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Looking Far (And Not So Far) Ahead: Texas's New Rule Against Perpetuities For Trusts

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I. INTRODUCTION

After nine prior failed attempts over two decades, a bill (HB 654) extending Texas's rule against perpetuities as it applies to trusts (but not in other contexts) was passed by both houses of the Texas Legislature and signed into law by Governor Abbott on June 16, 2021. HB 654 amends Tex. Prop. Code § 112.036 effective as of September 1, 2021. The new Tex. Prop. Code § 112.036 replaces the "lives in being plus 21 years" time limit for the vesting of interests in trusts with a fixed 300-year time limit for trusts that become irrevocable *on or after* September 1, 2021. The new statute also permits certain trusts that were irrevocable *before* that date to invoke the new 300-year time limit via the inclusion of certain provisions in the trust instrument (see Tex. Prop. Code § 112.036(d)). Trusts that were in existence on June 16, 2021, will be unlikely to properly invoke the new perpetuities period, and if they do not properly invoke it, the "lives in being plus 21 years" time limit for vesting will continue to apply.

II. THE RULE – WHAT IS THE RULE AGAINST PERPETUITIES?

The long-standing Texas rule against perpetuities ("Rule") that existed prior to the enactment of HB 654 generally required that an interest that was subject to the Rule must vest, if at all, not later than 21 years after the death of some life or lives in being (1) at the time of the creation of the interest plus a period of gestation, in the case of an interest in trust, or (2) at the time of the conveyance, in the case of a conveyance of real property. It may be stating the obvious, but the Rule will not serve to invalidate interests that are already vested, including vested remainder interests in trusts. If the only condition to an interest becoming possessory is the natural termination of the preceding estate (such as the death of a holder of a life estate) then the remainder interest is considered vested rather than contingent and is not subject to being voided by the Rule.[1] However, if there is some condition precedent that the interest is subject to, or if the recipient of the interest has not yet been born or cannot be ascertained, then the interest is contingent and must vest within the parameters established by the Rule in order to be valid. If there is any possibility that a contingent interest will remain continent for longer that the Rule permits (more than 21 years after lives in being for beneficial interests governed by the prior Rule or more than 300 years after the trust creating the interest became irrevocable under the current Rule), the interest will be invalidated by the Rule. In other words, a contingent interest is valid if it is certain to vest (or fail) no later than the maximum period allowed under the Rule.[2]

III. EXCEPTIONS TO AND LIMITATIONS OF THE RULE

Some specific types of interests either do not fall within the scope of the Rule, are carved-out as exceptions, or have otherwise been held not to violate the Rule. For example, a reversionary

[1] Gray, Rule Against Perpetuities, §101 (4th ed. 1942).

[2] Frederic S. Schwartz, *A Student's Guide to the Rule Against Perpetuities* §3.02 (1988).

interest is not subject to the Rule. Similarly, an interest that is subject to a power in one person to make himself or herself the absolute owner of the property (e.g., a revocable trust or a general power of appointment exercisable in favor of oneself) is not subject to the rule. The Rule provides an exception for charitable trusts as well as direct gifts of future interests to charity. There also appear to be some statutory exceptions to the Rule in Texas, which include pension benefit trusts (see Tex. Prop. Code § 121.004), cemetery property (see Tex. Health & Safety Code § 711.035(c)), perpetual care trust funds (see Tex. Health & Safety Code § 712.023), and perhaps most notably, condominium association declarations/rules (see Tex. Prop. Code § 82.053). Another example (in the real property context) is an oil and gas lease granting the lessee the right to explore and develop for a fixed term and as long thereafter as minerals are produced, which creates a "fee simple determinable" in the minerals that does not violate the Rule. Executory interests were traditionally considered to vest only upon becoming possessory and were subject to the Rule; however, in *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858 (Tex. 2018), the Supreme Court of Texas upheld the validity of an executory interest that seemed to violate the traditional Rule, stating: "in this oil and gas context, where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, the Rule does not invalidate the grantee's future interest." Thus, through the enactment of statutory exceptions and the development of court-created exceptions, the scope of the Rule has been narrowed over time.[3]

