#L-3013

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06/30/89

Fifth Supplement to Memorandum 89-53

Subject: Study L-3013 - Uniform Statutory Rule Against Perpetutities (Additional Letters in Opposition)

Attached to this supplementary memorandum are letters from the following persons, all in opposition to adoption of the Uniform Statutory Rule Against Perpetuties on the basis that existing California law is better than the Uniform Rule:

William M. McGovern, Professor of Law, UCLA

Richard C. Maxwell, Professor of Law, Duke

Charles H. Whitebread, Professor of Law, USC

Ira Mark Bloom, Professor of Law, Albany

Professor Bloom enclosed a copy of his law review article, Perpetuities Refinement: There Is An Alternative, 62 Wash. L. Rev. 23 (1987). This article has previously been circulated with the First Supplement to Memorandum 89-53.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

L-3013

UNIVERSITY OF CALIFORNIA, LOS ANGELES

UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO

SANTA BARBARA · SANTA CRUZ

SCHOOL OF LAW
405 HILGARD AVENUE
LOS ANGELES, CALIFORNIA 90024-1476

June 19, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear Mr. DeMoully:

Jesse Dukeminier showed me a copy of his letter to you regarding the Uniform Statutory Rule against Perpetuities. I also teach and write on this subject. I agree with most of Jesse's points. I do not share his concern about lawyers taking advantage of USRAP to draft 90-year trusts to avoid the generation-skipping tax. Even before there was a generation-skipping tax, very few lawyers took advantage of the maximum limits of the common law Rule which are roughly equivalent to USRAP, as the drafters assert. With a generation-skipping tax, despite its liberal exemptions, there is less incentive rather than more to create long-term trusts, regardless of what happens to the Rule.

In my view, the real impact of USRAP will not be on sophisticated estate planning (which will go on much as it always has), but on home made wills or those drafted by less skilled lawyers. There are very few of these which raise perpetuity problems (somewhat surprisingly, since law students have so much trouble understanding the Rule). The two cases cited by Jesse are typical, Grove and Ghiglia. In the latter, the court reduced the age from 35 to 21 under Civil Code 715.5. This would not be necessary under USRAP since the trust would probably have terminated within 90 years. Age reduction is questionable because it may cause grandchildren to get property when they are too young to handle it. Age reduction would not have been necessary (even without USRAP) if the court had reformed or construed the will to include only the grandchildren who were born prior to the testator's death (as the court did in Grove). The court could also have used Civil Code 715.5 to read into the will a standard savings clause, as Professor Browder suggested many years ago.

Even though the court could have reached a better result under existing law, perhaps Ghiglia is an argument for USRAP, but to me

Grove is a stronger argument against it. The court's reformation of the will in that case would not have been necessary under USRAP, but some litigation would have been needed to figure out what this ambiguous home-drawn will meant. The case is a good example of Jesse's point about USRAP leaving families "strait-jacketed with unsuitable and unchangeable provisions" for 90 years.

The reduction-of-litigation argument for USRAP is a mirage (1) because perpetuities cases are so rare, and (2) the cases that do arise come from poorly drafted wills that require judicial construction, with or without the need to modify them to comply with the Rule.

USRAP may be better than other versions of wait and see, because it avoids the knotty problem of ascertaining the measuring lives. But wait and see is itself a dubious "reform." Incidentally, a few weeks ago Georgia joined the many states which have rejected it.

I do not think USRAP will do as much harm as Jesse suggests, but I think it will do more harm than good. Basically the question is whether courts can do a better job of reforming wills under Civil Code 715.5 than unsophisticated drafters who "plan estates" under the license afforded to them by USRAP. My reading of most of the perpetuities cases decided in this country over the past 40 years leads me to favor the courts, even though I do not always agree with their results. I know this is the age of "deregulation," but we have not yet abolished all controls over air safety or allowed anyone who feels like it to fly an airplane.

Sincerely,

William McGovern

William M McGovern
Professor of Law

Duke University
School of Law
Durham, North Carolina
27706

Richard C. Maxwell
Harry R. Chadwick, Sr.
Professor of Law

(919) 684-2427

June 24, 1989

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear John:

Although I am now a former Californian, my professional interest in property law continues to be focused on that state. I have recently been made aware of the proposal to replace Cal. Civ. Code § 715.5 with the Uniform Statutory Rule against Perpetuities. I do not intend to burden you with a scholarly discussion on the issue. I know you are well supplied with that heavy commodity. I have, of course, taught the Rule for many years, and have had occasion to publish comments on its application to mineral transactions. The purpose of this letter is to join in the submission on the subject written by Jesse Dukeminier to you and dated June 9, 1989. I find his analysis impeccable and his arguments very convincing.

I hope this letter finds you in good health. I will retire from Duke at the end of this month but will continue to teach one semester a year for the time being.

