

the will & the way

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The Chair's Comments



Jim Hardin

Thank you for the privilege and honor of serving as chair of our Estate Planning & Fiduciary Law Section this year. I thank my predecessor Sandy Clark of Raleigh for her invaluable guidance in the year just concluded. I also bid a fond farewell to Jane Weathers, our sections' staff liaison who served us with selfless dedication for decades and is now

enjoying a well-deserved retirement. On behalf of the section I welcome her successor Jeremy Williams and look forward to working with him in the upcoming year.

Allow me to begin by celebrating the success of our section's Thirty-fourth Annual Estate Planning & Fiduciary Law Section Meeting held July 18-20, 2013 on Kiawah Island, South Carolina. The attendance this year was 299 counting both section members and sponsors and exhibitors, very near our record. The presence of 24 sponsors and 18 exhibitors, also near a record, is reflective of the desire of these vendors to have access to estate planning and probate practitioners. The section members and staff who worked so hard to make the Annual Meeting a success are too numerous to mention. As always, our meeting, one of the largest of such meetings across over 30 sections of the Bar Association, provides us an invaluable opportunity to receive cutting-edge CLE while at the same time renewing old acquaintances and making new ones not only with our fellow lawyers but with our sponsors and exhibitors. Many of you also manage to incorporate the meeting as part of a family vacation, a benefit you richly deserve if your organizational skills allow you to combine personal and professional renewal. Talk about work/life balance!

Some observers of our practice area have surmised that the significant increases in the applicable exemption amounts brought about by the American Taxpayer Relief Act ("ATRA") of January 1, 2013 have cast doubts on the future economic viability of estate planning and fiduciary law. Those doubters need look no further than the con-

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Constitutionality of Rule Against Perpetuities Repeal Revisited

Brown Brothers Harriman Trust Co., N.A. v.

Benson – Constitutionality of Perpetual Trusts

By William R. Culp Jr. and Paula A. Kohut

In July of this year, there was considerable discussion at the North Carolina Bar Association's 34th Annual Estate Planning & Fiduciary Law Program about the current state of the rule against perpetuities as applied to trusts in North Carolina. Specifically, there was some discussion about the rule against perpetuities and **Brown Bros. Harriman Trust Co., N.A. v. Benson**, 688 S.E.2d 752 (N.C. Ct. App. 2010) (**Brown Bros.**). Several points were brought up that we felt

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should be addressed, specifically, (1) whether the Supreme Court of North Carolina's dismissal of the **Brown Bros.** appeal was a decision on the merits, and (2) whether the question in **Brown Bros.** was ripe for decision, such that the court's decision was proper.

Procedural History | Effective Aug. 19, 2007, the North Carolina General Assembly passed the Act Defining Perpetuities and Suspension of Power of Alienation for Trusts, N.C.G.S. Section 41-23(h), repealing the Rule Against Perpetuities based on vesting with respect to trusts created or administered in North Carolina. After passage of the act, some practitioners were concerned that Article 1, Section 34 of the North Carolina Constitution, which states “[t]hat perpetuities and monopolies are contrary to genius of a free state and shall not be allowed,” would act as a bar to the legislative repeal of the rule against perpetuities. However, that section only prohibits restraints on alienation, not trusts which allow for indefinite postponement of vesting. *Brown Brothers Harriman Trust Co., N.A.* (Brown Brothers Harriman) brought a declaratory judgment in connection with the administration of a dynasty trust. The North Carolina Court of Appeals affirmed the Business Court's grant of summary judgment in **Brown Bros.**, which found that (1) the Act Defining Perpetuities and Suspension of Power of Alienation for Trusts was constitutional, (2) the non-vested property interest to the beneficiaries of the dynasty trust in issue were valid, and (3) Brown Brothers Harriman could properly administer the Benson Trust as a perpetual or dynasty trust. The appellants petitioned the North Carolina Supreme Court for discretionary review and filed an appeal of right asserting that the case involved a substantial question arising under the North Carolina Constitution. The court dismissed the appeal and denied the petition in **Brown Bros. Harriman Trust Co., N.A. v. Benson**, 698 S.E.2d 391 (N.C. 2010).

