, Tennessee, Nevada, and Texas also have similar general provisions outlawing perpetuities, which Gray recognized did not refer to the Vesting Rule). Gray noted that *"(t)he original meaning of a perpetuity is an inalienable, indestructible interest.* The second artificial meaning is, an interest which will not vest to a remote period. This latter is the meaning which is attached to the term when the rule against perpetuities is spoken of." *Bouvier's Law Dictionary* 933 (1926) (quoting John Chipman Gray, *The Rule Against Perpetuities* § 140) (emphasis added). It is important to note that as late as 1797 (21 years after the adoption of the North Carolina Constitutional Prohibition of Restraints on Alienation - Article I, Section 34 of the North Carolina Constitution - English common law continued to focus on "inconvenient" restraints on alienability of property interests rather than a rule premised upon remoteness of vesting. *See Long v. Blackhall*, 7 T.R. 100, 101 Eng. Rep. 875 (K.B. 1797) (upholding a will containing a restraint on vesting alone, where there was no suspension of alienation).

## III. HISTORY OF THE CONSTITUTIONAL PROHIBITION AGAINST RESTRAINTS ON ALIENATION AND THE COMMON LAW RULE AGAINST PERPETUITIES IN NORTH CAROLINA.

There are two different historical formulations of prohibitions against perpetuities in the United States, one based on the rule against undue restraints on alienation ("Alienation Rule") and one based on the rule against remoteness of vesting ("Vesting Rule"). In 1921, George Bogart recognized both formulations in the *Handbook of the Law of Trusts*, describing the Alienation Rule as "entirely different" from the Vesting Rule. George Bogart, *Handbook of the Law of Trusts* 172 (1921). The Alienation Rule "is aimed at preventing property from being inalienable for too long a period" and keeping "property in the market." In contrast, the Vesting

Rule is "aimed at preventing the fastening of contingent and uncertain interests upon real property for too long a period." *Id.*

The North Carolina Constitution of 1776, like the constitutions of other original colonies, was created shortly after the July 4, 1776, Declaration of Independence from England, when the colonies suddenly found themselves free of English rule and without any laws or government. As a means of rectifying this potentially unruly situation, a declaration of rights and constitution were adopted and together formed the original constitution of North Carolina. John V. Orth, *Symposium: "The Law of the Land": The North Carolina Constitution and State Constitutional Law: North Carolina Constitutional History* 70 N.C. L. Rev. 1759, 1761 (1992). Article 23 of the North Carolina Constitution of 1776 declared, "That perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed." The North Carolina Constitution of 1971 changed Article I to replace the subjunctive mood with the imperative to clarify that the Article I provisions "are commands and not mere admonitions." John L. Sanders, *Our Constitutions: A Historical Perspective* 9, available at http://statelibrary.dcr.state.nc.us/nc/stgovt/preconst.htm#1971. With the exception of substituting the word "shall" for "ought" in 1971, the language comprising the constitutional prohibition against restraints on alienation ("perpetuities") has remained unchanged since its adoption in 1776 and today is located in Article I, Section 34 of the North Carolina Constitution. *See* N.C. Const. art. 1, § 12.

Similarly, Article 43 of the North Carolina Constitution of 1776 illustrates the framers' commitment to prohibiting restraints on alienation, stating, "That the future Legislature of this State shall regulate entails, in such a manner as to prevent perpetuities." *Id.* § 43. As discussed above, an "entail" is a conveyance that creates a series of successive life estates which prevents a subsequent fee simple transfer of the property. *See Barron's Law Dictionary* 159, 187 (defining

entail and fee tail). In 1784, the General Assembly enacted statutes widely reforming the then-current property law, stating, "entails of estates tend only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice." Orth, *supra*, at 1767-69 (quoting Act of 1784, ch. 22, § 5, *reprinted in* 24 THE STATE RECORDS OF NORTH CAROLINA 574 (Walter Clark ed., 1904)).

Early North Carolina Supreme Court cases confirm the constitutional framers' intent for the North Carolina prohibition against perpetuities to be grounded in the Alienation Rule. In 1820, the North Carolina Supreme Court declared, "the duration of an estate does not constitute a perpetuity; for every fee simple is, in contemplation of Law, to a man and his heirs forever. It is the exemption from the power of alienation which makes a perpetuity." *Griffin v. Graham*, 1 Hawks 96, 4, 8 N.C. 96, 1820 WL 165 (N.C.) (1820). The court's description of a perpetuity and its proximity in time to the drafting of the constitutional language evidence the framers' intent for North Carolina's constitutional prohibition against perpetuities to be limited to a prohibition against restraints on alienation, not remoteness of vesting.

