#L-3013

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Fifth Supplement to Memorandum 90-22

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

Attached to this supplement is a letter from Professor Robert Fletcher expressing his opposition to adoption of USRAP in California. Professor Fletcher believes that existing California law is excellent.

Respectfully submitted,

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March 3, 1990

Mr. John H. DeMoully
Executive Secretary, California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Dear Mr. DeMoully:

Allow me to add my voice to those who urge the Commission not to recommend the adoption of the Uniform Statutory Rule Against Perpetuities (USRAP). In doing so I know I join a distinguished and thoughtful company, including Professors Bird, Bloom, Dukeminier, French, and Niles.

In my many years of teaching trusts and estates (recently retired from the University of Washington, visiting at Hastings in fall 1989 [and returning there in 1991 and 1992], currently visiting at Vermont Law School) and in my growing acquaintance with California law, I have come to know and greatly admire the work of the Commission in the field of trusts and estates; but, with all respect to Professors Waggoner and Halbach, I submit that to adopt the USRAP would be an unfortunate mistake. I say so not just because the USRAP is ill-conceived (it is) but also because California now has a body of excellent perpetuities law, especially in its provision for reformation, most of which would be swept away.

To my thinking the most ill-suited part of the USRAP is the combined effect of its very long period (90 years!) and the fact that this period is only remotely related if at all to the varying dispositions to which it would apply. Indeed, the genious of the common law Rule is that its measure is just the opposite. It takes the people who are intimately involved in the particular disposition and uses them, their lives, to provide validity. The period thus allowed, though it will vary in its number of years from one trust to another, will consistently apply a measure that closely approximates what the settlor wishes to accomplish and, at the same time, what we as a society are willing to tolerate. Ninety years--or any fixed period--does not and cannot make that accommodation.

Next in order of severity in my list of factors that condemn the USRAP is that it would force people to wait until the evolving facts proved the invalidity before reformation is available. There is no reason--none at all--to require such waiting. The potential invalidity in any scheme can be identified as soon as the instrument goes into effect, and the offending facts can be foretold. If in a particular case those facts are likely to occur, if there is substantial property at stake, and if the need

for certainty and repose is strongly felt, the people involved ought to be able to get the help of the court. If they have to wait out those facts--for them actually to happen--the people most affected may well by that time be dead. Not only that, the forced wait puts the people who do live, the descendants of those who have died, and the judge who must do the reforming in a very frustrating position, for a major task they confront is to reconstruct the general intent of a settlor who by this time has also long since been dead. The familiar refrain is all too apt, that is, most of the witnesses are dead, others are aged with failing memories, and tangibles like letters have been lost or discarded.

To repeat this point: Surely the offending facts can be identified and described long before they actually happen, and they and the invalidity they will cause can, if necessary, be obviated at a time much better suited to the needs of the affected people.

Others have commented on other deficiencies of the USRAP, and I shall not repeat them except to agree strongly with Prof. Dukeminier in his prediction that a "free" 90-year period will encourage the use of a "90-year trust" and in his dismay at such a prospect. Such a device, without tie to lives of people, would extend dead-hand control far beyond what I consider tolerable limits.

Sincerely yours,

Robert L. Fletcher
Visiting Professor of Law