Bosch Decision | A discussion on whether **Brown Bros.** firmly established the constitutionality of the rule against perpetuities repeal should start with **Commissioner v. Estate of Bosch**, 387 U.S. 456 (1997). In **Bosch**, the existence of a federal estate tax liability turned on the character of a property interest. The United States Supreme Court examined whether the Internal Revenue Service was conclusively bound by a rule of law established by a trial court in a prior proceeding in which the Internal Revenue Service was not a party. The court cited **Erie R. Co. v. Tompkins**, 304 U.S. 64 (1938), where it held that state law decided by the highest court in the state must be followed in a diversity case. The court in **Bosch** extended this rule to non-diversity cases, noting that a state's highest court is the best authority on the state's law.

In addition to the basic **Erie** rule establishing the supremacy of a state supreme court's interpretation of state law, the **Bosch** court noted a broader set of principles. William R. Culp and N. Lucille Siler stated the rules as follows:

(a) lower state court decisions should be attributed some weight but are not controlling, where the highest court of the state has not addressed the issue,

(b) “an intermediate appellate state court... is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise,*” and

(c) that federal courts shall apply state law in accordance with the decisions of a state's highest court.

William R. Culp, Jr. and N. Lucille Siler, “U. S. Supreme Court Case Supports Constitutionality of Perpetuities Repeal,” *The Will and the Way*, May, 2011 (citing **Bosch**, at 465 (emphasis in original)).

The Dismissal in Brown Bros. was a Final Decision on the Merits | As previously noted by William R. Culp, Jr. and N. Lucille Siler, the North Carolina Supreme Court's dismissal was a ruling on the merits by the highest court in North Carolina under the United States Supreme Court's principles in **R. J. Reynolds Tobacco Co. v. Durham County, North Carolina**, 479 U.S. 130 (1986). In **Reynolds**, the United States Supreme Court only had jurisdiction to hear the appeal if the appeal of R.J. Reynolds lay from a final decision by the North Carolina Supreme Court on the merits. If the North Carolina Supreme Court's dismissal of the appeal constituted a determination that the state supreme court lacked jurisdiction over the appeal, as opposed to a decision on the merits, the United States Supreme Court had no jurisdiction to hear the appeal. **Reynolds**, at 138. The **Reynolds** appeal to the North Carolina Supreme Court, like the **Brown Bros.** appeal, was an appeal of right because of an asserted substantial constitutional issue.

The United States Supreme Court noted:

It is one of those not infrequent cases in which decision of the merits of the case also determines jurisdiction. The petition was dismissed, not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the court could consider.

Reynolds, at 139 (quoting **Matthews v. Huwe**, 269 U.S. 262, 265 (1925)).

In resolving the issue, the court announced a clear rule on this jurisdictional question: “[S]o that practitioners may be certain of their ground... in the absence of positive assurance to the contrary from the North Carolina Supreme Court, we consider the court's dismissal of the **Reynolds'** appeal to be a decision on the merits.” **Reynolds**, at 138 (emphasis added). The court noted that its treatment of “the North Carolina Supreme Court's summary dismissal as a decision on the merits accords [with the court's] view of its own summary dispositions.” *Id.* at 139 n.7 (citing **Hicks v. Miranda**, 422 U.S. 332, 344 (1975)).

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The court in **Mandel v. Bradley**, 432 U.S. 173, 176 (1977), while noting that ascertaining the reach of summary decisions may present issues, stated the following:

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

The court has also stated in **Washington v. Confederated Bands and Tribes of the Yakima Indian Nation**, 439 U.S. 463, 477 n.20 (1979), that a “summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision.” Like a summary dismissal by the United States Supreme Court, the North Carolina Supreme Court’s dismissal of the appeal of right in **Brown Bros.** was a decision on the merits which left the appellate court decision undisturbed.

The North Carolina Supreme Court decision in **State of North Carolina v. Fayetteville St. Christian School**, 261 S.E.2d 908 (N.C. 1980), provides an instructive example of a dismissal of an appeal of right asserting a substantial constitutional issue by the North Carolina Supreme Court. In the denial of the appeal the court provided “positive assurance” that the dismissal was not a decision on the merits consistent with the bright line rule in **Reynolds**. In **Fayetteville St. Christian**, the record and oral arguments revealed that the trial court’s denial of the defendant’s motion to dismiss and grant of a preliminary injunction constituted nonappealable interlocutory orders. The court dismissed the appeal, vacated the appellate court decision and remanded the case to the trial court. The court specifically noted that the constitutional arguments of the defendants (freedom of religion) required a fully developed factual record and that “[n]othing expressed herein should be construed as an expression of our own opinion on the constitutional issues attempted to be raised by defendants.” *Id.* at 914.