IV. REFORMATION

Despite these exceptions and limitations, some interests will still fail to vest within the requisite time-period. The Texas legislature has provided relief in those situations in the form of Tex. Prop. Code § 5.043(a), which states that courts are required to "reform or construe an interest in real or personal property that violates the Rule to effect the ascertainable general intent of the creator of the interest. A court shall liberally construe and apply this provision to validate an interest to the fullest extent consistent with the creator's intent." By its terms, the obligation to reform interests applies to trusts taking effect on or after September 1, 1969, as well as to exercises of powers of appointment. If an interest is invalidated by the Rule (including an interest created via the exercise of a power of appointment), court reformation as provided by Tex. Prop. Code § 5.043(a) is required to validate the interest.

[3] We note also that increased longevity results in a natural elongating of the acceptable period of time that trust or property interests may be held prior to vesting under the common law Rule because the time limitation is based upon "lives in being." According to the UK Office of National Statistics, a male born in 1841 had a life expectancy of 40.2 years and a female had a life expectancy of 42.2 years. According to the Centers for Disease Control and Prevention, the average life expectancies for males and females in the United States in 2020 were 75.1 years and 80.5 years, respectively. Thus, the permissible duration of interests before vesting must occur has already increased from perhaps 61 years to 101 years on average (a 65% increase) in less than 200 years.

V. HISTORICAL DEVELOPMENT OF THE RULE

The Rule has a long and rich history. The widely recognized common law rule imposing time limitations on restraints on alienation of property can be traced back at least as far as the 1797 English case *Long v. Blackall*, in which Lord Kenyon stated, "It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being, and twenty-one years and the fraction of another year, allowing for the time of gestation." *Long v. Blackall*, 101 Eng. Rep. 875 at 877 (1797). In *Gardner v. City National Bank & Trust Co.*, 267 Mich. 270, 255 N.W. 587 (1934), a Michigan court described the Rule in much greater detail, quoting at length from *Laws of England*:

> " 'The rule stated more fully is as follows: First, subject to the exceptions hereafter mentioned, every future estate or interest in any kind of property, the rights in which are governed by the law of England, must be such that, at the time when the instrument creating it comes into operation, it can be predicated that, if the estate or interest vests at all, it must necessarily vest not later than at the end of a certain period. Secondly, this period is the life of a person or the survivor of any number of persons in being at the time of creation of such future estate or interest, and ascertained for that purpose by the instrument creating the same, and 21 years to be computed from the dropping of such life; but if no such person or persons are ascertained by the instrument, the period is 21 years computed from the time of creation of the future estate or interest. In the following paragraphs this period is called "the perpetuity period." Thirdly, a child who is *en ventre sa mere* at the time of creation of an estate or interest, and is afterwards born alive, is deemed to be a person in being for the purposes both of the vesting of the estate or interest in him, and of being a life chosen to form the perpetuity period. The perpetuity period may, therefore, be apparently extended by a period or periods for gestation, but only in those cases where gestation actually exists. This branch of the rule is applied whether it is for the advantage of the unborn child or not. … Fifthly, any estate or interest which does not necessarily satisfy the above rule is void from its creation, and events, subsequent to the date of the instrument which, or subsequent to the death of the testator whose will, created the estate or interest, which in fact make the vesting take place within the perpetuity period, have no effect so as to make the estate or interest valid.' " 267 Mich. 270 at 284-285, quoting from 22 Halsbury, LAWS OF ENGLAND, §641, p. 302 (1912).

The policy reasons for establishment of the Rule (which held perpetuities in disfavor) were so widely endorsed that rules invalidating perpetuities were ultimately adopted by courts in the U.S. as well as by many of the states when they adopted their Constitutions. Texas is among those states.

