

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, ANNE H.
BENSON, LINLEY C. BENSON, RUTH
PRINGLE PIPKIN FRANKLIN, and the
UNBORN AND UNASCERTAINED ISSUE
AND HEIRS OF ANNE P. BENSON,

Defendants.

**BRIEF OF
DEFENDANT ANNE P. BENSON
IN RESPONSE TO
PLAINTIFF'S MOTION FOR
SUMMARY
JUDGMENT**

Defendant ANNE P. BENSON ("Benson"), as Grantor of the Benson Trust, hereby submits this brief in response to Plaintiff's Motion for Summary Judgment.¹

PRELIMINARY STATEMENT

The Benson Trust can be administered as a perpetual trust pursuant to North Carolina General Statute Section 41-23, which repealed both the common law Rule Against Perpetuities and the Uniform Statutory Rule Against Perpetuities as they apply to trusts in North Carolina. Although Article I, Section 34 of the North Carolina Constitution provides that "perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed," this constitutional prohibition is solely directed at unreasonable restraints on the alienation of property and is not concerned with the vesting of remote interests. Although the common law Rule Against

¹ Unless otherwise defined herein, all defined terms refer to terms defined in Plaintiff's Brief In Support of Motion for Summary Judgment.

Perpetuities, which imposes an arbitrary deadline for the vesting of remote interests, was previously part of North Carolina law, the common law rule was partially abrogated in 1995 when the North Carolina legislature adopted the Uniform Statutory Rule Against Perpetuities. The subsequent passage of the “Act Defining Perpetuities and Suspension of Power of Alienation for Trusts,” as amended by House Bill 1384, Session Law 2007-390 (the “Act”), enacted as Chapter 41, Article 2, Section 23 of the North Carolina General Statutes, completed the repeal of the common law Rule Against Perpetuities in North Carolina so that the only standard with any continuing relevance for determining whether a trust constitutes an invalid perpetuity is the alienation rule of the North Carolina Constitution. Consistent with the North Carolina Constitution, the Act provides that there is “no suspension of the power of alienability by a trust or by equitable interests under a trust if the trustee has the power to sell, either expressed or implied, or if there exists an unlimited power to terminate the trust in one or more persons in being.” N.C. GEN. STAT. § 41-23(e). Therefore, where a trust of perpetual duration grants the trustee the power to alienate the trust property, as the Benson Trust does in this case, such trust will be valid under the Act and can be administered as a perpetual trust that does not violate the North Carolina constitutional prohibition against unreasonable restraints on alienation.

STATEMENT OF THE FACTS

The facts in this case are uncontested and have not been detailed in this Brief.

STANDARD OF REVIEW

A. Standard for Summary Judgment

Summary judgment is proper if the pleadings and evidence, “together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. GEN. STAT. § 1A-1, Rule 56. “A motion for summary judgment shall be granted when the evidence reveals no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Forsyth County v. R.L. York, 19 N.C. App. 361, 363, 198 S.E.2d 770, 771 (1973) (citing Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972) and Kessing v. Mortgage Corp., 278 N.C. 523, 180 S.E.2d 823 (1971)). The facts in this case are uncontested and thus summary judgment is appropriate.

B. Assumption of Constitutionality

With regard to legislation which has been enacted by the General Assembly, 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 (2001). The North Carolina Supreme Court has held that 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. Anderson, 275 N.C. 168, 171, 166 S.E.2d 49, 50 (1969)). Further, “[i]n considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity.” Id. (quoting State v. Lueders, 214 N.C. 558, 561, 200 S.E. 22, 24 (1938)). Thus, in reviewing the constitutionality of the Act, this Court must assume the Act is constitutional and within the legislature’s power.

LEGAL ARGUMENT

A. Trusts of Perpetual Duration Do Not Violate the North Carolina Constitutional Prohibition of Perpetuities Even Though Such Trusts May Otherwise Be Invalid Under the Common Law Rule Against Perpetuities.