Later North Carolina case law developed a common law rule against perpetuities based on the Vesting Rule, which effectively encompasses both the constitutional prohibition of restraints against alienation ("perpetuities") and the common law prohibition against remote vesting of interests, without altering the scope of the constitutional prohibition. In 1949, the North Carolina Supreme Court stated, "the common law rule against perpetuities is recognized and enforced in this state." *Mercer v. Mercer*, 230 N.C. 101, 103, 52 S.E.2d 229, 230 (1949). The *Mercer* court noted the purpose of the common law rule, stating, "The rule is thus applied for the reason a trust violative of the rule in duration effects an undue postponement of the direct

enjoyment of the property and works an unreasonable restraint on alienation." *Id.* While the court recognized and enforced the Common Law Rule Against Perpetuities based on remoteness of vesting, this adoption of Gray's formulation is a dramatic expansion beyond what is required by the North Carolina Constitutional Prohibition of Restraints on Alienation based on the Alienation Rule. The *Mercer* case indicates that, in addition to the constitutional prohibition against perpetuities based on the Alienation Rule, North Carolina courts also would apply the Vesting Rule.

More recently, North Carolina courts have recognized the two formulations of the rule against perpetuities. In *Wing v. Wachovia Bank & Trust Co., N.A.*, the North Carolina Court of Appeals looked at both the Vesting Rule and the Alienation Rule as they applied to the particular facts of the case, noting that the result would be the same regardless of which version of the rule was applied. 35 N.C. App. 346, 349, 241 S.E.2d 397, 400 (1978).

## IV. OVERVIEW OF NORTH CAROLINA RULE AGAINST PERPETUITIES

Article I, Section 34 of the North Carolina Constitution states that "perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed" ("North Carolina Constitutional Prohibition of Restraints on Alienation").

In addition to the North Carolina Constitutional Prohibition of Restraints on Alienation, North Carolina common law established a rule against perpetuities requiring that an estate vest not later than 21 years, plus, when appropriate, the period of gestation, after the life or lives of persons in being at the time of the creation of the estate ("Common Law Rule Against Perpetuities"). The Common Law Rule Against Perpetuities is based on remoteness of vesting, not on the prohibition of undue restraints on alienation.

The North Carolina General Assembly repealed the Common Law Rule Against Perpetuities by enacting the Uniform Statutory Rule Against Perpetuities codified at North Carolina General Statute Sections 41-15, et. seq. ("Uniform Statutory Rule Against Perpetuities") in 1995. The Uniform Statutory Rule Against Perpetuities provides that a nonvested property interest is invalid unless (1) at the time the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive, or (2) the interest either vests or terminates within 90 years after its creation. N.C. Gen. Stat. § 41-15. Like the Common Law Rule Against Perpetuities, the Uniform Statutory Rule Against Perpetuities is based on remoteness of vesting and not on the prohibition of restraints on alienation. As a result of Section 41-15, a conveyance violating the Common Law Rule Against Perpetuities will not automatically be deemed invalid but instead may be reformed to vest within 90 years. *See id.* (full statutory provision)*; see also id.* § 41-17 (statutory provision for reformation under Section 41-15). Section 41-15 allows trusts to exist beyond the period prescribed by the Common Law Rule Against Perpetuities. If the North Carolina Constitution were to include a rule against remoteness of vesting, both Section 41-23(h) and Section 41-15 would be unconstitutional. Plaintiff asserts neither, maintaining that the North Carolina Constitutional Prohibition of Restraints on Alienation is based exclusively on the Alienation Rule.

On August 19, 2007, the North Carolina General Assembly passed General Statute Section 41-23 ("Act Defining Perpetuities and Suspension of Power of Alienation for Trusts"), which repealed both the Common Law Rule Against Perpetuities and the Uniform Statutory Rule Against Perpetuities as they apply to trusts created or administered in North Carolina. North Carolina General Statute Section 41-23 states, "A trust is void if it suspends the power of

alienation of trust property...for longer than the permissible period," and defines the "permissible period" as "no later than 21 years after the death of an individual then alive or lives then in being plus a period of 21 years." Section 41-23 further provides that neither the Common Law Rule Against Perpetuities nor the Uniform Statutory Rule Against Perpetuities applies to trusts created or administered in North Carolina. The Act Defining Perpetuities and Suspension of Power of Alienation for Trusts is based on the prohibition of restraints on alienation, not on remoteness of vesting.

