

Fourth Supplement to Memorandum 90-22

Subject: Study L-3013 - Uniform Statutory Rule Against Perpetuities
(Comments of Professor French)

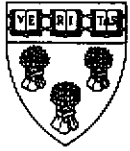
Attached to this supplement is a letter from Professor Susan French in opposition to adoption of USRAP in California. Professor French argues that nothing is wrong with existing law, that uniformity is not necessarily needed in this area of the law, and that adoption of USRAP is not necessary to achieve uniformity in any event.

Professor French suggests other revisions of California law to duplicate the results of USRAP without losing the benefits of immediate *cy pres*. Specifically, she suggests (1) extending the 60-year period in Civil Code Section 715.6 to 90 years and (2) using the *cy pres* statute to validate interests that would be validated by wait-and-see under USRAP. Her suggestions for revision are explained in detail in her forthcoming article *Perpetuities: Three Essays in Honor of My Father*, 65 Wash. L. Rev. 101 (1990). (Consistent with the approach in the Second Supplement, we have not reproduced the page proofs of this article.)

As explained in Memorandum 90-22, at this point we have limited the options to two -- adoption of USRAP or no change in existing law -- in order to focus the issues and to avoid being mired in the host of revisions that have been proposed during the years that the "Perpetuities Wars" (Professor French's term) have raged.

Respectfully submitted,

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March 1, 1990

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

RE: USRAP Proposal

Dear John:

I had hoped that the Commission had dropped the proposal to adopt USRAP on the ground that there is nothing wrong with California's current law. However, I see that I was overly optimistic, so I write to add my voice to those who oppose adoption of USRAP. My reasons for opposing it include the following:

1. There is nothing wrong with California's current law.

California has eliminated the unborn widow problem by Civil Code Section 715.7 and the administrative contingency problem by case law. All other perpetuities problems can be addressed at any point--without waiting--under the cy pres statute, section 715.5. In addition, section 715.6 provides an alternate 60-year period for situations where the common law period is not desirable, and for practitioners who are uncomfortable with the common law Rule.

2. Adoption of USRAP will impose unnecessary costs on Californians.

As several others have pointed out, USRAP is awfully complicated. California's probate code revision process has already subjected the legal profession to very substantial re-education costs for necessary changes in our law. This does not seem like a very good time to add additional confusion and education costs for accommodation to changes that are not really necessary.

Adoption of USRAP will eliminate California's immediately available cy pres, which will certainly impose additional uncertainty costs, and may ultimately result in more expensive and less satisfactory cy pres litigation.

Although USRAP compensates with costs saved because wait and see does not require litigation until the end of the period, if at all, the probable balance of costs saved versus those added is not at all clear. As the staff recommendation points out, there is a wide difference of opinion on the subject. Since our present statute seems to be working fine, I see little reason to adopt a different system that may impose substantial downstream costs. However, if our present statute is imposing unnecessary litigation costs, California can obtain the advantages of a judicial hands-off reform without sacrificing the advantages of having an immediately available cy pres, as I explain below.

3. It is not necessary to adopt USRAP to achieve uniformity.

If uniformity is really needed in this area--and I am not persuaded that it is--we don't need to adopt USRAP to get it. Substantive uniformity is all we need, and we already have the most important feature of USRAP: California law permits reformation of interests that violate the Rule. A USRAP state would have no difficulty applying California's cy pres statute to validate interests in California source assets, or appointments exercising powers governed by California law.

There are two other aspects to substantive uniformity: (1) that dispositions valid in other states be valid in California and valid California dispositions be valid in other states; and (2) that dispositions substituted for invalid future interests be the same in every state. As to the first, it can be achieved in California much more simply than by adopting USRAP (to the extent it can be achieved at all), and, as to the second, even USRAP does not provide uniformity in the result to be reached on applying cy pres.

As to (1), we cannot achieve uniformity unilaterally, or even by adopting USRAP, but we can duplicate the USRAP results--without adopting USRAP and its complications, and without losing the benefit of our immediately available cy pres. Two simple steps will do it:

1. Amend Civil Code Section 715.6 to substitute 90 for 60 years for a 90-year period in gross.

2. Provide that our cy pres statute shall be applied to validate all interests validated by USRAP's "wait and see," by "separating the contingencies" inherent in the future interest that violates the common law Rule. This will result in validating, in advance, all future interests that in fact vest within the common law period, which is the same result as that produced by USRAP's wait and see. (For a more complete explanation of how and why this works, see my forthcoming article, "Perpetuities: Three Essays in Honor of My Father, 2. Ending the Perpetuities Wars of the Late 20th Century: A Better Reform Package," 65 Washington Law Review 101 (1990)." I enclose a copy of the page proofs for your use).

To mandate reformation according to this model, we can either add another subsection to Civil Code Section 715, or simply add a Law Revision Comment to Section 715.5. The comment would explain how instruments should be reformed to achieve results identical to USRAP's wait and see, and spell out the reasons why this method of reformation produces results which are both sensible and desirable to achieve uniformity goals. Either way should be effective, and neither would disrupt California's current statutory scheme, or require any re-education of the bar.

An additional advantage of specifying this method of reforming future interests, to produce the same results as wait and see, is that the cy pres statute will become self-executing in all but the most extraordinary cases, achieving the "judicial hands-off" benefits claimed for USRAP. If you know in advance that an instrument will be reformed so that the future interest is valid under all circumstances that lead to vesting in fact within the common law period, there will be no need to litigate the reformation question. The only uncertainty will be over the disposition that will be made of the future interest under circumstances that, in fact, would lead to vesting beyond the common law period.

Although there will seldom be a need to litigate to determine the appropriate reformation of interests that will certainly not vest within the common law period, the cy pres proceeding would be available. The parties will be free to bring the action whenever the convenience of having a settled ownership outweighs the costs of the action. This is far superior to USRAP, which requires you to wait for 90 years, even if you need to know earlier what will be done if the interest becomes invalid.

John H. DeMouilly
March 1, 1990
Page 4

In conclusion, let me urge the Commission not to adopt USRAP. While it may be worthwhile for states without a modern perpetuities statute, it will cause more problems than it is worth in California. We achieve all the benefits of uniformity without incurring the costs of USRAP.

Yours very truly,



Susan F. French
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