

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
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.**

**BRIEF IN SUPPORT OF CROSS-  
MOTION FOR SUMMARY  
JUDGMENT OF DEFENDANT JOHN  
H. BENSON AND RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

COMES NOW, Defendant John H. Benson, individually and as legal representative pursuant to N.C.G.S. §§ 36C-2-206 and 36C-3-303(6) of Anne H. Benson and Linley C. Benson, and respectfully submits this Brief in Support of Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment. As set forth below, Defendant moves for summary judgment in his favor and opposes the motion for summary judgment of Plaintiff Brown Brothers Harriman Trust Co., N.A., as Trustee of the Benson Trust. Defendant concedes that there are no genuine issues of material fact, only questions of law, and that the court's ruling on Plaintiff's motion for

summary judgment is appropriate. Defendant joins in Plaintiff's request that the court schedule a hearing for the parties to be heard at oral argument pursuant to Business Court Rule 15.4.

## **I. INTRODUCTION**

This matter comes before the court on Plaintiff's motion for summary judgment and Defendant's cross-motion for summary judgment in this declaratory judgment action. In its motion, Plaintiff seeks a determination by the court that (1) the General Assembly's repeal of the common law and statutory rule against perpetuities with respect to trusts is constitutional under North Carolina law; and (2) the Benson Trust can properly be administered as a perpetual or dynasty trust. (Pl.'s Br. Supp. Summ. J. 15–16.) Defendant opposes Plaintiff's motion and argues that the statutory repeal of the common law rule against perpetuities with respect to trusts contained in N.C.G.S. § 41-23(h) violates North Carolina's constitutional prohibition against perpetuities and, therefore, Plaintiff's motion for summary judgment should be denied. Defendant further requests that the court enter summary judgment in his favor and find that: (1) N.C.G.S. § 41-23(h) violates North Carolina's constitutional prohibition against perpetuities to the extent it repeals the common law rule against perpetuities with respect to trusts; (2) N.C.G.S. § 41-23(h) is constitutional to the extent it repeals N.C.G.S. § 41-15 with respect to trusts; and (3) the trust at issue is void as violating the common law rule against perpetuities and the trust property immediately should be distributed to John H. Benson, Anne H. Benson, and Linley C. Benson.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Effective August 19, 2007, the General Assembly of North Carolina enacted N.C.G.S. § 41-23, which repealed the applicability of N.C.G.S. § 41-15 and the common law rule against perpetuities to trusts created or administered in North Carolina. Act of Aug. 19, 2007, sec. 1, 2007 N.C. Sess. Laws 390 (repealing statutory rule against perpetuities based on vesting as applied to trusts and enacting a perpetuities rule based on alienation with respect to trusts). Section 41-23 of the North Carolina General Statutes provides that a trust is void if it suspends the power of alienation of trust property for longer than 21 years after the death of an individual then alive, or lives then in being plus a period of 21 years. *Id.* (codified at N.C.G.S. § 41-23(a) (2007)). Section 41-23 further provides that the power of alienability by a trust or by equitable interests under a trust are not suspended “if the trustee has the power to sell, either express or implied, or if there exists an unlimited power to terminate the trust in one or more persons in being.” *Id.* (codified at N.C.G.S. § 41-23(e) (2007)).

On November 27, 2007, after the effective date of N.C.G.S. § 41-23, the settlor and named defendant in this case, Anne P. Benson, established a trust for the benefit of Defendant and his minor sisters, Anne H. Benson and Linley C. Benson (the “Benson Trust”). (Benson Aff. ¶¶ 5–6). Defendant stipulates to the facts contained in Plaintiff’s Brief in Support of Motion for Summary Judgment concerning the establishment and terms of the Benson Trust and consents to the court’s reliance thereon in making its determination. (Pl.’s Br. Supp. Summ. J. 1–4.)

On June 16, 2008, Plaintiff initiated this action by filing its Complaint for declaratory judgment in the North Carolina General Court of Justice, Superior Court

Division. On June 26, 2008, Plaintiff filed its Amended Complaint alleging that the Act Defining Perpetuities and Suspension of Power of Alienation of Trusts, codified at section 41-23 of the North Carolina General Statutes, N.C. Gen. St. § 41-23, does not violate North Carolina's constitutional prohibition against perpetuities and monopolies contained in N.C. Const. art. 1, § 34, and that the Benson Trust is valid in duration under North Carolina law.