Best wishes,

Dick

THE LAW CENTER
UNIVERSITY OF SOUTHERN CALIFORNIA
UNIVERSITY PARK
LOS ANGELES, CALIFORNIA 90089-0071

CHARLES H. WHITEBREAD
GEORGE T. PFLEGER PROFESSOR OF LAW

(213) 743-7295

June 26, 1989

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. DeMoully:

I write in opposition to the adoption of the Uniform Statutory Rule against Perpetuities. As a professor of gifts, wills, and trusts at the University of Virginia from 1968-1981 and from 1981 to the present at the University of Southern California, I have analyzed the existing California cy pres statute and find it clearly preferable to the Uniform Statutory Rule against Perpetuities.

I have read and endorse the letter sent you by Professor Jesse Dukeminier of UCLA. I hope his views will carry the day.

Very truly yours,

Charles H. Whitebread

Charles H. Whitebread

CHW:klw

UNION UNIVERSITY
ALBANY LAW SCHOOL
80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208
518-445-2355

IRA MARK BLOOM
PROFESSOR OF LAW

June 28, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear Mr. DeMoully:

I understand that the Commission is considering whether California should adopt the Uniform Statutory Rule Against Perpetuities (USRAP). I thought you might find it helpful to have some further input in reaching your decision, including the enclosed copy of my law review article, Perpetuities Refinement: There Is An Alternative, 62 Washington Law Review 23 (1987).

At the outset, I wish to associate myself with Professor Dukeminier's advice, so eloquently expressed in his June 9th letter, that California not adopt USRAP. The following points may be of interest in your ultimate decision on USRAP.

I. Academic Opposition to USRAP

Based on responses to my perpetuities article, I can represent that a substantial number of law professors are opposed to USRAP. If you like, I would be happy to supply names once permissions have been obtained. I can tell you that USRAP opponents include prominent scholars at the most prestigious law schools in this country.

II. Reasons for Not Adopting USRAP

USRAP is the latest version of the wait-and-see approach to the common law Rule Against Perpetuities. In my article I argue why the wait-and-see approach generally, and USRAP specifically, should not be adopted by any state. I suggest that the principal reason for rejecting USRAP is that the non-problem (the infrequency of perpetuities violations) does not justify a complex and unnecessary solution (the adoption of USRAP). In other words, the assumption of frequent invalidation because of the common law rule is not confirmed.

In my article (pages 38-58), I also attempt to address questions raised by USRAP including the following:

* Will USRAP unreasonably extend dead hand control?

* Will USRAP simplify the law?

* Will USRAP only cause minimal inconvenience?

* Does USRAP constitute consumer-protection legislation for the average consumer of legal services?

* Is there a need for a uniform statutory Rule Against Perpetuities?

You also might take into account that the 90-year waiting period under USRAP is prospective in effect. Thus, if California adopts USRAP a dual system will operate for decades under which judicial involvement still will be required to reform any violations under the existing system. Of course, the California experience to date suggests almost no involvement because of the non-existence of the problem.

III. New York and USRAP

I recently spoke with the Director of New York's Law Revision Commission. He advised that the Commission is aware of USRAP but that it is not presently under serious consideration by the Commission. In addition, as the vice-chair of a committee of the Trust and Estates Section of the New York State Bar Association, I am unaware of any current interest that the section has in recommending adoption of USRAP.

IV. CY PRES

California already has a wonderful solution to deal with the **infinitesimal** number of cases involving perpetuities violations in the donative transfer area: cy pres. Even Professor Leach, the godfather of the wait-and-see movement, favored immediate cy pres. Why change something that works in the rare instances when a problem arises? Although some suggest that reformation has not been perfect under immediate cy pres, understanding of course the rarity in which the process has been invoked, less perfection should be anticipated when judges and lawyers almost a century later attempt to divine a transferor's intent under USRAP's deferred cy pres approach.

V. USRAP Ignores the Commercial Area

If there is a problem with Rule violations, my research discloses that it is in the commercial area. By excluding the commercial area from the common law and 90-year proxy periods, USRAP does not solve the problem because in many instances a more limited time period is appropriate. Therefore, by adopting USRAP California would not effectively address the commercial side which is relatively more in need of resolution than the donative side.

VI. Why Bind Unborn Generations On Dead Hand Control?

By adopting USRAP it is likely that a 90-year saving clause will become the standard, the default system. If later generations object to the extension of dead hand control, they will nonetheless be saddled with these controls because repealing legislation will likely be limited to prospective transactions. Do we render a service to future generations by binding them to 90 years of dead hand control?

VII. Conclusion

I would urge that the Commission not recommend adoption of USRAP in California. Although USRAP attempts to solve a problem (unintentional perpetuities violations), there is no evidence that the problem exists. Assuming, arguendo, that perpetuities violations are a problem in California, California's present system has been and will be more than adequate. The inordinately complex system under USRAP also has the potential for creating many problems, including the extension of dead hand control under standardized 90-year saving clauses. In the final analysis, you might ask what benefit California would derive by enacting USRAP.

Very truly yours,

Ira Mark Bloom
Professor of Law

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