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Summary of Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc., 131 Nev. Adv. Op. 13

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Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc., 131 Nev. Adv. Op. 13[1]

PROPERTY LAW: RULE AGAINST PERPETUITIES

Summary

The Ninth Circuit Court of Appeals certified two questions to the Nevada Supreme Court concerning its rule against perpetuities:

1. Does Nevada's Rule Against Perpetuities ("RAP") apply to an area-of-interest provision in a commercial mining agreement?

2. If so, may courts reform such agreements under NRS 111.1039(2)?[2]

The Court answered the first question in the negative, citing public policy reasons since the Nevada Legislature has exempted commercial, nondonative transfers from RAP. The second question, as moot, was not reached.

Background

Bullion Monarch Mining, Inc. ("Bullion") claims that Barrick Goldstrike Mines, Inc. ("Barrick") owes Bullion royalty payments under an area-of-interest provision in a 1979 agreement for Barrick's predecessor-in-interest to develop Bullion's predecessor-in-interest's mining claims.

Bullion is to receive royalty payments under the agreement on production from after-acquired claims for 99 years. When Bullion filed suit seeking royalty payments, Barrick claimed the area-of-interest provision was void as violating RAP. The federal district court granted summary judgment to Barrick, Bullion appealed, and the Ninth Circuit certified this questions to the Court.

Discussion

The Nevada common-law RAP states that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[3] It is also codified in the Nevada Constitution[4] and Nevada state law.[5] The Nevada statute was not enacted until 1987, thus restricting the Court's analysis to the common-law RAP.

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[1] By Patrick Phippen.

[2] The statute allows courts to reform property dispositions violating RAP in a manner which "most closely approximates the transferor's manifested plan of distribution" without violating the rule. NEV. REV. STAT. § 111.1039(2) (West 2014).

[3] Sarrazin v. First Nat'l Bank of Nev., 60 Nev. 414, 418, 111 P.2d 49, 51 (1941) (internal quotation omitted).

[4] *See* NEV. CONST. art. XV, § 4.

[5] *See* NEV. REV. STAT. § 111.1031 (West 2014).

Nevada's RAP is not static; since it is "a creature of the common law . . . [its] application may vary with the circumstances of time and place."[6] While common law may be adopted in broad form by statute, it continues to evolve as new circumstances require new application.

Nineteenth century legal dictionaries define perpetuities in reference to donative transfers, not commercial ones. They do not contemplate business agreements that might outlive the persons executing it but do not outlive the business entities owning the interest. They also do not contemplate royalty interests, which have no obvious restraint on alienation because they can be exchanged, bought, or sold.[7] Thus, it is not obvious from the definition of perpetuity that it includes commercial mining interests.

The modern trend is "not to apply the rule (against perpetuities) rigidly or mechanistically." Particularly in commercial settings, courts often refuse to apply RAP where its public policy purposes – to curb excessive dead-hand control of property – will not be served.[8] For example, in a case similar to the instant case, a New Jersey appellate court decided that RAP does not apply to commercial transactions by applying a later-enacted statutory rule to a transaction because it "effectuated the current policy declared by the legislative body."[9]

The Court thus declared that "public policy weighs against applying the rule against perpetuities to area-of-interest royalty agreements." Since the agreement at issue is commercial in nature, there is no human decedent exercising dead-hand control over still-living descendants.[10] Even if the interest remains on the land, there is no prohibition against alienation of the interest. The Court found no reason to disagree with the policy enshrined in statute by the Nevada Legislature that nondonative transfers are not subject to RAP.[11]

Conclusion

The Court held that RAP does not apply to area-of-interest royalty provisions in commercial mining contracts and, because of this holding, there was no need to address the second certified question.

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[6] The U.S. Supreme Court, for example, determined that "arms" in the Second Amendment was not limited to weapons existing in the eighteenth century. District of Columbia v. Heller, 554 U.S. 570, 582 (2008).

[7] Neither Bullion nor Barrick were the original parties to the agreement, having later acquired their interests.

[8] *See, e.g.,* Atl. Richfield Co. v. Whiting Oil & Gas Corp., 320 P.3d 1179, 1184 (Colo. 2014).

[9] Juliano & Sons Enterprises, Inc. v. Chevron USA, Inc., 593 A.2d 814, 818–19.

[10] *See, e.g.,* Atl. Richfield, 320 P.3d at 1184 (noting that the "vesting period of the common-law rule . . . makes little sense in the world of commercial transactions").

[11] NEV. REV. STAT. § 111.1037 (West 2014).