The Defendants in this case timely answered Plaintiff's Amended Complaint, and on August 18, 2008, the parties filed a consent motion for designation of this case as a complex business case pursuant to Rule 2.1 of the General Rules of Practice for Superior and District Courts and assignment to the North Carolina Business Court, or, in the alternative, designation of the case as exceptional and assignment to the Honorable Albert Diaz as the Special Superior Court Judge for Complex Business Cases. On August 28, 2008, the Honorable Sarah Parker, Chief Justice of the Supreme Court of North Carolina, entered an order granting the consent motion of the parties to designate the case as exceptional and assign it to this court.

On October 27, 2008, Plaintiff filed its motion for summary judgment seeking a determination by the court that N.C. Gen. St. § 41-23 is constitutional under North Carolina law and that the Benson Trust is not invalid as an unconstitutional perpetuity. In the motion, Plaintiff argues that the North Carolina constitutional prohibition against perpetuities only refers to the rule against undue restraints on alienation (hereinafter, the "rule against perpetuities based on alienation"), and does not encompass the common law rule against remoteness of vesting (hereinafter, the "common law rule against

perpetuities” or the “rule against perpetuities based on vesting”). (Pl.’s Br. Supp. Summ. J. 15–16.)

Responding in opposition to Plaintiff’s motion on behalf of the current primary beneficiaries of the Benson Trust individually and as legal representative pursuant to N.C. Gen. St. §§ 36C-2-206 and 36C-3-303(6), Defendant argues that N.C. Gen. St. § 41-23 is constitutional to the extent it repeals the Uniform Statutory Rule Against Perpetuities (“USRAP”), N.C. Gen. St. § 41-15, but is unconstitutional to the extent it repeals the common law rule against perpetuities with respect to trusts. Defendant requests an order from the court denying Plaintiff’s summary judgment motion, granting Defendant’s cross-motion for summary judgment, and finding that the Benson Trust is an invalid perpetuity in violation of Article I, section 34 of the North Carolina Constitution and, therefore, Plaintiff must distribute the trust property outright and free of trust to the current primary beneficiaries of the Benson Trust.

### **III. DISCUSSION AND ANALYSIS**

#### **A. Standard of Review**

North Carolina courts have “a duty to examine a statute and determine its constitutionality when the issue is properly presented.” *State v. Arnold*, 147 N.C. App. 670, 673, 557 S.E.2d 119, 121–22 (2001). When examining a statute, “a reviewing court must assume that acts of the General Assembly are constitutional and within its legislative power until and unless the contrary clearly appears.” *Id.* (quoting *State v. Lueders*, 214 N.C. 558, 561, 200 S.E. 22, 24 (1938)).

Although the constitutionality of a statute is presumed, it will not be upheld if it is in conflict with a constitutional provision. *Vinson v. Chappell*, 3 N.C. 348, 350, 164

S.E.2d 631, 632 (N.C. App. 1968) (citing *State v. Hales*, 256 N.C. 27, 122 S.E.2d 768 (1961)). “When it is clear a statute transgresses the authority vested in the legislature by the constitution, it is a duty of the court to declare the act unconstitutional.” *State v. Felton*, 239 N.C. 575, 578, 80 S.E.2d 625, 628 (1954) (internal quotation omitted). The burden of proof lies with the party challenging the statute. *Matter of Belk*, 107 N.C. App. 448, 450, 420 S.E.2d 682, 683 (1992) (internal citation omitted).

## **B. Rule Against Perpetuities**

### **1. Constitutional Prohibition Against Perpetuities**

The Declaration of Rights contained in the North Carolina Constitution provides that “[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.” N.C. Const. art I, § 34 (1970).<sup>1</sup>

### **2. Common Law Rule Against Perpetuities**

“The common law rule against perpetuities has been long recognized and enforced in this jurisdiction, and its application has the continuing sanction of Article I, Section 34, of our State Constitution.” *N.C. Nat’l Bank v. Norris*, 21 N.C. App. 178, 189, 203 S.E.2d 657, 658 (1974). The North Carolina Supreme Court has stated that the rule against perpetuities provides that:

No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. If there is a possibility such future interest may not vest within the time prescribed, the gift of grant is void.

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<sup>1</sup> The language prohibiting perpetuities has remained unchanged since its adoption in 1776, with the exception of changing “ought” to “shall” in the 1970 revision to the North Carolina Constitution.

