

Cloud Still Hangs Over Validity of Nevada's Perpetuities Law

Matthew D. Blattmachr of Alaska Trust Company

Despite the contention by some that the recent decision of the Nevada Supreme Court in [*Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 131 Nev. Advance Opinion 13 \(Bullion\)](#) eliminates any question concerning the invalidity of the Nevada statute permitting trusts to last for 365 years, a careful review of this well written decision does not, in fact, seem to do so.

In fact, the decision does not even appear related to trusts. The court frames the question it was asked to answer as "whether Nevada's "Rule Against Perpetuities appl[ies] to an area-of-interest provision in a commercial mining agreement."

It seems that a commercial mining agreement is not the same as a trust in Nevada. *Bullion* states, in part, "We are thus confronted with the question of **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. We hold that it does not. *** we must for the first time decide whether **an area-of-interest royalty is indeed an unenforceable perpetuity** under the common law of Nevada." (Emphasis added.)

The decision goes on to say, "This shows that alienation is not restricted in the traditional sense, where property is tied up with descendants through the dead-hand power of century-ago settlers. So it is not obvious from the definition of 'perpetuity' that it encompasses commercial mining interests. * * * **The rule developed 'to curb excessive dead-hand control of property retained in families through intergenerational transfers.'**" Restatement (Third) of Prop.: Servitudes § 3.3 cmt. b (2000). Thus, courts have held that certain commercial agreements are not subject to the common-law rule against perpetuities because to hold otherwise would contravene public policy.***We are persuaded that public policy weighs against applying the rule against perpetuities to area-of-interest royalty agreements.



Because such provisions compensate explorers, applying the rule this way appears efficient. And **because the agreement is a commercial one, there is no human decedent exercising dead-hand control over still-living descendants.***This is not the kind of 'entailed estate[]' that the rule against perpetuities was intended to prevent.*****Our Legislature has determined that, as a matter of policy, **nondonative transfers** should not be subject to the rule against perpetuities." (Emphasis added.)

It seems relatively certain that, unlike a commercial contract, a transfer to a trust by gift is a donative transfer and, therefore, the *Bullion* decision (and its reasoning) does not apply to a trust.

The issue of whether the Nevada statute is invalid was recently raised in a Vanderbilt Law Review article by Harvard Professor of Law Robert Sitkoff and Steve Horowitz, a former student of Professor Sitkoff and now a practicing attorney. See "Unconstitutional Perpetual Trusts," 67 Vanderbilt Law 1769 (2014) which can be accessed at this link: [Unconstitutional Perpetual Trusts](#).

Some have even contended that *Bullion* rejects the article's reasoning and conclusions but neither the article nor its authors are mentioned in the decision.

It seems prudent for practitioners to appreciate that the issue remains unresolved. As mentioned in an article by Jonathan Blattmachr, Mitch Gans and Bill Lipkind that discusses the Sitkoff/Horowitz Vanderbilt article ([LISI Estate Planning Newsletter #2263](#), (December 18, 2014) at <http://www.LeimbergServices.com>), if the trust has a perpetuities limitation (or savings) provision, it appears there is no adverse result except that the trust may not last for as long as the settlor initially hoped. If a long term duration would not be valid, then under the savings provision a traditional trust duration period (e.g., the standard lives in being plus 21 years term) should apply. Here is a sample they offer of such a duration clause which practitioners may wish to consider:

"Maximum Duration" for Trusts Defined

The Maximum Duration for Trusts is the longest period that property may be held in trust under this Agreement under the applicable rules governing perpetuities, vesting, accumulations, the suspension of alienation and the like (including any applicable period in gross such as twenty-one (21) years or ninety (90) years). If under those rules the Maximum Duration for Trusts shall be determined (or alternatively determined) with reference to the death of the last survivor of a group of individuals alive upon the date of this Agreement, or at such other time that the application of such rules limiting the maximum duration of trusts is deemed to begin, those individuals shall consist of those measuring lives described in the paragraph below entitled 'Measuring Lives.' The measuring lives under this paragraph shall consist of those of the following individuals who are living at the time that the application of such rules limiting the maximum duration of trusts is deemed to begin: the Grantor's Wife, all of the Grantor's descendants and any surviving spouse of a descendant of the Grantor."

Certainly, it will behoove practitioners to place such a limitation in any trust that is to last a long time to ensure it will not be declared invalid because it violates some perpetuities limitation under applicable state law.

ABOUT THE AUTHOR:

Matthew D. Blattmachr is a trust officer with and Vice President of Alaska Trust Company since 2010. He is an active member of the ATC Trust Committee and is responsible for coordinating all aspects of business development including creating a strategic business plan for company expansion. Matthew is also on the Board of the Anchorage Senior Center Endowment Fund. Matthew has a Bachelor degree from the University of Alaska Anchorage, a CFP designation from the College of Financial Planning, and has earned a Certified Fiduciary & Investment Risk Management Specialist designation from the Cannon Financial Institute. Matthew will also earn a Master of Business Administration degree from Alaska Pacific University in August. Matthew can be reached at mblattmachr@alaskatrust.com.



Image courtesy of taesmileland at FreeDigitalPhotos.net