## V. REQUIREMENTS OF CONSTITUTIONALITY IN NORTH CAROLINA

The North Carolina Constitutional Prohibition of Restraints on Alienation (Article I, Section 34 of the North Carolina Constitution) is separate and distinct from the Common Law Rule Against Perpetuities and requires only that a statute not create prohibited restraints on alienation. Gray himself acknowledged that the general provisions of North Carolina's Constitution did not endorse any rule dealing with remoteness of vesting, describing the general provision as simply a "declamation without juristic value, at least on any question of remoteness." John Chipman Gray, *The Rule Against Perpetuities* 557-58 (3d. ed. 1915). The early North Carolina cases interpreted and defined the scope of the constitutional prohibition, while later cases expanded North Carolina's rule against perpetuities. While both a rule based on prohibition of restraints on alienation and a rule based on remoteness of vesting are permissible under the North Carolina Constitution, a prohibition of restraints on alienation is the only one mandated by the North Carolina Constitution.

Because a trustee is free to transfer title to property owned by the trust, there is no constitutionally prohibited restraint on alienation created by North Carolina General Statute Section 41-23. *See Griffin v. Graham*, 1 Hawks 96, 4, 8 N.C. 96, 1820 WL 165 (N.C.) (1820).

Therefore Section 41-23 is well within the requirements of the North Carolina Constitution. In this case, the trustee of the Benson Trust is free to "sell, exchange, or otherwise dispose of any property at any time held or acquired hereunder" (Benson Trust, Item X (b)(1)) and "shall have the power to sell any trust property, including but not limited to the power to convey an absolute fee in possession of land, and full ownership of personal property" (*Id.* at Item X (l)).

The North Carolina General Assembly enacted substantial changes to the Common Law Rule Against Perpetuities with the Uniform Statutory Rule Against Perpetuities (N.C. Gen. Stat. § 41-15) in 1995. If the North Carolina Constitution mandated that the Common Law Rule Against Perpetuities were the law in North Carolina, then Section 41-15 would be unconstitutional due to its significant departure from the Common Law Rule Against Perpetuities. The statute's constitutionality is not determined by its compliance with the Common Law Rule Against Perpetuities based on the remoteness of vesting, but rather upon its compliance with the mandates of the North Carolina constitutional prohibition against restraints on alienation.

The authority of the North Carolina General Assembly to reformulate North Carolina's rule against perpetuities has been recognized. In his treatise on the North Carolina Constitution, constitutional scholar John V. Orth concluded that the present rule against perpetuities is not beyond the reach of the General Assembly. John V. Orth, *The North Carolina State Constitution: With History and Commentary* 76 (1995). The North Carolina General Assembly had the authority to enact the Act Defining Perpetuities and Suspension of Power of Alienation for Trusts (N.C. Gen.Stat. § 41-23). When deciding whether Section 41-23 is constitutional, a court should focus on the constitutional requirement that Section 41-23 prevent restraints on alienation, not remoteness of vesting.

## VI. STANDARD OF REVIEW

The North Carolina Supreme Court has acknowledged the authority of the General Assembly to enact statutory law overriding common law. The Court has declared,

> the General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter.

*McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956).

The Court also has articulated that "this Court gives acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute." *In re Spivey,* 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997).

## VII. CONCLUSION

The amendment adding North Carolina General Statute Section 41-23 ("Perpetuities and suspension of power of alienation for trusts") into the North Carolina General Statutes is constitutional. Exempting trusts from the Common Law Rule Against Perpetuities and the Uniform Statutory Rule Against Perpetuities (N.C. Gen. Stat. § 41-15) is within the authority of the North Carolina General Assembly and permitted, as North Carolina's Constitutional Prohibition of Restraints on Alienation requires only that a statute not violate the Alienation Rule. Section 41-23 does not create constitutionally prohibited restraints on alienation since a trustee is, as is the Plaintiff in this case, free to transfer title to any and all trust property by sale or by distribution to the trust beneficiaries. Therefore Section 41-23 does not violate the North Carolina Constitutional Prohibition of Restraints on Alienation and is valid.

Based upon the foregoing authorities, the Plaintiff, Brown Brothers Harriman Trust Co., N.A., respectfully requests that the Court:

1. Enter an Order declaring the rights, status and legal relations of the parties hereto under the Benson Trust, determining:
   a. whether N.C. Gen. Stat. § 41-23 (Perpetuities and Suspension of Power of Alienation for Trusts) is constitutional, and
   b. whether the Benson Trust can properly be administered as a perpetual or dynasty trust; and
2. Grant such other and further relief which the Court deems just as proper.

The undersigned certifies that according to the word count software on Microsoft Word used to create this brief, the word count of this brief, excluding covers, indexes, tables of authorities, certificate of service, certification of word count, and appendices, is no more than 7,500 words.

This 27th day of October, 2008.