*Rich, Rich & Nance v. Carolina Constr. Corp.*, 355 N.C. 190, 193, 558 S.E.2d 77, 79 (2002) (quoting *Parker v. Parker*, 252 N.C. 399, 402–03, 113 S.E.2d 899, 902 (1960)).

“If the period of the trust is too long, the court does not reduce the limitation to lives in being plus twenty-one years, but declares the whole trust invalid.” *Mercer v. Mercer*, 230 N.C. 101, 104, 52 S.E.2d 229, 230 (1949) (citing 1 Bogert, *Trusts and Trustees*, sec. 218, p. 680, and cases cited in note).

### **3. Uniform Statutory Rule Against Perpetuities**

In 1995, the General Assembly of North Carolina modified the common law rule against perpetuities by adopting USRAP and authorizing a ninety-year wait-and-see approach for vesting or termination of nonvested property interests. *Id.*, 355 N.C. at 194, 558 S.E.2d at 79; N.C.G.S. § 41-15 (2006), *amended by* N.C.G.S. § 41-15(a) (2007). The Comment provided that USRAP did not supersede the common law rule against perpetuities as interpreted by case law, except to the extent the common law was inconsistent with the provisions of USRAP as enacted. N.C.G.S. § 41-15, cmt. H (2007). For example, under the ninety-year wait-and-see approach a nonvested property interest is not invalid until it has neither vested nor terminated within the permissible ninety-year vesting period, even if the nonvested property interest is invalid at creation under the common law rule against perpetuities. *See, e.g.*, N.C.G.S. § 41-15, cmt. C (2007) (discussing technical violation of common-law rule against perpetuities in situations involving the fertile octogenarian, administrative contingency, and unborn widow).

#### **4. N.C.G.S. § 41-23: Perpetuities and Suspension of Power of Alienation for Trusts**

In 2007, the General Assembly of North Carolina enacted a new statutory rule governing the rule against perpetuities and the suspension of power of alienation with respect to trusts. N.C.G.S. § 41-23 (2007). N.C.G.S. § 41-23 expressly provides that USRAP's modified statutory rule against perpetuities contained in N.C.G.S. § 41-15, as well as the common law rule against perpetuities, no longer apply to trusts created or administered in North Carolina. N.C.G.S. § 41-23(h) (2007). Instead, "[a] trust is void if it suspends the power of alienation of trust property . . . for longer than the permissible period." N.C.G.S. § 41-23(a) (2007). The "permissible period" is defined 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." *Id.* "The power of alienation is suspended only when there are no persons in being who, alone or in combination with others, can convey an absolute fee in possession of land, or full ownership of personal property." N.C.G.S. § 41-23(d) (2007). There is no suspension of the power of alienability by a trust or by equitable interests under a trust, however, if the trustee has the express or implied power to sell trust property, or if there exists an unlimited power to terminate the trust in one or more persons in being. N.C.G.S. § 41-23(e) (2007).

#### **C. Analysis**

By eliminating the applicability of USRAP and the common law rule against perpetuities to trusts created or administered in North Carolina, the General Assembly has impermissibly eliminated the requirement that beneficial interests in trusts must "vest" within some ascertainable period of time. As enacted, N.C.G.S. § 41-23 provides



that no violation of the rule limiting suspension of the power of alienation of trust property occurs where the trustee has the full legal power to sell the property held in trust, even if the equitable interests in trust property continue for an unlimited duration. Therefore, N.C.G.S. § 41-23 provides that under North Carolina law there is no requirement that equitable interests in trusts vest within a requisite time, so long as trust property is fully alienable under a trustee's power to sell. *See* N.C.G.S. § 41-23(e) (2007).

In support of its motion for summary judgment, Plaintiff maintains that under North Carolina law the constitutional prohibition against perpetuities extends only to undue restraints against alienation. (Pl.'s Br. Supp. Summ. J. 13–14.) Defendant respectfully argues that this position is without merit. The North Carolina Supreme Court has held that where a trustee has the power to sell, and thus alienate, property subject to a trust, a perpetual trust does not violate the North Carolina constitutional prohibition against perpetuities. *Griffin v. Graham*, 8 N.C. 96, 131–32, 1820 WL 165, at \*20 (1820). Defendant concedes that, in accordance with the *Griffin* court's ruling, N.C.G.S. § 41-23 prohibits the creation of trusts that would violate the constitutional prohibition against perpetuities with respect to restraints on alienation. However, Defendant takes the position that the constitutional prohibition against perpetuities encompasses more than alienability and thus applies to the vesting of beneficial interests in trust property, which can be extended indefinitely under N.C.G.S. § 41-23.