Article 1 of the Texas Constitution of 1876, containing our Texas Bill of Rights, prohibits "perpetuities" without defining what is meant by that term:

> Sec. 26. PERPETUITIES AND MONOPOLIES; PRIMOGENITURE OR ENTAILMENTS. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

In *Anderson v. Menefee*, 174 S.W. 904 (Tex.Civ.App - Ft. Worth 1915), the Fort Worth appellate court upheld a judgment by the lower court that the decedent's will was invalid on the ground that it violated section 26, art. 1 of the Constitution by creating a prohibited perpetuity. The court adopted a definition for the term "perpetuity" taken from an Illinois case, *Bigelow v. Cady*, 171 Ill. 229, 48 N.E. 974, 63 Am.St.Rep. 230, being:

> Perpetuity is a limitation, taking the subject-matter of the perpetuity out of commerce for a period of time greater than a life or lives in being and 21 years thereafter. If, by any possibility, a devise violates the rule against perpetuity, it cannot stand. If there is possibility that a violation of this rule can happen, then the devise must be held void. (Citations omitted.) Neither will its violation be tolerated when it is covered by a trust any more than when it actually appears in the creation of a legal state. The courts of equity will not permit limitations of future equitable interests to transcend those of legal interest of executory devises and shifting and springing uses at law. (Citations omitted.)

Anderson, 174 S.W. at 907-08.

Several years later, in *Neely v. Brogden*, 239 S.W. 192, 193 (Tex.Comm.App. 1922), *Anderson* was cited for the same definition of a "perpetuity." In *Brooker v. Brooker*, 130 Tex. 27, 38, 106 S.W.2d 247, 254 (Tex. 1937), which involved a will that granted a testator's heirs from time to time who had reached age 21 the ongoing right to extend the duration of the trust created therein by majority vote, the Court held: "that this will, as regards the trust estate, attempts to create a perpetuity in violation and contravention of section 26 of article 1 of our State Constitution."

VI. CONSTITUTIONALITY – IS THE CHANGE TO TEX. PROP. CODE § 112.036 PERMITTED BY THE TEXAS CONSTITUTION?

Could the change in the perpetuity period resulting from the enactment of HB 654 be vulnerable to a constitutionality challenge?[4] After all, a fixed 300 years is likely to be longer than 21 years after the death of any person who is alive today, though future advancements in medical science may someday change that expectation. The meaning of the word "perpetuities" is not defined in the Constitution. Under the prior manifestation of Tex. Prop. Code § 112.036, an impermissible perpetuity was defined consistently with the common law definition as an interest that cannot be shown to vest or fail within the "lives in being plus 21 years" time limit. However,

[4] An in-depth discussion of whether the statute passes constitutional muster can be found in the 2021 Texas Estate & Trust Legislative Update written by William D. Pargaman and by Meredith N. McIver, available for download from REPTL's Estate & Trust Legislative Updates page.

that statutory definition was not enacted and made effective in Texas until 1984. Even before the Texas Trust Code was enacted, the "lives in being plus 21 years" rule was consistently used by Texas courts in the context of validating or invalidating interests based upon when they vest. But if a term does not necessarily have a fixed meaning, it would seem to be within the purview of the courts or the legislature to define and re-define it from time to time, bringing us to the question of whether the term does have a fixed meaning.

Was there a specific meaning of the term "perpetuities" that was known in 1876 when the Texas Constitution was adopted and that the drafters intended to invoke? Was the meaning so well-settled in their mind that there was no need to elaborate by providing a definition in the Constitution? In the context of statutory interpretation, the U.S. Supreme Court has stated that: "[W]here a common law principle is well established ... the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). Would this interpretive rule apply in the context of constitutional interpretation (not just statutory interpretation), and if so, was the meaning of "perpetuities" such a well-established common law principle at the time the Texas Constitution was adopted that its meaning should be limited to that meaning alone? In *Brooker v. Brooker*, 130 Tex. 27, 38-39, 106 S.W.2d 247, 254 (1937), the court stated that, "According to our authorities, and also according to the authorities generally, the rule against perpetuities, as contained in the [Texas] constitutional provision, is that no interest within its scope is good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the interest, and in some instances the period of gestation will be added. (citing *Clarke v. Clarke*, 121 Tex. 165, 46 S.W.(2d) 658; *Neely v. Brogden* (Tex.Com.App.) 239 S.W. 192, 193). History tells us that the common law Rule transcended time and geography. Should the pre-Constitution common law meaning of the term "perpetuities" be inferred? If a challenge to the constitutionality of the new 300-year perpetuity period for trusts is brought, the courts may hold that any change to the definition of a perpetuity as used in the constitution, being so closely related to and perhaps even relying on the common law definition, requires a constitutional amendment.