1. The North Carolina Constitutional Prohibition of Perpetuities Extends Only to Unreasonable Restraints on Alienation.

Article I, Section 34 of the North Carolina Constitution now provides that “perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.” N.C. CONST. ART. I, § 34. At the time of its adoption, first as Section 23 of the Declaration of Rights, and subsequently through incorporation by reference into the North Carolina Constitution of 1776 (the “1776 Constitution”), the focus of the provision was a form of conveyance known as entails of estates, which was an estate of inheritance designed to prevent alienation of property for an indefinite period of time. John C. Gray, The Rule Against Perpetuities 113-116 (2d ed. 1906) (“There is started up a device called perpetuity; which is an entail with addition of a proviso conditional tied to his estates, not to put away the land from the next heir; and, if he do, to forfeit his own estate.” *citing* 7 Bacon’s Works 491 (Spedding’s ed. 1629)); John V. Orth, The North Carolina Constitution: With History and Commentary 75 (1995) (“perpetuities meant legal arrangements involving entails that tied up land in one family for all future generations – the legal basis, in other words, of a landed aristocracy”) As evidenced by the historical foundations of this constitutional provision, the notion that rules regulating of the suspension of the power of alienation of property interests were necessary to prevent wealthy families from having undue political influence in a democratic republic shaped the concept of the North Carolina constitutional prohibition of perpetuities. Orth, *id.* at 75. Rules that developed in several states, including North Carolina, were aimed at “facilitat[ing] the transfer of property interests and to prevent them from being kept in a static condition and out of commerce for a lengthy period.”

George G. Bogert and George T. Bogert, Handbook of the Law of Trusts 187 (5th ed. 1973).

Consistent with the Declaration of Rights, Section 43 of the 1776 Constitution also included a direction “[t]hat the future Legislature of this State shall regulate Entails, in such a Manner as to prevent Perpetuities.” Id. at 6 (*citing* N.C. CONST. of 1776, Declaration of Rights, §43). Section 43 of the 1776 Constitution was later implemented by property law reforms enacted by the North Carolina General Assembly in 1784 imposing limits “on the descent of land in perpetuity.” Id. at 6-7. In support of this statute, the General Assembly noted that “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.” Id. at 6-7 (*citing* Act of 1784, ch. 22 § 5).

In one of the earliest North Carolina cases interpreting the constitutional prohibition of perpetuities, the North Carolina Supreme Court held that “the clauses in the bill of rights and constitution, were designed only to prevent dangerous accumulations [sic] of individual wealth and referred to estates-tail alone: the establishment of a *permanent fund for charitable uses* does not come within the mischief, and is not prohibited by either of those clauses, nor by the common law.” Griffin v. Graham, 8 N.C. (1 Hawks) 96, 1820 WL 165, at *2 (1820). In an opinion addressing the validity of a disposition by will of property in perpetual trust for charitable purposes, the Griffin court stated, “[t]he 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.*” Id. at *4 (emphasis added). Thus, the Court correctly reasoned that Section 23 of the 1776 Constitution invalidated only restraints on the power of alienation, concluding that the constitutional prohibition against perpetuities was inapplicable to the trust in Griffin because the trustees had the power to sell the

trust property. *See* John C. Gray, The Rule Against Perpetuities 535 (2d ed. 1906) (“It has been said to refer only to estates tail, and has been held not to affect gifts to charities.”).

2. The Constitutional Prohibition Against Restraints on the Power of Alienation of Property is Distinct From but Often Confused With the Common Law Rule Against Perpetuities.

While the North Carolina Constitutional prohibition against perpetuities was intended to eliminate restraints on alienation of property (the “Alienation Rule”), a separate yet distinct rule developed at common law against remoteness of vesting (the “Vesting Rule”).² The Vesting Rule became part of North Carolina law through the adoption of English common law in 1715, and it continued in force following adoption of the 1776 Constitution to the extent it was “not destructive of, repugnant to, or inconsistent with the freedom and independence of the state, not abrogated, repealed, expired, or become obsolete, should continue in force.” North Carolina Corp. Comm’n. v. Citizens’ Bank & Trust Co., et al., 193 N.C. 513, 137 S.E. 587, 589 (1927); *see also* N.C. GEN. STAT. § 4-1 (“All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.”). North Carolina courts have recognized the Vesting Rule, which provides that “[n]o 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 time of the creation of the interest.” Clarke v. Clarke, 253 N.C. 156, 161, 116 S.E.2d 449, 452-453 (1960) (*citations omitted*); *see also* American Trust Co. v. Williamson, 228 N.C. 458, 462,

² The Alienation Rule “is aimed at preventing property from being inalienable for too long a period,” whereas the Vesting Rule “is aimed at preventing the fastening of contingent and uncertain interests upon real property for too long a period.” George G. Bogert, Handbook of the Law of Trusts 172 (1921).

46 S.E. 2d 104, 107 (1948) (“A trust for private purposes must terminate within a life or lives in being and twenty-one years and ten lunar months thereafter.”).

