A Lawyer with a Candlestick in the Conservatory: The Perpetuities Whodunnit

Author : Bridget J. Crawford

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Grayson M.P. McCouch, Who Killed the Rule Against Perpetuities?, 40 **Pepp. L. Rev.** 1291 (2013).

Ding, dong, the Rule Against Perpetuities is dead. Well, in about half of all states. No longer must property interests vest within "lives in being plus twenty-one years." Wealthy individuals can put their money in trust forever. Even better, when that trust is created in a state without an income tax, and the trust assets never become included in the estate of a beneficiary, assets transferred to a perpetual trust remain … perpetually tax-free. What is the explanation behind the rush among states to repeal the RAP, beginning in the mid-1990's? Professors Robert Sitkoff and Max Schanzenbach, among others, have pointed to the generation-skipping transfer tax as the engine driving repeal. Other theories include settlors' desires for post-mortem control or creditor protection for beneficiaries. Enter into the conversation Grayson M.P. McCouch with his concise and well-written article, *Who Killed the Rule Against Perpetuities?* McCouch argues that the repeal of RAP is as much the work of bankers and lawyers as it is of any tax law.

McCouch begins his essay by looking at the use of perpetual trusts before and after the enactment of the generation-skipping transfer tax (and its $1 million exemption) in 1986. Prior to 1986, it was possible to create a perpetual trust in Delaware, Wisconsin and Idaho, albeit via different mechanisms or legal exceptions. Yet those states did not have a lion's share of the trust business, which McCouch attributes to settlors' ability to achieve objectives within the perpetuities period of their chosen local jurisdiction and a sense that the tax benefits of creating a trust in Delaware, Wisconsin or Idaho were "incremental" at best. After 1986, the generation-skipping transfer tax inspired a search for ways to avoid technical problems that could arise even in the existing perpetual jurisdictions. (McCouch explains the "Delaware tax trap" problem with such clarity and elegance that the article is worth reading for that single paragraph alone.)

McCouch goes on to ask the more difficult question of why the period of rapid perpetuities reform did not begin until 1995 with Delaware's repeal of the rule, almost 10 years after the enactment of the generation-skipping transfer tax. He suggests that only with the economic boom of the later 1990s did lawyers and bankers start to market perpetual trusts in a way that appealed to the dynastic aspirations of the newly rich. He observes, "Perpetual trusts, like other upscale goods and services, are sold at retail to well-heeled consumers through appeals to vanity, anxiety, and ambition, as well as tangible financial returns." McCouch suggests that bankers and lawyers—not their clients or the host jurisdictions—are the real beneficiaries of the repeal of the rule against perpetuities.

For readers who are interested in the relationship between and among tax law, legal reform and professional culture and change, this article provides much food for thought. Many states that have repealed the rule against perpetuities have also abolished income taxation of trusts and their beneficiaries. For that reason, even states with a booming trust business may not receive any direct tax revenue from it. But the ancillary effects of increased trust business—more jobs created in that state—should not be underestimated. It may be that some lawyers and bankers have benefitted handsomely from perpetuities reform, but so has that same reform given rise to a new cadre of supporting professionals who pay taxes and spend their paychecks in those states. McCouch's article undoubtedly will serve as the inspiration for additional scholarship in this area.

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