On the other hand, is it possible that the meaning of the term is not fixed by the constitution? The common meaning of the term "perpetuity" is simply perpetual or eternal, and many states have defined "perpetuity" so as to impose a time limit for the vesting of interests that is different from the common law Rule or have abolished the Rule entirely (several states even permit some interests to be held in trust in perpetuity). Black's Law Dictionary defines the term as: "A future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of or will not necessarily vest within the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation. Lewis, Perp. 104; 52 Law Lib. 139. Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond, and, in case of a posthumous child, a few months more, allowing for the term of gestation. Rand. Perp. 48. Such

a limitation of property as renders it unalienable beyond the period allowed by law. Gilb. Uses, (Sugd. Ed.) 200." In *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 866-67 (Tex. 2018), discussed both above and in greater detail below, the court (recognizing that the Constitution does not define "perpetuities") provided us with definitions of the term that suggests it has a broader meaning in Texas – an "inalienable interest" and an "interest that does not take effect or vest within the period prescribed by law." It seems that the legal meaning of the term may have evolved over time to refer to impermissibly lengthy restraints on alienation in a broader sense and is not limited to an interest that fails to vest under the "lives in being plus 21 years" rule.

The *Anderson* court explained that the lives in being plus 21 years vesting period is "the time fixed by **the courts** as the limit allowable for the enforcement of a devised estate under the rule against perpetuities." *Anderson*, 174 S.W. at 907 (emphasis added). The opinion does not suggest that the Constitution establishes that time limit, or that the Constitution invokes the time limit established by common law, but rather that the courts set that limit when called upon to rule on whether a prohibited perpetuity had been created. The *ConocoPhillips* opinion provides guidance on this question as well as on the definitional issue in stating that: "… the Texas Constitution does not define "perpetuities," and without a statute on the subject, the common law on the matter is the law of the state. … Our holding does not run afoul of the constitution's prohibition of perpetuities because the future oil and gas interest at issue here does not restrain alienability indefinitely…." *ConocoPhillips Co.*, 547 S.W.3d at 873 (Tex. 2018). Although the decision was written to apply narrowly and did not relate to trusts or to Tex. Prop. Code § 112.036, the opinion seems to suggest that in the court's view, the courts and the legislature may specify from time to time what constitutes an impermissible perpetuity and, in such event, no constitutional amendment would be necessary to redefine "perpetuities."

What do we make of the absence of constitutional challenges to the statutory exceptions to the Rule that have been enacted in Texas? Although some of Texas statutes that carve out exceptions to the Rule could be argued to be in the same vein as a charitable trust, which is an exception to the common law Rule, others seem to fall outside the scope of a charitable trust characterization. And to our knowledge, none of these statutes has met a constitutional challenge and none has required an amendment to the Constitution. Is the absence of constitutional challenges an indication that the mechanics and details of the Rule, including possibly the determination of the time allowed for vesting, fall within the legislative purview?

VII. THE NEVADA CASE STUDY

As mentioned, Texas is not the first state to attempt to re-define the term "perpetuity" in the context of property interests. Nevada's rulemaking journey with regard to restraints on alienation has been similar to that of Texas. In 1864, the first adopted Nevada constitution provided in art. 15, § 4 that "No perpetuities shall be allowed except for eleemosynary purposes." The Nevada Constitution, like the Texas Constitution, does not define "perpetuities." In the

