

PUBLICATION

'Til Death Do Us Part: Not So Fast!

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On September 7, 2012, the U.S. Circuit Court of Appeals for the Eight Circuit issued its opinion in *H&R Block Tax Services, LLC v. Franklin*, 691 F.3d 941 (8th Cir. 2012), reversing the lower court's ruling that a franchise agreement carried a perpetual term. The plaintiff, H&R Block, is a Missouri limited liability company which operates retail tax preparation offices and franchises others to operate such offices under its service marks. The franchisee, who was the defendant in the case, operated two such offices in California pursuant to a Franchise Agreement dated 1975. The Franchise Agreement contained the following provision governing its duration:

The initial term of this Agreement shall begin on the date hereof and, unless sooner terminated by Block [for cause] as provided in paragraph 6, shall end five years after such date, and shall automatically renew itself for successive five-year terms thereafter (the "renewal terms"); provided, that Franchisee may terminate this Agreement effective at the end of the initial term or any renewal term upon at least 120 days written notice to Block prior to the end of the initial term or renewal term, as the case may be.

On June 30, 2010, H&R Block gave the franchisee notice of its intent not to renew the Franchise Agreement when the then-current renewal period was said to expire on December 1, 2010. H&R Block also filed a suit in Federal District Court in Kansas City, Missouri seeking a declaratory judgment that it could terminate the agreement. The franchisee counter sued for a declaration that H&R Block was not entitled to decline to renew the Franchise Agreement.

The parties filed cross-motions for summary judgment on the issue of H&R Block's right to terminate the Franchise Agreement. The District Court ruled in favor of the franchisee holding that the language of the Franchise Agreement contained an unequivocal expression of the parties' intention to enter into a perpetually enforceable contract.

On appeal, the Eighth Circuit noted that, absent ambiguities, the intention of the parties to a contract is derived exclusively from the plain language of the writing. The court also noted that the Franchise Agreement provided that it was to be governed by Missouri law, and this choice-of-law provision was reasonable and enforceable. Thus, the court looked to Missouri substantive law.

The Appeals Court found that, in the past, Missouri courts were prone to hold against the theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation. *Paisley v. Lucas*, 364 Mo. 827, 143 S.W.2d 262, 270 (Mo. 1940). For a contract to be enforceable in perpetuity, it must be "adamantly clear" that such was the parties' intent. *Preferred Physicians Mut. Mgt. Group, Inc. v. Preferred Physicians Mut. Risk Retention Group, Inc.*, 961 S.W.2d 100, 103 (Mo. Ct. App. 1998). The parties' intention that the contract's duration is perpetual must be clearly expressed in unequivocal terms. *Paisley*, 143 S.W.2d at 271. This approach is generally in accord with most other states. See, e.g. 17B *Corpus Juris Secundum*, Contracts, § 602 (2011), and the cases cited therein.

The franchisee correctly pointed out to the court that the franchise agreement expressly gives the franchisee the sole right to terminate the contract without cause. Thus, the franchisee argued, the parties intended a perpetually enforceable contract subject only to its exclusive right to terminate without cause.

In a split two-to-one decision, the Eighth Circuit disagreed and reversed the district court's opinion. The court noted that in only one other Missouri case did the court construe a contract as perpetually enforceable, and in that case the word "perpetually" was contained in that contract. Additionally, the court concluded that the clause providing for automatic renewal contradicts the notion that the contract would last forever.

Ultimately, H&R Block was allowed to terminate its Franchise Agreement, but only after two and a half years of costly litigation, and even then by virtue of a split decision of the Court of Appeals. At the time this suit was filed, the Franchise Agreement was 35 years old. An updated agreement was badly needed. Franchisors have an obvious interest in securing long term franchisees. However, for franchisors, your franchisees are the face of your brand. Changes in circumstances over time sometimes necessitate fresh faces. Franchisors must draft term and renewal clauses that, in the absence of franchise relationship statutes which control franchise terminations in some states by limiting termination unless good cause exists, provide franchisors and franchisees with a certain end date of the term, and give both parties the flexibility they may need to deal with changed circumstances many years in the future.