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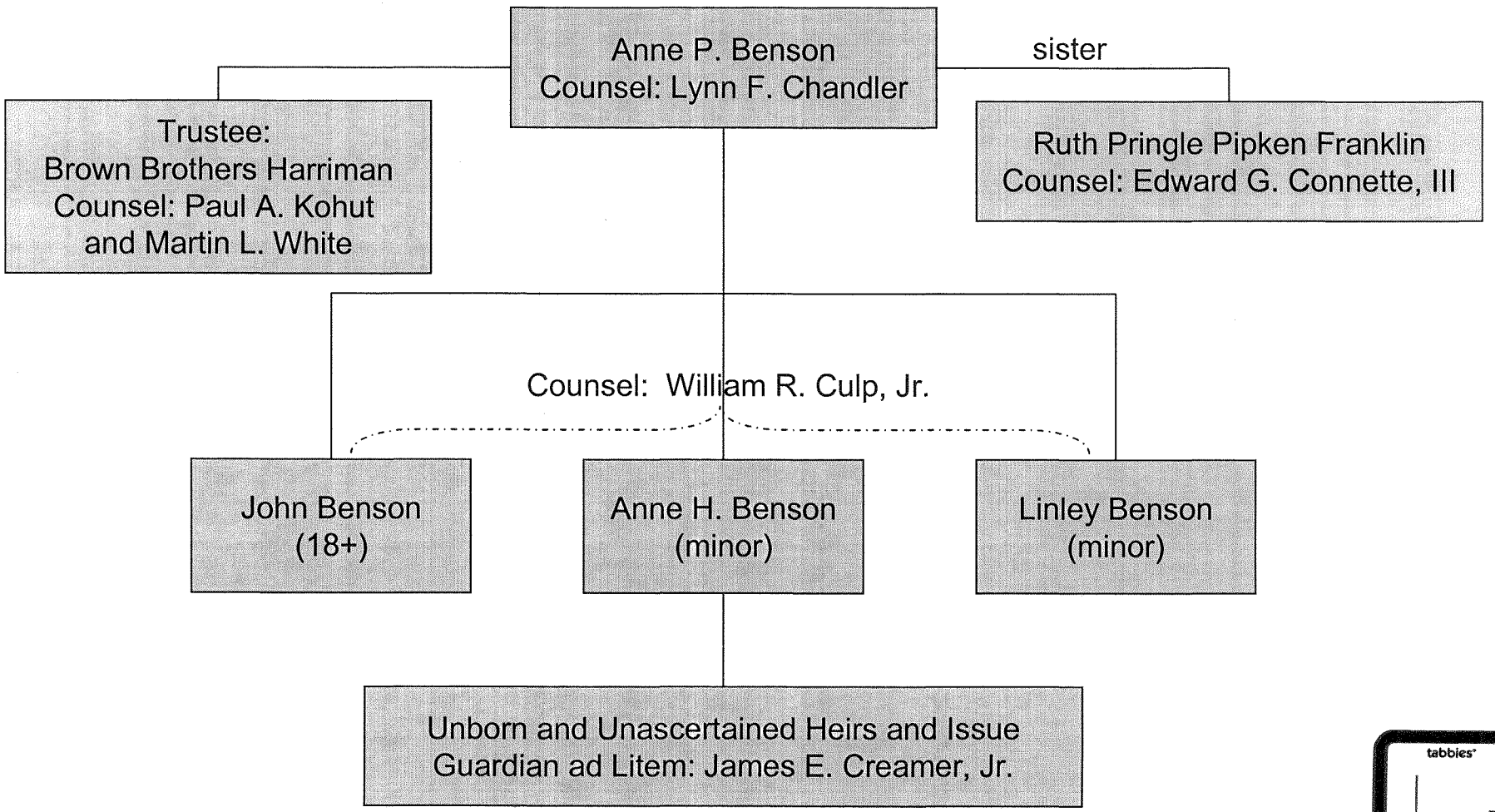
# Anne Benson Family Tree

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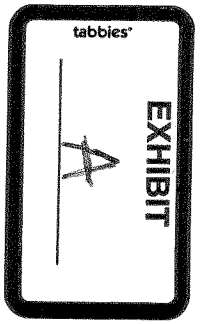

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading was served upon all other parties to this action or their attorneys of record by depositing a copy of the same in a post-paid envelope in an official depository of the United States Postal Service, addressed as follows:

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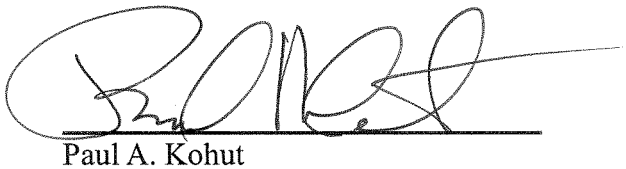
This the 27th day of October, 2008.



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