Over time, the Alienation Rule has frequently been confused with the Vesting Rule, which through usage came to be known as the common law Rule against Perpetuities.³ Unfortunately, case law in North Carolina case has also been influenced by the tendency to confound the two rules. For example, in Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949), the Court held a private trust invalid where a future interest may not vest within the prescribed period correctly noting “that the common-law rule against perpetuities is recognized and enforced in this State.” Id. at 103. However, as support for its decision, the Mercer court erroneously cited North Carolina Constitution, Article I, Section 31 (the predecessor to current Section 34), stating *in dicta* that the “[w]henver . . . the right of alienation is suspended beyond the period stipulated in the rule, it is violative thereof.” Id. While the Mercer court ultimately reached the correct result under the Vesting Rule of the common law Rule Against Perpetuities, its reliance on the constitutional prohibition of perpetuities erroneously confused the common law Vesting Rule and the constitutional prohibitions of the Alienation Rule by erroneously overlaying the durational limitations of the former on the restraints against alienation that are the object of the latter.

In McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 743, 68 S.E.2d 831, 836 (1952), the Court later distinguished Mercer, stating that “[t]he question is not the length of the trust but whether title vested within the required time.” Id. Though reaching the correct result under the Alienation Rule, the McQueen court again confused the Alienation Rule with the Vesting Rule, stating “[a]s these provisions of the will are not violative of the rule against

³ “The misconception [that Rule against Perpetuities is aimed at restraints upon alienation] has been aided by the name given to the Rule. It would have been better had it been called the Rule against Remoteness.” Gray, p. 1-2.

perpetuities, they do not constitute an unreasonable restraint upon the right of alienation.” Id.

Eventually, the Court completely rejected the durational limitation previously set forth in Mercer, relying on McQueen as support for the premise that “[i]t was formerly the law in this jurisdiction that a trust for private purposes must terminate within a life or lives in being and twenty-one years and ten lunar months thereafter.” Poindexter v. Trust Co., 258 N.C. 371, 378, 128 S.E.2d 867, 873 (1962) (construing a devise to issue of the income from property indefinitely as vested within permissible period); *see* Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 351-352 (1978) (Mercer holding that trust must terminate within the permissible period subsequently overruled by McQueen and Poindexter). The Poindexter court arguably reached the correct conclusion in construing the testatrix’s intent that the devise to her son’s issue should vest at the death of her son though the trust might continue beyond the permissible period of the Vesting Rule. However, the Poindexter court’s erroneous rejection of the Vesting Rule of the common law Rule Against Perpetuities, which was still part of the common law in force in North Carolina in 1962, exemplifies the confusion that persisted in the case law due to the attempts to combine the Alienation and Vesting Rules. Though the outcome in these cases can perhaps be independently justified based on their unique facts, these decision have unfortunately contributed to a convoluted misunderstanding of the separate, yet distinctly different Alienation Rule of the North Carolina Constitution and the Vesting Rule of the common law Rule Against Perpetuities. Rather than perpetuate the errors of these past decisions, this Court should recognize that each rule operates independently of the other and only one, the Alienation Rule, derives its legal authority from the North Carolina Constitution.

C. The Common Law Rule Against Perpetuities Limiting the Duration of Private Trusts Is No Longer In Force in North Carolina.

1. The Uniform Statutory Rule Against Perpetuities Prospectively Repealed the Vesting Rule of the Common Law Rule Against Perpetuities in North Carolina.

As a common law rule, the Vesting Rule of the Rule Against Perpetuities became part of North Carolina law by statutory enactment in 1715, and the power to abrogate the common law Vesting Rule likewise rests with the legislature.⁴ It is well settled that when the General Assembly chooses to enact legislation affecting matters that are subject to a common law rule, the statute replaces the common law rule as the law of this State. McMichael v. Proctor, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956) (holding legislation enacted by General Assembly regarding subject matter of any common law rule becomes public policy in place of common law); Christenbury v. Hedrick, 32 N.C. App. 708, 711, 234 S.E.2d 3, 5 (Ct. App. 1977) (“[W]hen the General Assembly legislates in respect to the subject matter of any common law rule, the statute supplants the common law and becomes the public policy of this State in respect to that particular matter.”).

In 1995, the North Carolina General Assembly exercised its power to abrogate common law by adopting Chapter 41, Article 2 of the North Carolina General Statutes, referred to by its short title as the Uniform Statutory Rule Against Perpetuities (“USRAP”), to have prospective application to nonvested property interests or powers of appointment created on or after October 1, 1995. Section 41-22 of USRAP, provided, in pertinent part, that “[t]his Article supersedes the rule of the common law known as the rule against perpetuities.” N.C. GEN. STAT. § 41-22.

