

Sixth Supplement to Memorandum 90-22

Subject: Study L-3013 - Uniform Statutory Rule Against Perpetuities
(Additional Comments)

Attached to this supplement are several more comments on USRAP:

- In Exhibit 1, Professor Lawrence Waggoner comments on the arguments put forward by Professor Waterbury relating to the potential for perpetual trusts. (See Second Supplement to Memorandum 90-22, Exhibit 2.) The staff agrees that the argument over perpetual trusts is not relevant to the issue of whether USRAP should be adopted in California.
- In Exhibit 2, Professor Russell Niles reaffirms his opposition to USRAP. (For his earlier letter, see Memorandum 90-22, Exhibit 6, at exhibit pp. 221-22.) Professor Niles takes this position because of his opposition to the repeal of Civil Code Section 715.5, the immediate *cy pres* rule.
- In Exhibit 3, Professor Richard Maxwell reaffirms his opposition. (For his earlier letter, see Memorandum 90-22, Exhibit 6, at exhibit p. 218.)
- In Exhibit 4, Professor Gail Boreman Bird renews her opposition. (For her earlier letter, see Memorandum 90-22, Exhibit 6, at exhibit pp. 211-12.) Professor Bird does not believe that the interest in uniformity outweighs the detriments she sees in USRAP. She urges the Commission to undertake further study and review of the proposal. The staff is not clear what further study should be undertaken. We cannot imagine that the opponents of USRAP will find any new arguments against it or that the proponents will find any new arguments in favor of it.
- In Exhibit 5, Professor Charles Whitebread again writes in opposition to USRAP. (For his earlier letter, see Memorandum 90-22, Exhibit 6, at exhibit p. 223.)

Professor Edward Halbach, Jr., called on March 6 to reaffirm his support of USRAP. (For his earlier letter, see Memorandum 90-22, Exhibit 5, at exhibit pp. 196-97.) Professor Halbach said that the wait-and-see approach will "rule the turf" eventually and that the best available wait-and-see scheme is USRAP. Professor Halbach supports the

staff recommendation that USRAP be made applicable retroactively in California. He also said that adoption of USRAP would not require attorneys to redraft instruments, contrary to the perceptions of some members of Study Team No. 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. (See Study Team 1 Report on Memorandum 90-22, February 27, 1990, to be distributed at meeting.) In fact, it would be unwise to draft a savings clause based on the 90-year period since the validity of dispositions in a trust may eventually be judged under the law of another state which has the traditional Rule.

Professor Waggoner has informed us that the Georgia Legislature has passed USRAP and sent it to the governor. This would make Georgia the 11th state to adopt USRAP (although the Minnesota enactment is on hold).

Respectfully submitted,

Stan Ulrich
Staff Counsel

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LAW COMM'N

MAR 06 1990

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March 5, 1990

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

Re: Study L-3013 - Uniform Statutory Rule Against Perpetuities

Dear John:

I understand that Professor Thomas Waterbury has submitted an article to the staff in which he states that USRAP contains a "loophole" that allows perpetual trusts. The "loophole" he suggests is that a resident of a USRAP state can set up a trust to last for 90 years, after which its situs is to shift to Wisconsin (where there is no rule against perpetuities) where the trust is to continue perpetually.

The ruse or ploy suggested by Professor Waterbury should not be of concern to the Law Revision Commission for the following reasons:

1. Such a trust creates a nonvested property interest that can vest, but not within 90 years. As such, it is directly covered by Section 3(3). Under Section 3(3), a nonvested property interest that can vest, but not within 90 years, is subject to immediate reformation to require it to vest within 90 years. I therefore do not believe that the ploy will work, and I think that Professor Waterbury has overlooked section 3(3).

2. It seems to me that it is very unlikely that anyone would really try to use such a ploy anyway, certainly not a California resident (because of the distance between California and Wisconsin).

3. If someone really wants to set up a perpetual trust, they can go to Wisconsin right away. No perpetuity reform can prevent that. The current California immediate-reformation rule does not prevent that.

4. Assets are not moving into Wisconsin trust companies. See the statistics in Mary Lou Fellows' article showing that Wisconsin, if anything, has a disproportionately low number of total trusts and aggregate trust assets as compared to its population. Among the states, Wisconsin ranks 16th in population and 17th in aggregate trust assets. See p.89 of her manuscript.

5. If this ploy is still a concern, and if section 3(3) is not thought to be specific enough to cut it off, then the remedy is certainly not to reject USRAP, but just to add a new subsection to Section 3 as follows:

(4) a nonvested property interest that is not validated by Section 1(a)(1) is created in a trust or other property arrangement containing a direction or authorization that the situs of the trust is to or can shift after a specified period of time or upon the happening of a specified event to [a jurisdiction whose law allows perpetual trusts] [another jurisdiction].

Yours sincerely,

Larry Waggoner

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PMS MR JOHN H DEMOULLY, DLR *D-142*

CARE CALIFORNIA LAW REVISION COMMISSION RPT DLY MGM, DLR

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I CONTINUE TO OPPOSE ADOPTION OF USRAP BECAUSE I STRONGLY OPPOSE
REPEALING CIVIL CODE SECTION 715.5

RUSSELL D NILES

HASTINGS COLLEGE, SAN FRANCISCO

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4000 Middlefield Road, Ste. D-2
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Dear John:

I am told that the discussion on the proposal to adopt the Uniform Statutory Rule against Perpetuities goes on. I know that the Commission has important governmental responsibilities and is not a debating society in the image of the American Law Institute, but I am struck by the fact that this proposal has generated a dispute of rare intellectual and professional quality. I hope that before the proposal enters the legislative forum some way can be found to give an opportunity to the proponents and opponents of the measure to make their case in a manner that will cure the relatively uncritical process by which the Uniform statute was originally produced. I know that the Commission has many other complex matters on its agenda that it is necessary to get on with but it would be a shame to hurry to a conclusion on the Rule which would put the immense prestige of the Commission and ultimately of California behind an idea whose time should not have come.

Sincerely,



Richard C. Maxwell



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UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

GAIL BOREMAN BIRD
Professor of Law

March 6, 1990

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

Dear John:

I am writing to renew my opposition to the adoption of the Uniform Statutory Rule Against Perpetuities. As I indicated in my last letter, I believe that California's present statutory scheme is preferable to the Uniform Rule. I do not believe that the uniformity advantage outweighs the various detriments raised by Professor Dukeminier.

I urge the Commission to undertake further study and review of this proposal before considering its implementation.

Very truly yours,


Gail Boreman Bird

GBB:pcm

CA LAW CENTER
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CHARLES H. WHITEBREAD
GEORGE T. PFLEGER PROFESSOR OF LAW

(213) 743-7295

March 6, 1990

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

Dear Mr. DeMouilly:

Once again, this spring, I write in opposition to the adoption of the University 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.

As the Commission is meeting this week, I hope my comments, which echo those of Professor Dukeminier of UCLA and Professor Susan French of Harvard, will not be too late to be considered.

Very truly yours,



Charles H. Whitebread

CHW:klw