Although the constitutional prohibition against perpetuities originally was intended to address the estate tail, the prohibition is against perpetuities in general. *Griffin*, 8 N.C. at 135, 1820 WL 165, at \*22 (Hall, J., dissenting). Therefore, Defendant

respectfully requests that the court take a more expansive reading of “perpetuities” and hold that the constitutional prohibition applies not only to the alienability of property but also to the vesting of interests in such property.

The North Carolina Supreme Court has stated that perpetuities are contrary to the North Carolina Constitution and that “[u]nder our form of government, the law favors the early vesting of estates to the end that property may be kept in the channels of trade and commerce.” *Walker v. Trollinger*, 192 N.C. 744, 747, 135 S.E. 871, 873 (1926). In interpreting the common law rule against perpetuities, the North Carolina Supreme Court has noted that:

The right to create contingent interests in property, title to which is to vest at some time in the future, and to postpone the full enjoyment of vested interests, has always been recognized. Even so, the creation of a future interest in property necessarily fetters the estate and tends to affect its marketability. The courts therefore, at an early date, recognized that a rule which would hold the exercise of this right within reasonable bounds was imperative. To this end the rule against perpetuities was devised. While modified by statute in some states, it has been consistently followed in this and a majority of other jurisdictions in this country.

*McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 741, 68 S.E.2d 831, 834 (1952).

Although the issue has not been explicitly addressed in this jurisdiction, subsequent developments in North Carolina case law suggest that the constitutional prohibition against perpetuities applies not only to the alienability of property but also to the vesting of interests in property held in trust. *See Mercer*, 230 N.C. at 103, 52 S.E.2d at 230 (noting that common law rule against perpetuities based on vesting applies to private trusts). Vesting is the most widely accepted method used to prevent undue restraints on alienation of property, whether held in trust or outright, and a rule based on

vesting is thus more likely to promote the policy embodied by the constitutional prohibition against perpetuities.

Based on the foregoing, Defendant argues that although the trust at issue satisfies the constitutional and statutory requirements that trust property be “alienable” through the trustee’s power to sell, modern developments in North Carolina jurisprudence recognize not only that there should be no undue restraints on alienation but also that property must vest within the applicable period of the common law rule against perpetuities. *See Mercer*, 230 N.C. at 103, 52 S.E.2d at 230. As a result, Defendant takes the position that N.C.G.S. § 41-23(h) is unconstitutional to the extent it repeals the common law rule of perpetuities with respect to trusts because the failure of equitable interests in trust property to vest within an ascertainable period of time unduly postpones direct enjoyment of the property. Furthermore, Defendant takes the position that N.C.G.S. § 41-23(h) is constitutional to the extent that it repeals the applicability of N.C.G.S. § 41-15 with respect to trusts created or administered in North Carolina, and, therefore, the trust at issue is void under the common law rule against perpetuities because it creates interests in property that could vest or fail beyond the permissible period of time.

#### **IV. CONCLUSION**

In conclusion, Defendant requests that the court deny Plaintiff’s motion for summary judgment and find that N.C.G.S. § 41-23(h) violates North Carolina’s constitutional prohibition against perpetuities to the extent it repeals the common law rule against perpetuities with respect to trusts created and administered in North Carolina and permits the creation of nonvested property interests in trust for an unlimited duration.

Defendant further requests that the court grant summary judgment in his favor and find that although N.C.G.S § 41-23(h) is unconstitutional to the extent it repeals the common law rule against perpetuities based on vesting with respect to trusts, N.C.G.S. § 41-23(h) is constitutional to the extent it repeals N.C.G.S. § 41-15 with respect to trusts, and, therefore, the Benson Trust is void as violating the common law rule against perpetuities and the trust property immediately should be distributed to John H. Benson, Anne H. Benson, and Linley C. Benson.

The undersigned certifies that according to the word count software on Microsoft Word used to create this brief, the word count of this brief is no more than 7,500 words in compliance with Business Court Rule 15.8.

This 1st day of December, 2008.

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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing **Brief in Support of Cross-Motion for Summary Judgment of Defendant John H. Benson and Response in Opposition to Plaintiff's Motion for Summary Judgment** was served electronically pursuant to Business Court Rule 6.5 to counsel of record as follows:

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