Under USRAP, the General Assembly prescribed the period in which a valid interest

⁴ Section 4-1 of the North Carolina General Statutes provides that “the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.” N.C. GEN. STAT. § 4-1.

must vest by invalidating a nonvested property interest unless: (1) when 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. As a result, a nonvested interest in property that would automatically have been deemed invalid under the common law Rule against Perpetuities could be created and, under the wait-and-see approach of USRAP, later reformed by the courts if necessary to vest within 90 years after its creation. Like the common law Rule against Perpetuities, USRAP is a rule based on remoteness of vesting, not a rule involving unreasonable restraints on alienation that are the object of the North Carolina constitutional prohibition against perpetuities. The General Assembly's adoption of USRAP was a lawful exercise of its legislative power to repeal or abrogate the common law Vesting Rule and replace it with a new rule reflecting the policy of this State regarding the remote vesting of property interests; and, since the adoption of USRAP, the common law Rule against Perpetuities has no longer been in force and part of the law of this State as to all nonvested property interests created on or after October 1, 1995.

2. The Vesting Rule of the Common Law Rule Against Perpetuities Was Finally Repealed in its Entirety by the Act Defining Perpetuities and Suspension of Power of Alienation for Trusts.

In August 2007, the General Assembly again exercised its authority to pass legislation abrogating the common law by adoption of the Act. In doing so, the General Assembly repealed the Vesting Rule of the common law Rule Against Perpetuities to the extent still in force in North Carolina and also repealed USRAP, both of which rules were concerned with the remoteness of vesting of nonvested property interests. Specifically, Section 41-23(h) provides that the “provisions of [N.C. Gen. Stat. §] 41-15 and the common law rule against perpetuities do not apply to trusts created or administered in this State.” N.C. GEN. STAT. § 41-23(h). As a

result of the Act, the Vesting Rule of the common law Rule Against Perpetuities and USRAP are no longer limitations on when interests in trust must vest, thereby permitting North Carolina trusts to exist indefinitely with limited restrictions.

In addition to the abrogation of the Vesting Rule of the common law Rule Against Perpetuities, the Act recognizes that the Alienation Rule of the North Carolina Constitution is still in full force and effect. Specifically, the Act declares a trust “void if it suspends the power of alienation of trust property...for longer than the permissible period,” and further provides that “the power of alienation is suspended only when there are no persons in being who...can convey an absolute fee in possession of land, or full ownership of personal property.” N.C. GEN. STAT. § 41-23(a) and (d). The invalidation of trusts where the power of alienation of the trust property is suspended for too long is entirely consistent with the prohibitions of Article I, Section 34 of the North Carolina Constitution. Therefore, the Act represents a lawful exercise of the General Assembly’s power to replace the common law Rule Against Perpetuities with a statutory rule validating the perpetual duration of trusts in North Carolina in a manner consistent with the constitutional limitations prohibiting unreasonable restraints on alienation.

CONCLUSION

Chapter 41, Section 23 of the North Carolina General Statutes is a valid exercise of the North Carolina General Assembly’s power to repeal the common law Rule Against Perpetuities and to substitute in its place a new policy permitting perpetual trusts where the power of alienation of the trust property is not suspended for too long a period. Because the trustee of the Benson Trust has the power, pursuant to Article X(b)(1), “to sell, exchange or otherwise dispose of any property at any time held or acquired,” the Benson Trust is valid under the Act and satisfies the requirements of the Alienation Rule, the Act, and the North Carolina Constitution.

Accordingly, the Trustee of the Benson Trust is required to administer the Benson Trust as a perpetual trust pursuant to its terms and the Act. Therefore, this Court should enter an Order granting Plaintiff's Motion for Summary Judgment; declaring the Act is constitutional and supersedes any other law, whether arising by statute, case decision or otherwise, providing that, in order to be valid, a nonvested property interest in trust must be certain to vest or terminate within a permissible period of time; and declaring that the nonvested property interests of the beneficiaries in the Benson Trust are valid.

This the 5th day of January, 2009.

/s/ Lynn F. Chandler

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 15.8 of the Amended General Rules of Practice and Procedure for the North Carolina Business Court, undersigned counsel certifies that the foregoing Brief, which is prepared using a proportional font, is double-spaced and is less than 7500 words, excluding the case caption, signatures, and certificates of counsel, as reported by the word-processing software.

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CERTIFICATE OF SERVICE

This is to certify that on January 5, 2009, I electronically filed the foregoing Brief of Defendant Anne P. Benson in Response to Plaintiff's Motion for Summary Judgment with the Clerk of Court using the CM/ECF system:

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