An important takeaway from **Fayetteville St. Christian** is that when presented with a proposed substantial constitutional issue, the North Carolina Supreme Court knows how to dismiss an appeal of right while also providing positive assurance that the dismissal is not a decision on the merits. The **Brown Bros.** appeal of right was dismissed outright without any positive assurance that it was not a decision on the merits.

It is understandable why the **Brown Bros.** court did not find it necessary to do more than simply dismiss the appeal of right. The North Carolina Supreme Court held in **Yadkin Navigation Co. v. Benton**, 9 N.C. (2 Hawks) 10, 13 (N.C. 1822) (involving the ability of stockholders to transfer shares and the opportunity for the public to invest in a corporation), that a “perpetuity” in the context of the passage of the North Carolina Constitution means “property locked up from the uses of the public, and which no person has power to alienate.” Two years prior to **Yadkin**, the North Carolina Supreme Court similarly held in **Griffin v. Graham**, 8 N.C. (1 Hawks) 96, 130-32 (N.C. 1820), that an unconstitutional perpetuity only exists when property “is so settled that it cannot be undone or made void.” Both of these cases were cited by the North Carolina Court of Appeals in **Brown Bros.**

Griffin involved a charitable trust established for the purposes of

constructing and operating a school for indigent children. The decedent drafted the trust to continue forever, but he gave the trustees the power of alienation. The court in **Griffin** stated that “a perpetuity which the law would deem void must be an estate so settled for private uses that by the very terms of its creations there is no *potestas alienandi* in the owner.” *Id.* at 132. Since the trustees in **Griffin** had the power to alienate the trust assets, there was not an unconstitutional perpetuity.

A repeal of the common law rule against perpetuities did not violate the North Carolina Constitution’s prohibition against perpetuities because the common law rule against perpetuities deals with vesting and is only one method of restricting unreasonable restraints on alienation. N.C.G.S. Section 41-23(h) repealed the common law rule against perpetuities and the statute substituted another constitutionally permitted way to prevent unreasonable restraints on alienation.

Brown Bros. plainly rests on two previous North Carolina Supreme Court decisions, as discussed by the appellate court. **Brown Bros.**, 688 S.E.2d at 755. As such, it is understandable why the Supreme Court of North Carolina did not provide positive assurances that its dismissal of **Brown Bros.** was not a decision on the merits.

The Issue in Brown Bros. was Ripe for Decision | Another question addressed during the discussion of the **Brown Bros.** decision at the 34th Annual Estate Planning & Fiduciary Law Program was whether the issue at hand was ripe for declaratory judgment. It was suggested that **Brown Bros.** may not have been ripe for a declaratory judgment action because the property in the trust at issue would have remained in trust for 90 years under N.C.G.S. Section 41-15(a) (2) if Section 41-23 was unconstitutional. Therefore, the issue of the constitutionality of the trust would not have been ripe for decision for another 90 years.

In **Brown Bros.**, the case was briefed, pled, and argued that Section 41-23 was unconstitutional as to the repeal of the common law rule against perpetuities but was constitutional as to the repeal of Section 41-15 as applied to trusts. The remainder beneficiaries argued that the assets of the trust would need to be distributed immediately as a result of the repeal of the 90 year wait and see period. In other words, it was argued that the trust was void because the common law rule against perpetuities should still be in place, and that Section 41-15(a)(2), providing for a ninety year rule, would not apply because it would have been repealed by Section 41-23. This created an important, current controversy. The trustee was entitled to seek declaratory judgment so as to settle this question arising out of the trust administration. Moreover, the record on appeal in **Brown Bros.** clearly established that the North Carolina Supreme Court considered the declaratory judgment to be “exceptional.” Such a designation as “exceptional” allows a case to be heard in Business Court. By order of the Chief Justice of the Supreme Court of North Carolina, Chief Justice Sarah Parker, dated Aug. 28, 2008, the case was assigned to the Honorable Albert Diaz, Special Superior Court Judge for Complex Business Cases. **Brown Bros.**, 688 S.E.2d at 754; Rule 2.1, Gen. Rules of Practice, N.C. Superior and District Courts. ●

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