absence of guidance from the legislature, the Nevada courts adopted the common law definition of "perpetuities." In 1987, Nevada legislation defined a statutory length for "perpetuities" that essentially codified the common law definition – a life in being plus 21 years – and added several exclusions from the statutory rule against perpetuities, including nondonative transfers. In 2005, the Nevada legislature amended the statutory rule against perpetuities, providing that "A nonvested property interest is invalid unless: (a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of a natural person then alive; or (b) The interest either vests or terminates within 365 years after its creation." Nev. Revised Statute § 111.1031(1.).[5] In *Bullion Monarch v. Barrick Goldstrike*, 345 P.3d 1040 (2015), the Nevada Supreme Court described the issue before it as: "whether Nevada's common-law rule against perpetuities, as codified by the Nevada Constitution, applies to commercial mining agreements for the payment of area-of-interest royalties." One party argued that the rule against perpetuities as it existed when the Constitution was adopted was the rule to be applied, not the new statutory manifestation of the rule. The court stated: "As a creature of the common law, the rule against perpetuities is not static. Our Constitution may have adopted the common-law rule, but it did not freeze the rule's application." *Bullion Monarch*, 345 P.3d at 1041. In upholding a statutory exemption for nondonative transfers, the Nevada Supreme Court reasoned that "[t]he meanings of the Constitution's words remain constant, but their application may vary with the circumstances of time and place." The Nevada Supreme Court acknowledged that Nevada's Constitution had codified the common-law rule against perpetuities but nonetheless permitted the Nevada legislature to alter application of the Rule by creating exceptions to its application that were not part of the common law. Although the opinion in *Bullion Monarch* would not bind Texas courts, our courts may consider it to have persuasive value.

VIII. IS THERE A SEPARATE PERPETUITIES PERIOD FOR REAL PROPERTY HELD IN TRUST?

The new Tex. Prop. Code § 112.036 concludes with subparagraph (f), which provides "Under this section, a settlor of a trust may not direct that a real property asset be retained or refuse that a property may be sold for a period longer than 100 years." Although at first glance subparagraph (f) may appear to establish a separate, new perpetuity period applicable solely to real property held in trust, by its terms the provision merely prohibits a settlor from mandating that real property be retained or not be sold for a period longer than 100 years. Subparagraph (f) does not appear to prohibit the actual retention of real property in trust for longer than 100 years. It would seem that real property could be retained in trust for the full period of time permitted under the Rule so long as the trust provisions do not contain a prohibition on the sale of real property for longer than 100 years or direct that it be retained for longer than 100 years. If the settlor intends that a trust hold legacy real estate assets and includes restraints on alienation in the governing instrument, it would be advisable to terminate the restrictions prior to the

[5] Nevada's statutory rule against perpetuities helpfully validates interests that vest within *either* the period afforded under the common law rule (referencing then-alive persons plus 21 years) *or* the 365-year fixed period of time, perhaps in recognition of the uncertainty that a perpetuity period defined as a fixed term of years could give rise to, especially in a state having a constitutional prohibition against perpetuities.

expiration of the 100-year period. Such a provision would not necessarily mandate the sale of the property; instead, lifting any restrictions on alienability should be sufficient. However, the clause terminating any applicable restrictions by the 100–year time limit might include beneficiary purchase rights or guidance as to what options should be considered at that time (e.g., perhaps real property that generates rental income or other operating income could be transferred to a partnership or limited liability company to be owned by the trust or its beneficiaries rather than continue to be held in trust directly, assuming that a "see through" rule would not apply). It is not entirely clear what the consequence for violating the new subparagraph (f) would be. If the restriction endures too long, is the beneficial interest in the real property void, or is the provision restraining alienation for more than 100 years void? Will subparagraph (f) be considered as part of the rule against perpetuities as it applies to trusts, and if so, will Tex. Prop. Code § 5.043(a) be available to allow court reformation of an otherwise void interest or provision?

IX. CONCLUSION

We may not know whether the new Tex. Prop. Code § 112.036 will pass constitutional muster for years or even decades. In the meantime, it may be advisable to at least allude to the possibility that the statute could be invalidated and to utilize a perpetuities savings clause that would invoke the correct period for vesting regardless of the outcome of a constitutional challenge. Perhaps a maximum trust duration established in the trust instrument that is measured by the maximum legally permitted vesting period at the time the trust became irrevocable, as may be determined from time to time, would suffice.

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